HCJ 4466/16
HCJ 8503/16
HCJ 285/17
HCJ 6524/17

Petitioners in HCJ 4466/16:	**Muhammad Alian and 6 others**
Petitioners in HCJ 8503/16:	**Yousef Abd A-Rahim Abu Saleh and 3 others**
Petitioners in HCJ 285/17:	**Sabih Abu Sabih**
Petitioners in HCJ 6254/17:	**Mohammad Ahmad Qunbar**
	v.
Respondents:	1. **Commander of IDF Forces in the West Bank** 2. **Israel Police** 3. **Office of the State Attorney** 4. **State of Israel**

The Supreme Court sitting as High Court of Justice

Before: Justice Y. Danziger, Justice N. Hendel, Justice G. Karra

Israeli Supreme Court cases cited:

[1] HCJ 7893/09 *Almagor - Terror Victims Association (R.A.) v. Government of Israel*, (Oct. 1, 2008)

[2] HCJ 6063/08 *Shahar v. Government of Israel*, (July 8, 2008)

[3] HCJ 5856/08 *Farhangian v. Government of Israel*, (July 6, 2008)

[4] HCJ 914/04 *Victims of Arab Terror International v. Prime Minister*, (Jan. 29, 2004)

[5] HCJ 9290/99 *MMT Terror Victims HQ (R.A.) v. Government of Israel*, IsrSC 54(1) 8 (2000)

[6] HCJ 9594/09 *Legal Forum for the Land of Israel v. Ministerial Committee on National Security Affairs*, (April 21, 2010)

[7] HCJ 548/04 *Amana – The Settlement Movement of Gush Emunim v. Commander of the IDF Forces in the Judea and Samaria Region*, IsrSC 58(3) 373 (2004)

[8] HCJ 2717/96 *Wafa v. Minister of Defense*, IsrSC 50(2) 848 (1996)

[9] HCJ 358/88 *Association for Civil Rights in Israel v. Central District Commander*, IsrSC 43 (2) 529 (1989) [https://versa.cardozo.yu.edu/opinions/association-civil-rights-v-central-district-commander]

[10] HCJ 1539/05 *MASHLAT – Law Institute for the Study of Terror and Assistance to Terror Victims v. Prime Minister*, (Feb. 17, 2005)

[11] LCA 2558/16 *A. v. Pensions Officer – Ministry of Defense*, (Nov. 5, 2017)

[12] CA 7368/06 *Luxury Apartments Ltd. v. Mayor of Yavneh*, (June 27, 2011)

[13] HCJ 1640/95 *Ilanot Hakirya (Israel) Ltd. v. Mayor of Holon*, IsrSC 49(5) 582 (1996)

[14] HCJ 6824/07 *Manaa v. Israel Tax Authority*, IsrSC 64(2) 479 (2010)

[15] HCJFH 9411/07 *Arco Electric Industries Ltd. v. Mayor of Rishon LeZion*, (Oct. 19, 2009)

[16] HCJ 1437/02 *Association for Civil Rights in Israel v. Minister of Public Security*, IsrSC 58(2) 746 (2004)

[17] HCJ 5100/94 *Public Committee Against Torture in Israel v. State of Israel*, IsrSC 53(4) 817 (1999) [https://versa.cardozo.yu.edu/opinions/public-committee-against-torture-v-israel]

[18] HCJ 5128/94 *Federman v. Minister of Police*, IsrSC 48(5) 647 (1995)

[19] HCJ 355/79 *Katlan v. Israel Prison Service*, IsrSC 34(3) 294 (1980) [https://versa.cardozo.yu.edu/opinions/katlan-v-prison-service]

[20] CrimA 40/58 *Attorney General v. Ziad*, IsrSC 12 1358 (1958)

[21] LCA 993/06 *State of Israel v. Dirani*, (July 18, 2011)

[22] HCJ 52/06 *Al-Aqsa Company for the Development of Islamic Waqf Property in the Land of Israel Ltd. v. Simon Wiesenthal Center Museum Corp*., (Oct. 29, 2008)

[23] HCJ 3114/02 *MK Barake v. Minister of Defense*, IsrSC 56(3) 11 (2002) [https://versa.cardozo.yu.edu/opinions/barake-v-minister-defense]

[24] HCJ 7583/98 *Bachrach v. Minister of the Interior*, IsrSC 54(5) 832 (2000)

[25] HCJ 6195/98 *Goldstein v. GOC Central Command*, IsrSC 53(5) 317 (1999)

[26] HCJ 3933/92 *Barakat v. GOC Central Command*, IsrSC 46(5) 1 (1992)

[27] HCJ 11075/04 *Girby v. Minister of Education, Culture and Sport – Chair of the Higher Education Council*, (Dec. 5, 2007)

[28] HCJ 6536/17 *Movement for Quality Government in Israel v. Israel Police*, (Oct. 8, 2017)

[29] HCJ 962/07 *Liran v. Attorney General*, (April 1, 2007)

[30] HCJ 693/91 *Efrat v. Director of the Population Registry in the Ministry of Interior*, IsrSC 47(1) 749 (1993)

[31] HCJ 1075/98 *State of Israel v. Oppenheim*, IsrSC 54(1) 303 (2000)

[32] CrimA 2013/92 *State of Israel v. Jose*, IsrSC 48(2) 818 (1994)

[33] CA 421/61 *State of Israel v. Haz*, IsrSC 15 2193 (1961)

[34] HCJ 7803/06 *Abu Arfa v. Minister of Interior*, para. 46 (Sept. 13, 2017)

[35] LCA 3899/04 *State of Israel v. Even Zohar*, IsrSC 61(1) 301 (2006)

[36] CA 524/88 "*Pri Haemek" – Cooperative Agricultural Society Ltd. v. Sdeh Ya'akov – Workers Cooperative Village of Hapoel Hamizrachi for Agricultural Cooperative Settlement Ltd.*, IsrSC 45(4) 529 (1991)

[37] HCJ 6807/94 *Abbas v. State of Israel*, (Feb. 2, 1995)

[38] HCJ 4118/07 *Hanbali v. State of Israel*, (Aug. 30, 2015)

[39] HCJ 9025/01 *Awadallah v. Commander of IDF Forces in Judea and Samaria*, (May 11, 2014)

[40] HCJ 8086/05 *Masri v. Commander of IDF Forces in Judea and Samaria*, (May 11, 2014)

[41] HCJ 8027/05 *Abu Selim v. Commander of IDF Forces in the West Bank*, (July 15, 2012)

[42] HCJ 5887/17 *Jabareen v. Israel Police*, (July 25, 2017)

[43] HCJ 9108/16 *Shaludi v. Commander of IDF Forces in the West Bank*, (Jan. 29, 2017)

[44] HCJ 9495/16 *Hagug v. Commander of IDF Forces in the Judea and Samaria Area*, (Dec. 7, 2016)

[45] HCJ 2204/16 *Alian v. Israel Police*, (May 5, 2016)

[46] HCJ 2882/16 *Awisat v. Israel Police*, (May 5, 2016)

[47] HCJ 7947/15 *A. v. Israel Defense Forces*, (Dec. 16, 2015)

[48] CrimFH 7048/97 *Does v. Minister of Defense*, IsrSC 54(1) 721 (2000) [https://versa.cardozo.yu.edu/opinions/does-v-ministry-defense]

[49] HCJ 769/02 *Public Committee Against Torture in Israel v. Government of Israel*, (2006) [https://versa.cardozo.yu.edu/opinions/public-committee-against-torture-v-government]

[50] HCJ 7957/04 *Mara'abe v. Prime Minister of Israel*, IsrSC 60(2) 477 (2005) [https://versa.cardozo.yu.edu/opinions/mara%E2%80%99abe-v-prime-minister-israel]

[51] HCJ 2056/04 *Beit Sourik Village Council et al. v. Government of Israel*, IsrSC 58(5) 807 (2004) [https://versa.cardozo.yu.edu/opinions/beit-sourik-village-council-v-government-israel]

[52] HCJ 698/80 *Qawasmeh v. Minister of Defense*, IsrSC 35(1) 617 (1980)

[53] HCJ 4764/04 *Physicians for Human Rights v. Commander of the IDF Forces in Gaza*, IsrSC 58(5) 385 (2004) [https://versa.cardozo.yu.edu/opinions/physicians-human-rights-v-idf-commander-gaza]

[54] HCJ 168/91 *Morcus v. Minister of Defense*, IsrSC 45(1) 467 (1991)

[55] *Abu Hdeir v. Minister of Defense*, (July 4, 2017)

[56] HCJ 5839/15 *Sidar v. Commander of IDF Forces in the West Bank*, (2015)

[57] CFH 5698/11 *State of Israel v. Dirani*, (Jan. 1, 2015)

[58] HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister of Israel*, (2006) [https://versa.cardozo.yu.edu/opinions/supreme-monitoring-committee-arab-affairs-israel-and-others-v-prime-minister-israel]

[59] LCrimA 10141/09 *Ben Haim v. State of Israel*, (March 6, 2012)

[60] HCJ 337/81 *Mitrani v. Minister of Transport*, IsrSC 37(3) 337 (1983)

[61] HCJFH 9411/00 *Arco Electrical Industries Ltd. v. Mayor of Rishon Lezion*, (Oct. 19, 2009)

[62] CA 1600/08 *Maximedia Outdoor Advertising v. Tel Aviv – Jaffa Municipality*, (Aug. 18, 2011)

[63] HCJ 693/91 *Efrat v. Director of Population Registry*, IsrSC 47(1) 749 (1993)

[64] CrimA 6434/15 *State of Israel v. Shavir*, (July 4, 2017)

[65] HCJ 6893/05 *Levy v. Government of Israel*, IsrSC 59(2) 876 (2005)

[66] CA 8622/07 *Rotman v. Ma'atz - National Roads Company of Israel Ltd.*, (May 14, 2012)

[67] HCJ 680/88 *Schnitzer v. Chief Military Censor*, IsrSC 42(4) 617 (1989) [https://versa.cardozo.yu.edu/opinions/schnitzer-v-chief-military-censor]

[68] HCJ 3037/ 14*Abu Safa v. Ministry of Interior*, (June 7, 2015)

[69] HCJ 2959/17 *Alshuamra v. State of Israel*, (Nov. 20, 2017)

[70] CA 2281/06 *Even Zohar v. State of Israel*, (April 28, 2010)

[71] HCJ 5290/14 *Qawashmeh v. Military Commander*, (Aug. 11, 2014)

[72] HCJ 4597/14 *Awawdeh v. Military Commander*, (July 1, 2014)

[73] HCJ 5376/16 *Abu Hdeir v. Minister of Defence*, (July 4, 2017)

[74] HCJ 3132/15 *Yesh Atid Party v. Prime Minister of Israel*, (April 13, 2016) [https://versa.cardozo.yu.edu/opinions/yesh-atid-party-v-prime-minister]

[75] CA 294/91 *Jerusalem Burial Society v. Kestenbaum*, IsrSC 46(2) 464 (1992)

[76] HCJ 52/06 *Al-Aqsa Association for the Development of the Assets of the Muslim Waqf in the Land of Israel v. Simon Wiesenthal Center Museum Ltd.*, (Oct. 29, 2008)

[77] CA 7918/15 *Doe v. Friedman*, (Nov. 24, 2015) [https://versa.cardozo.yu.edu/opinions/doe-v-friedman]

[78] HCJ 6167/09 *Avni v. State of Israel*, (Nov. 18, 2009)

[79] CA 1835/11 *Avni v. State of Israel*, (Nov. 17, 2011)

[80] HCJFH 3299/93 *Wechselbaum v. Minister of Defence*, IsrSC 49(2) 195 (1995)

[81] HCJ 794/98 *Obeid v. Minister of Defence*, IsrSC 58(5) 769 (2001)

[82] HCJ 6063/08 *Shachar v. Government of Israel*, (July 8, 2008)

[83] HCJ 10203/03 *Hamifkad Haleumi v. Attorney General*, (Aug. 20, 2008) [https://versa.cardozo.yu.edu/opinions/hamifkad-haleumi-v-attorney-general]

[84] HCJ 4491/13 *Academic Center for Law and Business v. State of Israel*, (July 2, 2014)

[85] HCJ 1125/16 *Mari v. Commander of Military Forces in the West Bank*, (March 31, 2016)

[86] HCJ 7040/15 *Hamed v. Military Commander in the West Bank*, (Nov. 12, 2015)

[87] HCJ 794/17 *Ziada v. Commander of the IDF Forces in the West Bank*, (Oct. 31, 2017)

[88] HCJ 7523/11 *Almagor Terror Victims Association v. Prime Minister*, (Oct. 17, 2011)

[89] HCJ 9446/09 *Karman v. Prime Minister of Israel*, (Dec. 1, 2009)

Decisions of the European Court of Human Rights cited:

[90] *Sabanchiyeva v. Russia Judgment* ECHR 38450/05 (6/6/2013)

[91] *Maskhadova v Russia Judgment* ECHR 18071/05 (6/6/2013)

[92] *Pretty v. The United Kingdom* ECHR 2346/02 (2002)

[93] *Pannulullo v. France* ECHR 37794/97 (2001)

[94] *Girard v. France* ECHR 22590/04 (2011)

[95] *Dodsbo v. Sweden* ECHR 61564/00 (2006); *Hadri-Vionnet V. Switzerland* ECHR 55525/00 (2008)

[96] *Hadri-Vionnet v. Switzerland* ECHR 55525/00 (2008)

JUDGMENT

Justice Y. Danziger:

The question before us is whether reg. 133(3) of the Defence (Emergency) Regulations, 1945 (hereinafter: the Defence Regulations) authorizes the Military Commander to order the temporary burial of terrorists in order to hold their corpses for the purpose of negotiations.

Background of the Petitions

1. At the end of 2016, the State of Israel decided to update its policy on returning the corpses of terrorists to their families. The decision was made by the Government's Ministerial Committee on National Security Affairs (the State Security Cabinet), and recorded in its resolution: "A Uniform Policy on Handling the Corpses of Terrorists" (B/171) (unclassified version) (January 1, 2017) (hereinafter: the Cabinet Decision). The Cabinet Decision was the first instance where a clear policy was enunciated on the issue of holding terrorists' corpses by the State for negotiation purposes. This policy determines that, as a general rule, terrorists' corpses are to be returned to their families under restricting conditions that would ensure that public order is maintained. However, two conditions to this rule were established, under which the corpses of terrorists would not be returned to the families, but be kept by the State of Israel in a temporary burial. The first exception was terrorists belonging to Hamas. The second concerned the bodies

of terrorists who had carried out a terrorist act classed as "particularly exceptional". The State Security Cabinet thought it justified to hold on to these corpses specifically, as they might prove to have "special symbolic context", and keeping them might help the State of Israel reach an agreement on the exchange of corpses and prisoners held by enemies. The Cabinet's Decision was established as a general policy, while the actual implementation of the policy was delegated to the Military Commander in accordance with the authority granted to him by law, under reg. 133(3) of the Defence Regulations, to order the place and time for burying the dead.

2. The Cabinet Decision was not made in a vacuum, but must be understood in context and in terms of its timing. Starting in early 2015, Israel faced a wave of terrorist attacks dubbed the "Intifada of the Individuals". This reality led the political echelon and the security establishment in Israel to make various decisions and, inter alia, also reconsider the policy on holding terrorists' corpses for negotiation purposes. Accordingly, the Cabinet undertook an administrative procedure, wherein it was presented with various professional opinions and assessments by political and security entities involved in contacts with enemies, including the Coordinator of POWs and MIAs in the Prime Minister's Office, the Israel Security Agency, the National Security Council, and the Israel Defence Forces. The senior lawyers at the Ministry of Justice also pondered the issue in a number of meetings. The 2004 position of then Attorney General M. Mazuz was also presented to the decision makers. According to the State, the position of Attorney General Mazuz was that terrorists' bodies should not be held based on an indefinite need to keep "bargaining chips" for some future negotiation, but that the possibility should not be excluded given special reasons for holding the bodies, including a concrete deal with an enemy for an exchange of corpses (hereinafter: the Attorney General's 2004 Decision).

3. Since the Cabinet Decision was taken, the State of Israel has held a few dozen terrorist corpses in its custody. These were held by virtue of orders or decisions issued by the Military Commanders or police commanders. The large majority of corpses—more than 40—were returned to the terrorists' families in keeping with the rule laid down in the Cabinet's Decision. On the other hand, the minority of corpses, which the State claims fall under the exceptions defined in the Cabinet's Decision, were held by the State. At this point in time, nine terrorist corpses are held by the State of Israel.

Seven were buried temporarily under orders issued by the Military Commander. Two have yet to be buried, after legal proceedings in their matter resulted in the issuance of interim orders preventing their burial. The Petitioners are family members of six of the terrorists whose corpses are currently held by the State of Israel: Fadi Ahmad Hamdan Qunbar, who carried out a terrorist attack at the Armon HaNatziv Promenade on January 8, 2017, murdering IDF soldiers Shira Tzur, Yael Yekutiel, Shir Hajaj and Erez Orbach of blessed memory, and injuring 18 more (HCJ 6524/17); Muhammad Tra'ayra, who carried out a terrorist attack on June 30, 2016 in Kiryat Arba, murdering the girl Hallel Yaffa Ariel of blessed memory (HCJ 8503/16); Muhammad al-Faqiah, who participated in a terrorist attack on July 1, 2016, in which Rabbi Michael Mark of blessed memory was murdered and members of his family injured (HCJ 8503/16); Masbah Abu Sabih, who carried out a shooting attack on October 9, 2016, murdering Mrs. Levana Malihi and Police Sergeant First Class Yossef Kirma of blessed memory and injuring others (HCJ 285/17); Abd al-Hamid Abu Srur, who carried out a terrorist attack in a Jerusalem bus on April 18, 2016, injuring tens of people (HCJ 4466/16); and Rami al-Ortani, involved in an attempted terror attack on July 31, 2016 (HCJ 8503/16).

The State of Israel argues that holding these terrorist corpses might help reach a concrete deal for the exchange of corpses and prisoners with Hamas, which holds the corpses of IDF soldiers Lieutenant Hadar Goldin of blessed memory and Staff Sergeant Oron Shaul of blessed memory, and holds Israeli civilians Avera Mengistu and Hisham a-Sayed.

4. To complete the factual picture, we would note that the State of Israel has transacted past deals with terrorist organizations for the exchange of prisoners and missing persons. A substantial part of the deals involved returning bodies of terrorists affiliated with the organizations in question as part of the "consideration" that the State of Israel "paid". An unclassified affidavit submitted by Head of the POW and MIA Department of the IDF Intelligence Directorate stated that in 1991, 1996, 1998, 2004, 2007 and 2008, the State of Israel concluded deals for the exchange of prisoners and missing persons with enemy organizations, in the context of which it handed over 405 bodies of dead terrorists, along with living detainees and prisoners. Within the framework of these deals, the State of Israel repatriated, among others, IDF fallen soldiers Samir Asad, Yossef Fink, Rahamim Alsheikh, Itamar Ilya, Benny Abraham,

Omar Suwad, Adi Avitan, Gabriel Dawit, Ehud Goldwasser and Eldad Regev. These data only relate to deals transacted by the State of Israel with non-state terrorist organizations, not to deals concluded with enemy states at the end of Israel's wars and military campaigns.

The Parties' Arguments and the Proceedings

5. The main argument in the petitions is that the State of Israel has no authority to hold the terrorists' corpses. The Petitioners point to the absence of any arrangement under Israeli or international law authorizing the Military Commander to hold terrorists' corpses for purposes of negotiation by way of temporary burial or any other way. Beside this key point, the Petitioners further argue that to hold terrorists' corpses for negotiation purposes is a practice that disproportionately violates the dignity of the dead and that of the families seeking to bring them to burial, and one that constitutes collective punishment against the terrorists' families for no fault of their own.

6. According to the State, the Military Commander does have authority to order the temporary burial of terrorists to be held for negotiation purposes. As the State sees it, reg. 133(3) of the Defence Regulations authorizes the Military Commander to order the place where a person's body is to be buried. This is also the basis for his authority to order the temporary burial of terrorists who were involved in terrorist attacks, for negotiation purposes. According to its position, this source of authority constitutes explicit, primary legislation in Israel's domestic law that suffices to allow the Military Commander to act. According to the State, this source of authority is also consistent with international law. The State adds that terrorists' corpses are being held for a proper purpose and proportionately, considering that this practice is meant to help bring back Israeli captives and missing persons.

7. The proceedings were conducted in a number of stages. In brief, we held several hearings. The petitions were initially heard separately, before different panels, and were later joined into a single proceeding. At a certain point, interim orders were issued with respect to the two yet-unburied terrorists, as well as orders nisi in all the petitions. The State was given an opportunity to present its position in two separate response affidavits. In addition, the State submitted a number of updates and answers to questions

addressed to it by the Court. By the end of the judicial proceedings, the scope of dispute was clarified, and the questions requiring decision, which I will discuss below, were defined.

Discussion and Decision

8. As noted above, the central question to be decided in the petitions is whether reg. 133(3) of the Defence Regulations authorizes the Military Commander to order temporary burial of terrorist corpses with a view to hold them for negotiation purposes.

Preliminary note: On the relationship between the Cabinet Decision and the authority of the Military Commander, and on the requirement for a specific source of authority for the Military Commander's action

9. As noted, the decision by State Security Cabinet was established as a general policy in the present matter, whereas its execution and implementation were delegated to the Military Commander under the authority granted to him, as argued, in reg. 133(3) of the Defence Regulations. This legal situation deserves discussion and a preliminary clarification.

10. The Ministerial Committee on National Security Affairs (the State Security Cabinet), as we know, is responsible for shaping the government's policy on matters pertaining to the country's security and foreign relations. Its members include, among others, the Prime Minister, Minister of Defence, Minister of Justice, Foreign Minister, Minister of Public Security and Minister of Finance. The principal legal norms that regulate the Committee's activity are found in sec. 31(e) of Basic Law: The Government, in sec. 6 of the Government Law, 5761-2001, and in the Government Work Regulations. The areas covered by the Committee are decided by dedicated government decision. Currently, Decision 41 of the 34th Government, "Ministerial Committee on National Security Affairs (The State Security Cabinet)" (May 31, 2015) states that the Committee may deal with a number of areas, including the State of Israel's security policy and foreign relations. Cabinet decisions have the same binding validity as government decisions, namely: they are decisions by the executive branch, not provisions that have normative status like a law enacted by the legislature. With

that said, it should be clarified that decisions made by the Cabinet lie at the heart of the executive branch's prerogative, and the degree of judicial intervention therein is accordingly highly restrained and limited for the most part (see: HCJ 7893/09 *Almagor - Terror Victims Association (R.A.) v. Government of Israel* [1], para. 3 ; HCJ 6063/08 *Shahar v. Government of Israel* [2], para. 4; HCJ 5856/08 *Farhangian v. Government of Israel* [3], para. 5; HCJ 914/04 *Victims of Arab Terror International v. Prime Minister* [4], para. 2; HCJ 9290/99 *MMT Terror Victims HQ (R.A.) v. Government of Israel* [5], 12).

11. Policy decisions reached by the government via the State-Security Cabinet direct and obligate the branches of government. One such branch is the Israeli Military Government and its commanders. The military echelon and its commanders often implement orders in line with the policy laid down by the political echelon, serving as the long arm of the government in these cases. There is nothing wrong with that, as long as the actions of the military echelon and its commanders are legal *per se*. And note that the Military Commander, in exercising governmental powers, is required to implement the political echelon's policy, but in doing so remains subject to and committed to the principles of Israeli administrative law. Within this framework, he must act in accordance with the rules of administrative authority. As previously held: "The Military Commander is authorized, and even obligated, to act in the area under his command in a way consistent with the policy set by the government, provided that, as part of his discretion, he acts in accordance with the authority granted him under any law" (HCJ 9594/09 *Legal Forum for the Land of Israel v. Ministerial Committee on National Security Affairs* [6], para. 15; and also see: HCJ 548/04 *Amana – The Settlement Movement of Gush Emunim v. Commander of the IDF Forces in the Judea and Samaria Region* [7], 379; HCJ 2717/96 *Wafa v. Minister of Defence* [8], 855; HCJ 358/88 *Association for Civil Rights in Israel v. Central District Commander* [9], 537-538).

12. We should make it clear that while the government often outlines the policy for the activity of the public administration, its decision does not supplant the need for the executive echelons to have sources of authority. In reality, the government often determines a general policy, which is then supposed to be carried out by administrative organs based on specific authority granted to them by law. The government formulates

policy in some area—such as housing, security, support, pensions, education, etc.—but clearly not just any administrative agency acting under the government can undertake its implementation, but only those bodies vested with the authority to do so. Accordingly, it has been held, for example, that the government may decide that, as a matter of policy, it wants to release Palestinian prisoners within the framework of negotiations with enemies. Yet, it has been held that this policy does not supplant the need that action taken by administrative organs be in accordance with authority granted to them by law. It has been held that while the political echelon's authority still stands, "the authority to decide the release of prisoners before serving their full sentence is not the government's to make", but lies instead with others holding executive powers, among them the President of Israel and the Military Commanders. It was thus made clear that in order to order the release of Palestinian prisoners, it is not enough for government to set a policy, but that a given authority granted to the executive echelon must be exercised (HCJ 1539/05 *MASHLAT – Law Institute for the Study of Terror and Assistance to Terror Victims v. Prime Minister* [10], [para. 3).

13. The requirement for a specific source of authority for the action of the Military Commander derives from rule of law and the principle of administrative legality. Any administrative organ must operate within the confines of the authority granted it by law. This principle is the cornerstone of administrative law. It makes it incumbent upon administrative agencies to act according to the law, thus limiting the power of government and ensuring individual liberties. The administrative obligation that applies to the Military Commander to act by authority applies regardless of the nature and wisdom of his decision. Even "good" administrative action or action arising out of an "administrative need" can be found to be illegal in the absence of a source of authority (LCA 2558/16 *A. v. Pensions Officer – Ministry of Defence* [11], para. 37; CA 7368/06 *Luxury Apartments Ltd. v. Mayor of Yavneh* [12], para. 33; HCJ 1640/95 *Ilanot Hakirya (Israel) Ltd. v. Mayor of Holon* [13], 587; DAHPNE BARAK-EREZ, ADMINISTRATIVE LAW, vol. I, 97-98 (2010) (Hebrew); BARUCH BRACHA, ADMINISTRATIVE LAW, vol. I, 35 (1987) (Hebrew); YITZHAK ZAMIR, ADMINISTRATIVE AUTHORITY, vol. I, 74-76 (2nd ed., 2010) (Hebrew) (hereinafter: ZAMIR, ADMINISTRATIVE AUTHORITY).

14. When the administrative act infringes human rights, not only is the administrative entity required to point to a source of authority for its action, but the

enabling provision must meet constitutional requirements. Inter alia, it must be anchored in primary legislation, in a special provision of law intended to permit the violation of the fundamental right. In addition, it must be clear, specific and explicit. This is what this Court has long held, and this principle was eventually even anchored in sec. 8 of Basic Law: Human Dignity and Liberty, which provides that a violation of basic rights protected under the law shall only be permitted "by virtue of express authorization in such law" (see: HCJ 6824/07 *Manaa v Israel Tax Authority* [14]; HCJFH 9411/07 *Arco Electric Industries Ltd. v. Mayor of Rishon LeZion* [15]; HCJ 1437/02 *Association for Civil Rights in Israel v. Minister of Public Security* [16], 762; HCJ 5100/94 *Public Committee Against Torture in Israel v. State of Israel* [17], 831 (hereinafter: the *Public Committee* case); HCJ 5128/94 *Federman v. Minister of Police* [18], 653; HCJ 355/79 *Katlan v. Israel Prison Service* [19]; CrimA 40/58 *Attorney General v. Ziad* [20]).

15. In our case, the actions of the Military Commander involve a violation of human rights. This Court has often held that the right to human dignity also gives rise to the rights of the dead and their family members to bring the deceased to a proper, dignified burial, which will allow them to commune and commemorate. These rights have been recognized in the case law regardless of the identity of the deceased, even when they were terrorists or enemy soldiers. The background for this is the general convention that human rights are granted to all people as such, even if they fall under the definition of "enemy". For our purposes, it is indeed an accepted convention that even the most abhorrent murderer has the right to burial, and his family has a right to bury him. This convention may raise difficult emotional responses, especially in those who have suffered from the deceased's actions, but it is necessary in a regime that respects human rights, as often explained in the case law (see: LCA 993/06 *State of Israel v Dirani* [21], para. 54; HCJ 52/06 *Al-Aqsa Company for the Development of Islamic Waqf Property in the Land of Israel Ltd. v. Simon Wiesenthal Center Museum Corp.* [22], paras. 190-194; HCJ 3114/02 *MK Barake v. Minister of Defence* [23], (hereinafter: the *Barake* case); HCJ 7583/98 *Bachrach v. Minister of the Interior* [24], 841-842; HCJ 6195/98 *Goldstein v. GOC Central Command* [25], 330 (1999); HCJ 3933/92 *Barakat v. GOC Central Command* [26], 6 (hereinafter: the *Barakat* case); AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL RIGHT AND ITS DAUGHTER RIGHTS, vol. I, 381-383

(2014) (Hebrew) [published in English as HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT (2015)].

16. To complete the picture, we should note that the State did not dispute the necessity that the action by the Military Commander in this case be based on some specific authority granted by explicit, primary legislation. The State agreed with this, and did not raise any alternative argument. In particular, the State did not argue that the Military Commander's action in our case could be based on residual or inherent powers of the government. Note, in this context, that it is possible to imagine situations in which the government might lay down some general policy, where it would hold some of the authority involved in its execution as inherent power. In these situations, there may be scenarios where the policy would be implemented by an administrative organ, as the long arm of government, even in the absence of a specific source of authority in the law for its action (see sec. 3 of Basic Law: The Government; HCJ 11075/04 *Girby v. Minister of Education, Culture and Sport – Chair of the Higher Education Council*, [27], para. 15; "The Authority to Enter a Contractual Undertaking on Behalf of the State", *Attorney General's Guidelines 6.2000* (May 15, 2003); ZAMIR, ADMINISTRATIVE AUTHORITY, 423). However, these are concrete, well-defined situations, whereas in most situations—especially those involving the violation of human rights, as in our case—government policy cannot be executed based on residual powers granted to the government. As noted, the State never even raised such an argument in this case.

17. To summarize the point: The decision by the State Security Cabinet was established as a general policy, but its execution and implementation were delegated to the Military Commander under the authority granted to him by law. In this legal state of affairs, we must examine whether the law does have a provision authorizing the Military Commander to implement and execute the Cabinet's policy. Furthermore, if an enabling provision of law exists, we would then also have to examine whether it is anchored in explicit, specific primary legislation, seeing as the actions that the Military Commander seeks to carry out violate human rights,.

Does Regulation 133(3) of the Defence Regulations constitute an explicit, specific primary source of legislation that authorizes the Military Commander to order the temporary burial of terrorist bodies for negotiation purposes?

18. Regulation 133(3) of the Defence Regulations states as follows:

> Inquests, etc.
>
> 133. (1) (Cancelled)
>
> (2) Notwithstanding anything contained in any law, where a member of the Government's forces has died in Israel in any manner or in any circumstances whatsoever, it shall be lawful for an Army Medical Officer to issue a certificate of death of such person, and such certificate, upon being countersigned on behalf of the General Officer Commanding, shall be full and sufficient authority for the burial of the body of such person.
>
> (3) Notwithstanding anything contained in any law, it shall be lawful for a Military Commander to order that the dead body of any person shall be buried in such place as the Military Commander may direct. The Military Commander may by such order direct by whom and at what hour the said body shall be buried. The said order shall be full and sufficient authority for the burial of the said body, and any person who contravenes or obstructs such order shall be guilty of an offence against these Regulations.

19. Answering the question whether reg. 133(3) of the Defence Regulations authorizes the Military Commander to make a decision on the temporary burial of terrorist bodies for negotiation purposes requires some interpretation. While the starting point for the interpretation is the regulation's language, it is not, as we know, the end point, given that among the existing linguistic possibilities, the interpreter must choose the one that best fulfills the purpose of the law. The purpose of legislation is the goals, values, policy, social functions and interests that the legislation is meant to fulfil. The purpose of legislation is a normative concept, which consists of the subjective and objective purposes of the legislation. The subjective purpose is the specific goal that the legislature sought to achieve through the law ("the legislative intent"). The objective purpose is the one that the legislation was meant to realize in our legal system as the

system of a democratic society. Both purposes can be deduced from the language of the law, its legislative history and other external sources (HCJ 6536/17 *Movement for Quality Government in Israel v. Israel Police* [28], para. 30; HCJ 962/07 *Liran v. Attorney General* [29], paras. 33-34; HCJ 693/91 *Efrat v. Director of the Population Registry in the Ministry of Interior* {30], 764 (1993); AHARON BARAK, INTERPRETATION IN LAW: INTERPRETING LEGISLATION (1992) Hebrew); AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (2003) Hebrew) (hereinafter: BARAK, PURPOSIVE INTERPRETATION) [English edition 2011]).

20. Looking at the language of reg. 133(3) of the Defence Regulations, one is led to conclude that it cannot be considered an "explicit" source of authority for the Military Commander's action. The regulation's language refers to a situation where the security forces are in possession of a corpse. In this situation, the regulation authorizes the Military Commander to issue a burial order, and order who will bury the corpse, and at what place and hour it will be buried. While the regulation grants the Military Commander authority to issue such orders with respect to the body "of any person", it does not specify the circumstances under which the authority is to be exercised. It does not make explicit whether the Military Commander's authority to make decisions concerning the burial of dead persons applies only in "times of emergency", or whether the authority is meant to exist in other contexts as well. It does not make clear whether the Military Commander's authority to make decisions on burial only exists when a dead person cannot be brought to burial in the acceptable, ordinary way, or in other circumstances as well. Furthermore, and this is the crux of our issue: The language of the regulation does not address the question of whether the authority granted to the Military Commander to order a burial also applies to *temporary burial for negotiation purposes*, which in no way constitutes burial in the usual sense, but a holding of the body, *a holding by burial*, where there can be no doubt that its circumstances and purpose differ from a classic, normal act of burial. In this context, the language of the regulation is vague and cannot be considered an explicit source of authority.

21. Examining the purpose of reg. 133(3) of the Defence Regulations leads to the conclusion that the regulation was never meant to authorize the Military Commander to order the temporary burial of terrorist bodies for negotiation purposes. As we will explain, when one traces the legislative history of the regulation, examines its internal and external logic, applies the presumptions of purposive interpretation, and looks at

Israeli law and international law as they relate to issues similar to the holding of corpses, the result is a sharp, clear picture: The Mandatory legislator, followed by the Israeli one, never envisaged a situation relating to the temporary holding of terrorist bodies for negotiation purposes. They never imagined that the Military Commander would exercise his authority in such circumstances. And in any case, reg. 133(3) does not include the balances required between the conflicting interests and rights in this area. The regulation also makes no reference to necessary information related to exercising the authority in the unique situation of the temporary burial of corpses for negotiation purposes, among them: circumstances that would justify the temporary burial of a body; how long a body may be held in temporary burial; the authority and timing for disinterment after a deal is struck; the requirements for documentation and registration of the body and the burial; obligations to transmit information regarding the body, etc. The regulation is deafeningly silent on all the above, and cannot be taken to imply any intent by the legislator to grant the Military Commander authority and power to address them or make decisions in that regard.

22. On examining the legislative history of reg. 133(3) of the Defence Regulations, one finds that it is, in fact, a later incarnation of reg. 19C of the Emergency Regulations, 1936 (hereinafter: the 1936 Emergency Regulations). Chronologically following the regulation's evolving formulation suggests that the regulation had seen a number of transformations and changes. In its historic formulation, as it appeared in the 1936 Emergency Regulations, the regulation mentioned a burial authority under very specific circumstances, where a person was hanged in one of the two central prisons in the cities of Acre and Jerusalem. With regard to these circumstances, the regulation stated, as published in the Hebrew Official Gazette, stated: "Notwithstanding anything stated in any Ordinance or law, the District Commissioner may order that the body of any person who has been hanged at the Central Prison in Acre or the Central Prison in Jerusalem shall be buried in the cemetery of the community to which such person belongs…", and in its English-language formulation, as published in the official gazette in the English language, the Regulation similarly stated that: "Notwithstanding anything contained in any Ordinance or law it shall be lawful for the District Commissioner to order that the body of any person who has been executed at the Central Prison, Acre, or the Central Prison, Jerusalem, shall be buried in such cemetery of the community to which such

person belongs…". The title of the Regulation at the time was "Death certificates, inquests and burials".

Then, in 1945, reg. 19C was copied from the 1936 Emergency Regulations into reg. 133(3) of the Defence (Emergency) Regulations, 1945 (hereinafter: the 1945 Emergency Regulations). The language of the regulation remained the same, except for minor changes, but its location was moved to the part devoted to "Miscellaneous Provisions". In addition, the title of the Regulation was shortened and re-defined as "Inquests, etc." A few years later, in January 1948, the Regulation underwent its last revision, fixing it in its current version (hereinafter: the 1948 Defence Emergency Regulations). As part of this revision, the High Commissioner announced his decision to change the regulation such that the District Commissioner would be replaced by the Military Commander as the administrative organ vested with the authority, and such that his scope of authority would be extended to allow him to order, inter alia, the burial of any person's dead body—i.e. not just a "person who has been executed at the… prison"; and anywhere, i.e. not just in the "cemetery of the community". The new, updated version of reg. 133(3) of the Defence Regulations in Hebrew is the one quoted above. The updated regulation was officially published by the High Commissioner in English, as follows: "Notwithstanding anything contained in any law it shall be lawful for the Military Commander to order that the dead body of any person shall be buried in such place as the Military Commander may direct. The Military Commander may by such order direct by whom and at what hour the said body shall be buried. The said order shall be full and sufficient authority for the burial of the said body, and any person who contravenes or obstructs such order shall be guilty of an offence against these Regulations".

(For the official publications of the regulation's text, both in Hebrew and in English, from its appearance in the 1936 Emergency Regulations, through its appearance in the 1945 Defence Regulations, to its appearance in the 1948 Emergency Regulations, see: Supplement No. 2 to the Palestine Gazette, issues No. 584, 753 and 825 (of 19 April 1936, 27 January 1938 and 13 October 1938 respectively) (Palestine (Defence) Order In Council, 1931, 1937) (Regulations made by the High Commissioner under Articles IV, 6 and 10); Supplement No. 2 to the Palestine Gazette issue No. 1442 (of 27 September 1945) (The Defence (Emergency) Regulations, 1945); Supplement No. 2 to the Palestine Gazette, issue no. 1643 (of 22 January 1948) (Palestine (Defence)

Order In Council, 1937) (Regulations made by the High Commissioner under Article 6) (Defence (Emergency) Regulations, 1948). We would note that the fact that the text of the regulation was also published from the outset in the Hebrew language in the official Mandatory publications makes interpretation easier, as it obviates the need to trace translation processes; compare: HCJ 1075/98 *State of Israel v. Oppenheim* [31], 326; CrimA 2013/92 *State of Israel v. Jose* [32], 825-826; CA 421/61 *State of Israel v. Haz* [33], 2206).

Examining the legislative history of reg. 133(3) of the Defence Regulations reveals that never once in its process of enactment was the possibility contemplated that the Military Commander would be able to order the temporary burial of a corpse for negotiation purposes. Rather, the existing data are more consistent with the conclusion that the historical purpose of the regulation was to handle burials primarily in situations where objective difficulties arose that made it hard to return the body of the dead to the relatives. And note: at the outset, the regulation authorized the District Commissioner to order the burial of the bodies of prisoners of the Mandatory regime who were executed at the central prisons in Jerusalem and Acre. Naturally, these prison executions made it necessary to regulate the handling of corpses. Indeed, the Mandatory authorities followed clear rules in this regard: *The rule was to hand over the body of those executed to their relatives to be buried normally as per the dead person's customs*. At times, however, an objective obstacle arose to transferring the dead person's body to his relatives. Such was the case, for example, when the relatives did not claim the body, whether because they had no knowledge of the ill fate that had befallen him (for example, because he was an illegal immigrant), or due to their fear of turning to the Mandatory authorities. In these cases, the Mandatory legislator sought to guarantee that the dead person would be brought to burial under proper, dignified arrangements, as consistent as possible with his customs and practices (reg. 19C of the 1936 Emergency Regulations instructed that the deceased should be buried "in such cemetery of the community"). For this purpose, the Mandatory administrative organs were granted various powers. Thus, reg. 302 of the Prison Regulations, 1925, stated that the Prisons Commissioner would be allowed to order how a body should be handled. Similarly, reg. 19C of the 1936 Emergency Regulations, later copied into the 1945 and 1948 Emergency Regulations, authorized the District Commissioner to order the burial of the corpse. This is how these things are described by Dr. Joshua Caspi in his comprehensive

article *Prisons in Palestine during the Mandate Period*, 32 CATHEDRA QUARTERLY - A JOURNAL FOR THE HISTORY OF ERETZ-ISRAEL, (Yad Ben Zvi), 171-172 (1984) (Hebrew):

> The hanging was usually carried out in secret, at night or in the early morning, when the other prisoners were sleeping, by 08:00 AM at the latest (reg. 298). Following the hanging, the physician would check whether the convict had already expired. *The body was left hanging for one hour and then handed over to relatives for burial. If the relatives did not want the body, it was buried by the authorities (Regulation 302)* (Emphasis added – Y.D.).

As noted, the regulation's historic context is more in keeping with the conclusion that it was primarily meant to manage exceptional situations where the corpse could not be transferred to the person's relatives. This conclusion also appears logical in relation to the regulation's later versions. While the wording of the regulation did undergo changes over the years, it can be reasonably assumed that the Mandatory legislator did not seek to change the rule whereby the body of the deceased person should be handed over to its relatives, if possible. This also holds true for the wording of the 1948 Regulation. While the wording of the regulation was changed at the time, and the holder of the authority was changed, it stands to reason that, at this point too, the regulation mainly targeted situations where the security forces had a corpse that, for some reason or another, could not be delivered to the dead person's relatives, whether because it was not possible to identify the dead individual, because no one came forward to claim the body, or because it was held by the security forces during confrontations. In these situations, where it was not clear where and how the body should be buried, the Military Commander was granted authority to make decisions, based on the understanding that he was the one in charge "on the ground" who could ensure a proper, dignified burial. It is hard to accommodate an inverse conclusion whereby the purpose of the authority was to give the Military Commander "general" power to order the burial of dead individuals across a large variety of circumstances, even when their corpses could be handed over to their families. In any cast, and this is the crux of the matter, even if we assume that the historic purpose of the regulation was to grant the Military Commander "general" power over burials, it is hard to adopt a

conclusion that the intention was to also allow him to issue orders in a situation involving the temporary burial of terrorist bodies for negotiation purposes.

23. The location and context of reg. 133(3) of the Defence Regulations within the fabric of the legislation likewise support the conclusion that the power was not meant to authorize the Military Commander to order the temporary burial of terrorist bodies in order to hold them for negotiation purposes. Regulation 133(3) appears under part XIV of the Defence Regulations, devoted to "Miscellaneous Provisions", as one of several secondary regulations. *The burial powers granted therein do not constitute a unique, specific and complete legal arrangement dedicated to the holding of enemy bodies for negotiation purposes*. One might have expected that a legal system desirous of adopting a practice of holding terrorist bodies for some reason or another would do so by means of a unique, concrete legislative arrangement wholly devoted to regulating the matter. While reg. 133(3) of the Defence Regulations grants the Military Commander – at most – broad "general" powers from which one might derive action, even the State does not dispute that it does not represent a dedicated legal arrangement devoted to regulating the temporary burial of terrorist bodies. The fact that reg. 133(3) is at most a "general" arrangement under "Miscellaneous Provisions" undermines the State's claim that it should be seen as an "explicit" legislative arrangement. Parenthetically, it should be noted—and we shall return to this later—that there are, in fact, few countries in the world whose legal code includes a dedicated legislative arrangement to allow the holding of terrorist bodies, and even those countries that have decided to include such an arrangement in their legal code have done so by way of a dedicated, specific legislative arrangement, radically different from the one in the Defence Regulations.

24. Implementing the accepted interpretive presumptions as to purpose in the Israeli legal system also reinforces the conclusion that reg. 133(3) of the Defence Regulations cannot be construed to grant the Military Commander broad authority to order the temporary burial of terrorist bodies for negotiation purposes. Inasmuch as the provisions of the arrangement violate human rights, the interpretative rule that a legal provision should be interpreted narrowly and strictly applies. Moreover, there is the purposive presumption that the goal of a legal provision is to inflict the least harm to human rights. In our case, as noted, the language of the regulation does not establish explicit authority to order the temporary burial of terrorists for negotiation purposes.

Under these circumstances, the regular rules of interpretation relating to the protection of human rights obtain (for the rules and interpretative presumptions relating to the protection of human rights, see: BARAK, PURPOSIVE INTERPRETATION, 224; HCJ 7803/06 *Abu Arfa v. Minister of Interior* [34], para. 46; LCA 3899/04 *State of Israel v. Even Zohar* [35], 317; CA 524/88 "*Pri Haemek*". *v. Sdeh Ya'akov* [36], 561). Another interpretative presumption that might apply in our case has to do with the compatibility of domestic law with international law (see BARAK, *ibid*). As I shall explain in detail, the present case raises serious questions about the relationship between domestic Israeli law and the international humanitarian law treating of armed conflicts, and international human rights law.

25. An examination of the case law of this Court in similar contexts also reinforces the conclusion that reg. 133(3) of the Defence Regulations cannot be interpreted as the State would have it. We would first note the absence of any prior ruling directly concerned with the Military Commander's authority to order the temporary burial of terrorist bodies by virtue of the regulation. While it was previously held that the regulation might constitute a source of authority for his decision to order a funeral to take place at a specific hour (the *Barakat* case [26]), and the Court even sanctioned a decision not to return to Hamas the body of a terrorist until information about the burial place of a fallen IDF soldier was provided (HCJ 6807/94 *Abbas v. State of Israel* [37]). However, the aforementioned rulings did not take up the question of the Military Commander's authority to order the temporary burial of bodies for negotiation purposes. It should be further noted that the State had previously presented its position on reg. 133(3) of the Defence Regulations, but the Court was not required to express its opinion since the petitions became moot (See: HCJ 4118/07 *Hanbali v. State of Israel* [38]; HCJ 9025/01 *Awadallah v. Commander of IDF Forces in Judea and Samaria* [39]); HCJ 8086/05 *Masri v. Commander of IDF Forces in Judea and Samaria* [40]; HCJ 8027/05 *Abu Selim v. Commander of IDF Forces in the West Bank* [41]). In any case, despite the absence of rulings directly pertaining to the question of the Military Commander's authority to order the temporary burial of terrorist bodies by virtue of reg. 133(3) of the Defence Regulations, important debates held in similar contexts can be found in the case law.

An examination of Israeli case law shows that most petitions similar to this one addressed situations where terrorist bodies were held in order to maintain public order.

The State's position in those situations was not based on the Cabinet Decision or on reg. 133(3) of the Defence Regulations. The State argued that returning terrorist bodies to their families might lead to riots and to mass funerals that would lead to overt glorification of and identification with the acts of the terrorists, and become a locus of incitement (for recent examples, see: HCJ 5887/17 *Jabareen v. Israel Police*, [42] (hereinafter: the *Jabareen* case); HCJ 9108/16 *Shaludi v. Commander of IDF Forces in the West Bank* [43]; HCJ 9495/16 *Hagug v. Commander of IDF Forces in the Judea and Samaria Area* [44]; HCJ 2204/16 *Alian v. Israel Police* [45]; HCJ 2882/16 *Awisat v. Israel Police* [46]; HCJ 7947/15 *A. v. Israel Defence Forces* [47]). The situations in which terrorist bodies are held in order to maintain public order raise questions that are distinct from those in our case, and moreover, as noted, the examination mostly concerns other sources of authority. In any case, and this is the main point, the decisions in those situations also emphasized that terrorist bodies could not be held in the absence of a specific source of authority, anchored in explicit primary legislation.

Of particular importance in this context is the judgment recently rendered in the *Jabareen* case [42], which stated that the Israel Police was not authorized to hold terrorist bodies as a condition for obtaining their families' consent to the conditions under which the funerals would take place. It was made clear that, for the purpose of holding the corpses, the Israel Police was obligated to point to a specific *dedicated source of authority* anchored in explicit primary legislation. The Police's position in the proceedings was that secs. 3 and 4A of the Police Ordinance [New Version], 5731-1971 constitute such an explicit source of legislation. The Police explained that sec. 3 of the Ordinance granted it broad authority to engage in the maintaining of public order and the safety of persons", and that sec. 4 of the Ordinance authorized every police officer "to undertake any action that is necessary" to prevent serious harm to the safety of life and property. As the Police saw it, these general, broad powers were sufficient to allow it to hold on to terrorist bodies. As noted, this position was rejected by the Court for the same reason stated above in regard to reg. 133(3) of the Defence Regulations. It was held that "this position of the Police is inconsistent with the requirement for 'explicit' authorization in all that concerns an action that violates basic rights", since the existing sections in the Police Ordinance are general and were not intended to grant the police specific powers in regard to holding corpses (*ibid*, para. 9). Consequently, it was held that the Police would return the terrorists' bodies to their families. As noted, despite the

difference in circumstances between the *Jabareen* case and the case before us, the reasoning regarding the authority requirement is identical.

A similar ruling on the requirement for a source of authority, from which an analogy can be drawn to our case, was rendered in CrimFH 7048/97 *Does v. Minister of Defence* [48] (hereinafter: the *Bargaining Chips* case). In that case, the question debated was whether sec. 2(a) of the Emergency Powers (Detention) Law, 5739-1979, constituted a source of authority for holding live detainees as bargaining chips. This Court ruled by majority—*per* Justices A. Barak, S. Levin, T. Orr, E. Mazza, I. Zamir and D. Dorner, and contrary to the dissenting opinions of Justices M. Cheshin, Y. Kedmi and J. Turkel—that the answer to the question was negative. It was explained that, indeed, the language of the Detention Law gave the Minister of Defence general, broad authority to detain an individual "on grounds of national security or public safety" in a way that might also accommodate a reading that he may arrest detainees as bargaining chips. However, it was held that such a possibility "did not come up for discussion, and was not, in fact, examined, by those dealing with the tasks of legislation" (*ibid*, 739). In those circumstances, it was held that it was not possible to extend the boundaries of the authority and interpret the provisions of the Detention Law as if they were meant to grant detention powers in such situations as well. It should be noted that the ruling in the *Bargaining Chips* case was also rendered with the prospect of finalizing deals for swapping prisoners and missing persons floating in the background. Even so, and despite the understandable human difficulty, the ruling was that, in the absence of a dedicated source of authority in explicit primary legislation, live detainees could not be held as bargaining chips. This was aptly summarized by Deputy President S. Levin in his ruling: "It would be naïve and even dangerous to deprive the State of appropriate means for freeing its fighters. However, the statute has not placed such a tool at its disposal. In my opinion, in order to place it as its disposal, a different source or grounds for its authority is required in primary legislation for a matter that *prima facie* has significance of a primary nature. " (*ibid*, 753).

It is true that drawing an analogy from the ruling in the *Bargaining Chips* case to our case is not simple. There is no denying that holding live detainees—a decision that violates the right to freedom in the narrow, nuclear sense—carries different weight than a decision to hold corpses. We should also bear in mind is that the judgment in the *Bargaining Chips* case also included a minority opinion that cannot be ignored,

according to which nothing prevents deriving specific authority to hold live detainees from the general authority in the Detention Law, in circumstances where the other side to a conflict also holds prisoners and missing persons. In addition, we have before us various critiques of the judgment published in the professional literature, as well as academic discussions on the subject (see and compare: EMANUEL GROSS, THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM: LEGAL AND MORAL ASPECTS, 287-259 (2004) (Hebrew) [published in English as: THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM: LESSONS FROM THE UNITED STATES, THE UNITED KINGDOM, AND ISRAEL (2004)]; Eitan Barak, *Under Cover of Darkness: The Israeli Supreme Court and the Use of Human Lives as "Bargaining Chips*", 8 PLILIM 77 (1999) (Hebrew) [published in English in 3(3) INTERNATIONAL JOURNAL OF HUMAN RIGHTS (1999)]). Still, and this for me is the crux of the matter, one cannot dispute that the rule laid down in the majority in the further hearing on the *Bargaining Chips* case also clearly supports the conclusion that actions of the kind in question—like those that the State wishes to carry out in the case before us via the Military Commander—must rest on authority based in explicit primary legislation intended to regulate the delicate, complex situation of holding live detainees, as well as terrorist bodies, for negotiation purposes.

26. The position of Attorney General M. Mazuz in 2004 also supports the conclusion that it is hard to accommodate an interpretation whereby reg. 133(3) was intended to grant the Military Commander sweeping, practically unrestricted authority to order the temporary burial of terrorist bodies for negotiation purposes. We would recall that the State claimed that the Attorney General's position was that terrorist bodies could not be held based on a theoretical need to keep "bargaining chips" for future negotiations, but that the possibility should not be ruled out if there are special reasons to hold on to the bodies. An examination of the Attorney General's decision shows that he never addressed the question of the Military Commander's authority under reg. 133(3) of the Defence Regulations, and stated no opinion in that regard. On the other hand, the Attorney General did point out that *"it is impossible to defend a general policy"* of not returning terrorist bodies to their families (para. 1 of the decision); that "*preventing the return of bodies is a measure that cannot be justified by a theoretical need to keep bargaining chips for future negotiations on captives and missing persons*" (para. 7); and that: "*a policy allowing terrorist bodies to be held in certain cases and no few cases, is inconsistent with the duty to strike a balance between the dignity of the*

dead and their families and considerations of security and protecting public order and safety in the area" (para. 8). Indeed, the Attorney General's position did not categorically rule out the measure of holding bodies for negotiation purposes in special situations, such as a concrete deal for the exchange of bodies. As previously noted, however, this determination was rendered under the clear assumption that there is authority to hold bodies, and in any case this should be read in light of the other determinations in his decision—which would seem to be the main point—that seek to limit such authority and confine it to specific, concrete circumstances.

27. Interim summary: The conclusion from the interpretative analysis thus far is that reg. 133(3) of the Defence Regulations does not constitute a specific, explicit, primary source of legislation that authorizes the Military Commander to order the temporary burial of terrorist bodies for negotiation purposes. This conclusion arises, first and foremost, from the language of the regulation, which, as explained, is at best "general" and "broad" in a manner that fails to meet the requirement for explicit legislation. It also follows from the regulation's purpose, as suggested by its historical context, inner and external logic, and its juxtaposition with rulings made in similar contexts. As explained, the Mandatory legislator, followed by the Israeli one, never considered a situation concerning the temporary holding of terrorist bodies for negotiation purposes, and did not seek to create a unique legal arrangement that would grant authority to that effect. In the next part of the judgment, I will further explain that this interpretative conclusion is even reinforced, in my opinion, in light of the provisions of international law and comparative law treating of situations of handling bodies during armed conflict or confrontation.

International Law and Comparative Law

28. In our case, the State's consistent line of argument was predicated on the assumption that the Military Commander had a source of authority in Israel's *domestic* law. The State made it clear that it was not predicating its position on *international* law, although emphasizing that, in its view, there is no prohibition upon holding dead bodies international law. In the previous part of the decision, I examined the provisions of domestic Israeli law and arrived at the conclusion that this examination itself shows that it comprises no source of authority for holding bodies for negotiation and bargaining. However, I think it justified to go further, and also address issues relating

to international law, for three reasons: First, even though the State sought to base its actions solely on domestic Israeli Law, it is possible that international law may apply at least to some of the corpses. In this context, suffice it say that some of the terrorists whose bodies are held by the State of Israel are of inhabitants of the Territory[1] "affiliated" or "identified" with Hamas in a manner that may raise questions regarding the applicability of international law. Second, the discussion about international law may play a part in the interpretation of reg. 133(3) of the Defence Regulations, since the purposive interpretive presumption is that the legislature meant to grant the Military Commander powers conforming to the provisions of international law. Third, the discussion of international law is also required as it could contribute to establishing some legal order in similar body-holding situations in the future. We would emphasize that the goal of the discussion is not to make positive assertions concerning the applicability of international law in each of the possible body-holding situations, but only to present a general picture of the subject.

29. The factual situation is that the State of Israel wishes to hold bodies of terrorists who have committed acts of terrorism against its civilians. The web of laws that might apply in this situation is complex. The normative framework might be based exclusively on domestic Israeli Law. Such is the case, for example, when the terrorist is a citizen and resident of Israel, and unaffiliated with any terrorist organization. In other situations, the normative framework might include the provisions of international humanitarian law on armed conflict, as well as complementary provisions from international human rights law. When it comes to armed conflict, the provisions of the law might relate to international armed conflict or non-international armed conflict. In certain circumstances, for example when the terrorist is a resident of the Judea and Samaria area, the laws of belligerent occupation might also apply in parallel. Alongside those, one has to keep in mind that the laws of armed conflict include fine distinctions that might also bear upon the legal situation. Particularly well-known is the distinction between combatants and non-combatants or civilians (for more on the systems of laws that might apply to a body-holding situation, see: Anna Petrig, *The War Dead and their Gravesites*, 91 INT'L. REV. OF THE RED CROSS 341-369, 343 (2006) (hereinafter: Petrig);

[1] Translator's note: In this context, the term "Territory" refers to Judea and Samaria.

Thomas L. Muinzer, *The Law of the Dead: A Critical Review of Burial Law, with a View to its Development*, 34 OXFORD J. OF LEGAL STUD. 791-818 (2014)).

30. The international humanitarian law applicable to armed conflict comprises various norms on burials and the handling of corpses. The key provisions are anchored in the four Geneva Conventions of 1949, and the two Protocols Additional to the Conventions of 1977. The large majority of the provisions constitute customary international law, which forms part of the binding domestic law of the State of Israel. There is no disputing that the State of Israel is committed to the First, Second and Third Geneva Conventions. On the other hand, its traditional position is that the belligerent occupation laws found in the Fourth Geneva Convention do not apply to the area of Judea and Samaria, even though it respects the humanitarian provisions included therein. In addition, the State of Israel is not party to the Additional Protocols. It has reservations about some of their provisions, but sees itself subject to their customary provisions of law (see HCJ 769/02 *Public Committee Against Torture v. Government*, [49], paras. 16-23; HCJ 7957/04 *Mara'abe v. Prime Minister of Israel* [50], 492; HCJ 2056/04 *Beit Sourik v. Government* [51], 827; HCJ 698/80 *Qawasmeh v. Minister of Defence* [52], (hereinafter: the *Qawashmeh* case); ORNA BEN NAFTALI & YUVAL SHANI, INTERNATIONAL LAW BETWEEN WAR AND PEACE (2006) (Hebrew); Ruth Lapidot, Yuval Shani & Ido Rosenzweig, *Israel and the Two Protocols Additional to the Geneva Conventions* (Policy Paper 92, Israel Democracy Institute) (2011) (Hebrew); YORAM DINSTEIN, THE LAWS OF WAR (Hebrew) (1983)).

(For the conventions, see: The First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter: the First Geneva Convention); The Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter: the Second Geneva Convention); The Third Geneva Convention relative to the Treatment of Prisoners of War (hereinafter: the Third Geneva Convention); The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter: the Fourth Geneva Convention). For the Protocols, see: Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 (Hereinafter: the First Protocol); Additional Protocol to the Geneva Conventions of 12 August 1949 Relating

to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977 (Hereinafter: the Second Protocol)).

31. Most of the norms relating to the handling of dead bodies in international humanitarian law apply to situations of international armed conflict. The Geneva Conventions impose various obligations upon belligerent parties with respect to the evacuation, documentation, identification, registration and handling of—and the communication of information on—bodies during combat in the field. These obligations are meant to ensure proper, respectful handling of bodies during combat, which would also make it possible to know the fate of the fallen in the future. These obligations are anchored, inter alia, in arts. 16-17 of the First Geneva Convention, arts. 19-20 of the Second Geneva Convention, art. 120 of the Third Geneva Convention, and arts. 27 and 130 of the Fourth Geneva Convention (for more, see: HCJ 4764/04 *Physicians for Human Rights v. IDF Commander* [53], 401-404 ; the *Barake* case). The Geneva Conventions do not establish an obligation to return bodies within the framework of an international armed conflict. The reason for this is that the representatives of the delegations who took part in formulating them preferred leaving this option open, since some of the delegations preferred that the dead to be buried on the battlefield (see: J.S. PICTET, COMMENTARY OF GENEVA CONVENTION (1949) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, 181 (1952)). However, even if the Conventions do not state an obligation to return bodies, the interpretation specified in the Red Cross's updated commentary on the First Geneva Convention (INTERNATIONAL COMMITTEE OF THE RED CROSS COMMENTARY OF 2016 OF I GENEVA CONVENTION (1949) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 1643-1647 (2016)) states unequivocally that the preferred option is to return the bodies to the family members of the fallen:

> The obligation to ensure that the dead are buried or cremated can be satisfied in different ways.
> …The preferred option is the return of the remains of the deceased to their families so that they may bury or cremate them in accordance with their religious beliefs and practices. Another reason why this option is preferable is that it enables the families to mourn their loved ones. Indeed, return of the dead to their families can be

considered a basic humanitarian goal, recognized in both conventional and customary humanitarian law.

Furthermore, the First Protocol adds and anchors a specific requirement to return bodies in certain circumstances. The Protocol establishes that the remains of people who died as a result of occupation situations or acts of hostility should be buried respectfully, and that as soon as circumstances permit, the parties to a conflict are expected to reach an agreement on their return (art. 34 §2(c)). The Protocol further states that, if no such agreement is concluded, the party holding the bodies may offer to return them (art. 34 §3). While the articles of the Protocol state that the parties "shall conclude agreements" without imposing an obligation to return bodies, their tenor is clear. The commentary on the Protocol even clarifies that although this arrangement seemingly applies in certain circumstances only, it might serve as a good platform for returning bodies in other circumstances as well (COMMENTARY ON THE ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, para. 1330 (1977)). Guidelines in a similar spirit also exist in the accepted interpretations of customary international law. Thus, the rules in the study by the International Committee of the Red Cross explain that a party to an international armed conflict must make every effort to facilitate the return of a dead person's remains to the other side upon its request (see: JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Vol. I: Rules, Rule 114 (2006)). As it transpires from this study, similar instructions appear in a number of military manuals, including in the United States, which announced its support of the rules of the First Protocol relative to the return of bodies in an international armed conflict.

32. Beside these provisions, international humanitarian law includes norms pertaining to non-international armed conflicts. In this context, there is no denying that the law is more vague (see Petrig's criticism on this matter, 353). However, Common Article 3 of the Geneva Conventions, concerning the right to dignity, as well as certain provisions of the Second Protocol, might apply. While these provisions do not establish an explicit prohibition on holding bodies, they, too, can be used to derive obligations relating to handling deceased persons and bodies. We would further note that even in a non-international armed conflict, the provisions of customary international law may apply. In this context, the study conducted by the International Committee of the Red

Cross (*ibid*.) specifies that even though the applicable rules on returning bodies in non-international armed conflicts are vague, the international legal and humanitarian organizations have a clear position on the subject. Thus, for example, the 22nd Conference of the Red Cross established obligations aimed at ensuring that parties to a conflict would make every effort to facilitate the return of a dead person's remains to the other side of a conflict. Similar resolutions were rendered by the UN General Assembly in 1974, and by the 27th Conference of the Red Cross in 1999, which stated that all parties to an armed conflict must ensure that "every effort is made... to identify dead persons, inform their families and return their bodies to them". The International Committee further added that this was required in view of the basic rights accorded to the families of the dead (*ibid*, p. 414).

33. International human rights law—which complements the laws of armed conflict—also includes general provisions on the right to dignity and to family life that are relevant to our case. These provisions are anchored, inter alia, in the European Convention on Human Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: the Convention against Torture); and the International Covenant on Civil and Political Rights. These provisions do not lay down an explicit ban on holding bodies, but the legal approach in this matter can be inferred from them. We would note that, in accordance with the provisions included in these conventions, the UN Commission on Human Rights issued a number of resolutions against Belarus, Tajikistan and Uzbekistan stating that their refusal to return bodies of deceased persons to their families was a violation of rights (see: *Staselovich v. Belarus*, Communication No. 887/1999 (2003); *Bazarov v. Uzbekistan*, Communication No. 959/2000 (2006); *Sultanova v. Uzbekistan*, Communication No. 915/2000 (2006); *Khalilova v. Tajikistan*, Communication No. 973/2001 (2005); *Shukurova v. Tajikistan*, Communication No. 1042/2002 (2006)). Another thing to note is that the UN committee in charge of verifying the implementation of the Convention against Torture looked into the Israeli government's policy on retaining terrorist bodies. In its conclusions of 2016, the Committee's recommendation to the State of Israel was to take all necessary steps to return the terrorists' bodies to their families as soon as possible (see: *UN Committee Against Torture (CAT), Concluding Observations on the Fifth Periodic Report of Israel*, 42-43 (2016)). Note that the Israeli government's position is that the Committee's recommendations have no binding legal force).

34. The rulings of the European Court of Human Rights (ECHR) likewise attest that holding bodies is a legally problematic move from the perspective of human rights law. It was ruled, for example, that Russia's refusal to return terrorists' bodies to their families in Chechnya contravened a number of provisions in the European Convention on Human Rights (*Sabanchiyeva v. Russia Judgment* [90] (hereinafter: the *Sabanchiyeva* case); *Maskhadova v Russia Judgment* [91] (hereinafter: the *Maskhadova* case). The European Court emphasized that the decision by the Russian authorities violated protected fundamental rights, among them the right to respect for private and family life, protected by virtue of art. 8 of the European Convention on Human Rights. This conclusion was based on precedents that gave expansive interpretation to the right to family life and the possibility for relatives to unite with their kin (see, for example, *Pretty v. The United Kingdom* [92]; *Pannulullo v. France* [93]; *Girard v. France* [94]; *Dodsbo v. Sweden* [95]; *Hadri-Vionnet v. Switzerland* [96]). The European Court did rule that in holding the terrorists' bodies, the Russian authorities acted "in accordance with a law" under domestic Russian Law, as required by art. 8 of the European Convention, and it even agreed to view the purpose for which the said law was enacted in domestic Russian Law as legitimate in itself. At the same time, it was ruled that the Russian arrangement did not meet the proportionality requirement, because of its sweeping nature and its failure to strike a proper balance between conflicting interests and rights.

35. With regard to the ruling of the European Court on the Russian arrangement, we would note in passing that even if this arrangement had been found to be legal, it would not in any case have been possible to draw an analogy from it to the Israeli arrangement. Contrary to Israeli Law, the Russian arrangement included unique, *concrete and explicit* provisions of law that positively prohibited the return of terrorists' bodies. This arrangement was included in a law titled *Federal Interment and Burial Act, Law no. 8-FZ*, and a decree titled *Decree no. 164 of the Government of the Russian Federation* (20.3.2003). The Russian Law *explicitly* permitted action against bodies of persons defined as "terrorists" even in the absence of any objective reason preventing their return. It stated in no uncertain terms that their bodies would not be handed over for burial, and that their place of burial would not be divulged, as follows: "The interment of persons against whom a criminal investigation in connection with their

terrorist activities has been closed because of their death following interception of the said terrorist act shall take place in accordance with the procedure established by the government of the Russian Federation. Their bodies shall not be handed over for burial and the place of their burial shall not be revealed" (§4) (English translation taken from the ruling in the *Sabanchiyeva* case). Furthermore, the authorities' action in Russia was also anchored in an explicit decree that regulates, in precise and rigorous terms, the way that bodies should be kept and their burial arrangements. Moreover, in the petitions in the *Sabanchiyeva* case and the *Mashkadova* case, it was argued that Russia was in fact the only state beside Israel that had a clear policy, seemingly grounded in law, on holding terrorists' bodies. The Israeli government did not contest this claim in the judicial proceeding conducted before us, nor did it point to any other country in the world with a similar arrangement.

36. Along with this, we would note that other than the laws of armed conflict and human rights law, history has seen peace treaties signed between countries that have referred to how dead bodies are to be handled and repatriated (e.g. the Treaty of Versailles, 1919, arts. 225-226).

37. The picture that emerges from the review is that although neither international humanitarian law nor international human rights law establish a statutory prohibition on holding bodies in an armed conflict, this practice is met with reservations, and involves considerable legal difficulty. True, it is possible to imagine situations where security interest might justify a party to a conflict holding bodies for certain periods of time within the framework of an armed conflict, for example, when battle on the ground is protracted, or certain bodies are required for investigation purposes. This is particularly so when both parties to a conflict simultaneously keep bodies (although we should note that each party is severally held to comply with international law and act according thereto, and violation by one party cannot, in itself, justify violation by the opposing party). Indeed, in these exceptional cases, the temporary holding of bodies might reflect a proper balance between security interests and conflicting rights, while also being legal under international law. Still, notwithstanding the existence of possible exceptions, international law expressly instructs that the preferred option is to return the bodies. Clear, explicit rules instruct parties to armed conflicts to make every effort to return the deceased to one another. This conclusion is understood from the spirit of

many legal provisions of the Geneva Conventions, the Protocols Additional to the Geneva Conventions, the various conventions on human rights, customary international law, the Red Cross commentary collections, judicial decisions by international tribunals, the professional literature on international humanitarian law and international human rights law, etc.

38. As to the specific case of the State of Israel, its decision to hold terrorist bodies, as noted, is not based on international law but on domestic Israeli law. In any case, this decision also appears to raise weighty questions when examined in light of international law. The State wants to interpret reg. 133(3) of the Defence Regulations in a way that grants the Military Commander broad authority to order the burial of terrorists for negotiation purposes, whereas reg. 133(3) of the Defence Regulations does not refer at all to relevant distinctions in international law and does not relate to it. The regulation makes no mention of the numerous obligations imposed on parties to conflicts by virtue of international law as regards the evacuation, documentation, identification, registration and handling of bodies, as well as the communication of information on bodies. In addition, the regulation does not factor in the full range of distinctions required by international law in a situation where terrorist bodies are held, including distinctions between different combat situations (routine, armed conflict, etc.); between different types of terrorists (combatants, "affiliated", civilians, etc.), and between different terrorists based on their territorial affiliation (residents of Judea and Samaria, residents of East Jerusalem, of Israel, etc.). Regulation 133(3) of the Defence Regulations does not "converse" with international law in these numerous contexts, in a manner that raises questions about the extent to which it conforms to international law. The Cabinet Decision is also silent on these numerous contexts. This fact naturally carries implications for the interpretation of reg. 133(3) of the Defence Regulations, and serves to reinforce the conclusion regarding its generality and its being a non-explicit provision of law.

The "Reciprocity" Claim and its Implications for the Decision

39. An argument that floated in the background of the petitions—one that is detached from the interpretation, and that I believe warrants separate discussion—is the reciprocity claim. The claim is that the State of Israel is actually holding terrorist bodies

because the Hamas organization is holding bodies of IDF soldiers, as well as Israeli civilians. Were it not for Hamas holding bodies of IDF soldiers, the State of Israel, too, would not have held bodies of Hamas-affiliated terrorists. There is no denying that this argument raises serious questions of principle, and certainly moral questions. One cannot ignore the strong gut feeling, also pointed out by Justice M. Cheshin in his minority opinion in the *Bargaining Chips* case, that a substantial, fundamental difference exists between a state of affairs where both sides to a conflict simultaneously hold bodies, and a second state of affairs where only one party to a conflict holds bodies and refuses to return them. Given the circumstances of the case, however, I do not consider it possible to lend much legal weight to the reciprocity claim, for a number of cumulative reasons.

40. First and foremost, it is obvious that the reciprocity claim cannot replace the requirement for authority. The fact that Hamas holds Israeli captives and missing persons might constitute moral grounds for reciprocation, but does not replace the obligation to act on the authority of law. As pointed out, even justified administrative action can be found to be illegal in the absence of a source of authority. The authority requirement does not draw its vitality from the justification of the administrative action, but from the principle of the rule of law and from broad goals meant to limit the power of government and ensure individual liberties. The principle of the rule of law, and the authority requirement derived therefrom, are separate from the question of the morality of some concrete administrative action. These things must be distinguished. As Justice Zamir said, the principle requiring authorization in law "overrides other public interests, including interests of the first order"—and even an important security interest cannot legitimize administrative action not authorized by law—"This is the rule of law in government" (ZAMIR, ADMINISTRATIVE AUTHORITY, 76). And note well that the obligation to act in compliance with a law that regulates the exercise of governmental power and its restrictions is particularly important in the fight against terrorism, where the wielding of governmental power often involves questions relating to human rights (see: Aharon Barak, *The Supreme Court and the Problem of Terrorism*, in JUDGMENTS OF THE ISRAEL SUPREME COURT: FIGHTING TERRORISM WITHIN THE LAW 9 (2005); HCJ 168/91 *Morcus v Minister of Defence* [54], 470). As noted, the requirement of authorization in the law stands on its own. The reciprocity claim, justified and proper

as it may be in moral terms, cannot legitimize the Military Commander's action in the absence of authorization in law for his action.

41. Secondly, reg. 133(3) of the Defence Regulations does not stipulate any reciprocity condition. It does not establish that a necessary condition for holding bodies is for both parties to a conflict to hold bodies at the same time. The contrary is true: the authority in principle granted thereunder seems to be a broad authority that does not depend on the existence of any preconditions. The Cabinet Decision is also not explicit in this regard. While the Cabinet Decision was forward looking, at a time when Hamas held Israeli captives and missing persons, it did not clarify that it was only valid until their repatriation. Note that had there been a specific, explicit primary arrangement in Israeli Law that authorizes an administrative entity to hold terrorists' bodies for negotiation purposes, reciprocation ought to have been a primary and necessary condition. Indeed, if the purpose of the arrangement is to allow the State of Israel to negotiate with enemies for the return of its own sons, and if the State of Israel accepts (as it declared before us) that holding terrorists' bodies for negotiations should be reserved for situations involving concrete contacts for the exchange of prisoners and missing persons, it stands to reason that authority to hold bodies for negotiation purposes would be made conditional on both parties to the conflict simultaneously holding prisoners and missing persons. As noted, such a condition is absent from the Cabinet Decision and from reg. 133(3) of the Defence Regulations.

42. Third, in the more general sense, one should bear in mind that the fact that the enemy acts in certain ways does not always justify similar action. As President Barak said: "This is the destiny of a democracy — it does not see all means as acceptable, and the ways of its enemies are not always open to it. A democracy must sometimes fight with one hand tied behind its back. " (the *Public Committee* case [49], para. 64, 844-845). In this context, as noted, even if one can envisage situations where the State of Israel would be able to hold bodies, and even if we accept the reciprocity claim in certain senses, this does not mean that the State of Israel can take every action taken by its enemies. “Reciprocity” does not necessarily mean “full reciprocity”. Indeed, even if the State of Israel sought to hold terrorists' bodies only when its enemies simultaneously held Israeli captives and missing persons, it would still be subject to internal norms that are incumbent upon it, and that it had itself chosen to abide, among them that its actions

are in accordance with the law, meet the rules of proportionality, are consistent with various obligations in both domestic and international law, comply and respect constitutional balances, etc. In this sense, the assumption that the enemy's actions follow "different norms", some of them contrary to basic legal and humane norms, cannot serve as legal justification for sanctioning every action—by way of mirroring—on Israel's part as well.

43. Finally, the reciprocity claim in this case ignores that the connection between the specific terrorists whose bodies are held by the State of Israel and Hamas is unclear. In this respect, the State made it clear that it did not claim that the terrorists whose bodies it holds are Hamas fighters. On the other hand, it was claimed that they are at most "affiliated" or "identified" with Hamas ideologically. Assuming even that Hamas were interested in holding negotiations on those bodies in dispute, it is obviously possible to imagine similar situations where the equation between the State of Israel and the terrorist organization would not be simple and clear-cut, and this too should be considered when examining the reciprocity claim.

44. As noted, the conclusion is that the reciprocity claim cannot be accorded much weight within the judicial debate upon the petitions, and that it makes no difference to the analysis of the authority in this case.

The Remedy

45. As explained above, Israeli Law does not grant the Military Commander authority to hold terrorists' bodies for negotiation by way of temporary burial or in any other way. As a general, non-explicit provision of law, reg. 133(3) of the Defence Regulations does not constitute such source of authority. Prospectively, the conclusion is that the Military Commander may not use his authority under the regulation to hold terrorists' bodies for negotiation. Retrospectively, the conclusion is that the burial orders that are the subject of the petitions were issued by the Military Commander unlawfully. A possible remedy in these circumstances is to declare those burial orders void, which would mean the immediate return of the terrorists' bodies to their families. However, considering the entirety of rights and interests at play, it is my opinion that if the State so wishes, it should be afforded the opportunity to formulate a full, complete

legislative arrangement, in explicit, specific primary legislation that meets the relevant legal standards, and which will be intended and dedicated to treat of the issue of holding bodies for the desired purposes, and which would accord weight to the observations made in this judgment. While an outcome where the State of Israel continues to hold bodies even after it has been judicially determined that this action is done without authority is no simple matter, I believe that it is a balanced and appropriate outcome considering the totality of circumstances (on granting a remedy of the suspended voidance, see: DAPHNE BARAK-EREZ, PROCEDURAL ADMINISTRATIVE LAW, 430 (2017) (Hebrew); Yigal Marzel, *Suspending a Declaration of Voidance*, 9 MISHPAT U'MIMSHAL 39 (2005) (Hebrew)). In light of the above, if my opinion be heard, my recommendation to my colleagues would be to grant the petitions, make the orders nisi issued within their framework absolute, and order the granting of a suspended declaration of voidance that would allow the State time to formulate a full legal arrangement within six months from the time of the rendering of this judgment. Should the State fail to formulate an arrangement by that time, the bodies of the terrorists whose matter was heard in the petitions shall be returned to their families. I would further recommend to my colleagues that we not issue an order for costs in this proceeding.

Comments on the Margins of the Decision

46. Given my decision that reg. 133(3) of the Defence Regulations does not grant the Military Commander authority to hold terrorists' bodies for negotiation purposes, I need not address additional arguments raised by the Petitioners, including those made with respect to the Military Commander's exercise of his discretion and the purpose of his actions. I would note, in particular, that I have found no need to address the Petitioners' claim regarding the territorial application of the Defence Regulations. In this context, the Petitioners argued that even if reg. 133(3) of the Defence Regulations were determined to constitute a source of authority for the Military Commander's decision to hold bodies for negotiations, this authority would not have applied, in any case, to all the bodies in the petition. In their view, the authority under the Defence Regulations applies only to bodies of terrorists from Judea and Samaria, and not to bodies of terrorists from East Jerusalem. As I said, I am not required to rule on this claim, but I will note, beyond what is strictly necessary, that this claim is erroneous on its face. The Defence Regulations also apply within the State of Israel, as they constitute

Mandatory legislation that predates the establishment of the State. Hence, the decision on the question of the Military Commander's authority by virtue thereof is also relevant to bodies of terrorists from East Jerusalem (see and compare: Michal Tzur (supervised by Prof. M. Kremnitzer), *The Defence (Emergency) Regulations, 1945*, The Israel Democracy Institute, Policy Paper No. 16, p. 11 (1999) (Hebrew); HCJ 5376/16 *Abu Hdeir v. Minister of Defence* [55], para. 32, *per* Justice E. Rubinstein); HCJ 5839/15 *Sidar v. Commander of IDF Forces in the West Bank* [56], para. 1, *per* Justice U. Vogelman).

47. In debating the question of the remedy, I decided upon the remedy of a suspended declaration of voidness, in order to allow the State sufficient time to formulate a full, complete primary legislative arrangement. I would like to emphasize that, notwithstanding my decision to order that final remedy, this should not be taken as an expression of any position in regard to a decision, if such is made, to launch a legislative procedure. The decision to initiate a legislative procedure, with its possible implications, is the legislature's to make, and it is assumed that it will exercise discretion as well as wisdom. It goes without saying that I am also not expressing any opinion on the content of any legislation that may be enacted. My only operative determination in this ruling is that reg. 133(3) of the Defence Regulations does not constitute a source of authority for the Military Commander to order terrorist bodies to be held for negotiation purposes. My judgment is based on this determination and it alone. As opposed to this, one should not read into it any other determination that might inhibit the Court from expressing positions on future legislation, including authority that may be granted by virtue of such legislation, its purposes, the discretion exercised within its framework, proportionality, etc. Of course, it can be assumed that these issues, too, might raise weighty legal questions in the future.

Summary

48. This ruling addressed only a single question: whether reg. 133(3) of the Defence Regulations authorizes the Military Commander to order the temporary burial of terrorists' bodies for the sake of holding them for negotiation purposes. As explained, reg. 133(3) of the Defence Regulations does not constitute a source of authority for the Military Commander's action. This conclusion necessarily derives from the principle of

the rule of law and the principle of administrative legality. It follows from interpretative analysis of the regulation's language, which indicates that this is a general, broad regulation that cannot be deemed explicit, specific legislation. It can also be understood from the purpose of the regulation, which comprises its historical context, its inner and external logic, and the application of the rules of interpretation applied in the Israeli legal system. As explained in the decision, the Mandatory legislator, followed by the Israeli one, never envisaged a situation related to the temporary holding of terrorists' bodies for negotiation purposes, and did not seek to put in place a unique arrangement to grant authority in that regard. Moreover, the conclusion in the matter of authority is reinforced when juxtaposed with this Court's rulings in other, similar contexts of terrorists' bodies and live detainees being held as "bargaining chips", as well as when compared to international humanitarian law as it relates to the laws of armed conflict and to international human rights law.

49. In effect, my judgment can be summarized as follows: The State of Israel—as a state under the rule of law—cannot hold terrorists' bodies for negotiation purposes in the absence of explicit enabling legislation. If the State so wishes, it must formulate a full, complete legislative arrangement specifically tailored to this subject, in explicit primary legislation that meets the legal standards of Israeli law, and corresponds with those provisions of international law that are not disputed. Since Israeli law has no such legislative arrangement, *I recommend to my colleagues that we grant the petitions, make the orders nisi issued within their framework absolute, and make a suspended declaration of voidness with respect to the burial orders, so that the State can formulate a full, complete, dedicated legal arrangement within six months of the rendering of this judgment. Should the State fail to formulate a legal arrangement by that time, the bodies of the terrorists whose matter was heard in the petitions shall be returned to their families.*

50. Before concluding, and not unnecessarily, I would like to note that in writing my opinion, I constantly had in mind the family members of IDF soldiers Lieutenant Hadar Goldin of blessed memory and Staff Sergeant Oron Shaul of blessed memory, and of Israeli civilians Avera Menigstu and Hisham al-Sayed, as well as the relatives of the victims of the hostile acts committed by the terrorists whose case was heard in the petitions. Truth be told, deciding these petitions has been extremely hard for me.

The suffering of the Israeli prisoners and missing persons held in Hamas captivity and the pain of their family members are unbearably heavy. The human outcome is hard, especially when the State believes that holding the terrorists' bodies might help obtain a deal for their repatriation. At the same time, as judges, our job is to rule in accordance with the law and the binding legal rules. To quote President Barak in the *Bargaining Chips* case [48], "as important as the purpose is of the release of prisoners and missing persons, it is not sufficient – in the framework of the petition before us – to legitimize all means." (*ibid*, para. 24, at p. 744). As previously noted, the State of Israel cannot, as a state under the rule of law, hold bodies of terrorists for negotiation purposes without authority. It has the option to arrange the issue in law, and the hope is that—with or without regard for this—all the legal means will make it possible to bring home the Israeli captives and missing persons as soon as possible.

51. All that remains for me to do is to end this judgment on the well-known words of Justice H. Cohn in the *Qawasmeh* case, which I also had the opportunity to quote in the past in CFH 5698/11 *State of Israel v. Dirani* [57]:

> How is the fighting of the State different from the fighting of its enemies? The one fights while upholding the law, whereas the others fight while breaking the law. The moral strength and material justification of a government's fight are entirely contingent upon upholding the laws of the State. By giving up this strength and this justification of its fight, the government serves the enemy's objectives. The moral weapon is no less important than any other weapon – and perhaps superior—and there is no moral weapon more effective than the rule of law.

Justice G. Karra:

I concur in the opinion of my colleague Justice Y. Danziger, and will add this: Regulation 133(3) authorizes the Military Commander to order the *place* of burial of any person's corpse, *who* will bury that corpse, *and at what time* it will be buried, but it cannot be understood as testifying to the existence of authority for the Military Commander to *hold* a corpse after its burial. Since "the limits of interpretation are the limits of language", the language of the regulation cannot be interpreted to include what is not there.

Justice N. Hendel:

The State of Israel has existed in a state of emergency—literally, as well from the legal standpoint—since the day of its inception. A state of emergency, as well as of war. The law of war, in all its elements and aspects, is no oxymoron, but rather a constant legal challenge imposed upon the State by circumstances. Reality, which forms the factual foundation, does not dictate an outcome one way or another. This area—the law of war—is perhaps the most difficult of legal disciplines. It is not theory, but concrete questions that stand on the shoulders of other questions, some of which are virgin soil: life and death, defense and morality, and even defining the kind of society we are, and the kind of society we choose to be. Caution is required, as well as sensitivity and legal analysis in accordance with its rules. Deciding the issue of handling terrorists' bodies thus requires an in-depth, meticulous and rigorous legal journey through the fields of the relevant norms and considerations—upon which I shall elaborate in my opinion.

1. On January 1, 2017, the Israeli government—through the Ministerial Committee on National Security Affairs—adopted a new policy on handling bodies of terrorists. According to this decision, such bodies would be returned, as a general rule, to relatives "under restricting conditions" set by the security establishment. However, two groups form an exception to this rule: Bodies of terrorists who had belonged to the Hamas terrorist organization (hereinafter: Hamas) or had committed a "particularly exceptional terrorist act", would be held by Israel by way of burial. The decision by the Ministerial Committee was based on security evaluations that suggested that holding bodies of terrorists belonging to the last two categories—and hence known to hold

"value" for Hamas—"might aid" in repatriating the civilians and the bodies of fallen IDF soldiers held by the terrorist organization, and facilitate future negotiations on the matter. At the very least, holding terrorists' bodies might improve the nature and parameters of a future repatriation deal, together with the significant, related security implications. Thus, the policy adopted by the Ministerial Committee was meant to promote the safe return of Israeli civilians Avera Mengistu and Hisham a-Sayed, and the return for interment in Israel of IDF combatants Lieutenant Hadar Goldin of blessed memory and Staff Sergeant Oron Shaul of blessed memory—while protecting the security and safety of the general public.

According to this policy, and by virtue of burial orders issued by the relevant Military Commanders, four bodies of terrorists were buried in the cemetery for fallen enemies in Amiad, and DNA samples were taken to allow for future identification. Two other bodies of terrorists are held by the Israel Police, with no burial orders having been issued for them as yet. On September 13, 2017, we acceded to the request of the Petitioners in HCJ 285/17 and HCJ 6524/17, and instructed the Respondents—pursuant to previous decisions—not to bury these bodies until a decision is made on the petitions.

2. In their petitions, the Petitioners ask that we order the Respondents to return the bodies of their relatives, claiming that holding the bodies violates the constitutional right—of the terrorists and their family members— to dignity, constitutes collective punishment, and is contrary to international law. From the Petitioners' perspective, the Respondents' policy is unreasonable and disproportionate. Furthermore, in the absence of explicit grounding in primary legislation, it violates the principle of administrative legality and does not meet the conditions of the limitation clause. As opposed to this, the Respondents invoke reg. 133(3) of the Defence (Emergency) Regulations, 1945 (hereinafter: the *Defence Regulations*; the regulation, verbatim, will be presented below), which authorizes the Military Commander to order the place, time and manner of burying "any person"—and thus also applies in the case of terrorists. The Respondents believe that the limited violation of the rights of the dead terrorists and their families is reasonable and proportionate, and given the circumstances—i.e., the Israeli civilians and the bodies of fallen soldiers held in Hamas hands—even consistent with the binding provisions of international law.

3. In his comprehensive opinion, my colleague Justice Y. Danziger determined that refraining from delivering the terrorists' bodies to their families violates their constitutional right to dignity—since even "the most abhorrent murderer" is entitled to a dignified, proper burial—and hence adopting this measure requires "clear, specific and explicit" authorization in primary legislation. The problem being that reg. 133(3) of the Defence Regulations, on which the Respondents relied, "does not constitute a specific, explicit, primary source of legislation that authorizes the Military Commander to order the temporary burial of terrorist bodies for negotiation purposes", while the residual powers of the government do not comprise steps that violate fundamental rights. My colleague therefore proposes to grant the petitions in the heading, and order a suspended declaration of voidness of the relevant burial orders—should the State fail to resolve the issue with suitable legislation by June 1, 2018.

I accept my colleague's position that there is value to comprehensive legislative regulation of the authority to hold terrorists' bodies, while specifying the relevant considerations and criteria for exercising it, and laying down the manner and limitations for holding bodies. I am also willing to concede that the handling of terrorists' bodies might infringe the right to dignity. In this respect, even the existing international law and custom carry weight. In other words, not every instance whatsoever of handling bodies is immune to judicial review. As grave as the terrorists' activity may be, it is not their values or actions that will dictate to us the binding legal norms within our system. But even from this perspective, the conduct of Hamas and the terrorist organizations, and the prevailing security situation, are pertinent in examining the violation of the right to dignity and its magnitude. For this reason, but not only for this reason, bringing the terrorists' bodies to proper burial, even if in a different form than the one they had hoped for before setting out on their murderous rampages, considerably reduces the violation.

When all is said and done, I cannot concur in the result reached by my colleague, and condition the validity of the burial orders on some future legislative arrangement. For the reasons that I shall clarify below, my position is that reg. 133(3) of the Defence Regulations authorizes the Military Commander to order the time, place and mode of burying terrorists' bodies, and that considerations having to do with preserving public safety and security—including against a background of civilians or bodies of fallen soldiers being found in enemy hands—lie at the core of this authority. The aspiration

to promote a *lex ferenda*, i.e., a complete, comprehensive legislative arrangement of the issue, cannot blur the nucleus of authority entrusted by the existing law to the Military Commander—reg. 133(3) of the Defence Regulations. In these circumstances, although holding the terrorists' bodies oversteps the residual authority of the Israeli government (see HCJ 11163/03 *Supreme Monitoring Committee v. Prime Minister* [58], para. 20, *per* Deputy President M. Cheshin), I have found no real substance in the Petitioners' claims as concerns the authority.

4. Before I delve into the interpretation of reg. 133(3) of the Defence Regulations, we should recall that its current version was shaped in early 1948, when its scope was extended and the authority was vested in the Military Commander (sec. 2 of the Palestine (Defence) Order In Council, 1937, Official Gazette, Supplement 2, 66)). As such, the regulation and its provisions come under the aegis of the preservation of laws provision in para. 10 of Basic Law: Human Dignity and Liberty, and are not subject to the conditions of the limitation clause in sec. 8 of the Basic Law, including the requirement that the violation of rights be done "by law… or by virtue of express authorization therein".

It has indeed been ruled that even in the absence of direct applicability of the limitation clause—whether because the violated rights lack constitutional status, or because their violation is not anchored in secondary legislation—"a piece of legislation is not to be interpreted as authorizing a violation of fundamental rights unless the authorization to do so is clear, unequivocal and explicit" (HCJ 7803/06 *Abu Arfa v. Minister of Interior* [34], para. 52, *per* justice U. Vogelman (hereinafter: the *Abu Arfa* case); LCrimA 10141/09 *Ben Haim v. State of Israel* [59], para. 22, *per* President D. Beinisch; HCJ 6824/07 *Manaa v. Tax Authority* [14], para. 14, *per* Justice U. Vogelman (hereinafter: the *Manaa* case). Considering the importance of the fundamental rights, surely the legislature did not intend to authorize the executive branch to violate them, unless this is explicitly stated in law. This interpretative presumption also rests on the difficulties raised by a general authorization, be it implied or vague, which hinders the identification of the nature and boundaries of the authority, and allows for its arbitrary use (*ibid.*; HCJ 337/81 *Mitrani v. Minister of Transport* [60], 355-358).

That being said, the case-law requirement for explicit authority should not be given strict, rigid, literal interpretation. On the contrary, it is a flexible requirement whose real content varies depending on "the nature of the right being violated and its underlying reasons, the relative social importance of the right, its social repercussions, the identity of the violating authority and how severely the protected right is violated in the situational context". Even when the language of the law does not clearly delineate the scope and boundaries of the authority, "It suffices that its particular purpose… makes the existence of authorization to violate the fundamental right a necessary conclusion" in order to fulfil, in the appropriate cases, the explicit-authorization requirement (HCJFH 9411/00 *Arco Electrical Industries Ltd. v. Mayor of Rishon Lezion* [61], para. 11, *per* President D. Beinisch).

These following was stated in relation to the explicit-authorization requirement in the limitation clause, but it equally holds true for its case-law counterpart, inasmuch as:

> Interpreting the case-law rule on clear, and explicit authorization “flexibly” rather than “literally", and adopting a “contextual” approach by which the degree of strictness in applying the explicit-authorization requirement is followed in accordance with the relative importance of the violated right, the degree of its violation, the purpose of the law and the entirety of circumstances, promotes interpretative harmony, and is also justified for substantive reasons, in that it is characterized by flexibility and lack of dogmatism, as is required in a discourse on rights, and strikes a balance between the reasons justifying the limitation of human rights only in primary legislation and contrary values of administrative effectiveness and effective maneuvering room" (the *Manaa* case, para. 15; the *Abu Arfa* case, *ibid*; see and compare CA 1600/08 *Maximedia Outdoor Advertising v. Tel Aviv – Jaffa Municipality* [62], paras. 7-8, and 12).

The question whether or not a given piece of legislation comprises clear, explicit authorization cannot, therefore, be resolved through exclusively literal interpretation. The interpreter must delve into the purposes of the relevant norm, and examine whether, given the overall circumstances of the matter, they attest to a legislative intent to grant the executive branch permission to infringe the fundamental rights in question.

5. Against this background, I will now address the interpretation of reg. 133(3) of the Defence Regulations, which instructs as follows:

> Notwithstanding anything contained in any law, it shall be lawful for a Military Commander to order that the dead body of any person shall be buried in such place as the Military Commander may direct. The Military Commander may by such order direct by whom and at what hour the said body shall be buried. The said order shall be full and sufficient authority for the burial of the said body, and any person who contravenes or obstructs such order shall be guilty of an offence against these Regulations.

As we know, "the limits of interpretation are the limits of language ", and so the first order of business is to examine the language of the relevant norm, in context, and weed out interpretations that find no support therein (the *Manaa* case, para. 19; AHARON BARAK, INTERPRETATION IN LAW, vol. 2 – Statutory Interpretation, 104 (1993) (hereinafter: INTERPRETATION IN LAW) (Hebrew)). A text does not deviate from its plain meaning, and read literally, reg. 133(3) of the Defence Regulations tips toward the Respondents' position. The Regulation grants the Military Commander broad discretion, allowing him to order where and when the body of "any person" is to be "buried"—and by whom. There is nothing in the text to point to a distinction between permanent and temporary burial—since the term "burial" is used in both contexts (see, for example, secs. 3A and 4B of the Military Cemeteries Law, 5710-1950; Dorit Gad, *Second Jewish Burial–"Gathering Bones"*, 26-27 YAHADUT HOFSHIT (2003) (Hebrew))—and surely the phrase "any person" does not rule out terrorists' bodies. Furthermore, as the words "by whom… the said body shall be buried" suggest, the Military Commander's authority does not come down to limiting the identity or number

of those attending the *funeral* (a limitation discussed in HCJ 3933/92 *Barakat v. GOC Central Command* [26], 5-6; (hereinafter: the *Barakat* case), but also pertains to the identity of *the burying* entity—in a way that allows a departure from the norm relating to the delivery of the body to the family. The regulation thus grants the Military Commander a broad array of powers, from specifically ordering the time of burial to a more significant decision on the identity of the burier. At any rate, as my colleague also suggests, the regulation makes no direct or detailed reference to the possibility of temporary burial with negotiations taking place in the background. For this reason, I am willing to assume, within the framework of this decision, that its language does not tip the scales in favor of the Respondents, and that the Regulation also "tolerates" a more restrictive interpretation.

6. Having said that, we must move on to the *second stage* of the interpretative process and examine which of the proposed alternatives optimally fulfils the purpose of the legislation in both its layers (HCJ 693/91 *Efrat v. Director of Population Registry* [63], para. 11, *per* President A. Barak; (hereinafter: the *Efrat* case). First, we need to trace the subjective purpose that the *legislature* sought to advance—and which can be established, inter alia, by analyzing the social and legal background of the legislation, the explanations given for it, as well as the language and structure of the law and the interrelation among its various provisions (*ibid*, 13-15; INTERPRETATION IN LAW, pp. 201-202).

The first pertinent reference in Mandatory legislation to the issue at hand appeared in reg. 302 of the Prison Regulations, 3 Laws of Palestine 2091 (1925), which provided that after hanging prisoners sentenced to death, "the body shall hang for one hour, after which it will be taken down and handed over to the relatives for burial. Should the relatives not desire to take charge of the body, it will be buried at Government expense". Incidentally, it is interesting to note that this provision deviates from the law practiced in Britain at the time, under which prisoners who were executed were buried in the prisons, and not handed over to their families (see, for example, Caroline Sharples, *Burying the Past? The Post-Execution History of Nazi War Criminals*, in A GLOBAL HISTORY OF EXECUTION AND THE CRIMINAL CORPSE 249, 250-251 (Richard Ward, ed., 2015)). In any event, reg. 19C of the Emergency Regulations 1936—as amended in October 1938, under the Palestine (Defence) Order in Council,

1937, Official Gazette, Supplement 2, 825, 1095—authorized the District Commissioner to deviate from the provisions of reg. 302 on handing over the body to relatives, and to order, "Notwithstanding anything contained in any Ordinance or law… that the body of any person who has been executed at the Central Prison, Acre, or the Central Prison, Jerusalem, shall be buried in such cemetery of the community to which such prisoner belongs".

This amendment of reg. 19C was preceded by another, in early 1938, wherein the coroner was authorized "not to perform an autopsy on the corpse of a person" who was "killed as a result of actions by His Royal Majesty's navy, army or air forces… for the purpose of suppressing riots" (Palestine (Defence) Order in Council, 1937, Official Gazette Supplement 2, 753, 77). The consolidation of these two provisions into one regulation, under the umbrella of emergency regulations, creates the impression that what we have here is a general arrangement on processing the bodies of persons killed or executed, against the background of hostilities with the security forces. This impression grows stronger in view of the social reality that led to the enactment of the emergency regulations—that is, the Arab revolt that took place in Palestine between 1936 and 1939, which met with a strong response from the Mandatory authorities. Scholars note that the increasing magnitude of the hostilities shifted the balance between the civil and military authorities in the country, and that by the end of 1938, the pendulum had already swung in favor of the latter, "leading to the implementation of complete military control in Palestine by October 1938" (Jacob Norris, *Repression and Rebellion: Britain's Response to the Arab Revolt in Palestine of 1936-9*, 36 THE JOURNAL OF IMPERIAL AND COMMONWEALTH HISTORY 25, 29 (2008)). The arrangements relating to the handling of corpses of the fallen and of terrorists should thus be seen as an integral part of the continuous struggle of the colonial authorities against terror, in which extensive use was made of legal tools meant to broaden their powers, "as a means of specifically combating the revolt" (*ibid*, pp. 29-30; for a general description of the colonial fight against the locals' uprising, see also YEHOSHUA PORAT, FROM RIOTS TO REBELLION: THE PALESTINIAN ARAB NATIONAL MOVEMENT, 1929-1939 (1979) (Hebrew); Yigal Eyal, THE FIRST INTIFADA: THE SUPPRESSION OF THE ARAB REVOLT BY THE BRITISH ARMY IN PALESTINE, 1936-1939 (Hagai Porshner, ed., 1998) (Hebrew)).

Let us continue to present the socio-legal historical background. A few years later—this time in the face of the intensifying Jewish struggle for independence (CrimA 6434/15 *State of Israel v. Shavir* [64], para. 4, *per* Deputy President E. Rubinstein)—the Defence (Emergency) Regulations, 1945 replaced the 1936 Regulations, and reg. 19C was reincarnated—lock, stock and barrel—in reg. 133 of the new regulations. Historians note and that the Mandatory authorities exercised this authority, and sometimes dictated the place of burial of those executed, in disregard of the family's requests and those of the deceased themselves (thus, for example, the Mandatory authorities decided to bury the three *Olei Hagardom* ["Those who went to the Gallows"] Eliezer Kashani, Mordechai Alkahi and Yehiel Dresner of blessed memory in Safed, even though all three expressed their wish to be buried in Rosh Pina, and despite the request of the Alkahi and Kashani families to bury their sons in their place of residence in Petah Tikva (BRUCE HOFFMAN, ANONYMOUS SOLDIERS: THE STRUGGLE FOR ISRAEL 1917-1947 530 (2015); *4 Hanged in secret at Acre: Funeral at Safad*, Palestine Post, April 17, 1947; *Families were not told before*, Palestine Post, April 17, 1947).

In any case, in January 1948, after the UN partition resolution was adopted and the first shots of the War of Independence were fired, substantial changes were made to sub-sec. (3) of the new regulation, the sub-section that is our main focus: The narrow scope, limited to the burial of prisoners who had been executed, was replaced by a broad reference to "the body of any person", and the provision requiring burial of deceased persons in the cemetery of the community they belong to was dropped. What this means is that the original authority to prevent the return of the body to relatives was significantly broadened, and transferred from the District Commissioners to the Military Commander. Here too, the broader authorities granted to the Military Commander were not detached from the security context, i.e. Britain's joining the fighting that broke out between the Jews and the Arabs in November 1947 (see: BENNY MORRIS, 1948: A HISTORY OF THE FIRST ARAB-ISRAELI WAR 97 (2010). Benny Morris is a history professor at Ben-Gurion University).

7. Hence, the Mandatory legislator considered the Defence Regulations—including reg. 133(3)—a legislative platform intended to give the (mainly military) authorities effective powers with which to fight the terror directed at them from both

sides of the Palestine divide (TOM SEGEV, DAYS OF THE ANEMONES: PALESTINE DURING THE BRITISH MANDATE 387 (1999) (Hebrew) [English: ONE PALESTINE COMPLETE: JEWS AND ARABS UNDER THE BRITISH MANDATE (trans. Haim Watzman) (2000)). Initially, the regulation was satisfied with laying down a narrow exception to the norm relating to the return of prisoners' bodies to their families, but the authority was later expanded to apply to other bodies as well—belonging, as evidenced by the other components of reg. 133(3) of the Defence Regulations, to terrorists killed by the "forces of His Majesty", or to the fallen of these "forces". Thus, even if the historical and legal background for reg. 133(3) of the Defence Regulations does not provide a direct answer to the question before us, it suggests that the Mandatory legislator sought to authorize the Military Commander to refrain from handing over bodies to the relatives given considerations of protecting public safety and security, and be satisfied with burying them at the time and place, and in the manner he saw fit. From here, it is but a short distance to determining that considerations having to do with releasing the bodies of fallen soldiers, or live civilians, held captive by terrorist organizations lie at the heart of this purpose.

8. Indeed, identifying the subjective intent of the *legislator* is not enough—since the objective purpose of the *law* is much broader, and it has been held that "a piece of legislation often has an objective purpose that the members of the legislating body never contemplated" (the *Efrat* case, para. 12). This purpose is of secondary importance in our case, since, as this Court noted in regard to another provision of the Defence Regulations:

> The interpretation of the Defence Regulations in the Mandatory period, where colonial values held sway, is not the same as their interpretation in the State of Israel, where Jewish and democratic values hold sway. The Defence Regulations will therefore be interpreted based on the fundamental principles of the Israeli legal system as they evolved over the years (HCJ 6893/05 *Levy v. Government of Israel* [65], para. 9, *per* President A. Barak (hereinafter: the *Levy* case).

It is therefore necessary to examine the objective purpose of reg. 133(3) of the Defence Regulations, which consists of the concrete purpose—stemming "from the type of legislation and the nature of its arrangements"—and of the general purpose, which derives from the fundamental values of the system and from legislative arrangements "that are topically close" (INTERPRETATION IN LAW, pp. 202-203; CA 8622/07 *Rotman v. Ma'atz - National Roads Company of Israel Ltd.*, [66], para. 98).

9. Analysis of the Defence Regulations shows that their main and undeniable purpose is to maintain state security, and public safety and order, while focusing on the fight against terror:

> First and foremost are considerations of state security and public order. These are the specific purposes underlying the exercise of the authority under the Defence Regulations. These purposes are inferred from the provision of the Palestine (Defence) Order in Council, by virtue of which the Defence Regulations were enacted. The Order in Council established that the regulations were meant "… to ensure the public's safety, the protection of Palestine, the imposition of public order and the suppression of uprisings, rebellions and riots, and to maintain the supply and services necessary for the public" (sec. 6). These objectives can also be seen on close examination of the Defence Regulations themselves (the *Levy* case, p. 886; see also HCJ 680/88 *Schnitzer v. Chief Military Censor* [67], 628).

In the same spirit, the Defence Regulations were described, in the *Abu Safa* case, as "security-military emergency legislation, which contains broad enforcement powers and diverse tools, administrative and punitive, *for fighting all types of terror*, including from the economic aspect" (HCJ 3037/14 *Abu Safa v. Ministry of Interior* [68], para. 10, (emphasis added)).

The Defence Regulations give broad interpretation to the purpose of maintaining state security and public safety. They do not stop at granting powers

pertaining to the "narrow", direct military struggle against armed terrorist operatives, but equip the authorities with a much larger toolbox. As stated:

> It has long been understood that the war on terrorism is not simply a matter of thwarting a terrorist just moments before he carries out his plan. It is an extensive struggle aimed at undermining the infrastructure of terrorist organizations, the resources available to them and their ongoing operations. This fight involves diverse means, among them legal ones… The offence of performing a service for a terrorist organization, like other provisions in the Defence Regulations and the Counter Terrorism Law, expresses the recognition that the fight against terrorism also involves *undermining the supporting structure* of terrorist organizations. The law recognizes the importance of neutralizing terrorist activity while still in the bud, as well as the need to target infrastructures and mechanisms that allow it to grow (CrimA 6434/15 *State of Israel v. Shavir* [64], paras. 59-60, *per* Justice D. Barak-Erez).

In this spirit, regs. 84 and 120 of the Defence Regulations allow the Military Commander to act against the economic infrastructure driving the terror machine and confiscate property linked—itself or through its owners—to these activities (on these regulations, which are no longer in effect within the territory of the State of Israel, see HCJ 2959/17 *Alshuamra v. State of Israel* [69], paras. 12-23 (hereinafter: *Alshuamra* case). Similarly, it was determined that reg.125 of the Defence Regulations authorizes the Military Commander to declare an area closed by order for the purpose of "delimiting training grounds, setting up military installations, etc." (CA 2281/06 *Even Zohar v. State of Israel* [70], para. 5, *per* Justice A. Procaccia, and compare para. 9 *per* Deputy President S. Joubran in the same matter; (hereinafter: the *Even Zohar* case))—and not necessarily for the purpose of preventing immediate confrontation (see the *Levy* case, pp. 892-893).

Regulation 133(3), which forms an integral part of the Defence Regulations, should also be interpreted in light of this broad purpose, i.e., promoting a systematic fight against terror and its various circles of support and activity. It goes without saying that curtailing the ability of terrorist organizations to use bargaining chips in order to gain achievements constitutes an integral part of this struggle. The ongoing war on terror takes on various forms, and must adapt itself to the enemy's innovations. Actions result in reactions, and so the chain changes. New and ugly facets of terrorist organizations are nothing new. The tactics frequently change, and cannot be ignored. One might say that there is a direct relationship between the breadth of the fight against terror and the breadth of interpretation: when the former broadens, the interpreter must draw the necessary conclusions, and give the relevant norm a contemporary interpretation that expresses its spirit and purpose. The purpose of the Defence Regulations is broad, and its practical "translation" must be adapted to the changing reality—within the bounds of authority delineated by the legislature. The purpose is thus adapted to reality and is integrated with the powers granted to the Military Commander. Ignoring the frequently changing needs misses the clear purpose of the Defence Regulations, including reg. 133(3) that is the focus of this case.

10. An "offshoot" that branches out from the purpose of maintaining state security and public order is the creation of individual and environmental deterrence. This purpose is expressed in a series of authorities that the Mandatory legislator granted to the Military Commander, believing that exercising them could "deter potential terrorists from carrying out a terrorist act and take human lives"—even if they are clearly devoid of direct, tangible military value (HCJ 5290/14 *Qawashmeh v. Military Commander* [71], para. 21).

Regulation 119 of the Defence Regulations, which authorizes the Military Commander to order the forfeiture and destruction of terrorists' houses, stands out prominently in this case, since its purpose—as determined by this Court repeatedly—"is not to punish but deter" (see, for example, HCJ 4597/14 *Awawdeh v. Military Commander* [72], para. 19). In other words, the justification for exercising the authority to order forfeiture and destruction "lies entirely in its hoped-for impact on the environment, and more particularly the terrorist's surroundings" (HCJ 5376/16 *Abu Hdeir v. Minister of Defence* [73], para. 3 of my opinion), even though destruction

carries no "pure" military value. A similar purpose is reflected in reg. 120 of the Defence Regulations, which authorizes the Military Commander to order the forfeiture of all the property of a person who committed an offence against any of the regulations—even when the offences are unrelated to the property, such that the forfeiture has no "deterrent justification" (the *Alshuamra* case, paras. 13-15). Without making a definitive statement, it seems possible that reg. 133(3) of the Defence Regulations—which primarily affects the non-implicated surroundings of the dead terrorist—also carries a similar deterrent purpose.

11. Another concrete purpose of reg. 133(3) of the Defence Regulations is to regulate the handling of enemy corpses while protecting the dignity of the dead. The regulation, which was, as noted, adopted against the background of the intensifying fighting against terrorist organizations and local militias, reflects the spirit of art. 17 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, which imposes a duty upon parties to a conflict to ensure honorable interment for the enemy's fallen. In other words, the legislator authorized the Military Commander to undertake the burial of these bodies, bearing in mind the possibility that at some point in time—or, as stated in art. 17: "as soon as circumstances permit, and at latest at the end of hostilities"—the bodies would be exhumed and handed over to the family members. Naturally, such burial is of a temporary character; it is meant to ensure that the deceased rests in peace until the time comes—when fighting ends, or when an exchange arrangements are concluded (as part of which, as the State has declared, hundreds of terrorists' bodies have been returned in the past decades).

This purpose of the regulation is not only reflected in the longstanding practice of holding the bodies of enemy fallen and terrorists— although this type of custom carries significant interpretative weight in itself (see and compare: HCJ 3132/15 *Yesh Atid v. Prime Minister* [74], para. 2 of my opinion). An examination of sec. 76 of the Counter Terrorism Law, 5776-2016, which revoked many of the provisions of the Defence Regulations, suggests that the legislature chose to leave reg. 133(3) of the Regulations unchanged. This stems, as evidenced by the explanatory notes to the amending bill Defence (Emergency) Regulations (Revocation of Regulations), 5773-2013, from perceiving reg. 133(3) as a vital, irreplaceable source of authority "*for the*

burial of enemy dead" (the details of the authority are regulated in various secondary sources, such as General Staff Order 38.0109 "Enemy Army's Dead – Procedure on Identification, Disposal of Effects, Reporting and Burial in Times of Emergency"). Beyond the security considerations in their "narrow sense", the regulation therefore seeks to ensure proper temporary burial of enemy dead, until their possible return to their countries and families. Note parenthetically that the legislature's choice to refrain from revoking the regulation is particularly significant in view of the customary practice of burying enemy dead in dedicated cemeteries, and in light of the ruling that sanctioned the holding of terrorists' bodies for considerations relating to negotiation with terrorist organizations (HCJ 6807/94 *Abbas v. State of Israel* [37]).

12. This last purpose "bridges" the security purposes of reg. 133(3) of the Defence Regulations and the general purpose attributed to each piece of legislation, namely the protection of fundamental rights. It is true that the preservation-of-laws provision maintains the validity of the Defence Regulations, including reg. 133(3), but:

> [that] their interpretation, especially when it comes to the objective sense, must be done in the spirit of the value-based normative declaration made in the Basic Law, while sometimes re-balancing the values underlying the piece of legislation, in the spirit of the renewed constitutional balance (the *Even Zohar* case, para. 5, *per* Deputy President S. Joubran).

> In this sense—interpretation versus direct attack—the fundamental rights are back up for debate. Burying the dead as per their wishes and those of their family forms an integral part of the fundamental right to dignity—which in this context comprises two heads: the dignity of the dead and that of their family. As President A. Barak stated at the time, "human dignity is not only a person's dignity in life. It is also a person's dignity after death, and also the dignity of that person's beloved, who cherish their memory in their hearts. This dignity is reflected, inter alia, in the very erection of a

> gravestone, in visits to the cemetery on memorial days and public ceremonies, and in tending the grave" (CA 294/91 *Jerusalem Burial Society v. Kestenbaum* [75], 523).

The introduction of Basic Law: Human Dignity and Freedom gave the principle of "the dignity of the dead" constitutional status, since "'the dignity of dead people derives from that of living people'… The dignity of the living person is violated when he is no longer guaranteed in life proper protection of his dignity when he is no longer alive" (HCJ 52/06 *Al-Aqsa Association for the Development of the Assets of the Muslim Waqf in the Land of Israel v. Simon Wiesenthal Center Museum Ltd.* [76] para. 135, *per* Justice Procaccia (hereinafter: the *Al Aqsa* case). Beside this aspect, albeit lower on the normative scale (CA 7918/15 *Doe v. Friedman* [77], para. 4 (hereinafter: the *Friedman* case)—stands, as noted, the right of the family members to determine how the dead and his memory are to be treated. The assumption is that "a violation of his memory and dignity is bound and intertwined with a violation of their dignity" (the *Al Aqsa* case, para. 139). Public policy, and the value attached by society to the care of its dead, reveal other facets in the principle of the "dignity of the dead" (*ibid*, para. 151)—and in some cases might even override the "private" rights of the dead and their families, dictating that their choices about the way to handle the corpse should be ignored (HCJ 6167/09 *Avni v. State of Israel* [78]; but see CA 1835/11 *Avni v. State of Israel* [79], and the *Friedman* case).

13. In my view, the "dignity of the dead", as such, stands on its own legs, and is higher up in normative status than "the dignity of the dead person's family". The more challenging question what is the basis for the principle of the "dignity of the dead": is it a derivative of human dignity—i.e., whether, just as human dignity is an individual "asset", so is the dignity of the dead, regardless of the surroundings and those surviving the deceased; or is protecting the dignity of the dead meant to send a clear message to the living, as a promise that their dignity will be preserved after their death. As noted above, the answer seems to comprise both possibilities.

In this regard, it is interesting to turn to Jewish law, which also comprises several levels of the right of the dead to dignity. One aspect is inherent in the halakhic injunction that it is "a religious duty to carry out the wishes of the deceased" (TB Gittin

14b). Commentators see the duty to honor the last wishes of the deceased and execute their will—including in matters unrelated to the distribution of the estate—as an expression of human dignity (RABBI OSHER WEISS, MINCHAS OSHER - BERESHIT, Parashat Vayekhi, Siman 66, 435-439 (2002) (Hebrew) in regard to Jacob's final charge in his blessings to his sons, and on his place of burial ["Bury me not, I pray thee, in Egypt"]). Another aspect is reflected in the biblical instruction not to leave an executed person's body overnight, "for an impaled body is an affront to God" (Deut. 21:23). Rashi (Rabbi Shlomo Yitzchaki, one of the most illustrious Bible and Talmud commentators, who lived in France in the early part of the second millennium CE) interpreted this verse in a way that connects human dignity to God's dignity: "It is an affront to the King in Whose image Man is created", hence the dignity of God requires the dignified burial of man, even if one who had sinned and was executed. Accordingly, it was determined that "whosoever lets his dead lie overnight transgresses a negative commandment", unless he is "kept overnight for the sake of his honor, to fetch him a coffin or a shroud" (mSanhedrin 6, 7). And note that the Talmud (TB Gittin 61a) says that the "dead of the heathen are buried along with the dead of Israel", which means that the commandment of burial applies to Jews and non-Jews alike. (See the ruling by the late Rabbi Shlomo Goren, who served for many years as the IDF's Chief Rabbi, and as the Chief Rabbi for Israel, with regard to the burial of non-Jewish soldiers in military cemeteries (TRUMAT HAGOREN, vol. II, Siman 79 (2012) (Hebrew); BEOZ UVETAATZUMOT: AN AUTOBIOGRAPHY, 152-153 (2013) (Hebrew)).

14. Returning to Israeli Law, the right of the deceased and the deceased's family to dignity is broad in scope. It spans issues such as "tending the grave" or choosing the form and content of the inscription on the garvestone (see also HCJFH 3299/93 *Wechselbaum v. Minister of Defence* [80]). The duty to hand over the dead person's body to the relatives for burial derives therefrom.

Indeed, in analyzing reg. 133(3), one cannot ignore that the dignity of the dead also applies to the burial of terrorists who had committed serious killing rampages. However, from a human-dignity perspective, and in the spirit of the Jewish law position—as shall be presented below—bringing the dead to proper burial expresses the values of the State of Israel as a Jewish and democratic state. These values are not diminished by the deceased's abject acts, nor do they distinguish between friend and

foe, Jew and gentile. It is worth noting that international law, too—e.g., art. 17 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, mentioned above (para. 10)—attaches great importance to burying the dead, even though they had fought in the enemy's ranks prior to their death. According to the ruling of the late Rabbi Shaul Yisraeli (the Israel Prize laureate for Judaic Studies, head of the Merkaz HaRav Yeshiva and member of the Chief Rabbinate Council, who died in 1995), Jewish Law attributes great weight to the provisions of international law as regards the law of war:

> And therefore, one has to see the agreement of the nations that war is one of the legal means, as long as the warring nations observe the accepted custom among nations with regard to war… and from now we will say that the prevailing law between countries also stems from agreement between the people of those countries, and although it concerns matters of life and death, their agreement is valid. And therein lies the foundation of the legality of war (AMUD HAYEMINI, Part 16, Chapter 5 (1992)).

The Halachic term *Dina d'malkhuta dina* [the law of the land is law] thus also applies in the realm of relations between the state and the international community, and imposes upon the State of Israel a duty to act in compliance with the norms anchored in the law of war, including paying last respects to enemy dead.

Beyond the weight that Jewish law accords to the provisions of international law in this context, Jewish law has its own deep, independent, ancient roots in regard to the duty to bury enemy dead. Thus, for example, we are told that after the Israelites returning to their land defeated the Canaanite kings who fought them, Joshua ordered the burial of the enemy's dead that very day (Joshua 8:29; Joshua 10:27). The book of Ezekiel, too, says (39:11) with respect to the Gog and Magog war to be waged at the end of the days, "And it shall come to pass in that day, that I will give unto Gog a place there of graves… and there shall they bury Gog and all his multitude: and they shall call it The valley of Hamongog". Based on the precedent set by Joshua, Nachmanides ruled that the general duty to bury the dead also extends to fallen enemies. Rabbi

Shlomo Goren, who, as we said, served as the first IDF Chief Rabbi, wrote this on the subject:

> During my service in the IDF, we set up special burial units whose role was to see to the identification and burial of fallen enemies in wartime. This is consistent with what we said at the outset, that the words of Scripture, "for in the image of God made he man" (Genesis 9:6), hold true for any human, with no distinction between nations and races (MESHIV MILCHAMA, vol. I, 40 (2nd ed., 1994) (Hebrew)).

We shall end with the responsum of Rabbi Nathan Ortner, who served as the Rabbi of Lod at the time, to a question put to him by an IDF soldier during the 1982 Lebanon War. That soldier said that his company had hit a Syrian tank and killed the soldiers in it, and wanted to know whether he was under religious obligation to bury the Syrians who had fought the IDF soldiers "and wanted to destroy us". After an extensive discussion, the Rabbi determined, with reference to Nachmanides's position presented above, that various nuances differentiated between the existing halakhic approaches—but that all of them recognized the duty to bury fallen enemies. Whether the duty originated in the Bible or with the rabbis, the rule is that the enemy's fallen must be buried, certainly when their bodies lie within the Land of Israel. (Nathan Ortner, *Burying Enemy Dead*, 4 TECHUMIN 97 (1983) (Hebrew); see also Shlomo Brody's article on burying the body of the terrorist who staged the 2013 attack at the Boston marathon, Shlomo Brody, *Even Criminals Rest in Peace*, Tablet (May 9, 2013)).

Thus, Israeli Law, international law and Jewish Law have stated their cases. What emerges is that the general purpose of reg. 133(3) of the Defence Regulations strives to minimize the violation of the dignity of the terrorist and his relatives, thus seeking to restrict the authority of the Military Commander to order the burial of the body as he sees fit in terms of the place and conditions of burial.

15. Another general purpose derived from the State's fundamental values is the value of "redemption of captives". Whether this is an integral component of "state security" or not, it is hard to question the significance accorded to this value within

Jewish tradition and within the Israeli ethos. As aptly described by Deputy President M. Cheshin (even if his interpretative position remained the minority opinion in the *Does* case [48]):

> The commandment of redemption of captives—a commandment of the utmost order—was instituted for good reason, since all of Israel (and for our purposes not only Israel) are responsible for one another. An army's strength lies in the brotherhood of its combatants, and this brotherhood is monolithic when battle comes and a combatant falls captive in enemy hands. As in the oath of the Three Musketeers, the one that Alexandre Dumas put in their mouth, "*Tous pour un, un pour tous*", a combatant will fight knowing that he is not alone, and that his friends will come to his rescue when trouble arrives. We are ordered and we are adamant not to abandon an injured person in the field and, as with an injured person, we will not rest until the release of our captives from their captivity. Combatants are akin to mountain climbers tied to each other by rope and fate, and a climber whose grip has failed and whose body is hurled into the abyss will be saved by his comrades (p. 747).

Indeed, as Justice I. Englard noted at the time (HCJ 794/98 *Obeid v. Minister of Defence* [81], 776-777):

> It has been held as a matter of halakha in SHULCHAN ARUCH, *Yoreh De'ah*, 252:1 that "There is no greater commandment than the redemption of captives," and that:
> "Whosoever ignores the redemption of captives transgresses against thou shalt not harden thine heart (Deut. 15:7), and nor [shalt thou] shut thine hand (Deut. 15:7), and neither shalt thou stand against the blood of thy neighbor (Lev. 19:16) and [the other] shall not rule with rigor over him in thy sight (Lev. 25:53) and neglects the commandment of

> thou shalt open thine hand wide unto him (Deut. 15:8), and the commandment of that thy brother may live with thee (Lev. 25:36) and thou shalt love thy neighbor as thyself (Lev. 19:18) and deliver them that are drawn unto death (Proverbs 24:11), and many such things (*ibid.*, sec. 2).
>
> It has also been ruled that "To delay the redemption of captives by even a moment, where it can be expedited, is akin to spilling blood" (*ibid.*, sec. 3).

16. Jewish law attaches particular importance to the "redemption of captives" in the sense of bringing warriors to burial, beyond the general value of preserving "people's dignity", which I have pointed out above. Thus, for example, Rabbi Shlomo Zalman Auerbach, one of the greatest decisors of Jewish Law in the 20th century, determined that even if saving a life overrides the whole of the Torah—and hence soldiers should seemingly not be put at risk in a mission to extract fallen soldiers—"the blow to the morale of soldiers who see that if they fall, they would lie by the wayside with no one to care for them, is an important factor in the fighting spirit and thus constitutes saving a life" (YEHUDA ZOLDAN, SHEVUT YEHUDAH ṾE-YIŚRA'EL: ERETS YIŚRA'EL -- GUSH ḲAṬIF, MANHIGUT ṾE-TSAVA, TSIBUR ṾE-HHEVRAH, Chap. 21(B)(4) (Eyal Fishler, ed., 2007)(Hebrew)). On a different, yet not unrelated issue, Rabbi Shlomo Goren ruled that the Sabbath may be violated in order to evacuate soldiers' bodies from battlefield, since "leaving fallen combatants on battlefield undermines combatants' morale" and "considering the particular emotional sensitivity we have toward our fallen sons" (RABBI RE'EM HA'COHEN, RESPONSA BADEI HAARON: ANSWERS IN CURRENT MATTERS, part 5 (2013) (Hebrew)). In interpreting reg. 133(3) of the Defence Regulations as regards the burial of the dead and conducting negotiations for the redemption of captives and fallen individuals, we must therefore also consider these essential Jewish and Israeli values.

17. The above suggests that a certain conflict arises among the various purposes of reg. 133(3) of the Defence Regulations, and hence one must proceed to the *third* and final stage of the interpretative process—distilling the ultimate purpose of the regulation after balancing the conflicting purposes, while keeping within the bounds of the language. In this stage, "account shall be taken, inter alia, of the relative importance

of the violated right, the extent of its violation and the overall circumstances of the case" (the *Manaa* case [14], para. 47).

As noted, burial of fallen enemies—terrorists or regular soldiers—by the Military Commander, instead of handing them over to their relatives, violates the right of the dead and their relatives to dignity. However, we should bear in mind that the authority granted to the Military Commander incorporates protection of the core of this right. It instructs him to bring the bodies to proper burial, and does not authorize him to hold them under inappropriate conditions. Furthermore, the burial of the bodies in Israel as a tool for facilitating negotiations for the repatriation of civilians and fallen soldiers held in enemy hands is temporary in nature. This is not, therefore, a question of denying the murderers a family burial plot, but rather delaying its establishment until the relevant security considerations have dissipated (whether because negotiations have ripened, or for other reasons).

As opposed to this limited violation stand considerations that lie at the core of the purposes underlying reg. 133(3) of the Defence Regulations—namely, protecting state security and public safety from the threat of terrorism. Returning the civilians held in Hamas captivity, Avera Menigstu and Hisham al-Sayed, and bringing back the bodies of fallen IDF soldiers Lieutenant Hadar Goldin of blessed memory and Staff Sergeant Oron Shaul of blessed memory for burial in Israel, themselves fall within the compass of these purposes. No less important, holding the bodies is significant due to its potential effect on the results of future negotiations—results that might have far-reaching implications for the security of the Israeli public at large (see, for example, the words of Justice E. E. Levy in HCJ 914/04 *Victims of Arab Terror International v. Prime Minister* [4]; HCJ 6063/08 *Shachar v. Government of Israel* [82]).

The proper balance between these purposes thus makes it clear that reg. 133(3) of the Defence Regulations seeks to authorize the Military Commander to regulate the proper burial of fallen enemies—be they terrorists or regular soldiers—when considerations of state security and public safety preclude their delivery to relatives. We would emphasize that the authority granted by the regulation is not restricted to situations involving some practical obstacle to handing over the corpses. The regulation does indeed seek to prevent the desecration of enemy bodies, but its security dimension

outweighs the humanitarian one. The legislator wished to grant the Military Commander authority to weigh a large array of security considerations and decide the burial issue based on these considerations, despite the limited violation of the dignity of the dead and their relatives. Thus, for example, President A. Barak ruled in the *Barakat* case (pp. 5-6) that the Military Commander is authorized to order the date and manner of burial of "a person whose death was security related"—even if not within the framework of a violent confrontation with the security forces—if he believed that this was necessary in order to prevent an incendiary outburst of emotions and disturbance of public order:

> The Military Commander has the authority to order that the funeral of a person whose death was security related will take place at night, with the participation of family members only. This authority originates in the general powers of the Military Commander to maintain order and security in the Territory. It is also anchored in the provisions of reg. 133(3) of the Defence (Emergency) Regulations, 1945.

Even more important to our case is the court ruling in the *Abbas* case [37], where President M. Shamgar determined that there had been no flaw in the discretion exercised by the Military Commander when he made the return of the body of a Hamas terrorist conditional upon revealing the burial spot of soldier Ilan Saadon of blessed memory, who was murdered by the organization's terrorists. Reasonableness "requires that an authority weigh all the relevant considerations deriving from the purpose of the law, and only them, and grant each one its appropriate weight." (HCJ 3132/15 *Yesh Atid v. Prime Minister* [74], para. 7 of my opinion)). Hence, in the *Abbas* case, the Military Commander's authority to weigh considerations of the kind that lie at the heart of these proceedings was recognized.

Thus, even if these things are not explicitly written in reg. 133(3) of the Defence Regulations, and certainly not in detail, purposive interpretation of the regulation makes it clear that the Military Commander is authorized to order the temporary burial of enemy dead for considerations of security, while showing respect to the dead. Indeed, contrary to the matter debated in the *Jabareen* [42], the Military Commander does not

seek to rely on a *general* authorization to maintain order that makes no concrete reference to the possibility of preventing—or restricting—burial. What we have here is a *dedicated* provision regarding burial, in which case there is nothing to prevent us from resorting to interpretation in order to appraise its full scope (see and compare HCJ 10203/03 *Hamifkad Haleumi v. Attorney General* [83], paras. 30-33 *per* President M. Naor; HCJ 5100/94 *Public Committee against Torture* [17], 835-839).

18. Before concluding the discussion on the question of authority, I will briefly address several issues. One concerns the primary arrangements rule, which states that "in matters falling within the framework of 'primary arrangements', an administrative authority may only act with the clear authorization from the legislature" (Yoav Dotan, *Primary Arrangements and the New Legality Principle*, 42 MISHPATIM 379, 411 (2012) (Hebrew)). In our case, the legislator was the one to outline the basic policy, determining that the Military Commander would be able to order—based on security considerations—the place, time and manner of burial for enemy dead. In the absence of complexity or extraordinary social disagreements, the implementation of the policy in the cases before us—the burial of terrorists' bodies, for security considerations relating to negotiations for the return of abductees and fallen soldiers—cannot therefore be seen as a primary arrangement (see and compare the *Abu Arfa* case [34], paras. 57-63 *per* Justice U. Vogelman; for general comments on the difficulty of identifying primary arrangements, see, for example, HCJ 4491/13 *Academic Center for Law and Business v. State of Israel* [84] para. 19, *per* President A. Grunis). In any case, in view of the said explicit authorization arising from the purpose of reg. 133(3) of the Defence Regulations and its language, the primary arrangements rule—even if assumed relevant to our case—cannot influence the outcome (*ibid*, para. 21; the *Manaa* case [14], paras. 14-15). I would also add, beyond what is required, that the constitutional layer that some attribute to this rule (*ibid*, paras. 22-25) has no bearing on the status of reg. 133(3) of the Defence Regulations, which comes under the aegis of the preservation of laws provision.

19. Another issue has to do with the possible comparison with the "bargaining chips" case, in which this Court gave sec. 2 of the Emergency Powers (Detention) Law, 5739-1979, a restrictive interpretation, determining that it did not authorize the Minister of Defence to order the detention of a person who poses no danger—even if this might

facilitate negotiations for the release of captives (the *Does* case [48]). I will say, at the outset, as my friend, Justice Y. Danziger also noted (in para. 25 of his opinion), that comparing the force of the injury to the dignity and freedom of an individual held in custody with that involved in burying a terrorist in a way that does not suit his wishes, poses a difficulty. Since the interpretation of the norm in question is largely influenced by the nature of the right being violated and the degree to which it is violated, this difference carries an interpretative significance that cannot be ignored. Furthermore, the restrictive interpretation preferred in the *Does* case is anchored in the purposes of the Emergency Powers (Detention) Law, reflecting an essential distinction between the detention of a person who poses a threat to state security and the detention of another who does not, himself, pose any threat. On the other hand, reg. 133(3) of the Defence Regulations—which, by its very nature, focuses on environmental security considerations, since the dead no longer pose any danger—does not provide any basis for a random distinction between temporary burial and permanent burial, or between burying the soldiers of the enemy's regular army and burying terrorists. The desire to expand the protection of a dead person's dignity has merit, but cannot serve as a basis for an arbitrary outcome that makes random distinctions between different situations—and in fact requires the legislature to pedantically specify every scenario that the Military Commander might encounter, even if it even if it is not substantively unique. One must keep in mind, as the majority justices in the *Even Zohar* case emphasized:

> The status of the right to property as a constitutional right casts interpretative "rays of light" toward the old legislation preceding the Basic Law, including the Defence Regulations enacted by the Mandatory legislator in 1945. However, *the effect of those interpretative "rays of light" is limited and confined to the margins of the old legal provision, and they do not have the power to turn it on its head and change its deep essence* (para. 10, *per* Justice A. Procaccia [emphasis added]; see and compare paras. 5 and 10 *per* Deputy President S. Joubran).

In the absence of purposive anchoring of the distinction between permanent and temporary burial, or between security considerations relating to disturbances during

burial ceremonies and ones relating to the repatriation of civilians held by the enemy, the substance of reg. 133(3) of the Defence Regulations cannot be changed, despite the change that has taken place in the status of the "dignity of the dead".

20. I will conclude the discussion on the question of authority by joining the result arrived at by my colleague Justice Y. Danziger, that "neither international humanitarian law nor international human rights law establish a statutory prohibition on holding bodies in an armed conflict," (para. 37 of his opinion)—certainly when required for a specific, real security need. This being the case, and considering the applicability of the Defence Regulations within both the State of Israel and the Territory (see, for example, HCJ 358/88 *Association of Civil Rights in Israel v. Central District Commander* [9], 532-533), there is nothing to support the distinction between bodies of terrorists who were residents of the Territory or residents of Israel—and the authority of the Military Commander extends to all of them.

I shall only note that the rulings of the European Court of Human Rights mentioned by my colleague (*Maskhadova v. Russia* [91]; *Sabanchiyeva v. Russia* [90]) reinforce this conclusion, at least as concerns bodies of terrorists who were residents of Israel. The said rulings determined that the Russian authorities' decision not to return bodies of terrorist to their families disproportionately violated the right to privacy and family life (anchored in sec. 8 of the European Convention on Human Rights (ECHR)). However, the Court's reasoning actually highlights the substantial difference between the Russian policy, which was rejected, and reg. 133(3) of the Defence Regulations, which we are now debating. First, in discussing the arguments made by the family members, the European Court noted (*ibid*, §138) that the Russian arrangement was particularly harmful:

> In that it completely precluded them from any participation in the relevant funeral ceremonies and involved a ban on the disclosure of the location of the grave, thus permanently cutting the links between the applicants and the location of the deceased’s remains.

That is, the violation of rights is compounded, since the decision of the Russian authorities completely and irreversibly severed the link between the family members and the graves of their loved ones, excluding the families from the funeral ceremonies and withholding the location of the grave from them. These characteristics are clearly irrelevant to Israeli Law, which does not rule out the family's participation in the burial, permits the disclosure of the burial location, and certainly does not completely sever the tie between the family and its beloved deceased. Moreover, we should recall that the burials in our case are temporary in nature, such that the terrorists' bodies will be returned to the relatives in the future, whether as part of an exchange arrangement or after such an arrangement will no longer be on the agenda.

The ECtHR rulings, whose result was based on the sweeping, disproportionate nature of the Russian arrangement, also demonstrate the importance of the distinction between authority and discretion, showing that the question of authority is one thing (as it was indeed found to be in the Russian context) and the question of discretion is another. Furthermore, they suggest that the arrangement under reg. 133(3) of the Defence Regulations meets the tests of reasonableness and proportionality. As the European Court emphasized (*ibid*, § 144 146; see also paras. 233-238 in the *Mashkhadova* case) –

> The relevant official did not take the decision using a case-by-case approach and included no analysis which would take into account the individual circumstances of each of the deceased and those of their family members […] that was so because the applicable law treated all these questions as irrelevant, the decision of 15 May 2006 being a purely automatic measure […] Having regard to the automatic nature of the measure, the authorities' failure to give due consideration to the principle of proportionality, the Court finds that the measure in question did not strike a fair balance between the applicants' right to the protection of private and family life, on the one hand, and the legitimate aims of public safety, prevention of disorder and the protection of the rights and freedoms of others on the other.

In other words, the disproportionality of the decisions by the Russian authorities stems from the sweeping nature of the domestic legislation, which entirely rules out the return of terrorists' bodies to their families, automatically and without regard for the concrete circumstances, and even denies them "some kind of opportunity for paying their last respects to the deceased person" (*ibid*, § 143). *Expressio unius est exclusio alterius*: there is nothing inherently wrong about the authorities burying terrorists' bodies instead of handing them over the relatives, as long as the authority is exercised on a case-by-case and proportional basis, while examining the overall considerations in the matter. As noted, the policy adopted by the Ministerial Committee on National Security Affairs, and the concrete decisions of the Military Commander are based on a case-by-case examination of the terrorist's identity and the circumstances of the event, and do not inherently rule out the family's participation in the burial ceremony. The rule is accompanied by an exception – an exception accompanied by case-by-case examination. This being the case, and in complete contrast to the Russian arrangement, these are proportional decisions in which there is no cause to intervene.

21. We thus find that the Military Commander is authorized to order the place, time and manner of burying the bodies of fallen enemies—a burial that is often temporary in nature—when security considerations so dictate. Obviously, in exercising his discretion, the Military Commander must strike a balance between these considerations and the right to dignity of the dead and their family. However, as clarified with regard to other components of the Defence Regulations, *authority is one thing and discretion is another* (HCJ 1125/16 *Mari v. Commander Military Forces in the West Bank* [85], para. 20 *per* Justice M. Mazuz); HCJ 7040/15 *Hamed v. Military Commander in the West Bank* [86], para. 23 [hereinafter: the *Hamed* case]; the *Alshuamra* case, para. 17), and the limitations on how discretion is to be exercised do not blur the limits of the authority.

22. Having reached the conclusion that the Military Commander is authorized to order the burial of terrorists' bodies for security considerations related to negotiating the return of civilians and fallen soldiers, we must now examine whether the concrete decisions in the matter of the Petitioners before us, with the general policy underlying them, meet the test of reasonableness and proportionality.

I believe that the exercise of authority by the Military Commander, in accordance with the Ministerial Committee's policy, does not overstep the limits of reasonableness—whose bounds can be gauged, at least in the context of the violation of fundamental rights, using the proportionality tests as well (for a discussion on the relationship between reasonableness and proportionality (see HCJ 794/17 *Ziada v. Commander of the IDF Forces in the West Bank* [87], para. 118 *per* Deputy President S. Joubran, and the sources cited there). In any case, there is a difference between the reasonableness test and the proportionality test, and between the proportionality test in general and the proportionality test under sec. 8 of Basic Law: Human Dignity and Liberty). Thus, the material presented by the Respondents, both in their pleadings and in the course of the hearing held *ex parte*, suggests that the burial policy is based on assessments by security agencies regarding its possible contribution to facilitating negotiations for the return of the civilians and the bodies of fallen IDF soldiers held by Hamas. The Ministerial Committee reached its decision following several discussions, in which it was presented with the assessments of the Israel Security Agency and the Coordinator for Prisoners and Missing Persons in the Prime Minister's Office, and heard the positions of the National Security Council and the IDF. These assessments suggest that the burial in Israel of "Hamas affiliated" terrorists, or terrorists who have committed "a particularly exceptional terrorist incident" of clear symbolic significance, would help further negotiations for the return of civilians Avera Mengistu and Hisham a-Sayed, and the bodies of fallen IDF soldiers Lieutenant Hadar Goldin of blessed memory and Staff Sergeant Oron Shaul of blessed memory, even if the contacts for an exchange agreement have yet to reach an advanced stage. The Respondents also noted that "the political echelon holds, and will hold, periodic evaluations of the situation on this issue"—as required due to the violation of the dignity of the dead and their relatives (compare with the *Hamed* case, para. 27).

The concrete decisions that are the subject matter of the petitions before us are also based on an appropriate factual foundation regarding the organizational affiliation of the terrorists, the "symbolism" of the terrorist event in which they died—from the perspective of the terrorist organizations—or both. Thus, Musbah Abu Sabih, the terrorist who murdered a Border Police officer and an Israeli civilian in October 2016, is identified with the Hamas organization (HCJ 285/17), like the sons of Petitioners 2

and 3 in HCJ 8503/16 (the first, who was involved in an attempted terrorist attack in July 2016, and the other, who is among those who murdered Rabbi Michael Mark of blessed memory in the same month), and the son of Petitioner 7 in HCJ 4466/16 (who carried out a suicide bombing in Jerusalem in April 2016). As for the body of Petitioner 4's son in HCJ 8503/16, it has been clarified that it is being delayed due to the dire circumstances of the terrorist attack he committed—the murder of the girl Hallel Yaffa Ariel of blessed memory in her sleep, in June 2016—and the "standing" this terrorist had gained among the terrorist organizations. Finally, the decision in the matter of terrorist Fadi Qunbar (HCJ 6524/17), who murdered four soldiers in a vehicle-ramming terrorist attack committed in January 2017, rests on the dire circumstances of the attack and on Hamas claiming responsibility for it. As noted, according to the assessments of the security establishment, Hamas attaches greater importance to the bodies of its people, or to bodies of terrorists who committed particularly severe terrorist acts—and so holding these bodies effectively promotes negotiations for the return of the civilians and the bodies of the fallen soldiers held by the organization.

In these circumstances, there is no real doubt that the terrorists' bodies are delayed for a proper purpose—facilitating the repatriation of the civilians and fallen IDF soldiers held by Hamas, and influencing the negotiation in the matter in such a way as to minimize harm to the state's security and its citizens' safety—and not as an arbitrary punitive measure.

23. Moreover, the factual foundation presented to us suffices to show the reasonableness of the measures that the Military Commander adopted—or intends to adopt—in accordance with the policy of the Ministerial Committee, in order to further the said purpose. However, the link between the measures and the purpose might weaken, even considerably, as the circumstances change. As noted, the bodies with which the petitions before us are concerned have been held by the State of Israel for quite a while – as long as 20 months (HCJ 4466/16). Indeed, the security considerations underlying the Ministerial Committee's policy and the Military Commander's decisions dictate that no rigid "expiry date" be set whereupon the Respondents would have to return the terrorists' bodies to their families. Furthermore, past experience teaches us that Rome was not built in a day, nor the bridge to an arrangement, and that it may take more than a year for deals to mature for the exchange of prisoners or bodies of fallen

individuals (see, for example, HCJ 7523/11 *Almagor Terror Victims Association v. Prime Minister* [88], and HCJ 9446/09 *Karman v. Prime Minister* [89], regarding the repatriation of Israeli soldier Gilad Shalit). At the same time, clearly one cannot condone the unlimited holding of terrorists' bodies, and the competent authorities must frequently review the changing circumstances, both relative to the general policy (i.e., the "concreteness" of a possible exchange deal), and relative to the "value" of keeping specific terrorists (i.e., their current importance in Hamas' eyes). Thus, without establishing a definite timeframe, it is possible to determine that, at this stage, the measures taken by the Military Commander in order to further the proper purpose of the policy underlying his actions fall within the bounds of reasonableness—subject to renewed periodical examination of the issue, as the Respondents have undertaken to do.

In view of the security establishment's evaluation of the possible contribution of the policy in question to the security (and moral) interests involved in the repatriation of the civilians and fallen IDF soldiers, no real alternative has been presented to this policy and its implementation in the cases before us, with minimal violation of the dignity of the dead.

It should be emphasized that the decision of the Ministerial Committee on National Security Affairs instructs that terrorists' bodies be returned to their family members, except in relatively rare situations. Reality also testifies to this: The large majority of terrorists killed in recent years during terrorist attacks have been returned to their families, whereas the petitions before us relate to only six bodies. In other words, the Respondents have avoided adopting a comprehensive, deleterious policy of holding terrorists' bodies, and have sufficed with an individual arrangement that attributes weight to the organizational affiliation of each terrorist and the nature of terrorist attack committed. Moreover, the Ministerial Committee and the Military Commander have ordered the burial of the relevant bodies—as opposed to holding them in some other manner that would be less respectful of the dead.

Incidentally, and to complete the Jewish Law perspective, we should note a ruling made during the War of Independence. The first Sephardi Chief Rabbi of the State of Israel, Rabbi Uziel, addressed a situation where, in the midst of war and due to

the constraints of the hour, a soldier was buried in the Ayelet Hashachar kibbutz, whereas his family and center of life were in Tel Aviv. It was ruled that, under the circumstances, this burial could be considered temporary, and the body could be transferred to the Nachalat Yitzhak cemetery (BEN ZION MEIR HAI UZIEL, PISQEI UZIEL: BISHE'ELOT HAZMAN, 36 (1973) (Hebrew)). Despite the salient and clear differences between this case and ours, this serves to reinforce the obvious. A temporary grave fulfils the requirement, be it even preliminary, of the duty to bury the dead. Such is the case even if it causes a violation to the dignity of the dead and his family that justifies the transfer of the body at a later stage.

24. Finally, the Military Commander's decisions also meet the cost-benefit test. As I noted above, we are concerned with decisions that present a relatively minor violation of the right of the dead and their families to dignity, and not to the core of the right. What we are concerned with is essentially temporary burial that does not sever the link between the terrorists' families and their dead, and does not necessarily prevent them from visiting the temporary graves or even taking part in the funeral (subject, of course, to relevant security considerations). The proper burial of the terrorists, in accordance with their religious customs, and in a way that allows future identification of their bodies, further minimizes the violation of their dignity. Therefore, in weighing this violation against the substantial security purposes underlying the policy, by virtue of which the Military Commander's decisions were made, the scales tip, in principle, in favor of the latter.

One should bear in mind that the policy adopted by the Ministerial Committee on National Security Affairs, in light of which the Military Commander acted—and intends to act—is restricted and limited. It only relates to the bodies of terrorists identified with Hamas, or ones whose brutal actions earned them "value" in the eyes of this terrorist organization. Furthermore, the Military Commander's decisions concern terrorists who went on blind, brutal killing sprees—even if, fortunately, they were unable in some cases to put their evil plans into practice (see and compare, for example the *Abu Hdeir* case, para. 33 *per* Deputy President E. Rubinstein). As long as there is real cause to assume that the Military Commander's decisions are effective—in the sense that they can further the security interests involved in repatriating the civilians and the bodies of fallen soldiers held by Hamas, even if not in any immediately apparent

way—they fall within the bounds of reasonableness and proportionality, and we should not intervene.

25. In closing, purposive interpretation of reg. 133(3) of the Defence Regulations shows that the Military Commander holds broad authority to order the burial of bodies of enemy terrorists or fallen soldiers, based on considerations of protecting the State's security and the safety of its citizens, while respecting the dignity of the dead. There is no doubt that repatriating civilians and fallen IDF soldiers held by the enemy, and minimizing the related security cost, lie at the heart of these considerations. Therefore, the Military Commander is authorized to order the burial of terrorists' bodies in order to further that purpose. The distinction between the sphere of authority and that of discretion is essential. Even when there is justification for limiting the way the authority is exercised, one cannot simply ignore, at the stroke of a pen, the language of the authorizing norm and its purposes, and give it restrictive arbitrary "interpretation". In these cases, the "rays of light" radiated by the Basic Laws will illuminate the discretionary sphere, but they will not change the basic nature of the authorizing norm and undermine its purposes.

The material presented to us suggests that the Military Commander's decisions before the Court are based on a full, up-to-date, factual foundation, and meet the tests of reasonableness and proportionality. Thus, were my opinion accepted, we would determine that the Military Commander is authorized to continue to act reasonably and proportionately, within the bounds of his authority, to order the burial of terrorists' bodies.

26. Considering the importance of these issues, and to avoid misunderstanding in a very nuanced issue, I will summarize my position as it relates to the discretionary plane and to the exercise of the authority. I will first state the obvious, which might fall between the stools and the table of terrorism: The desirable situation would be to return the bodies of the dead, including terrorists, to their families—in accordance with the rule laid down by the Ministerial Committee, and without exceptions. However, the abhorrence and brutality exhibited by terrorist organizations, who hold civilians and bodies of fallen IDF soldiers and demand a price not only for those held alive in their custody but for the dead as well, leave no other recourse. In this reality, which is also

forced upon us, one has to walk a tightrope between achieving the objective of repatriating Israeli civilians and bodies of fallen IDF soldiers on the one hand, and on the other hand maintaining the dignity of the dead—be they even terrorists. And, of course, if the law recognizes the feelings of terrorists' relatives, then surely the cry of the families of the living and the dead held by Hamas will not let us rest. In other words: acknowledging reality, listening to the voice of the living who have not returned home and to the voice of the blood of our brothers who have not been brought to rest, and upholding the basic principles of the State of Israel as a Jewish and democratic state.

Of particular importance, in this regard, is the exact delineation of the Respondents' policy, according to which—as the attorney for the State has made clear—holding terrorists' bodies constitutes a rare exception. That is, even bodies of terrorists falling under both relevant categories will be buried temporarily only against a background of concrete negotiations for the repatriation of civilians and the bodies of fallen soldiers held by the terrorist organizations. The transfer of bodies should not be prevented in anticipation of what the future might bring. The security establishment is supposed, as it has done in this case, to exercise case-by-case discretion with regard to facilitating negotiations for the return of the Hamas-held civilians and fallen IDF soldiers. This is a very delicate matter. We should not turn a blind eye to the nature of negotiations in such sensitive matters between the State and a terrorist organization, even by means of a third party. A terrorist organization might declare that there is no negotiation in progress, where in reality this is not the case but only another stage in the negotiation. What matters is that if negotiations are indeed nonexistent, and no concrete contacts of any kind are underway for a deal, the bodies are to be returned. However, as long as there is a chance that is neither hypothetical nor slim of further negotiations, there is no obligation to return them. Another important point is, as noted above, that the dignity of the dead requires their burial. A situation in which terrorists' bodies are held over time in some form other than burial—be it even, as in the cases before us, by request of the families—might excessively violate the dignity of the dead and the principles that are binding under international law. In this case, there is no need to quantify and draw time limits, but, as noted, the more time that elapses, the greater the need to bury the corpse, and the time dimension also constitutes a consideration with regard to its time of return. Again, there are no set formulas. This depends on the contacts, the negotiations, and the point that they have reached. In our case, based on

the material submitted, it seems that this how the Respondents are acting in this case—although, as I see it, it is time to bring the bodies being held to temporary burial. Of course, the Ministerial Committee on National Security Affairs and the Military Commander must periodically review the existing policy—and how it is implemented in specific cases—and avoid the burial of bodies in Israel when this does not contribute to facilitating negotiations for the repatriation of the Hamas-held civilians and fallen soldiers.

27. All that remains is to express the hope that a burst of humaneness—or at least the Hamas's interest—will overtake the madness of terrorism and allow the dead to rest in peace. If exercising the authority under reg. 133(3) of the Defence Regulations can accelerate the safe return of civilians Avera Mengistu and Hisham a-Sayed to their families, and the return for interment in Israel of IDF combatants Lieutenant Hadar Goldin of blessed memory and Staff Sergeant Oron Shaul of blessed memory, I shall be content. I would deny the petition without an order for costs. In my view, it would be right to rescind the interim order and bring the two remaining bodies to temporary burial as soon as possible, in such place as shall be determined by the Military Commander.

The petitions are granted by the majority opinion of Justices Y. Danziger and G. Karra, contrary to the dissenting opinion of Justice N. Hendel, according to which the petitions should be denied.

Given this day, 26 Kislev 5778 (December 14, 2017).