**New Tools in the Fight Against Terrorism**

*“The well-known laws according to which the nations of the world behave, are largely adapted to the old and familiar model of wars between armies, while the new and terrible reality created in Israel and around the world by various terrorist organizations and individuals carrying out terrorist attacks does not take into account territorial boundaries, does not distinguish between times of war and times of peace, and every hour is a good hour to sow destruction, violence, and fear in most cases without distinction between civilians and soldiers. Terrorism does not in fact respect any of the rules of the game set by the Old World in the laws of war, and this reality requires that also the jurists and not only the security forces rethink and update these laws in a current manner* ***and adapt them to the new reality****[[1]](#footnote-1). [****Throughout the paper, emphases are added, unless stated otherwise M.Y.****]” (HCJ 8091/14 The Centre for the Protection of the Individual v. The Minister of Defence [Published in Nevo], paragraph 2 of my opinion (December 31, 2014).*

On January 1, 2017, two decisions were made by the Ministerial Committee on National Security (The Political-Security Cabinet) (hereinafter: the “**Cabinet***”*), which aim to produce new tools for exerting pressure on the Hamas movement, and tackling terrorism. One[[2]](#footnote-2) stipulates, that the State of Israel will not hand over terrorists’ corpses.[[3]](#footnote-3) The second[[4]](#footnote-4) stipulates, that residents of Gaza will not longer be able to visit the Temple Mount, and that family members of Hamas operatives will no longer be admitted to Israel for medical treatment. The following is the wording of the first Decision as permitted for publication:

“We Decide:

A. Terrorists’ corpses will be returned under restrictive conditions set by security officials.

B. The corpses of Hamas-affiliated terrorists will be held by Israel.

C. The corpses of terrorists who committed a particularly unusual terrorist incident will be held by Israel.”

On July 12, 2018, it was announced that the IDF was exploring the idea of burning fields belonging to Hamas operatives from Gaza who were leading the “kite terror”[[5]](#footnote-5), in order to create pressure to end the launching of the kites.[[6]](#footnote-6)

On December 25, 2018, the *Knesset* passed, by second and third reading, the Amendment to the Anti-Terrorism Act,[[7]](#footnote-7) which stipulates that terrorists convicted of certain offenses will not be able to receive early release on parole.[[8]](#footnote-8) The explanatory remarks attached to the Bill state that the Amendment was made for the purposes of *“*retribution and deterrence*”*[[9]](#footnote-9) and in other words, the purpose of the amendment of the law is to create another tool to combat terrorism, and to create additional deterrence – apparently emphasising acts of terrorism committed by individuals, which is difficult to thwart.

On June 4, 2019, the Supreme Court ruled[[10]](#footnote-10) in the Namnam case,[[11]](#footnote-11) that there is nothing wrong with the Minister of Internal Security*’*s decision, and the conduct of the prison service, preventing Hamas-affiliated prisoners from receiving prison visits. The Supreme Court allowed the denial of the visits, while opining that this is *“*means of pressure*”* on Hamas, and it is not a decision that results from the behaviour of the prisoners themselves.[[12]](#footnote-12)

On September 9, 2019, the Supreme Court ruled, in re-hearing with an expanded panel of seven judges, on the Aliyan case.[[13]](#footnote-13) In its judgment, the Court reversed, by majority opinion,[[14]](#footnote-14) the judgment of Justices Danziger and Karra.[[15]](#footnote-15) The Court ruled that the military commander, the Commander-in-Chief of the Central Command, has the authority to order the temporary burial of terrorists for the purpose of negotiations with Hamas.[[16]](#footnote-16)

The foregoing is only a partial list,[[17]](#footnote-17) of new and different tools that the State of Israel has begun to use in order to eradicate terrorism, and put pressure on the lone terrorists, as well as on terrorist organizations. The new tools, once again raise the question of the relationship between regular armies and terrorist organizations. The dilemma regarding the legal differences on this point also arises again. I would like to begin with the remarks of the Attorney General, Dr. Avichai Mandelblit, who gave his opinion on this issue:[[18]](#footnote-18)

*“In addition, as part of that same legal front, there is currently a worldwide battle over the laws of warfare. In the setting, some argue that more power should be given to regular armies in the face of terrorist organizations* ***and that traditional laws of war should be changed as they are unsuited to the new asymmetric combat challenges****. These are not the main voices. In the world today, it is actually the opposite process that is taking place, limiting the abilities of regular armies, and giving more power and protections to “freedom fighters”. Thus, there is an intention in the world to significantly limit the ability to use cluster munitions ...*

*The biggest threat, however, is an attempt to import norms from the field of human rights law into clear situations of combat. These norms are not at all suited to a situation of armed conflict in territory which is not under the military’s control; Even the European Court of Human Rights in Strasbourg does not believe it is right to apply them to unequivocal combat situations. This attempt is also extremely dangerous, and in fact all the regular armies of the civilized nations have to deal with it. The demand to abide by the laws of warfare is logical and self-evident, but in no way is there any justification for changing them so that additional restraints are placed on regular armies, who already operate in a complex warfare environment in light of the changes to the nature of combat discussed above. Attempting to make extreme demands on regular armies may eventually lead to an undesirable result – a renunciation of the rules.* ***Therefore, the traditional existing rules of the laws of war must be preserved and carefully applied giving appropriate interpretation to the challenges of asymmetric warfare****.*”*[[19]](#footnote-19)*

The complexity noted by Dr. Mandelblit, and the question of whether the new tools are indeed in line with international law, or whether there is another appropriate interpretation for the purposes of the fight against terrorism,[[20]](#footnote-20) is the purpose of this chapter.

As mentioned, the security apparatus is employing a high degree of creativity. On the one hand, it must deal with growing terrorist threats, and on the other, it must not deviate from the demands of the law. Known to all is the famous statement of President (retired) Barak in the High Court Justice case of the Public Committee Against Torture in Israel:[[21]](#footnote-21)

*“This is the fate of a democracy, in which not all means are kosher, and not all methods employed by its enemies are avenues open to it. A democracy often fights with one of its hands tied behind its back. Nonetheless, the democracy has the upper hand, since protecting the rule of law, and the recognition of individual freedoms are important components in its concept of security.*”*[[22]](#footnote-22)*

Thus, we would now like to examine the propriety of a number of new creative tools, which are employed by the security apparatus, and their correlation to international law (and the principles stated by President Barak and Justice Cohen cited above). Naturally, each new tool has its own law, and the question cannot be discussed as theoretical, without a case study. In addition, it is clear that in this context, it is not possible to discuss all the existing new tools.[[23]](#footnote-23) Therefore, I would like to introduce a number of issues of principle, and then analyse one of the tools as a case study. After much thought, I chose to examine the issue of holding the corpses, *inter alia*, in light of the recent ruling on this point in the Rehearing of the Aliyan case. Before I discuss the tool of holding the corpses, I would like to point out two particularly problematic characteristics, which, on the face of it, may exist in the new tools I presented in the previous chapters:

**A. Collective Punishment**

It is no secret that international law prohibits collective punishment. The difficulty inherent in collective punishment and the sweeping opposition to its use, are not matters that arose only recently. From ancient times, one can find ancient objections to collective punishment. For example, in the famous story of the city of Sodom, which was known as a city of the wicked destined for destruction. According to the story in the book of Genesis, Abraham, our forefather, turns to God and pleads with Him:

“Far be it from you to do such a thing, to slay the righteous with the wicked, so that the righteous fare as the wicked! Far be that from you! Shall not the Judge of all the earth do what is just?”[[24]](#footnote-24)

Words to similar effect were said by the leaders of the nation, Moses and Aaron, to God, during the crisis that befell the people in the affair of Korach and his community:

*“*Will you be angry with the entire assembly when only one man sins?*”*[[25]](#footnote-25)

As stated, the prohibition against collective punishment is repeated in many sources of international law. Amongst which is:

Article 33 of the Fourth Geneva Convention states that:

*“No protected person may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.”[[26]](#footnote-26)*

Article 50 of the Hague Regulations:[[27]](#footnote-27)

*“No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.”*

Rules 102 and 103, to the Rules of Customary International Humanitarian Law of the ICRC:[[28]](#footnote-28)

*“No one may be convicted of an offense except on the basis of individual criminal responsibility.”[[29]](#footnote-29)*

*“Collective punishments are prohibited*.”[[30]](#footnote-30)

Also, the prohibition against collective punishment can be found as part of the domestic law of most countries of the world, in legislation, or in military guides.[[31]](#footnote-31) The ban on collective punishment did not pass by Israeli law, and was ruled invalid, time and again, by the Supreme Court.[[32]](#footnote-32)

As I will explain below, collective punishment is one of the most significant challenges facing the Courts, with regard to the new tools. Moreover, as time goes by, I believe that there is an increasing use of applying pressure on third parties, who have committed no crime, to achieve certain goals, and as a result, the practice of collective punishment is increasing.

It can be said, that each tool I mentioned seems to be a form of collective punishment on its face. Violation of prisoners*’* rights, harms all prisoners, usually due to acts committed by Hamas in Gaza.[[33]](#footnote-33) The possession of the corpses of terrorists harms their families, for the crime of the terrorist himself, or for Hamas’ crime of holding the corpses of Israeli soldiers. Perhaps the most notable case in this regard is the denial of medical treatment to family members of Hamas operatives, which, on the face of it, constitutes severe collective punishment.

**B.** **Retroactivity**

International law unequivocally prohibits retroactive punishment. The ban can be found in a variety of places and in different contexts:

Article 11 (2) of the Universal Declaration of Human Rights:[[34]](#footnote-34)

*“No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.”*

Article 24 of the Treaty of Rome:[[35]](#footnote-35)

*“No person shall be criminally responsible under this Statute for conduct prior to entry into force of the Statute.”*

Article 15 (2) of the Convention on Civil and Political Rights:[[36]](#footnote-36)

*“Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”*

Article 65 of the Fourth Geneva Convention:[[37]](#footnote-37)

*“The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.”*

Alongside international law, the ban on retroactive punishment can be found in countless legal systems around the world. For example: Italy,[[38]](#footnote-38) South Africa,[[39]](#footnote-39) India,[[40]](#footnote-40) Brazil,[[41]](#footnote-41) the United States,[[42]](#footnote-42) Russia[[43]](#footnote-43) and more.[[44]](#footnote-44)

The prohibition also applies by virtue of basic constitutional principles. For example, in Israel, alongside the explicit prescription by law,[[45]](#footnote-45) the prohibition against retroactive punishment is also part of the State*’*s basic constitutional principles within the framework of the principle of the rule of law.[[46]](#footnote-46) In the examples mentioned, the problematic nature of retroactive punishment is very prominent.[[47]](#footnote-47) Imposing new sanctions on prisoners or their families, after they have already committed the offense, and they are already in prison, or imposing sanctions on terrorists after their death (as stated, after they have already committed the act), creates real inconvenience and raises serious questions about the legality of the actions.

It follows, therefore, that alongside additional challenges that will be discussed later, in our treatment of the test case, there are two major issues of weighty significance, both under international law and under domestic law, which the new tools will have to deal with, and provide them with, as far as possible, an appropriate legal solution. To discuss the aforementioned questions and other issues, I would like to discuss the matter of returning the corpses as a test case.

**Prescriptive Law**

Another issue that must be examined as a threshold condition of the tools for combating terrorism, is whether the use of the tool will cause a prohibited violation of prescriptive law (*jus cogens*). There is widespread agreement, that some of the rules of international law are compelling – that is, cannot be deviated from or conditioned.[[48]](#footnote-48) Although today, no consensus has yet been reached regarding the rules that are considered prescriptive, there is agreement on some of them. For example, the ban on genocide, the slave trade ban, the ban on torture and serious violations of basic human rights.[[49]](#footnote-49) In light of this, each case must be examined on its own merits, to review the type and intensity of the injury.[[50]](#footnote-50) As will be explained below, on the face of it, there is no explicit prohibition on the possession of corpses, however there is a violation of fundamental rights, and harm to third parties. Despite the harm and complexity presented below, it does not appear to be a significant violation of the core of human rights. However, we are referring to the possession of the corpses as a test case, and not to all the tools in the war against terrorism, which must be substantively reviewed, each tool individually.

**Possession of Terrorist Corpses for Security and Negotiation Purposes**

As stated above, on January 1, 2017, the Cabinet decided[[51]](#footnote-51) that the State of Israel will not return the bodies of terrorists who belong to the Hamas organization, or who were involved in an *“*exceptional terrorist incident.*”*[[52]](#footnote-52) This decision stemmed, *inter alia*, from the desire to create leverage[[53]](#footnote-53) on Hamas, and tools for future negotiations, for the return of the bodies of the late Captain Hadar Goldin and the late Sgt. Oron Shaul, along with the civilians Avra ​​Mengistu and Hisham al-Sayyid.[[54]](#footnote-54) The Decision was passed following receipt of the 2004 opinion Attorney General at the time, Menny Mazuz, presented to the Cabinet, stating that the terrorists’ corpses should not be held as bargaining chips for future negotiations, except when there is a concrete prisoner exchange deal, or a real concern for public safety.

Against this Decision, and against its actual implementation, a petition was submitted to the High Court of Justice.[[55]](#footnote-55) In their ruling, the High Court justices accepted the petition, by a majority, but dealt, in my opinion, mainly with the *“*technical*”* question of the military commander*’*s authority to order burial, and not the substantive questions emerging both from domestic and international law, on this important issue. With respect to this judgment, an application was filed by the State for a re-hearing by an expanded panel. As stated, this application was approved, and indeed the majority opinion overturned the previous decision of the Court, and the State’s conduct was approved. Now that the law in the State of Israel states that the bodies of terrorists can be held for negotiation purposes, I will seek to examine the issue in accordance with issues that arise, in my humble opinion, from international law,[[56]](#footnote-56) which are: Collective punishment, retroactive punishment, and the very legality of the possession of a corpse.

**Highlights of the Relevant Facts[[57]](#footnote-57)**

Since the Cabinet Decision, the State of Israel has held dozens of bodies, most of which have been returned. On the date of the judgement, the State of Israel had nine bodies. Seven of the bodies were temporarily buried by virtue of orders issued by the military commander. Two of the bodies had not yet been buried, following interlocutory orders issued in legal proceedings in their matter preventing their burial. Among the bodies held were: Fadi Ahmad Hamdan Conver, who on January 8, 2017 carried out an attack on the Armon Hanatziv promenade in Jerusalem in which Israel Defence Forces soldiers Shira Tzur, Yael Yekutiel, Shir Hajaj and Erez Orbach were killed, and 18 others were injured; Mahmad Traira, who on June 30, 2016 carried out an attack in Kiryat Arba in which the teenage girl Hillel Yaffe Ariel was murdered; Muhammad Alfakia, who participated on July 1, 2016 in carrying out an attack in which the late Rabbi Michael Mark was murdered and his family members were injured; Matzbakh Abu Sabikh, who on October 9, 2016, carried out a shooting attack in which Ms. Levana Malikhi and the police officer sergeant major Joseph Kirma were murdered and several others injured; Abd al-Hamid Abu Srur, who on April 18, 2016 carried out an attack on a bus in the city of Jerusalem in which dozens of people were injured; and Rami Elaurthani, who was involved in an attempted attack on July 31, 2016.

As stated, the issue of corpse possession raises many questions (moral, halakhic, and legal), but I would like to focus the discussion on the questions raised above.

**Possession of Corpses Under International Law[[58]](#footnote-58)**

International law imposes many obligations on a party holding the other party*’*s corpses.[[59]](#footnote-59) The question arises as to whether one of these obligations is immediate restitution, or alternatively, a prohibition on possession? The answer is complicated. A simplistic look at the various sources of international law reveals a number of references to the issue of corpses. The First Geneva Convention established a duty to document, and conduct a proper and dignified burial, along with the exchange of information regarding the exact location of the burial, to take place after the end of the conflict.[[60]](#footnote-60)

Similar issues can be found in the Second,[[61]](#footnote-61) Third[[62]](#footnote-62) and Fourth[[63]](#footnote-63) Geneva Conventions. As well as in Rules 112 - 116[[64]](#footnote-64) of the International Committee of the Red Cross (“**ICRC**”) Rules of Customary International Humanitarian Law.[[65]](#footnote-65) Unlike the other conventions, Article 130 of the Fourth Convention stipulates an obligation to return the ashes of the dead to his (or her) relatives. However, this duty, according to the section, applies only to ashes, and not to the event of a corpse.

From this it can be ostensibly assumed that a study of the art not only does not anchor the obligation to return corpses, and prohibit holding them for negotiation purposes, but perhaps the opposite is true. The very obligation to document, preserve, and maintain, indicates the premise that the bodies will not return to their country of origin, but will remain buried in the country where they died. The first shoot to contradict this assumption, appears in Article 34(2)(c) of the First Protocol to the Fourth Geneva Convention. This section stipulates that when circumstances allow, relatives must be allowed to return the remains of the fallen to the country of origin.

The problematic nature of this section is reflected in the fact that the return of the body involves the end of the conflict or other circumstances that permit it. Such circumstances are not common during a conflict, let alone the Israeli-Palestinian conflict. Thus, it can be said, that in practice the issue remains at the discretion of the party holding the corpse. Another source that highlights the desire to return bodies, and which does not make their return conditional on certain conditions, is Rule 114 of the Rules of Customary International Humanitarian Law of the ICRC. This Rule requires the parties to *“*endeavour*”* to facilitate the return of corpses.[[66]](#footnote-66) The Red Cross*’* interpretation of the First Geneva Convention also indicates a preference for returning the bodies to the deceased’s relatives.[[67]](#footnote-67)

To sum up thus far, we can say that the *“*dry*”* law does not introduce an obligation to return corpses, but does include a request from the parties to *“*consider*”* and *“*try*”* to permit their return. However, this examination of international law is incomplete. It is not possible to draw one conclusion or another regarding the legality of the operation without also considering the violation of human dignity inherent in the possession of the corpses. A discussion of the issue without reference to human dignity is partial at best, and not sufficiently exhaustive.

**Possession of Corpses Under International Law – The Right to Dignity**

The right to dignity is an integral part of international human rights law. Many references can be found in international law to protecting a person*’*s dignity. Let us turn to a few notable examples:[[68]](#footnote-68)

Article 1[[69]](#footnote-69) of the Universal Declaration of Human Rights:

“*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*”[[70]](#footnote-70)

Article 10 of the Convention on Civil and Political Rights:[[71]](#footnote-71)

“*All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*”

Common Article 3 of the Geneva Conventions:

“*In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*

*…*

*outrages upon personal dignity, in particular, humiliating and degrading treatment;*”[[72]](#footnote-72)

The Introduction to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment:[[73]](#footnote-73)

“*Recognizing that those rights derive from the inherent dignity of the human person.*”

These sources are just a few of the examples of international law*’*s treatment of human rights in general and dignity in particular. It is undisputed, that the right to dignity is a fundamental right, an integral and significant right, with numerous protections in international law. This is of course also true of domestic law in many countries.[[74]](#footnote-74) Thus, then the question that must be asked is whether the very act of becoming a tool for negotiation, that is, a bargaining chip, causes a violation of human dignity. This question has been discussed and decided by various courts, both in Israel and in international courts.

On October 16, 1986, the Israeli navigator Ron Arad fell into the hands of the terrorist organization “Amal” in Lebanon. The issue of the fate of Ron Arad preoccupied the State of Israel, which used many different tools to inquire after his fate and locate him. One of those tools was the capture of Sheikhs Abd al-Karim Obeid and Mustafa Dirani, in the hope that the two would serve as bargaining chips in negotiations for the release of Ron Arad. A petition was filed with the High Court of Justice against turning them into bargaining chips.[[75]](#footnote-75) The High Court ruled the action legal. This ruling was further deliberated in the setting of an expanded panel of nine judges[[76]](#footnote-76) who ruled that:

“***Holding human beings as “bargaining chips” is prohibited under international law*.**”[[77]](#footnote-77)

The Court further concluded in this matter that:

“*A person who has committed no crime, and from whom there is no danger, whose only “sin” – is being a “bargaining chip”.* ***The violation of liberty and dignity is so substantial and profound, that it cannot be tolerated in a country that seeks liberty and dignity, even if reasons of state security propel taking this action****.*”[[78]](#footnote-78)

Words to similar effect were heard in a completely different context when the Supreme Court discussed the question of the privatization of prisons in Israel. In that judgment, the Supreme Court ruled that turning a person (a prisoner in that case) into a profit-making tool, severely harms his dignity as a person.[[79]](#footnote-79) In other words, actually using a person as a tool – a bargaining chip or an economic tool – is a serious affront to his dignity.

The harm is so severe, that the Supreme Court banned it. Naturally, there is a difference between a living person and a deceased person. However, upon his death, the deceased does not lose his right to dignity.[[80]](#footnote-80) In addition, alongside the dignity of the deceased, one must take account of the rights of his family members,[[81]](#footnote-81) who are also harmed by their inability to go to the grave, or hold a funeral in accordance with their custom. These matters were even raised by the Supreme Court in the Aliyan case,[[82]](#footnote-82) despite the determination that the possession of the corpses is permissible:

“*The starting point for the debate which the state does not dispute, is that “preventing the return of terrorist corpses for burial by their families involves a certain violation of the* ***dignity of the deceased and his family****.*”[[83]](#footnote-83)

As stated, the Supreme Court of Israel is not alone in this position. Other significant parties hold similar views, like the Inter-American Court of Human Rights,[[84]](#footnote-84) the European Court of Human Rights[[85]](#footnote-85) and the UN Commission on Human Rights.[[86]](#footnote-86)

In conclusion, it seems that in terms of international law there is no explicit prohibition on the possession of a corpse, but it involves a real difficulty as it is a serious violation of fundamental rights, both of the deceased, and of his family. In general, constitutional infringement is permissible in certain circumstances and subject to certain conditions, chief among them is the principle of proportionality. This principle is a general principle of international law[[87]](#footnote-87) and is common in many sources.[[88]](#footnote-88) Although there is no general agreement on how to test proportionality, I would like to adopt Prof. Yuval Shani*’*s position, and make use of the sub-tests that exist in the Israeli legal system and in other countries.[[89]](#footnote-89) In Israeli law,[[90]](#footnote-90) the test of proportionality is a test that was born by virtue of the *Supremacy and Restriction Clauses* in the Basic Laws of Human Dignity and Liberty, and Freedom of Occupation. According to the test of proportionality, in order to test the suitability of a violation of basic rights, three cumulative tests must be met:[[91]](#footnote-91)

1. **The rational connection test** – Is there a connection between the goals and the means? That is, does the violation of the right lead to the goal for which the violation is performed. In this case, will the violation of the dignity of the deceased indeed lead to the achievement of the goal of obtaining the corpses of deceased IDF soldiers?
2. **The least injury test** – Is it possible to achieve the same goal with less severe harm? To my mind, this is the most important test of proportionality that seeks to minimize the violation of fundamental rights as much as possible – even if the violation is for a legitimate purpose.
3. **The test of proportionality in the narrow sense** – whether the benefit of achieving the goal outweighs the damage caused by the violation of the rights.

In addition, and as an integral part of the proportionality tests, the effectiveness of the counter-terrorism tools must also be examined. Proportionality, as stated, is what balances the achievement of the goal and the harm.[[92]](#footnote-92) If the goal is not achieved, the means is certainly not usable. The importance of efficiency rises time and time again in Supreme Court rulings that discuss the war on terror.[[93]](#footnote-93) However, there is considerable difficulty in applying the efficiency test. This difficulty lies in the fact that there are no objective tests for examining effectiveness, and the only way to decide the issue is based on the stated position of the security bodies.[[94]](#footnote-94) Although in the past doubts have arisen amongst judges as to the effectiveness in question notwithstanding the position of the security bodies, as a rule, the Court will accept the position without contesting it. Naturally, there is a difficulty in this situation, even a fear of a conflict of interest, since the authority that seeks to use the tool is the same authority that has an opinion regarding its effectiveness.

In my humble opinion, applying the Israeli tests of proportionality in this case can provide a proper and correct answer for the purpose of examining the exceptional situations in which a corpse can be held. It seems that as long as there is a rational connection between the possession of the corpse and the goal, the aforesaid difficulty notwithstanding, and if there is no lesser harmful means to achieve the same goal, and the more the benefit outweighs the damage, possession of corpses should be considered.

**Collective Punishment**

As stated above, collective punishment is strictly prohibited. However, is every act that results in harm to third parties necessarily considered collective punishment? The answer seems to be no. Liron A. Liebman, in a comprehensive article,[[95]](#footnote-95) reviewed collective punishment, its definition, and the differences between it, collective harm, and secondary harm.

Liebman defined three different terms:[[96]](#footnote-96) Collective **punishment**, collective **harm,** and **secondary harm**. In his view, a view I seek to adopt, collective punishment is:

“*Taking action that* ***directly*** *infringes on a person’s right, on account of an act for which* ***he cannot be held responsible****, and the harm to him is* ***only*** *due to his belonging to the collective.*”

In other words, Liebman conditions collective punishment on three cumulative conditions: Direct harm, lack of responsibility on behalf of the victim, and harm only due to being part of the collective. In contrast to collective punishment, collective harm is defined by him in situations where the harm:

“*Is done when all the elements of the definition of collective punishment are satisfied, except the violation of the right.* ***Instead of a right a privilege or a benefit is harmed****.*”

The only difference between harm and punishment is the right being infringed. To the extent that a right is violated, it is collective punishment. But if it is a benefit or a privilege,[[97]](#footnote-97) it is harm. This subtle distinction between punishment and harm is a critical distinction, as with respect to collective punishment it is presumed[[98]](#footnote-98) to be prohibited, while harm is sometimes allowed – depending on the circumstances.[[99]](#footnote-99) Finally, Liebman uses the concept of secondary damage:

“*When, following the* ***institution of******tangible measures to prevent terrorism****, people who are not involved in terrorism are* ***indirectly and unintentionally*** *harmed, it is consequential damage that does not constitute collective punishment or collective harm.*”

Secondary damage, is as its name implies. Meaning, there is another goal – the prevention of terrorism – and in the course of its pursuit action is taken, the purpose of which is **not** to harm third parties, yet there are still those who are harmed even though they are not involved. Although instances are undesirable, secondary harm is easier to permit when necessary. Referring to our case, Liebman argued that possession of corpses should be treated in two ways: Depending on the circumstances, and the reason for the possession. When the possession is aimed at preventing disturbances to the peace and incitement to terrorism, this will not be considered to be a collective punishment. However, when the purpose is to deter terrorists due to the fear of the suffering that will be inflicted on their family members in the future, then in Liebman*’*s view this is collective punishment.[[100]](#footnote-100)

The legal reality, as I understand it from the Supreme Court’s rulings that dealt with the issue, leads me to a different conclusion from Liebman*’*s. According to the judgements of the Supreme Court in Israel,[[101]](#footnote-101) when the purpose is **deterrent**, it is not collective punishment. For example, Justice Matza held:[[102]](#footnote-102)

“*It is therefore appropriate to reiterate what has been said many times: The purpose of using the means given to the military commander, in accordance with Regulation 119(1), in part concerning our case,* ***is to deter potential attackers*** *from committing murderous acts,* ***as an essential means of upholding security*** *(see, e.g. HCJ 987/89, Kahwaji v. Commander of IDF Forces in the Gaza Strip; Bishara et al. v. Commander of IDF Forces in the West Bank [9] (by Justice Beisky); HCJ 779/88 Alfasfus v. Minister of Defence et al.” [10], remarks by President Shamgar at p. 578).* ***The application of said sanction also has a serious punitive consequence, which harms not only the terrorist but also others****, usually his family members living with him,* ***but this is not its purpose, and this is not what it is intended for*** *(see HCJ 242/90 Alkatsatz et al. v. Commander of the IDF Forces In the Judea and Samaria Area [11], Justice Barak’s remarks at p. 616).*”

However, many disagree with the Supreme Court*’*s position on this issue, and the very distinction between deterrence and collective punishment.[[103]](#footnote-103) Prof. Kratzmer, for example, holds the view that this action is collective punishment contrary to international law. Prof. Kratzmer argues that one of the factors of punishment is the desire to deter, **and therefore deterrence and punishment are one and the same**.[[104]](#footnote-104) Prof. Harpaz and Prof. Cohen illuminate significant difficulties in the Supreme Court’s position, and what appears, on the face of it, to be material contradictions in the Court’s position on this point.[[105]](#footnote-105) On the other hand, Prof. Emanuel Gross sees **deterrence as a justified military need**,[[106]](#footnote-106) which does not constitute prohibited collective punishment.[[107]](#footnote-107)

Liebman, as stated, discusses two reasons for holding the corpses – preventing disorder and future deterrence. I would like to add, and discuss another reason for the possession, which is the return of the bodies of IDF fallen soldiers and prisoners. I will analyse the reason in accordance with Liebman*’*s definitions above, and examine whether it is collective punishment, collective harm, or secondary harm.

First and foremost, we can illuminate the possibility of collective harm from the discussion, since there is no doubt that this is the violation of a right, and not a privilege. Although we have stated that there is no explicit duty to hand back corpses under international law, we have also seen that the deceased and his family have significant rights, and that this is not a benefit or privilege. Thus, one must examine whether this is a collective punishment or secondary harm.

**A.** **Collective Punishment:**

1. Directly - The question is asked: Who is the action directed at? The possibilities that come to mind are three: The terrorist, his family, or Hamas. On the one hand, the most direct and powerful harm is to the right of the terrorist, whose body is not buried according to his will. This is, as stated, harm to the basis of his human dignity. On the other hand, since the terrorist is being held as a bargaining chip for negotiation purposes, the direct victims are the family members, who will serve to pressure Hamas to act to institute a prisoner exchange deal, to end their suffering and the suffering of their family member. Another possibility, is that the action is directed directly at Hamas, with the terrorist and his family members being *“*tools*”* in negotiations between Hamas and Israel. In my humble opinion, this question cannot be decided on a sweeping basis; rather, each case must be examined on its own merits, in accordance with the circumstances and the State’s arguments in that case.
2. Responsibility – Also on this point, three options must be distinguished. If the decision on the question of *‘*Directly*’* is the terrorist or Hamas, then responsibility can be attributed to them in fact, and thus[[108]](#footnote-108) the possibility of collective punishment is ruled out. However, when it comes to family members, the issue gets complicated. First, one must examine whether the family actually had responsibility for the act. Assuming the answer is no – since it is difficult to imagine circumstances in which the entire immediate family, which is affected as a whole, bears responsibility for the action – then the demand to define the action as a collective punishment is met.
3. Harm only due to belonging to a collective – Similar to its predecessor, this requirement will be met if it is decided that the direct injury is to the family members only because they are family members of the terrorist. We recall, that this harm will be considered only in the event that it is decided that it is a **direct** injury to the family members, and no claim will be heard that it is secondary harm, as I will discuss below.

**B.** **Secondary Harm**:

1. Tangible measures to prevent terrorism – The State of Israel argues vociferously that the entire purpose of the action is to prevent terrorism – terrorism expressed in the possession of corpses and prisoners, the intimidation of Israeli residents, and the torture of families. As is well known, and although each case is examined on its own merits, the position of the Supreme Court tends to accept the position of the State on this point. However, quite a few parties criticise this position, in line with the views presented at length above.
2. Not directly and unintentionally – I would like to treat both tests in one fell swoop. According to the analysis on the point of collective punishment, it will be necessary to examine whether the harm to the family members was indeed indirect and unintentional. It must be examined whether this is indeed an injury that can be defined as *“*secondary harm*”* caused as a result of a greater struggle, or whether it is a tool of direct pressure, use of which was planned in advance to achieve the goal. As I understand it, each case must be examined on its own merits, and in accordance with the concrete arguments presented by the State. The specific case needs to be investigated, and other cases cannot be decided sweepingly by analogy from it.

In conclusion, there is a difficulty in deciding in a general way whether holding bodies as bargaining chips for negotiation purposes constitutes prohibited collective punishment, or whether it is secondary harm that can be justified. This will turn in each case on its circumstances, with the greatest complexity being in relation to family members. According to past precedent, as well as according to the most relevant case law regarding the return of bodies,[[109]](#footnote-109) the position of the State of Israel is accepted by the Supreme Court of Israel. This position holds that this is not improper collective punishment, but a means of deterrence. However, this is subject to oversight, which is performed in each case on its own merits.[[110]](#footnote-110)

However, this position is subject to significant criticism, and many voices in the international legal world believe that there is no place for legitimizing such actions. The complex security reality, and the enormous efforts made to bring the IDF dead and prisoners home, alongside the comprehensive judicial review, strengthen my view that this is secondary harm, and not prohibited collective punishment.

**Retroactivity**

The intensity of the issue of retroactivity is lower in the case of corpses than in other cases, such as the denial of prisoners*’* rights in prisons.[[111]](#footnote-111) However, as part of reviewing the issue of corpses as a test case, the matter is briefly considered, also in the context of possession of corpses. On the face of it, in this case, the question of retroactivity is relatively simple. The Defence Regulations[[112]](#footnote-112) stipulate that the military commander may order burial in Israeli territory – in other words, may, in certain circumstances, not return the body. The Defence Regulations are known and published as duly required. Alongside the Defence Regulations, a Cabinet Decision was passed regarding the possession of corpses, which was also made public.[[113]](#footnote-113)

Thus, from the moment the Cabinet Decision was published, every person knew, or ought to have known, that if he carried out an attack, he risked his corpse remaining in Israel. Moreover, even without the government decision and without the need to hold the body for negotiation purposes, by virtue of the provisions mentioned above of international law regarding the burial of the body in a dignified manner, and regarding the obligation to document and transmit the information, everyone who goes to combat, of any kind, knows that it is feasible that he will not return from it, and be buried in the territory of the other side.[[114]](#footnote-114) It transpires, that in practice, it is difficult to claim that this is a retroactive and new measure.

However, due to the fact that over the years and even after the Government*’*s Decision, the State of Israel acted contrary to its Decisions[[115]](#footnote-115) and returned the bodies of terrorists, there seems to be room for a certain claim of reliance, as there was reason to assume, given past experience, that the body will be returned. In light of this contention, any change of situation can be considered a retroactive change. In addition, the actual decision to return the body is made in each case individually on its merits, after the fact, and in accordance with its circumstances.

Thus, it can be argued, that this is a sanction imposed on the corpse after the act and after death. Although these are real complaints, I have a hard time accepting them. The State of Israel has taken a Decision not to return the bodies of Hamas terrorists. Any case in which the State acts contrary to this Decision and returns a corpse is done, as far as possible, with the aim of reducing the violation of rights. In light of this, the claim of reliance on the return of other corpses cannot be accepted as a basis for a claim of retroactivity.[[116]](#footnote-116) It can also be said that the Decision of the Israeli government on this issue is a decision that looks to the future, and is based on an ancient law, and is therefore not retroactive.

1. Paragraph 2 in the judgment of President Hayut in HCJ 8091/14 The Centre for the Protection of the Individual v. The Minister of Defence (published in Nevo 31 Dec 2014). [↑](#footnote-ref-1)
2. Decision of the Ministerial Committee on National Security Affairs *Bet*/171 dated January 1, 2017. [↑](#footnote-ref-2)
3. In certain cases. [↑](#footnote-ref-3)
4. Decision of the Ministerial Committee on National Security Affairs *Bet*/172 dated January 1, 2017. [↑](#footnote-ref-4)
5. “The IDF is exploring: Setting fire to plots belonging to Hamas operatives responsible for the kite terror” - WALLA - <https://news.walla.co.il/item/3173065>. [↑](#footnote-ref-5)
6. As far as I know, and despite the publicity, the IDF did not act to set fire to Hamas operatives’ fields. [↑](#footnote-ref-6)
7. Amendment No. 4, Section 40A of the Anti-Terrorism Act. [↑](#footnote-ref-7)
8. By virtue of the Conditional Release from Imprisonment Act 2001-5761. [↑](#footnote-ref-8)
9. “Finally approved: The one-third shortening of sentence arrangements for terrorists is cancelled” *Knesset* website - <https://main.knesset.gov.il/News/PressReleases/pages/press25.12.18kq.aspx>. [↑](#footnote-ref-9)
10. Judges; Hendel, Baron, and Elron. [↑](#footnote-ref-10)
11. See *supra*., in re Namnam. [↑](#footnote-ref-11)
12. See *ibid.*, paragraphs 2, 10 and 11 of Justice Hendel’s judgment. [↑](#footnote-ref-12)
13. *HCJ Rehearing* 10190/17 Commander of the IDF Forces in the Judea and Samaria Area v. Muhammad Aliyan (published in Nevo, 9 Sep 2019) (hereinafter: “**Aliyan Rehearing**”). [↑](#footnote-ref-13)
14. President Hayut and justices; Amit, Hendel, and Solberg against the opinion of justices: Vogelman, Barak-Erez and Karra. [↑](#footnote-ref-14)
15. Justice Hendel was in the minority, and believed that the military commander did have authority. His position was adopted in the Rehearing. [↑](#footnote-ref-15)
16. Later in the chapter, we will expand the discussion on this judgment and deal with it extensively. [↑](#footnote-ref-16)
17. Many other tools can be pointed out, such as reducing the area permitted for fishing, restricting the passage of goods, closing border gates, and more. [↑](#footnote-ref-17)
18. Avichai Mandelblit, “*Legal War - The IDF Legal Front*”, Army and Strategy, Vol. 4, Issue 1 (2012). [↑](#footnote-ref-18)
19. *Ibid*., Pp. 51 – 50. [↑](#footnote-ref-19)
20. Without addressing the question of according to which paradigm this is examined. [↑](#footnote-ref-20)
21. *HCJ* 5100/94 Public Committee Against Torture in Israel v. Government of Israel, *NunGimel*(4) (817) (1999). [↑](#footnote-ref-21)
22. *Ibid*., para. 39 of the judgement of President Barak. [↑](#footnote-ref-22)
23. All the more so when novel tools are being tested daily. [↑](#footnote-ref-23)
24. Book of Genesis, 18:25. [↑](#footnote-ref-24)
25. Book of Numbers, 16:22. [↑](#footnote-ref-25)
26. Article 33 of the Fourth Geneva Convention. [↑](#footnote-ref-26)
27. Article 50 of the Hague Regulations. [↑](#footnote-ref-27)
28. Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, ICRC, and Cambridge University Press (2005, reprint 2009). [↑](#footnote-ref-28)
29. Rule 102, *ibid*., P. 372. [↑](#footnote-ref-29)
30. Rule 103, *ibid*., P. 374. [↑](#footnote-ref-30)
31. For an extension and full details of all countries, see the ICRC Customary International Humanitarian Law database, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule103>. [↑](#footnote-ref-31)
32. See p. 159 of the judgment of Justice Cheshin, *HCJ* 4772/91 Hizran et al. v. Commander of the IDF Forces in the Judea and Samaria Area, *PeyDaled* *MemVav*(2), 150: “The starting point in our case is in the guiding principle... **According to which collective punishment should not be imposed, and collective sanction should not be applied**.” [↑](#footnote-ref-32)
33. Such as the abduction of soldiers. [↑](#footnote-ref-33)
34. Universal Declaration of Human Rights, 10 Dec. 1948, GA Res. 217A (III), U.N Doc. A / 810 at 71 (1948). [↑](#footnote-ref-34)
35. Rome Statute of The International Criminal Court (17 Jul 1998). [↑](#footnote-ref-35)
36. International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 UN GAOR (Supp. No 16) at 52, UN Doc. A / 6316 (1996), 999 U.N.T.S. 171, entered into force 23 March 1976. [↑](#footnote-ref-36)
37. See *supra*., Fourth Geneva Convention. [↑](#footnote-ref-37)
38. Article 25 (2) of the Constitution of the Italian Republic. [↑](#footnote-ref-38)
39. Article 35 (3) (l) of the Constitution of the Republic of South Africa, 1996. [↑](#footnote-ref-39)
40. Article 20 (1) of the Constitution of India. [↑](#footnote-ref-40)
41. Part 2, Chapter 1, Article 5 (XXXIX) of the Constitution of the Federative Republic of Brazil. [↑](#footnote-ref-41)
42. Article 10 (1) of the Constitution of the United States of America. [↑](#footnote-ref-42)
43. Article 54 of the Constitution of the Russian Federation. [↑](#footnote-ref-43)
44. For more information, see Dr. Amnon Reichman, Lior Abu, Omer Bachman, Sarit Yakoti, Elad Katz, Eilat Levin, Nurit Inbal, Inbal Rubinstein “*The Right to a Fair Trial: Limitations on Substantive Law*” **Haifa University** (2005), pp. 7 – 13. [↑](#footnote-ref-44)
45. Section 3 of the Penal Code 1977-5737. [↑](#footnote-ref-45)
46. See, for instance, p. 776, to the judgment of President Barak, *Prisoner Petition Appeal* 1613/91 Arbiv v. State of Israel, *PeyDaled MemVav* (2) 765: “One of the presumptions which is customary in our system is that the purpose of a law is not for retroactive of retrospective applicability. Every law is presumed to be forward looking and not to peer into the past.” [↑](#footnote-ref-46)
47. Naturally in some examples this is more prominent than in others. [↑](#footnote-ref-47)
48. Ruby Sable and Yael Ronen “*International Law*”, 54 (2016). [↑](#footnote-ref-48)
49. Ben-Naftali and Shani, p. 393. [↑](#footnote-ref-49)
50. *Ibid*., 222-224. [↑](#footnote-ref-50)
51. The wording of the Decision appears above. [↑](#footnote-ref-51)
52. We will not deal with the question of “what is an exceptional terrorist incident” in this matter. [↑](#footnote-ref-52)
53. To me, returning the corpses, along with deterring further abductions, important goals in themselves, are also an integral part of the overall war against terrorism. [↑](#footnote-ref-53)
54. See pages 7-6 of Judge Danziger’s judgment in the Aliyan High Court of Justice case. [↑](#footnote-ref-54)
55. See *supra.*, HCJ Aliyan. [↑](#footnote-ref-55)
56. Some of the questions were addressed in one way or another in the judgment, but not all of them. [↑](#footnote-ref-56)
57. The facts are based on what is stated in the judgment, and are partially quoted. It is very possible that since the verdict the factual situation has changed (some of the bodies have been returned), but that information is not in my possession. [↑](#footnote-ref-57)
58. The question deals with the actual possession of the corpses, detached from the question of punishment and so on, which will be discussed separately. [↑](#footnote-ref-58)
59. For more on this topic, see: Anna Petrig, *The war dead and their gravesites*, 91 INT’L. REV. Of The Red Cross, 341-369 (2009). [↑](#footnote-ref-59)
60. Articles 16-17 of the First Geneva Convention. [↑](#footnote-ref-60)
61. Articles 19-20 of the Second Geneva Convention. [↑](#footnote-ref-61)
62. Article 120 of the Third Geneva Convention. [↑](#footnote-ref-62)
63. Article 130 of the Fourth Geneva Convention. [↑](#footnote-ref-63)
64. Except for rule 114, which will be addressed separately below. [↑](#footnote-ref-64)
65. Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law (“**CIHL**”), ICRC and Cambridge University Press (2005, reprint 2009).

    Also available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> [↑](#footnote-ref-65)
66. Rule 114 to the CIHL:

    “Parties to the conflict must **endeavour to facilitate** the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them” Available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule114>. [↑](#footnote-ref-66)
67. ICRC, Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2nd Edition, 2016, 1645. [↑](#footnote-ref-67)
68. And which are relevant to the matter in question. [↑](#footnote-ref-68)
69. The declaration mentions the right to dignity many times, Section 1 is noted for the sake of illustration. [↑](#footnote-ref-69)
70. Universal Declaration of Human Rights, 10 Dec. 1948, GA Res. 217A (III), U.N Doc. A / 810 at 71 (1948). [↑](#footnote-ref-70)
71. International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 UN GAOR (Supp. No 16) at 52, UN Doc. A / 6316 (1996), 999 U.N.T.S. 171, entered into force 23 March 1976. [↑](#footnote-ref-71)
72. See above the First, Second, Third, and Fourth Geneva Conventions. [↑](#footnote-ref-72)
73. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 Dec 1984). [↑](#footnote-ref-73)
74. See for instance: Israel – Basic Law: Human Dignity and Liberty, Germany – Article 1 of the German Constitution (Grundgesetz für die Bundesrepublik Deutschland), Croatia – Article 35 of the Constitution of the Republic of Croatia, China – Article 38 of the Chinese Constitution (The Constitution law of the People’s Republic of China), and more. [↑](#footnote-ref-74)
75. *Administrative Detention Appeal* 10/94 John Does v. Minister of Defence, *PeyDaled NunGimel*(1) 97. [↑](#footnote-ref-75)
76. *Criminal Rehearing* 7048/97 John Does v. Minister of Defence, *PeyDaled* *NunDaled*(1) 721. [↑](#footnote-ref-76)
77. Page 742 of the judgment of Justice Barak, in re John Does. [↑](#footnote-ref-77)
78. Page 740 of Barak’s judgment, in re John Does. [↑](#footnote-ref-78)
79. See page 602 of Justice Beinisch’s judgment *supra.*: “Imprisonment based on the private economic purpose makes prisoners, by virtue of their incarceration in a private prison, a means of generating monetary profits for the concessionaire or prison operator; thus, not only is the prisoner’s liberty harmed, but also his **human dignity**.” [↑](#footnote-ref-79)
80. See in this regard: *Civil Appeal* 294/91 Hevra Kadisha Jerusalem v. Kastenbaum, *PeyDaled* *MemVav*(2) 464, *HCJ* 5688/92 Wichselbaum v. Minister of Defence, *PeyDaled* *MemZayin*(2) 812. [↑](#footnote-ref-80)
81. From the review above, it appears that a significant part of the considerations to return the corpses, under international law, stems from the treatment of family members. [↑](#footnote-ref-81)
82. In re Aliyan, *supra*. [↑](#footnote-ref-82)
83. Page 18 of the judgment of Justice Hayut, in re Aliyan, *supra*. [↑](#footnote-ref-83)
84. Inter-American Court of Human Rights. See, for instance, the case of Moiwana Village v. Suriname (Inter-Am Ct. H.R., (Ser. C) No. 145 (2005) [↑](#footnote-ref-84)
85. See, for instance: Maskhadova and Others v. Russia, 18071/05, 6 June 2013. [↑](#footnote-ref-85)
86. For instance: Staselovich v. Belarus, Comm. 887/1999, U.N. Doc. A / 58/40, Vol. II, at 169 (HRC 2003), Sultanova v. Uzbekistan, Comm. 915/2000, U.N. Doc. A / 61/40, Vol. II, at 32 (HRC 2006). [↑](#footnote-ref-86)
87. See: Prof. Yuval Shani, “*The Use of the Principle of Proportionality in International Law*”, Israel Institute for Democracy, Policy Research 75 (2009), page 139 (hereinafter: “**Prof. Shani**”). [↑](#footnote-ref-87)
88. See Prof. Shani, *supra.*, pp. 21 – 32. [↑](#footnote-ref-88)
89. See Prof. Shani, *supra.*, page 141. [↑](#footnote-ref-89)
90. In Israel, the condition of the *Supremacy and Restriction Clause* – Section 8 of the Basic Law: Human Dignity and Liberty, and Section 4 of the Basic Law: Freedom of Occupation. [↑](#footnote-ref-90)
91. For more information on the proportionality test, see: *Civil Leave to Appeal* 1908/94 United Mizrahi Bank Ltd. v. Kfar Shitufi Migdal, *PeyDaled MemTet*(4) 221 (1995). [↑](#footnote-ref-91)
92. See, for instance, Ben-Naftali and Shani, p. 93. [↑](#footnote-ref-92)
93. See, for instance, on the one hand – paragraph 7, p. 6 of the judgment of Justice Naor in *HCJ* 9353/08 Hisham Abu Dahim v. General Commander of the Home Front Command (published in Nevo, 5 Jan 2009) and paragraphs 23 – 25 ​​of the judgment of President Hayut in re Aliyan, on the other hand – paragraph 3, p. 16 of the judgment of Justice Baron in the Atauna affair. [↑](#footnote-ref-93)
94. See in this regard, *HCJ* 2006/97 Misson Muhammad Abu Farah Janimat v. Commander-in-Chief of the Central Command – Uzi Dayan, *NunAlef*(2) 651 (1997) “*No scientific research has been done, and no scientific research can be done, on how many souls have been saved, and how many terrorist attacks thwarted, as a result of the deterrence actions of sealing houses and house demolitions. However, as far as I am concerned, it is enough that the opinion that there is a certain deterrent effect cannot be ruled out, for me not to interfere with the military commander’s discretion.*” [↑](#footnote-ref-94)
95. Liron A. Liebman, “*Will you indeed sweep away the righteous with the wicked? Security Measures and Collective Punishment*”, Israel Institute for Democracy, Policy Research 125 (2019) (hereinafter: “**Liebman**”). [↑](#footnote-ref-95)
96. See pages 7 – 8 Liebman. [↑](#footnote-ref-96)
97. For instance, and without entering into a discussion at this stage, some argue that the denial of certain prisoners’ rights does not constitute collective punishment since they are benefits and not basic rights. [↑](#footnote-ref-97)
98. A rebuttable presumption. See page 62, Liebman. [↑](#footnote-ref-98)
99. Page 8, *ibid*. [↑](#footnote-ref-99)
100. Page 148, *ibid*. [↑](#footnote-ref-100)
101. The Supreme Court discussed the matter on a variety of issues, but it seems that the most famous and perhaps most controversial example is the demolition of houses. [↑](#footnote-ref-101)
102. Page 346 to the judgment of the judgement of Justice Matza in *HCJ* 6026/94 Abd al-Rahim Hassan Nazal v. Commander of IDF Forces in Judea and Samaria, *MemHet*(5) 338 (1994) For another example, see page 2, Judge Barak’s opinion in *HCJ* 798/89 Mahmoud Hussein Shukri v. Minister of Defence (published in Nevo, 10 Jan 1990): “*The authority given to the military commander under Regulation 119 is not authority to exact collective punishment. Its exercise was not intended to punish the members of the petitioner’s family.* ***The authority is administrative, and its exercise is intended to deter and thus maintain public order****... We are aware that the demolition of the building harms the roof over the heads of the petitioner and his mother. True, this is not the purpose of the demolition, but it is the result. This difficult result has come to deter potential perpetrators of terrorist attacks, who must understand that by their actions they will harm, by their own hands, not only public safety and security, and not only the lives of innocent people, but also the safety of those close to them*.” [↑](#footnote-ref-102)
103. See, for instance, page 60. Dan Simon “*The Demolition of Homes in the Israeli Territories*” 19 Yale J. Int’l L. (1994) [↑](#footnote-ref-103)
104. Prof. David Kratzmer “**Judicial Review and the Occupied Territories: Aharon Barak’s Doctrine**”, 2009, p. 284. [↑](#footnote-ref-104)
105. Harpaz and Cohen, *supra.*, *inter alia*, pp. 21-23. [↑](#footnote-ref-105)
106. Prof. Emanuel Gross “**Democracy’s Struggle Against Terrorism, Legal and Moral Aspects**”, 2004, p. 228. [↑](#footnote-ref-106)
107. For further expansion see for instance: Cheryl V. Reicin, *Preventive Detention, Curfews, Demolition of Houses, and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories*, 8 Cardozo Law. Rev. (1987). [↑](#footnote-ref-107)
108. In the case of Hamas, responsibility cannot always be attributed, but this is true in most cases. [↑](#footnote-ref-108)
109. In re Aliyan. [↑](#footnote-ref-109)
110. See, for instance: *HCJ* 8627/17 Dr. Leah Goldin v. Government of Israel (published in Nevo, 11 Oct 2018); *HCJ* 5887/17 Ahmad Musa Jabarin v. Israel Police Force (published in Nevo, 25 Jul 2017). [↑](#footnote-ref-110)
111. It changes the conditions of those in prison after the act, and after they have already begun to serve their sentence. [↑](#footnote-ref-111)
112. Regulation 133 of the Defence (Emergency) Regulations, 1945. The regulation dealt with by the High Court of Justice in re Aliyan. [↑](#footnote-ref-112)
113. “The Cabinet has ruled that the bodies of Hamas terrorists will not be returned to their families” – Haaretz <https://www.haaretz.co.il/news/politics/1.3192648>. [↑](#footnote-ref-113)
114. And although there is an expectation that the body be returned, the risk that it not be is definitely known. [↑](#footnote-ref-114)
115. See in this regard, for instance, the petition of the Goldin family in *HCJ* 4248/18 Leah Goldin v. Government of Israel. [↑](#footnote-ref-115)
116. There may be a basis for a selective enforcement claim, but there is no scope to discussing the point in this paper. [↑](#footnote-ref-116)