**Introduction**

*And how did the state’s warfare change as compared to its enemies’ warfare? It fights while obeying the law, and they fight while violating the law. The moral power and righteousness of the authorities’ warfare all depend on adherence to the state’s laws… the weapon of morality is no less important than any other weapon, possibly even more important – and there is no better moral weapon than the rule of law.*

*Everyone needs to understand that the rule of law in Israel will never surrender to its enemies.[[1]](#footnote-1)*

Since the Yom Kippur War, all of Israel’s wars[[2]](#footnote-2) have been gradually transformed from warfare between regular armies to wars against various terrorist organizations.[[3]](#footnote-3) Due to its different nature,[[4]](#footnote-4) war against terrorism has created a new reality, in which the fighting is no longer confined to the “battlefield” alone. The home front has become exposed to war, as have citizens. The means of warfare have expanded to include unusual measures, the legality of which is at times questionable, to achieve a strategic advantage on the battlefield. Moreover, terrorist organizations over the years have not sat idly by, but have acted, and still work vigorously, to innovate and update their operating methods. At the same time, and as terrorist activity has become more sophisticated, the state security forces have been forced to seek new solutions to eradicate terrorism. As part of the fight against terror, “creative” – or unconventional – tools have been created over time to deal with the ever-changing reality.

The international community has also recognized the need to adapt to this new reality, and has held numerous discussions regarding adjusting the laws to meet the new challenges.[[5]](#footnote-5) This approach reflected the international community’s ability to change and update its law as needed. One example of this is how international law is coping with cyber warfare.[[6]](#footnote-6) Another prominent manifestation of how the countries of the world respond to the changing nature of war is reflected in how they view the relationship between “Warfare” and “Lawfare”[[7]](#footnote-7) and the weight given to each.

In recent years, terrorist organizations have managed to challenge the security forces, *inter alia*, by using incendiary balloons and kites, excavating terror tunnels, and the use of lone gunmen, forcing the security apparatus to “think outside the box” to find creative ways to cope with the challenges. As part of that effort, the security establishment began to use certain tools that raise complex questions about their legality pursuant to the rules of international law. In Israel, these tools have often met with legal challenges, bringing them to the Israeli Supreme Court’s table to examine their legality. Often, decisions are reached, but overturned at re-hearings.

“We pick up Hamas members as bargaining chips,” admitted then-Defence Minister Naftali Bennett.[[8]](#footnote-8) Such statements propelled me to conduct this research. What brought the State of Israel to possess and hold onto corpses of terrorists? Is such a policy at all possible? What is the complexity of this measure? And, inevitably, numerous more questions arise. In this study, I will discuss the almost daily-changing reality, and the new tools developed to fight terrorism created as a result. I will examine the compatibility of these tools with existing rules of international law, as well as the complexity of the relations between existing law and contemporary reality. I will conduct this analysis using the test case of the possession of terrorists’ corpses. In the context of this test case, I will examine issues involving collective punishment, retroactive punishment, the very legality of holding a corpse, and harm to human dignity. The study will focus on Israel, a country that has faced and continues to face relentless and constantly evolving terrorism, and the tools the Israeli security forces employ to fight it. It is indeed reasonable to argue that it is possible to apply Israel’s experience to the behavioral norms of other countries, but each tool must be examined on its own merits.

Finally, from the study’s central conclusions, it can be argued that there are new tools that can be used in the fight to eradicate terrorism in certain situations, albeit subject to criticism in each case. This conclusion is in line with the interpretation accepted today by the Israeli Supreme Court and the rules of international law. Inevitably, this study raises many more questions and countless issues that require examination, both at the macro level, and on the micro level with respect to specific examples, subjects that I hope to explore in future research.

**Conclusion**

In this study, I sought to examine the legality of the new measures to fight terrorism, which derive from the changing reality according to the rules of international law. I studied the new tools employed by the State of Israel in order to cope with the new, evolving forms of terrorism. First and foremost, the general challenges were presented from a macro perspective, and then led to a discussion of the details arising from the test case of possessing the corpses of prisoners. Having examined the international rules on holding corpses and concluding that there is no unequivocal requirement to return them, the discussion moved on to the question of the right to dignity, of both the deceased and of his or her family. This was followed by a review of the issue of harm, and the possibility of actually keeping corpses as bargaining chips. I dealt with the question of collective punishment, and the subtle details that shift the discussion from collective punishment to collective harm or secondary harm. Finally, I briefly touched on the question of retroactive punishment, which may also arise from this policy. I presented my opinion that existing laws should be preserved, but that they should be interpreted in to reflect today’s reality. Even in this case, and for fear of getting into a slippery slope situation, I sought to strengthen the criticism, and apply the tests of proportionality to examine the legality of corpse possession, each case separately.

In conclusion, I must be honest. When first embarking on this research, I believed that I would find unequivocal answers to my questions, and that when fighting terrorism is involved, international law would get pushed aside. To my pleasant surprise, I discovered that existing international rules are still relevant and important, and that modifying interpretations can help to both eradicate terrorism and protect fundamental rights. I will conclude with a quote from the words of the Israeli Supreme Court President, Justice Hayut, in the Aliyan rehearing judgement, succinctly expressing my conclusion:

**And as long as international laws have not adapted themselves to this new reality, I believe, that it is appropriate to interpret existing provisions in a “dynamic way which is attentive to the changing tides of time...**”

1. P. 132 of the opinion of Justice Haim Cohen, HCJ 320/80 **Yusra Kassam Kawasma v. Minister of Defence**, *Lamed-Heh*(3) (113) (1980). [↑](#footnote-ref-1)
2. And including military confrontations: Operation Protective Edge, Operation Pillar of Defense, Operation Cast Lead and Operation Defensive Shield, and most of the security challenges such as the First *Intifada*, the Second *Intifada*, the tunnel threat, and the rocket attacks threat. [↑](#footnote-ref-2)
3. This is true for many countries. For example, for many years the United States fought – and is still fighting – against the Taliban, Al-Qaeda and ISIS; Russia struggles *inter alia* against Chechen terrorist organizations; Turkey fights the Kurdish underground, and so on. [↑](#footnote-ref-3)
4. This nature is expressed, *inter alia*, by the absence of a regular army, fighting in a civilian environment, attacking civilian targets, attacks by suicide bombers, etc. [↑](#footnote-ref-4)
5. See, for example, the discussion of the Venice Commission of the European Council, Opinion No. 245 / 2003, on The Possible Need for Further Development of the Geneva Convention, Adopted by the Venice Commission at its 57th Plenary Session (Venice, 12 – 13 December 2003). [↑](#footnote-ref-5)
6. The 32nd International Conference of The Red Cross and Red Crescent, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts Report, (2015). [↑](#footnote-ref-6)
7. The subject of Lawfare is mentioned only as an example of the aforementioned changes, but the paper will not discuss it. [↑](#footnote-ref-7)
8. Bennet: “We pick up Hamas members as bargaining chips” – Mako <https://www.mako.co.il/news-israel-elections/2020-2020_q1/Article-f9f39fee5b94071027.htm> [↑](#footnote-ref-8)