



THE WARMTH OF OUR SONS

دفع ابنائنا

Necropolitics, memory and the Palestinian Quest for Closure
سياسات الموت، الذاكرة، والسعي الفلسطيني إلى إغلاق الدائرة

By: Budour Hassan



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Palestinian Right to Mourn*

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Dedication

*To the mothers and fathers,
daughters and sons,
sisters and brothers,
whom await with unending pain,
without despairing, and continue to
carry on this torturous plight...*



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OF OUR SONS

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*The Warmth of Our Sons:
Necropolitics, Memory, and the Palestinian
Right to Mourn*

By Budour Hassan

Epigraphs

*“ They’re out there somewhere / in the clouds or a grave
they’re out there somewhere / of that I’m certain
in the dear southern reaches of my heart
it may be they’ve lost their bearings
and now they wander asking always asking
where the hell is the road to true love
because they’re coming from so much hate ”*

Mario Benedetti

*“This whole country is an enormous cemetery but only
some people get proper graves, because most lives don’t
matter. Most lives get erased, lost in the whirlpool of trash
we call history.”*

Valeria Luiselli

A Preface

It is impossible to easily describe life under military occupation. One can describe the physical elements of occupation: checkpoints, the Wall and the constant presence of surveillance equipment and soldiers, for example. One can also describe the physical elements of Israel settler colonialism as evidenced by the ever-expanding settlements, the ongoing home demolitions and the construction of Israeli-only bypass roads. What is more difficult to describe, however, are the non-physical elements of occupation and settler colonialism, and the attempts to control even the minute of Palestinian life. One such mechanism is that of “necropolitics” described by author Budour Hassan - the withholding of the bodies of Palestinians killed by Israel. This policy, which Budour describes in great detail, has taken different turns throughout the seven decades of Israeli rule. And, like virtually all illegal Israeli measures, Israel attempts to shroud such policies in legality. Budour dispels though false measures highlighting how the courts have facilitated, rather than ended such practices.

Yet what is more alarming than the “legal” status of such necro-politics, are the attempts to control not only Palestinian life, but Palestinian death and Palestinian mourning. Israel, through this policy, dictates that Palestinians can only mourn when Israel allows us to mourn and can only mourn in the ways that Israel allows us to mourn. In this way, Israeli control is all encompassing, in all spheres, for even upon death Israel continues to exert its power over even Palestinians. But beyond controlling how and when we bury our dead, are policies designed to malign and victimize those killed by Israel, to turn them into bargaining chips or nameless, faceless individuals whose names are only recalled in the

negative when we attempt to memorialize their memory.

My first encounter with this style of necro-politics came in 2000 when meeting friend after friend who described in painful detail the loss of an uncle, a father or grandfather, and how after years of struggling they either learned to cope with the loss and lack of closure that comes with burial, or the endless struggle they pursued just to be able to bury a loved one. In addition to mourning loss, these friends endured the politics of occupation, with each one saying, “Can’t Israel just leave us alone?”

These policies continued with the deaths of Faisal Husseini, and the attempt to control his funeral, Yasser Arafat, and the refusal to bury him in the place of his choice and even with Mahmoud Darwish, whose family was unable to bury him in his place of birth, in a destroyed village in present day Israel.

But while Palestinian lives (and corpses) are either disposable to bargaining chips, Israel has venerated their soldiers. We can all recall the names of Israeli soldiers captured or killed in Lebanon, Israel has shrouded the names of our dead, and even attempted to punish us for uttering them. In this way, necro-politics are not simply another element of control over Palestinian lives, but a continuation of settler-colonial practices: the attempt to erase our very presence.

This study therefore is important in its attempt to detail and document these Israeli practices and highlight the campaign to be allowed to bury our dead in dignity, after being denied such dignity in life.

***By Dr. Diana Buttu
September 2019
Haifa***

Abstract

From the battlefields of Ancient Greece to mass graves in twenty-first century Spain, denying victims of war and repression the right to dignified burial has condemned loved ones to unspeakable pain and perpetual uncertainty.

This research focuses on Israel's implementation and legalization of post-mortem punishment through the detention and degrading handling of Palestinian mortal remains. Israel offers a unique modern case study because it is the only country in the world, besides Russia, whose primary legislation explicitly permits the withholding of bodies as part of its wider counterinsurgency program. It is also the only country in the world that relies on a complex - albeit ambiguous - legal framework for the withholding of bodies as potential bargaining chips.

Over the past five decades, Israel's practice of withholding the corpses of Palestinians has undergone various shifts and phases, evolving from initial ad hoc application, when Palestinian and Arab combatants killed during clashes were dumped in unmarked graves and clandestine cemeteries, to the current attempt to regulate and systematize the policy through legislation and government decisions. However, this shift has not been linear; the frequency of Israel's withholding of corpses has gone through ebbs and flows, with notable spikes occurring at the height of Palestinian uprisings and unrest.

The study addresses two main questions: What are the underlying motives for the Israeli policy of withholding bodies? And to what extent has the Israeli judiciary contributed to its legitimization?

Our examination of this policy moves beyond the Israeli discourse of security, deterrence, and public order. We analyze Israel's refusal to immediately deliver Palestinian martyrs' remains to their families and its restrictions on their funerals through the prisms of necropolitics, precarity and colonial control over spaces of death and mourning. According to this analysis, Israel treats the bodies of Palestinian martyrs as dissident bodies that must be disciplined. They are perceived as ideological ammunition for the articulation of sovereignty and the enunciation of symbolic power and violence. Since collective memory and shared public grief have always been central to the Palestinian narrative, erasing this memory and freezing grief are seen as important pillars in Israel's architecture of repression.

To formally authorize the military to withhold bodies of Palestinian martyrs as bargaining chips in potential prisoner swap deals, Israel relies on an emergency regulation promulgated by the British Mandate government in 1945, supported by a cabinet decision issued in January 2017. The newly amended Counterterrorism Law authorizes the police to delay the release of the bodies of Palestinian martyrs to their families and to impose restrictions on their funerals on the grounds of maintaining public order.

These amendments reveal a new trend aimed at entrenching the policy.

The process of consolidation has been facilitated by the Israeli High Court of Justice's (HCJ) failure to outlaw the policy, repeatedly approving the army's decision to withhold bodies as a proportional and reasonable measure. Not until 2017 did the HCJ examine the policy through the legality principle, concluding in two precedent-setting rulings that neither the police nor the army were authorized to withhold corpses, either for security reasons or as bargaining chips, without direct and explicit legislation. Far from resolving the issue, the HCJ gave the Israeli parliament (Knesset) a green light to pass legislation legitimizing the withholding of bodies, which is precisely what happened in 2018 when the Knesset passed a law to allow the police to set strict conditions on returning martyrs' bodies on public safety grounds. And while the practice of withholding martyrs' bodies as bargaining chips was deemed illegal by the HCJ in 2017, the precedent was overturned two years later.⁽¹⁾

Viewed through the lens of customary international humanitarian law and international human rights, Israel's policy of withholding corpses contravenes rules on the disposal and handling of the war dead and the prohibition against collective punishment. It also violates the human rights to dignity, family

1. Israeli High Court greenlights holding Palestinian bodies as bargaining chips. Retrieved from https://www.btselem.org/routine_founded_on_violence/20191022_hcj_greenlights_holding_palestinian_bodies_as_bargaining_chips

life, religious freedom, property and the prohibition against inhuman or degrading treatment. In certain conditions, it may also amount to enforced disappearance.

Read in a comparative perspective with the Spanish civil war and subsequent historical memory movement, both Israel's refusal to grant Palestinian martyrs a dignified burial, and the Palestinian struggle to reclaim the bodies languishing in military morgues and cemeteries of numbers, are not without parallel. Much can be learned from the particularly intriguing case of the Spanish historical memory movement and its struggle to identify, locate and exhume the remains of tens of thousands of Spanish Republican victims extrajudicially executed by Francisco Franco's forces during and shortly after the Spanish civil war. Even with Spain's transition to democracy after Franco's death in 1975, a "pact of forgetting" continued to engulf the mass graves and the missing remains. The Spanish struggle for exhumation provides ethical, legal and intellectual guidance for any movement seeking to reclaim the right to mourn, honor and bury victims of war and repression.

Considering the complicity of the Israeli judicial system in maintaining the policy of withholding corpses, the Spanish case shows both the importance of popular grassroots efforts and the possibility of seeking alternatives beyond national courts, such as appeals to the principle of universal jurisdiction or the United

Nations Working Group on Enforced or Involuntary Disappearances.

In 2008, The Jerusalem Legal Aid Center launched the National Campaign for the Retrieval of Palestinian and Arab War Victims' Bodies and the Disclosure of the Fate of the Missing. The campaign's purpose is to document cases of Palestinian bodies withheld by Israel and to take legal action to realize their return to their families. According to the estimates of the campaign, the bodies of at least 253 Palestinians are still buried in cemeteries of numbers in addition to the 51 martyrs whom Israel has continued to hold onto as bargaining chips under its new policy. This study is part of a process initiated by the campaign to produce knowledge and analysis the Israeli policy of withholding martyrs' bodies on. It is part of a larger breadth of activities that will ultimately include storytelling, oral history, ethnographic research and advocacy. Specifically, this report contributes theoretical and legal analysis to previous empirical and legal investigations into the issue of withholding bodies and expands on them by suggesting new approaches for examining Israel's policy, recognizing the uniqueness of the case but simultaneously putting it in a global context.



Introduction

“Our Polynices and Palinurus, Asian or African, drown away from home. Our Antigones, from all nations, demand the rights of the living and of the dead to a body and to a polis.”

Santiago Alba Rico.

On 13 October 2015, Bahaa Alayan, a 23-year-old native of Jabal al-Mukabber in occupied Jerusalem, was killed after attacking a bus in the illegal settlement of Armon HaNatziv, built and expanded on lands confiscated by Israel from Jabal al-Mukabber.⁽²⁾ The attack left three Israelis dead.

A community organizer, self-taught graphic designer and scout leader, Bahaa was credited for inspiring the revival of the cultural scene in Jabal al-Mukabber and opening up the public space for children and youth. In March 2014, Bahaa and his friends organized a public reading activity in Jerusalem, where thousands of readers from all ages formed a chain around the walls of Jerusalem’s Old City with books in their hands. The action served a twofold objective: encouraging people to read and reclaiming, albeit for a day, the streets of the occupied city as a means of stressing its Palestinian identity and challenging Israeli restrictions on public gatherings.⁽³⁾

2. Hassan, B. (2016, January 24). Fighting to bury their sons: on the necropolitics of occupation. Roar Magazine. Retrieved from <https://roarmag.org/essays/israel-withholding-palestinian-martyrs-bodies/>
3. Hassan, B. (2015, October 22). How a scout leader became a martyr

The shooting attack carried out by Bahaa against the settler bus in October 2015 was used by the Israeli government to intensify an already massive crackdown against Jerusalem’s Palestinian residents. In retaliation for the attack, the Israeli police issued a demolition order against Bahaa’s family home. His body, meanwhile, was seized by Israeli police at the scene and withheld in a police morgue for ten months. During those months, the life of Muhammad Alayan, Bahaa’s father, was turned upside down; not only did he lose his son and his home, he soon became one of the focal figures in the battle of Palestinian families to bury their loved ones. Parents and siblings fought for the reclamation of the bodies of their dead as though they were fighting to secure the release of living prisoners; the enormity of the death was briefly overshadowed by the obligation to recover and welcome back the lifeless body.

Contemplating life in “arrested time” following the sudden death of a child – that “acute sensation of being cut off from any temporal flow that can grip you after the sudden death of your child” - poet Denise Riley writes that “the person who says, ‘I keep expecting to hear his key in the door any moment’ isn’t merely falling back on a well-worn trope. She’s issuing a factual report.”⁽⁴⁾ Muhammad Alayan was straddled by this expectation, by the seemingly undeniable fact of his son’s impending return, making other concerns almost irrelevant. Even the looming demolition of his family’s home had hardly registered as a priority. For Muhammad, the daily anticipation of Bahaa’s footsteps nearing the door at 10pm made him convinced that his son was reaching out for him and seeking his arms for warmth. The

4. Riley, D (2012). Time Lived, Without Its Flow. Capsule Editions.

absence of a body to mourn magnified the sensation of floating in a time that had lost its flow; time was suspended and the passage of minutes, hours and days mattered little because there was no physical confirmation of the loss. He was so invested in the struggle to reclaim and bury the body that he found no room for private grief or for reckoning with the sudden absence of his son.

In October and November 2015, the wave of withholding martyrs' bodies reached unprecedented heights as Israel escalated its punitive and repressive measures against a Palestinian uprising that had swept through Jerusalem and most of the West Bank. In response, bereaved Palestinian families took to the streets to demand the release of their dead children.

This parents-led struggle reinvigorated the National Campaign for the Retrieval of Palestinian and Arab War Victims' Bodies and the Disclosure of the Fate of the Missing (hereinafter: the Campaign). The Campaign had been working since 2008 to retrieve the bodies of those in the "cemeteries for enemy combatants," mainly through litigation before Israeli courts. The cemeteries for enemy combatants are closed military zones where hundreds of Palestinians have been buried in secret and identified only by numbered plaques. The protests organized by the Committee for Martyrs' Families and the national campaign would bring together young mothers whose teenage sons bodies were detained in morgues following alleged attacks and elderly fathers whose loved ones' remains had been languishing for decades in the cemeteries of numbers. When They would chant "we want them back," the old and the

fresh wounds of waiting for closure coalesced in their voices. Their sons, they insisted, had been punished twice, first by the Israeli bullet that ended their lives and after their death, through the denial of dignified burial.

Punishing the dead, and thus also punishing their living loved ones by extension, may be an unconventional exercise of power but it is certainly not a new one. From the battlefields of ancient Greece to the mass graves and roadside ditches of twenty-first-century Spain, from the unmarked, abandoned burial sites in the slave plantations of the United States, through the innumerable cases of enforced disappearances in 1960s and 1970s Latin America, to the bones of undocumented Central American migrants scattered across the Sonoran Desert of Arizona, denying dignified burials to the subversive or unwanted dead has been used as a tool of repression, dehumanization and control. It has also condemned their loved ones to unspeakable pain and suspended grief, sentencing them to a perpetual cycle of uncertainty and a legal limbo.

While measures of and pretexts for exercising post-mortem punishment vary, the perpetrators are unified by a common, solid thread: a quest to permanently relegate an undesirable population, the "others," to a sub-human status and to control and discipline an entire community. This "othering" is part of a larger process of erasure and exclusion and in the Palestinian context, is part of Israel's logic of dispossession.

This report focuses on Israel's implementation and legalization of post-mortem punishment through the

detention and degrading treatment of the mortal remains of deceased Palestinians. If we erroneously classify Israeli violations against Palestinians in a hierarchy, preventing the burial of the dead will be treated as little more than a footnote. While it is less practiced than other violations, this narrower scope and less visible or quantifiable impact does not entail lesser significance. The practice has left long-lasting scars both on the individual families as well as the collective Palestinian consciousness. It also reveals the extent to which Israel is willing to persecute Palestinians, turning the metaphor of controlling their lives and destiny even beyond the grave into a tangible, literal act.

This report addresses two main questions. First: what are the underlying motives behind the Israeli policy of withholding Palestinian martyrs' corpses, a practice that has been resumed in the past four years after a temporary halt in the preceding decade? What normative measures and mechanisms make this recent resumption of such a policy different from previous decades? The second and related question pertains to the role played by the Israeli High Court of Justice (HCJ) in paving the way for the legalization of this practice. To what extent have the HCJ's rulings contributed to legitimizing this policy, even though in contravention of international law?

This report is divided into five chapters that address these issues from various angles in order to ultimately give a framework of the legal, moral and social complexities related to the withholding of bodies.

Chapter I, titled Frozen Bones, puts into conversation the revocation of funeral rites in Ancient Greece

with Israel's modern formulations of post-mortem punishment. By using examples from Homer's Iliad, specifically Achilles' refusal to hand over the body of Trojan warrior Hektor, and Antigone's struggle to bury her brother Polynices against King Creon's orders in the Sophocles tragedy, this report traces the historical roots of using death and mourning as a control mechanism against the living. Reading Antigone and the Iliad as a backdrop, the rest of Chapter I provides a historical background of Israel's policy of withholding corpses in its various phases over the past five decades. We trace the practice as it has evolved from inconsistent application to a temporary halt, then to its re-escalation, culminating in the current efforts to regulate and systematize the policy through a series of HCJ rulings and Israeli legislation.

Finally, this chapter looks at the theoretical framework of necropolitics that underpins the declared motives stated by the Israeli government to continue the policy of withholding bodies. Chapter I concludes by suggesting that Israel's specific use of post-mortem punishment is a manifestation of colonial violence, enactment of power and sovereignty, and erasure of collective memory.

Chapter II, titled Beyond the Grave, closely examines Israel's legal framework that institutionalizes the practice of withholding corpses and the ways in which the Israeli judiciary, represented by the HCJ, has handled Palestinian petitions against the policy.

First, we highlight the normative legal framework laid down by Israel in order to regulate the practice of the withholding of Palestinian war victims' corpses.

Rooted in an emergency regulation within a myriad of counterinsurgency measures adopted by British Mandate authorities, withholding corpses continues to be carried out by Israel under the auspices of regulation 133(3) of 1945, various government policies, and a newly approved amendment to the Counterterrorism Law. Both the amendment to the Counterterrorism Law and the official policy announced by the cabinet to regulate the practice have been approved since 2015, testifying to the major changes that have occurred in the last four years.

We then analyze the Israeli judiciary's attitude vis-à-vis the issue of withholding corpses by reviewing some of the most important decisions taken by the HCJ on the issue. While reviewing the rulings, we distinguish between three different forms of withholding: the temporary delay on releasing martyrs' bodies to the families under the pretext of maintaining public order; the indefinite retention of bodies on the grounds of using them in a potential prisoner exchange; and the issue of unidentified bodies buried in the "cemeteries for enemy combatants," known by Palestinians as the cemeteries of numbers. The distinction is relevant because it influences the path of litigation adopted by the petitioners.

Imposing conditions on funerals: The Jabareen Precedent

On 14 July 2017, Three Palestinian citizens of Israel from of Umm al-Fahm were gunned down by Israeli forces after allegedly killing two Israeli police officers outside al-Aqsa Mosque. The bodies of the three alleged assailants, Muhammad Ahmad Jabareen,

Muhammad Hamed Jabareen, and Muhammad Ahmad Mfaddi Jabareen, were subsequently held by the Israeli police who set various conditions for their release and burial.⁽⁵⁾

The police based its decision to withhold the three suspects' bodies on sections 3 and 4A of the Police Ordinance. In response to the decision, Adalah filed a petition before the High Court on behalf of the families of the three suspects, demanding the immediate release of their bodies for proper burial and the performance of autopsies on their bodies to determine the causes of death. The petitioners argued that retaining the bodies and setting conditions on their release have no legal basis in Israeli law due to the lack of a specific law that explicitly and directly authorizes such action.⁽⁶⁾

On 25 July, The Israeli High Court accepted the petitioners' demand to release the bodies, ordering the police to return the bodies of the suspects to their families within 30 hours.⁽⁷⁾The request for conducting an autopsy on their bodies, however, was rejected.⁽⁸⁾

The main legal question raised by the Court was whether the police is authorized to delay the release of assailants' bodies on the grounds of maintaining public order and safety.⁽⁹⁾ The Court ruled that Section

5. Adalah. (2017, July 20). Adalah demands Israel immediately return bodies of Al Aqsa shooting suspects. Retrieved from <https://www.adalah.org/en/content/view/9167>

6. Full text of the petition filed by Adalah: https://www.adalah.org/uploads/uploads/Bodies_petition_July_2017.pdf

7. HCJ 5887/17: Jabareen v. The Israel Police. Full text of the English translation of the rulings can be found here: https://www.adalah.org/uploads/uploads/English_SCT_decision_release_bodies_Umm_al-Fahem_July_2017_FINAL.pdf

8. Ibid at para 13.

9. Ibid at para 12.

3 of the Police Ordinance is a general section that lists the tasks of the police and does not provide an independent source of authority for retaining the bodies.⁽¹⁰⁾ Likewise, Section 4A does not offer any specific authorization for withholding bodies and is rather concerned with laying out the general powers granted to the police.⁽¹¹⁾ Despite ordering the release of the bodies, the Court maintained that the police is entitled to set terms and conditions on the funerals themselves for the purpose of preventing disturbances to public order.⁽¹²⁾ It is in direct response to this ruling that the Knesset adopted an amendment to the Counterterrorism Law in which a specific and explicit authorization was granted to the police to retain the bodies of alleged assailants for security considerations.

Israel responded to this ruling by enacting an amendment to the Counterterrorism Law, which authorized the police to impose conditions and severe restrictions on the funerals of those who allegedly carried out attacks to prevent possible disturbances.

Withholding bodies as bargaining chips: the Alayan Precedent

After offering a general overview, we focus on two rulings that accentuate the shift that characterized the HCJ's position on the questions of withholding bodies either as bargaining chips or on public order grounds. It was only in the last few years that the Court posed the question of whether the existing legislation constitutes a sufficient authorization for such acts, rather than immediately switching the

10. Ibid at para 6.

11. Ibid at para 7.

12. Ibid at para 15.

discussion of the reasonableness and proportionality of the practice of withholding.

The first is the Jabareen case where the Israeli police delayed the release of the bodies of three Palestinian citizens of Israel from the Jabareen family accused of killing two Israeli border police officers in Jerusalem's Old City in July 2017. The Court's subsequent verdict concluded that there was no statutory authorization for the police to impose conditions on delivering corpses of alleged Palestinian attackers to their families and restrictions on their funerals. The second case, commonly known as the Alayan case, pertains to the legality of withholding corpses in accordance with British emergency regulation 133(3) for the purpose of using the bodies as bargaining chips in potential negotiations. In December 2017, the HCJ ruled that the regulation did not authorize the practice, ordering the release of bodies held as bargaining chips within six months of the ruling unless the Israeli parliament, the Knesset, passes a law that expressly and directly permits the retention of bodies as bargaining chips. This precedent was later overturned when the HCJ issued a ruling in September 2019, following a further hearing, in which a majority of four justices held that the British regulation did constitute a sufficient source of authorization.

Based on the body of rulings analyzed throughout the chapter, we surmise that Israeli courts have contributed to the de facto legitimization of the retention of bodies as bargaining chips, first by refusing to grapple with the legality of the policy for nearly two decades and instead privileging the discretion of the army and the police, and more recently by explicitly indorsing the policy's legality.

The failure of the HCJ to revoke the policy despite acknowledging its profound moral predicaments is redolent of its general approach to greenlight military and security-driven policies that encroach upon Palestinians' fundamental rights. Even in the few cases where the court orders the revocation of such practices, as we saw in the Jabareen case, it leaves the door ajar for the Israeli government to legalize said practices by enacting laws that directly and explicitly authorize them.

We conclude Chapter II by presenting a legal timeline that charts the evolution of the policy of retaining bodies from the British emergency regulations of 1945 to the HCJ ruling of 2019. The timeline is aimed at condensing the most notable laws, rulings, orders, and decisions concerning the different forms of withholding Palestinian martyrs' bodies.

Chapter III, titled, *Do the Dead Have Rights?*, considers Israel's retention and negligent treatment of Palestinian martyrs' bodies from the vantage point of international humanitarian law (IHL) and international human rights law (IHRL). As we outline the relevant requirements of the Geneva Conventions and the International Covenant on Civil and Political Rights (ICCPR) on the handling of the war dead and the rights of their next of kin, we bring up concrete examples that illustrate Israel's failure to meet international standards on the handling of the war dead's bodies.

The chapter treats the practice as a form of collective punishment and also looks into the possibility of classifying some cases of retaining bodies as crimes of enforced disappearances.

The rest of the chapter reviews a 2013 ruling by the European Court of Human Rights (ECTHR) where the majority opinion determined that a Russian ban on handing over the bodies of alleged Chechen combatants and on disclosing their site of burial amounts to a disproportionate violation of the right to private and family life.

Chapter IV, titled *The Silence of Others*, shifts course from the rest of the report to provide a comparative analysis of the exhumation projects of the missing dead of the Spanish civil war.

A brief overview of the Spanish civil war (1936-1939) and the subsequent repression of Francisco Franco's dictatorship (1939-1975) is followed by an examination of the long and painful struggle of families in Spain to locate, exhume and identify loved ones languishing in mass graves.

This struggle can be divided into two major phases: the less-known cases of exhumations that took place on the local and regional level at the advent of the transition to democracy during the latter half of the 1970s. These exhumations were individual efforts carried out with modest means and resources, receiving scant media attention and no official support. This first wave of exhumation was short-lived due to the insistence of the Spanish political elites across the political spectrum to leave untouched the issues of historical memory and the repression of the dictatorship in the name of maintaining stability and reconciliation.

The second stage of exhumations, launched in October 2000 by journalist Emilio Silva with the

public exhumation of his assassinated grandfather's body, has garnered much greater attention and has paved the way for the eruption of the Spanish historical memory movement. Exhumations have been carried out all over Spain, aided by advanced scientific methods and forensic archaeology, and have sparked a national debate around collective memory, accountability, and the crimes of the dictatorship. The Law of Historical Memory, enacted in 2007, has slightly facilitated such exhumations, but a decision by the subsequent government to cut funding for the exhumations has meant that such efforts continue to lag behind.

Finally, this chapter details the judicial limitations in the Spanish system that hindered progress in the grassroots exhumation projects. Here, we show the ways families responded to this impasse by seeking alternatives to the Spanish courts such as the resort to the principle of universal jurisdiction by filing petitions before courts in Argentina as well as raising the issue with the United Nations Working Group on Enforced or Involuntary disappearances. A comparative perspective, we argue, offers Palestinian families, organizations, and scholars involved or interested in the issue of retrieving detained Palestinian bodies an invaluable insight into one of the most mature and sustained struggles for reclaiming the rights to dignified burial and historical memory.

In the concluding chapter, titled *Song of the Unburied*, we present the trajectory of the Palestinian National Campaign for the Recovery of War Victims' Bodies and the Disclosure of the Fate of the Missing (the national campaign), recounting some of its main achievements and most significant shortcomings in

the past eleven years. We elucidate the importance of a grassroots, popular movement, treating litigation before Israeli courts as one tactic rather than the sole strategy, and calling for building alliances and coalitions with historical memory movements in Spain and around the world. As far as legal avenues are concerned, cases where the withholding of corpses amounts to enforced disappearances may be raised before the United Nations Working Group on Enforced or Involuntary Disappearances. Following the Spanish model and resorting to the principle of universal jurisdiction is a far-fetched alternative in the Palestinian case, but the option may still be studied and considered especially in light of the HCJ's approval of the prolonged withholding of corpses as bargaining chips.

The withholding of corpses gives rise to variegated and multidisciplinary questions and as such, it should be discussed and confronted by using a multidisciplinary approach that combines legal work and research, political activism and organizing, advocacy, oral history, and ethnographic research.

Methodology

This report relies on theoretical analysis to interrogate the underlying motives behind Israel's refusal to return the bodies of Palestinian martyrs. The main theory used to analyze this policy is necropolitics as conceptualized by Achille Mbembe. The analysis also relies on Nadera Shalhoub-Kevorkian's research on Israel's use of dead bodies and sites of burial as a means of control and dispossession and her argument that such use is predicated upon colonial violence. Moreover, this report builds on

Judith Butler's reflections on precarity, precarious life and grievable and ungrievable loss.

To analyze the role of the Israeli judiciary in legitimizing the policy of withholding martyrs' corpses, this report surveys the main decisions taken by the Israeli Courts since 1992 and sketches all the relevant legislation from the British Mandate government in 1945 to the Israeli Counterterrorism Law of 2018. High Court precedents on the policy of withholding corpses are given close examination to provide a full and comprehensive picture of the court's attitude towards Palestinian death over time. This report presents the decisions and the legislation thematically rather than chronologically.

In addition to reading domestic Israeli law and rulings, this report closely examines international humanitarian law, international human rights law, and a landmark decision by the ECTHR.. Further, to provide a comparative lens of Israel's policy, one chapter is dedicated to the history and cases of missing corpses during the Spanish civil War.

This is not an empirical research project, but rather relies on the findings of the national campaign. Unless stated otherwise, the numbers and figures cited, some of which are estimates, have been provided by the database and field researchers involved with the campaign.

The report highlights individual stories of Palestinians buried in the cemeteries of numbers of withheld in Israeli morgues as a means of humanizing the issue and explaining its impact on Palestinian lives and Palestinian families.

Two foundational documents were of particular value both for the empirical and field research they conducted, and for offering important information and background on the policy.

In 2013, the national campaign issued the second edition of a booklet titled "We have Names, We have a Homeland." This booklet is the first Palestinian-published document to comprehensively deal with the Israeli practice of withholding martyrs' bodies and to present testimonies by Palestinians whose loved ones' remains are buried in the cemeteries of numbers. A report issued by Israeli human rights organizations B'Tselem and HaMoked in 1999 was the first extensive report on the issue and put together a list of the main legal procedures followed by Hamoked to assist Palestinians to retrieve the bodies of their loved ones from the cemeteries of numbers and to expose the demeaning conditions in those cemeteries.

This research complements the booklet's empirical contribution and the oral history it provided by examining the theoretical dimension of the policy to withhold corpses. The main objective of this research is not to provide statistical figures and data, but rather to build on the data collected by the national campaign through field documentation, testimonies, interviews, and newspaper articles. Furthermore, while amplifying the voices of the families whose loved ones' corpses are withheld is among the major tasks undertaken by the national campaign, it is also beyond the scope of this particular research to provide an oral history document.

Terminology

This report uses the term “martyrs” to refer to Palestinians whose bodies are withheld by Israel, including those who carried out attacks or were killed in clashes, prisons etc. Choosing the term martyrs does not necessarily reflect a normative or value judgment by JLAC but rather acknowledges the popular perception among Palestinians of those whose bodies are withheld as martyrs. It is this “martyrdom” status that they hold among Palestinians that also compels Israel to withhold their bodies.

This report also uses terms such as bodies, remains and corpses interchangeably.

Israel’s Supreme Court is referred to as the High Court of Justice (HCJ) as this is the official name of the court. Acts passed by the Israeli parliament, the Knesset, are referred to as laws or legislations.

Contribution

While local Palestinian mobilization has played an instrumental role in rescuing the withheld corpses and nameless graves from the dungeons of oblivion, the issue has received scant attention internationally. This research seeks to mobilize international public opinion and to shed light on a

critical, albeit forgotten, pillar of Israel’s architecture of repression and control. Moreover, the research constitutes a scholarly document in the production of local Palestinian knowledge on issues of collective memory, necropolitics, precarity, and forms of discipline and control.

This research is published at a particularly critical juncture in the Palestinian struggle for the recovery of withheld bodies. On 9 September 2019, the Israeli High Court approved the constitutionality of withholding Palestinian martyrs’ bodies as bargaining chips in potential prisoner swap deals with Hamas. The Court’s decision effectively closes the last remaining legal channel for Palestinians at Israeli courts but it can and should serve as a springboard for reviving attention to the issue and for highlighting the complicity of the Israeli judiciary in Israel’s human rights violations.

While this research is a primarily legal document, we believe that its importance is not limited to lawyers or legal scholars. Rather, it can be useful for all those engaged in struggles for the recovery of historical memory and confronting silence. When the oppressed are deprived of their right to mourn and remember, deconstructing the systems that silence or criminalize their grief is a first step towards reclaiming memory and grief as emancipatory vehicles.



THE **WARMTH**
OF OUR SONS

Chapter I:
Frozen Bones

***“He came back to her sightless
Strengthless expressionless
Asking only to be washed and burned
And his bones wrapped in soft cloths
And returned to the ground.”***

Alice Oswald.

He was forewarned that he might not be able to recognize the complexions or the body of his own son, but the metamorphoses he encountered was beyond his most lugubrious presentiments. His son’s glistening eyes, the mischievous smile that not so long ago christened his cheeks, the broken teeth that preserved many an untold story, the teenage exuberance and buoyancy parents learn to cherish when their kids mature, his sweaty palms, the feet that had scarcely walked because they were accustomed to running, or flying, they all metamorphosed into a blackened block of ice. The months that his son’s lifeless body had spent in a morgue whose temperature was below 50C left him disfigured, unrecognizable, bearing no resemblance to the boy who crackled with life and simple dreams.

Formerly known as Hassan Manasra, the child was transmuted into a block of ice, the fifteen summers he lived through compressed into one long, cold winter. Hassan, a tenth-grader from Beit Hanina, was shot dead by Israeli police on 12 October 2015 when he and his 13-year-old cousin Ahmad allegedly stabbed and wounded Israeli teenagers near the

illegal settlement of Pisgat Ze’ev.¹³ While Ahmad was eventually convicted of attempted murder and sentenced to nine-and-a-half years in prison after enduring severe interrogation, Hassan’s “sentence” came in the form of a months-long detention in a morgue.

They say that time freezes when parents wait for the corpses of their sons to be delivered back to them for a final farewell before they are shrouded by the soft cloths of their national flags, before Mother Earth cradles them. Time freezes and so do detained bodies, waiting for rest and for the ice to melt, waiting to close the final chapter in the lineage of their falling leaves, waiting for flowers to sprout from their graves. They wait, and their loved ones ache, fight, and shout in the dark.

“Another of the inconvenient things about those who leave behind no body, no trace is that grief is gradual and happens in stages but it’s never complete and there can be no real mourning if you advance through the process hesitantly and in installments.”

Javier Marías

Like hundreds of other parents whose grief was suspended while they were waiting for the release of their children, for the frozen time to make sense again, for the frozen body to look human again, to

13. Hassan, B. (2016, April 26). Palestinians battle Israel to bury their sons. Al Jazeera English Retrieved from <https://www.aljazeera.com/news/2016/04/palestinians-battle-israel-bury-sons-160425094954457.html>

feel warm again, Khaled Manasra waited, fought and wrestled with a regime that not only sought to freeze the memory of his son but also to repress his own mourning. And like Priam, king of Troy, father of fifty sons who perished in the ten-year war against the Achaeans, Khaled was forced to negotiate the conditions of the return of his son's body.

This chapter introduces the necropolitical regime that imposed post-mortem punishment on Hassan Manasra and inflicted suffocating pain on his father, Khaled. Why does Israel's settler colonial regime, despite all its military might and its myriad methods of repression, take revenge on the Palestinian dead, flexing its legislative muscles and wagging its rule of law as a middle finger in the faces of their loved ones? What do Homeric epics and extant Greek tragedies tell us about post-mortem punishment? The discussion may not solve the major quandary of why a practice condemned in the Bronze age and scorned by its gods and ancient dwellers continues to be employed in the modern age of artificial intelligence and surveillance capitalism. This is not a narrative of progress or decay. Rather, it is the biography of a death in many installments, the story of one exorbitantly cruel and inhuman punishment that continues to endure. Once used as method of naked revenge, post-mortem punishment has since replaced its garments over the millennia as perpetrators invariably scamper for the elusive cover of legitimacy that formal pretexts such as security, national interests, deterrence, military necessity or even inconvenience provide. But beyond rhetorics

and legal jargons, have they really broken away from the logic of reprisal that dictated the resort to this method?

From Priam to Antigone

"I have gone through what no other mortal on earth has gone through," King Priam entreated. "I put my lips to the hands of the man who has killed my children."¹⁴

An epic poem about war and warriors, Homer's *Iliad* is more famous for its graphic depiction of spears piercing the hearts of men, men sacking cities and waging an internecine war (ostensibly) for the sake of a woman, queen Helen, than for its human storytelling. Yet, the final book of the poem tells the story of one of the most enduring, emotionally charged and courageous quests in literature: the visit of Priam, the ageing king of Troy, to the encampment of Achilles, the swift-footed, lion-hearted son of a goddess. Achilles had slain Priam's eldest son Hektor, desecrated his corpse and refused to hand him over to the Trojans, in retaliation for Hektor's killing of Patroklos, Achilles' lifetime friend and companion. It took the intervention of immortal Zeus, an enormous ransom, and the astoundingly brave, lyrical and moving supplication of Priam to persuade Achilles to return the corpse. It was also one of the rare episodes where one could glimpse the vulnerability and humanity of Achilles as he could not

14. Lattimore, R., & Lattimore, R. A. (Eds.). (1961). *Iliad*. University of Chicago Press. Book 24, lines 505-506.

but empathize with the bereaved father who invoked his own. Even then, however, Achilles' refusal to return the corpse of Hektor violated the natural laws, ancient Greek religion, and the accepted norms of war, which dictated that all dead, including enemies and slaves, were entitled to funeral rites and burial. The significance of burial stems from the rest it grants the soul of the deceased. Ancient Greeks believed that the soul of the unburied

floats tormented and does not join the dead in Hades, the underworld. That even in the heat of a merciless war the dishonoring of and refusal to hand over an enemy's corpse was represented as an excessive revenge testifies to this significance. The lengths to which mortals would go and the risks they would take to secure dignified disposal for their dead would remain a recurring theme in many ancient Greek and Roman classics, most memorably perhaps in the story of Antigone.

By the fifth century BCE, when Sophocles' play *Antigone* was first performed, the norm in ancient Greece of properly and respectfully treating the war dead had been further buttressed, supported by the common laws of the Greeks as well as the natural, unwritten laws of the gods. In antiquity, this moral duty to comply with the natural law and bury the next-of-kin was arrogated to women. It was supposedly this moral and social obligation that propelled Antigone to assume the parlous task of burying her brother Polynices, whose body was left to rot at the order of Creon, the new king of Thebes, who had just

emerged victorious from his war against Polynices and his foreign allies.

***“I will bury him myself, and so die nobly,”
Antigone obdurately announced to her sister
Ismene, who was too wary of the implications
of disobeying King Creon’s ban on burying
Polynices. “I’ll lie beside him in love, guilty
of devotion! For I must please the dead a
longer time than I must please the living.
With them I’ll lie forever.”***⁽¹⁵⁾

Antigone appears to capture the age-old conflicts between the unwritten laws of justice and the mortal decrees of the ruler, between a dissident woman and a particularly misogynistic man, between individual and state, family and city. The motives behind Creon's ban on burying Polynices are more complex than Achilles'. As a traitor aided by foreign intervention to seize power in Thebes, Polynices deserved a punishment greater than death; his mere killing in combat might force people to forget him, to brush him aside like any ordinary dead soldier, but prohibiting his burial would turn him into an example for the fate that awaits those who rebel. Creon is also driven by political insecurity. By humiliating Polynices' corpse and criminalizing the performance of funeral rites, he looked to send a message that the only threat to his throne was not even worthy of burial and that any empathy with him was unacceptable. This insecurity and fear of any kind of opposition initially

15. Sophocles, *Antigone*, Translated by Frank The Greek Plays: Sixteen Plays by Aeschylus, Sophocles, and Euripides. From: Greek plays

led him to issue the death sentence against both Antigone and Ismene, even though the latter took no part in the “conspiracy.” That the act of disobedience was carried out by a woman only exasperated Creon further.

Creon sentenced Antigone to death by starvation in a cave outside Thebes, but she opted for suicide over execution. Creon faces an even more fateful end, however, as both his son and his wife kill themselves.

Both Antigone’s figure as a tragic heroine as well as her losing battle have been championed, criticized, re-interpreted and re-imagined by contemporary philosophers, psychoanalysts, feminists, political activists, literary critics, poets, playwrights and novelists as varied as Hegel,⁽¹⁶⁾ Kierkegaard,⁽¹⁷⁾ Jacques Lacan,⁽¹⁸⁾ Seamus Heaney,⁽¹⁹⁾ Anne Carson,⁽²⁰⁾ Slavoj Zizek,⁽²¹⁾ and Sara Uribe,⁽²²⁾ to name but few.

Some readings, such as Judith Butler’s attempt at Lacanian psychoanalysis, stretches the textual

boundaries of the play and treats Antigone’s insistence on honoring Polynices as the expression of erotic attachment and incestual love, challenging and

16. Donoghue, M. (1989). The Woman in White: On the Reception of Hegel’s Antigone. *The Owl of Minerva*, 21(1), 65-89.

17. Jerr, N. (2014). Modern and Tragic?: Kierkegaard’s Antigone and the Aesthetics of Isolation. *Philosophy and Literature*, 38(1), 188-203.

18. Miller, P. A. (2007). Lacan’s Antigone: The Sublime Object and the Ethics of Interpretation. *Phoenix*, 1-14.

19. Heaney, S. (2011). *The Burial at Thebes*. Faber & Faber.

20. Carson, A. (2015). *Antigonick*. New Directions Publishing.

21. Žižek, S. (2016). *Antigone*. Bloomsbury Publishing.

22. Uribe, S. (2012). *Antígona González*. México DF: Surplus.

transgressing rather than upholding the traditional family order.⁽²³⁾ Slavoj Zizek also acknowledges Antigone as a political rebel, but he views her far less sympathetically. He considers her dedication to Polynices as an ethical fidelity so inflexible and uncompromising that it resembles a proto-totalitarian excess, a suicidal drive that ends up ruining her sister, her city and her community.⁽²⁴⁾

Antigone’s defiance of King Creon’s orders was also presented by feminists of different strands - radical, anti-authoritarian or liberal - as a model for their own conflicting versions of feminism.⁽²⁵⁾

In a recent retelling of the tragedy, novelist Kamila Shamsie transports Antigone’s futile quest into the turf of twenty-first-century Britain and the war on terror.⁽²⁶⁾ In her novel *Home Fire*, a young British-Pakistani woman travels to Pakistan in a desperate journey to bring back the body of her brother to be buried in England next to their mother. In so doing, she challenges the Home Secretary, who stripped her brother of his British citizenship and prohibited his burial in London for his involvement with the Islamic State.

23. Butler, J. (2002). *Antigone’s claim: Kinship between life and death*. Columbia University Press.

24. Žižek, S. (2006). *Interrogating the real*. Bloomsbury Publishing. P 344.

25. Holland, C. A. (1998). After Antigone: Women, the past, and the future of feminist political thought. *American Journal of Political Science*, 42, 1108-1132.

26. Cora Currier (2017). *Novelist kamila shamsie talks about radicalization, citizenship, and the link between violence and masculinity*. Retrieved from <https://theintercept.com/2017/11/26/novelist-kamila-shamsie-talks-about-radicalization-citizenship-and-the-link-between-violence-and-masculinity/>

Doubtless, it is extremely problematic to treat ancient epics and tragedies passed on to us from antiquity as a terrain upon which the moral and political dilemmas of late-capitalism are negotiated and renegotiated. We did not revisit the struggles of Antigone and Priam to hold them as mirrors for the present condition, but to stress the contemporary resonance of the questions they address regarding the universal themes of post-mortem treatment of enemy dead and the dignity in death.

necropolitics and necroviolence are, in the words of anthropologist Jason de León, “a cultural practice whose genealogical tree has deep roots and many branches.”⁽²⁷⁾ Having traced these deep roots, the rest of the chapter will focus on one of the practice’s many branches, necropolitics as performed and produced by Israel against the posthumous lives of Palestinian martyrs and their corpses.

The Israeli Creons

Modern history is not short of Creons who become inordinately vocal during times of war or massive repression. Israel’s detention of the bodies of Palestinian martyrs represents one of the most salient re-incarnations.

Since 1967, Israel has applied an inconsistent policy of holding onto the corpses and remains of hundreds

of Palestinian and Arab combatants.⁽²⁸⁾ The dead were buried in what Israel refers to as “cemeteries for enemy combatants,” mass graves located in areas designated by Israel as closed military zones.⁽²⁹⁾ Palestinians refer to these gravesites as the “cemeteries of numbers” for their shared characteristic of numbered placards meant to mark each corpse. The Israeli authorities have largely kept these cemeteries as an “open secret,” and only officially admitted of their existence in the mid-1990s after a court-ordered investigation to locate the mortal remains of two “missing” Palestinian martyrs.

The subsequent commission of inquiry appointed by the Chief-of-Staff confirmed that by July 2000, three cemeteries of numbers were used by the Israeli army, where a total of 349 Arab and Palestinian martyrs had been secretly buried.⁽³⁰⁾

Beyond the scattered information provided by the Israeli army, the overall numbers of those released from the cemeteries of numbers over the years, the number of those who are still buried, and the circumstances surrounding their killing are hazy. This stems precisely from the inconsistency of the policy of withholding corpses, the clandestine nature

28. Gilbert, S. (2013, September 3). Occupied bodies: Israel is withholding the bodies of war victims. Retrieved from <http://palestinemonitor.org/details.php?id=be908za4973yvsvu6l1oqp>

29. Qawasimi, H. (2014, November 28). Cemeteries of numbers: Israel takes revenge on Palestinian corpses. Retrieved from <https://www.alaraby.co.uk/english/politics/2014/11/28/cemeteries-of-numbers-israel-takes-revenge-on-palestinian-corpses>

30. The Hebrew version of the Commission’s report can be found here: <http://www.hamoked.org.il/items/7217.pdf>

27. De León, J. (2015). The land of open graves: Living and dying on the migrant trail (Vol. 36). Univ of California Press. P 71

of the burial, and Israel's reluctance to disclose exact numbers. Much of the information known about who is buried in the cemeteries of numbers could be gleaned from oral histories collected by families, human rights workers and various political factions.

From what is known, many of the remains in the cemeteries of numbers go back to the 1960s and 1970s, a period of armed resistance against Israel, in which many exiled Palestinians and Arabs engaged in combat on the borders in an attempt to regain entry to Palestine. During this period there were no military protocols that facilitated the confiscation and burial of these bodies, but bodies of Palestinian and Arab fighters were excluded from the orders of handling the bodies of dead soldiers because they were considered "infiltrators" by Israel. Many of the corpses of the fallen were simply dumped, at times collectively, without the proper registration of the names of the dead and their place of burial. The systematically demeaning and negligent manner in which the bodies were buried or dumped, coupled with the lack of proper registration and documentation by Israel's military rabbinate, makes the process of identifying the victims for potential exhumation an uphill battle for their families. The locations of at least five such cemeteries were revealed over the years and they constitute a paradigmatic model of the dehumanization of Palestinians, who are transformed into nameless, disposable bodies.

According to figures compiled by the National

Campaign, Israel has buried at least 400 Palestinian and Arab combatants in the Cemeteries of numbers. The process of documentation adopted by the Campaign, currently the sole Palestinian body to undertake this task, relies on testimonies of victims' relatives, statements by factions to which the victims were affiliated, and statements by the Israeli occupation army if they are provided.

Adding to the difficulty of verifying the names of those buried in the cemeteries of numbers during the earlier phase is the lack of a clear, consistent and official policy. In the 1960s and 1970s, the Israeli decision whether to withhold a corpse of a Palestinian or Arab combatant killed in clashes or following an attack was completely draconian and did not rely on consistent or clear criteria.

Furthermore, and by its own recognition before Israeli courts, the Israeli army has repeatedly failed to meet basic international, and even Israeli standards of handling the mortal remains of war victims. These factors further complicate matters, putting tremendous burden on Palestinian families to scrape for information.

After years of work involving interviews with family members, accounts by survivors who were with the deceased during confrontations, collecting information from Israeli military orders and records, the national campaign managed to document 400 names.

From its inconsistent application and complete vagueness, the practice of withholding corpses of deceased Palestinians underwent a dramatic shift in 1994, for unclear reasons. On 11 November 1994, Hisham Ismail Hamad, a teenage Palestinian fighter affiliated with the Palestinian Islamic Jihad movement, blew himself up at an Israeli checkpoint in the illegal settlement of Nitzarim in the occupied Gaza Strip.⁽³¹⁾ The suicide mission was said to be carried out in retaliation for Israel's assassination of a high-ranking Islamic Jihad member and killed three Israeli soldiers, in addition to Hamad.⁽³²⁾

Since then, withholding the corpses of Palestinians who carry out suicide missions became the norm.

In 2004, Israeli Attorney-General Menachem Mazuz issued a directive in which he stated that the corpses of deceased Palestinian attackers shall not be withheld based on a need to use them as bargaining chips in future negotiations. He did, however, contend that there may be “exceptional justifications” for withholding corpses including “a concrete prisoner exchange deal with enemy groups.” During the decade following that directive, Israel's policy of mass withholding of bodies temporarily halted. In fact, the Israeli government embraced an approach to return all the corpses and remains withheld in the “enemy combatants” cemetery until another policy shift in 2015.

31. Chronological review of events relating to the question of Palestine. (1994). Retrieved from <https://unispal.un.org/DPA/DPR/unispal.nsf/0/D63E22C48DD2DB5F85256123004E466B>

32. Ibid.

The policy to withhold bodies en masse resurfaced in October 2015. Following a wave of individual attacks by Palestinians that began in October, the Israeli cabinet announced a package of punitive measures to quell and repress the uprising. Those included punitive home demolitions, closures, and the withholding of corpses of alleged Palestinian attackers. The practice was further institutionalized towards the end of 2016 as the Israeli government scrambled to formulate a specific policy before any court decision on the issue. On 1 January 2017, the Israeli ministerial committee on national security affairs (the cabinet) formally adopted the “unified policy” on handling the corpses of Palestinian attackers, which will be described in detail later in this chapter.⁽³³⁾

From October 2015 to September 2019, Israel withheld the bodies of more than 250 Palestinians, killed or, according to substantial evidence, believed to have been extrajudicially executed after allegedly carrying out attacks against soldiers or settlers. The National Campaign classifies a body as withheld if Israel does not return it to the family after more than three days of the killing or if the Israeli military issues an order declaring that they will not release the body.

One of the main contrasts between previous phases and this current and ongoing phase of withholding is that the bodies are not taken to the cemeteries of numbers but rather are withheld in police morgues

33. B/171 (2017, January 1). Decision approved by the Israeli cabinet.

and families are denied from even identifying the body. Their detention in the police morgues is carried out in humiliating and inhumane conditions, in which the bodies are treated negligently and frozen into blackened blocks of ice, deforming them to the extent that the families can hardly recognize them when they finally received them for burial after months of negotiation. This was the case of Hassan Manasra's body, in which the family refused to accept his body for burial, as it was stiff in a contorted position. While it is common practice for dead bodies to be temporarily held in sub-zero temperatures in the post-mortem state for preservation purposes, Palestinians argue that the manner in which the Palestinian bodies were treated was deliberately negligent. Yet, when given the excruciating choice of having their children held in these morgues under these conditions or being transferred to the cemeteries of numbers, parents demand the former. We can learn this from the requests for injunctions families attach to their petitions ordering the state to refrain from moving the bodies out of the morgues to the cemeteries of numbers as long as they are withheld.

"It is ironic having to choose between two types of posthumous detentions for your child but when our children's bodies are held in the morgues, we harbor some hope that this torment would be over soon," says Azhar Abu Surour, mother of Abdelhamid whose body has been withheld by Israel since April 2016. "But when it was casually revealed in a court

hearing that my son's body was transferred to the cemeteries of numbers, I realized that they [Israeli authorities] were intending to hold onto him for a prolonged period, perhaps for years. It was as though I were being told to stop waiting for him because he's perhaps never coming back."

Of the bodies withheld by Israel in morgues since 2015, the vast majority were released under severe restrictions on their funerals. As a condition for receiving the bodies of their loved ones, families were required to provide monetary guarantees that the funeral processions will be attended by an extremely limited number of relatives, that the funeral will take place at night and that no political slogans will be expressed. Some Jerusalemite families were also ordered to conduct the burial in a place other than the family's cemetery. These restrictions are supposedly designed to prevent disturbances during the funeral, to keep the funerals as low profile as possible, and to "protect public security and safety." For Jerusalemites, however, such restrictions constitute yet another layer in a system that thrives on spatial domination and social control.

By the end of 2019, Israel continues to withhold the bodies of 51 Palestinians, in addition to those buried in the cemeteries of numbers for decades. 17 of the 51 whose corpses are held captive three were killed in the occupied Gaza Strip and four died in Israeli prisons while the rest were killed after allegedly to carry in alleged attacks. Several human rights

organizations have raised doubts many of these killings appeared to be extrajudicial executions because the alleged assailants posed no imminent threat at the time of their deliberate shooting.⁽³⁴⁾

In this context, Israel's withholding of the bodies of those killed and its failure to conduct independently-overseen autopsies disrupts investigations into these killings.

Security Lexicon

The Israeli government and military promote three main lines of argumentation as an official justification for the practice of withholding corpses. Temporary withholding is grounded upon security rationales while prolonged withholding is based on bargaining and exchange.

Firstly, the Israeli military and police have repeatedly argued that the funerals of Palestinian martyrs result in frequent disturbances to public safety and security and lead to incitement. This was the main reasoning behind withholding the vast majority of the corpses during the period between 2015 and 2017. All corpses were not released until the Israeli police managed to secure funeral arrangements, especially in Jerusalem.

Secondly, the Israeli army and police argue that withholding corpses is a measure of deterrence.

34. Schaeffer Omer-Man, E. (2017). Extrajudicial Killing with Near Impunity: Excessive Force by Israeli Law Enforcement Against Palestinians. BU Int'l LJ, 35, 115.

This explains why, when the cabinet adopted various measures aimed at quelling the 2015 uprising, it included withholding corpses among them, in addition to punitive home demolitions. Even among the Israeli security establishment, however, the question of whether withholding bodies does indeed lead to deterrence remains contentious. In fact, Israeli intelligence services showed that there is little evidence that punitive demolitions or withholding corpses serve as effective measures to deter future or potential attackers. The sparse evidence concerning the efficiency of withholding corpses as a potential deterrent was among the factors that impelled the attorney-general to recommend halting the practice in 2004.

Thirdly, Israel argues that withheld corpses can be used as bargaining chips during potential negotiations over a prisoner exchange deal with Hamas or any other Palestinian or Arab group that allegedly holds captive Israeli soldiers or has information about them. Israel has explicitly used this argument both as a public rationale and as a specific clause in its official policy adopted at the start of 2017. But even before such a policy was concretely drafted, this rationale had been used in numerous court cases.

Israel has used the impetus of the need for security, public safety and potential bargaining to legitimize withholding the bodies and to silence the Palestinian demand to honor deceased family members with dignified burial and large funerals as both a moral duty and an inalienable right.

Necropolitics and Power

The abovementioned are the officially stated rationales for a policy that so blatantly goes against basic standards of human dignity and breaks international law. Beyond these rationales, there are more complex reasons for the withholding of corpses that cannot be divorced from Israel's attempt to impose full control on the Palestinian population that extends to the dead. This control also rests upon disciplining Palestinian expressions of grief and mourning.

Achille Mbembe's notion of necropolitics lends itself as an analytical framework to partially explain this policy as an articulation of sovereignty. According to Mbembe, "to exercise sovereignty is to exercise control over mortality and to define life as the deployment and manifestation of power."⁽³⁵⁾

Not only does Israel exercise its sovereignty by granting itself the right to kill and extrajudicially execute Palestinians in the guise of its war on terror, it also treats the dead body as a vehicle of exercising – and conveying - sovereignty over a population in rebellion. For this reason we see a marked increase in repressive tactics, such as withholding bodies, during escalating tensions and precisely in moments when Palestinians challenge and rebel against Israel's attempted sovereignty over their lives and the physical spaces they inhabit. Restrictions on funerals or extracting financial guarantees from the

35. Mbembe, A. (2003). Necropolitics. *Public Culture*, 15(1), 13-40.

families to ensure that such conditions are met can all be seen as a show of naked power and control.

These may include bullets and bulldozers, but they also include the adoption of policies designated to punish an entire population by denying it one of the most sacred rights, the rights to mourn the dead in peace and dignity.

Occupied Jerusalem is an epicenter of Israel's regime of necropolitics, the one city where control over the dead and their sites of burial and manifestations of grief is at its strictest and crudest. Attempts to control Palestinian mortality take the form of physical elimination through the deliberate destruction of cemeteries and the construction of Israeli sites on their ruins. This, for instance, has been the case in the Mamilla cemetery, an ancient Islamic cemetery in the western part of Jerusalem, whose graves have been bulldozed to make way for a parking lot, and more recently and not without a conspicuous twist of irony, a museum of "tolerance."⁽³⁶⁾

Besides physical erasure, Israel has also sought to transform Palestinian cemeteries into hubs of danger. A colonial power, as criminologist Nadera Shalhoub-Kevorkian asserts, seeks to reshape the relation between the living and the dead by seizing the physical spaces of death and turning burial grounds into what she refers to as "hot spots of criminality."⁽³⁷⁾A

36. Hijazi, A. (2016). Toward Spacio-Cide: Building the Museum of Tolerance over the Mamilla Cemetery in Jerusalem. *Jerusalem Quarterly*, (67), 97.

37. Shalhoub-Kevorkian, N. (2013). Criminality in spaces of death: The Palestinian case study. *British Journal of Criminology*, 54(1), 38-52.

third tool within the Israeli necropolitical arsenal is the prolonged withholding of bodies and the imposition of restrictions on their funerals of the unruly dead.

Dictating the relationship between Palestinians and their dead requires Israel to set rules on the ground, as Mbembe puts it, for the Palestinian population only. When Israeli police prohibits the family of a Palestinian martyr from burying her in the family's cemetery and orders the place of burial to be changed, it conducts such rewriting on the ground. When the cemetery is sealed off during the funeral of Palestinian martyrs and only a small number of relatives are allowed to enter, Israel militarizes the space of Palestinian death and cuts off the dead from their community. Imposing severe restrictions on funeral rites, dictating the place of burial against the wishes of the families and preventing the community from joining the family as it bids the martyr a final farewell tears the community asunder, disrupting the social relationship between the living and the dead and stunting the traditional networks of grief families need cope with the loss. It is critical, in this context, to move beyond the individualistic or biologically tied scope of the right to mourn. Mourning the victims of colonial, political or gender-based violence is an act that involves the community as a whole due to the collective identification with the victim and the conviction that this type of violence is directed against the community through the targeting of an individual.

The case of Fadi Alloun, a nineteen-year-old Jerusalemite shot dead by Israeli police on 4 October

2015, illustrates these imposed rules seeking to disrupt the traditional circles of mourning. ⁽³⁸⁾Alloun, an extremely popular youngster who was killed in a suspected extrajudicial execution after Israeli soldiers accused him of an attempted stabbing near the Old City, was the first Jerusalemite to be killed in what would explode into the deadliest wave of repression to hit Jerusalem since the second Intifada.

The body of Alloun was withheld for over a week during which his father had to agree to a series of conditions in order to receive the body of his only child. The Israeli police ordered the funeral to be held at dawn to limit the number of attendees and minimize the chances of confrontation. Most strikingly, his father was prevented from burying him in the traditional burial ground of the family near the Old City, ordering his burial to take place in Issawiyeh instead. Alloun's extrajudicial execution on the allegation of committing a stabbing attack was carried out at the start of what came to be known as the "intifada of knives" and sparked widespread outrage in Jerusalem. In a sense, the restrictions on his burial set the reinstatement of the Israeli policy of withholding corpses in motion. It also signaled the centrality of controlling spaces and rituals of death in Israel's crackdown against Palestinians. Reclaiming sovereignty over a population threatening to rise up entails repressing and reshaping the relation between the community and the political dead.

38. Hassan, B. (2015, October 8). Israel tore Fadi Alloun's family apart; then it killed him. *The Electronic Intifada*. Retrieved from <https://electronicintifada.net/content/israel-tore-fadi-allouns-family-apart-then-it-killed-him/14900>

Shalhoub-Kevorkian notes that “the continuous structural violence predicated by the occupying colonial power not only controls and expropriates the living, but also the dead and sites of Palestinian burial.”⁽³⁹⁾ Stripping the dead of the right to dignified burial and depriving the living of the right to mourn them are part and parcel of Israel’s structural violence.

Besides seeking to exert and manifest sovereignty and control, Israel is also aware of the power that the dead body can possess, the power of the martyr’s body to mobilize and inspire and its capacity to unite people around one shared cause.

As Palestinians are increasingly denied any visibility or presence in their own public spaces, with Israel consistently monopolizing the public space, funerals become a rare occasion where Palestinians can take to the streets and practice mass politics. In Palestinian political culture, funerals of martyrs are not simply an intimate occasion to share individual pain or an event where few relatives and loved ones gather to pay their respects. During the first intifada, martyrs’ funerals assumed a particularly iconic role. Like a significant protest, they mark a watershed moment, an event where people learn and practice politics and solidarity by interacting with others, planting the seed of a potential social movement. Funerals offers mourners/protesters a horizontal space for inclusive and open dialogue and debate free from the confines of traditional political parties.

39. Kevorkian, N. S. (2014). *Living Death, Recovering Life: Psychological Resistance and the Power of the Dead in East Jerusalem*. War Trauma Foundation, 12(1), 16-29.

Palestinians are denied this political performativity due to Israel’s restrictions and repression of direct action. In political funerals, Palestinians can express both their individual and collective grief and rage while using them as carriers of hope, resistance and radical solidarity.

Discussing precariousness and grievability, Judith Butler notes that outrage intertwined with open grieving possesses “enormous political potential.”⁽⁴⁰⁾ By restricting the number of participants in funerals, by delaying these funerals through the lengthy withholding of corpses, and by fining families who fail to guarantee that only a certain number of people may participate in the funeral, Israel seeks to deny Palestinians the opportunity to express collective open grieving, thus suppressing the political potential it contains.

Mourning is erroneously associated with resignation and passivity, but the importance of open grieving as a resource of politics lies in its capacity to catapult subversion and to develop, in Butler’s words, “a point of identification with suffering itself.”⁽⁴¹⁾

Writing through the Body

Imposing strict constraints on martyrs’ funerals, denying them proper burial, and withholding or mishandling their corpses reflect Israel’s treatment of dissident bodies as an ideological battleground for

40. Butler, J. (2016). *Frames of war: When is life grievable?*. Verso Books.

41. Butler, J. (2003). *Violence, mourning, politics*. *Studies in gender and sexuality*, 4(1), 9-37.

the articulation of sovereignty and the enunciation of symbolic power. For the colonial power, these dissident bodies are disposable and “othered,” relegated a status that deems them unworthy of the dignified posthumous treatment automatically guaranteed to the dead of the hegemonies colonizers. From their birth, Palestinians are forced to normalize a reality where their very existence on their land is governed by a bureaucratic regime that condemns them to perpetual disposability. The revocability of the status of Palestinians when they are alive extends to their death.

Thus, punishing the dead through the deeming their bodies disposable, ungrievable and unworthy of a dignified treatment, is a form of dehumanization and othering that targets the erasure and expropriation of their memory and the disciplining of their community. Paradoxically, while such post-mortem punishment implies that Palestinian lives (and deaths) do not matter and do not deserve respect, it also acknowledges the potentially emancipatory power they contain.

Israel, as Shalhoub-Kevorkian reminds us, “is still reading and writing the power of the dead as a security threat.”⁽⁴²⁾ The securitization of Palestinian spaces of mourning and the posthumous reprisal to which dead bodies are subjected testify to this fear.

It was Creon’s political insecurity and fear of disobedience that led him to prohibit Polynices’ burial. One can also view Israel’s policy of denying

42. Shalhoub-Kevorkian, N. (2015). *Security theology, surveillance and the politics of fear*. Cambridge University Press.

some Palestinians the right to dignified burial as a manifestation of insecurity, fear of the dissident body of the dead, insistence on policing collective memory and the expressions of grief.

Israel’s multi-layered necropolitical regime marks the lives of Palestinians and the afterlives they seek to cling to and reconcile with. The uncertainty associated with the withholding of bodies, the constant oscillating between irrational hope and guilty despair, the indefinite waiting with no closure in sight as embodied by a documentless death or a graveless corpse floating in a bardo, trap the families in a permanent state of ambiguous loss, as psychoanalyst Pauline Boss defines it. “With death, there is official certification of loss, and mourning rituals allow one to say goodbye.” she writes. “With ambiguous loss, none of these markers exist. The persistent ambiguity blocks cognition, coping, meaning-making and freezes the grief process.”⁽⁴³⁾

In addition to the ambiguous loss inflicted upon the affected family, this necropolitical regime creates a hierarchy of grievable and ungrievable lives, confining Palestinians to the latter. Thus Israel expands the application of its apartheid policies to the symbolic and emotional spaces occupied by the dead.

43. Boss, P. (1999). *Ambiguous loss: Learning to live with unresolved grief* (p. 5). Cambridge, MA: Harvard University Press.



THE **WARMTH**
OF OUR SONS

Chapter II:
Punishing the Dead

How Israel Legalizes Withholding Palestinian Bodies

“In our imperfect world, grief is distributed as unequally as wealth. Certain losses and lives are mourned while others are cruelly disregarded; a minority pays attention to suffering while the majority turns away.”

Astra Taylor⁽⁴⁴⁾

Each time twin boys Muhammad and Issa hear the clatter of keys, they squeal with delight thinking that their father had finally come home. When their grandmother sleeps over at their place in their parents’ bedroom they mistake the noise she makes for their father’s. It is difficult enough to explain death to children but to lose their father suddenly without saying goodbye is beyond any explanation the children’s mother and uncles could offer.

A father of six, Yasser Shweiki was distributing court notices when Israeli occupation forces shot him dead in the southern West Bank city of Hebron on 12 March 2019.⁽⁴⁵⁾ The army claims he had approached soldiers at a checkpoint in the Old City with a knife but no evidence of a stabbing attempt was provided and no injuries were reported among soldiers. Palestinian ambulances were denied access to treat

44. Milstein, C. (Ed.). (2017). *Rebellious Mourning: The Collective Work of Grief*. Chico, CA: Ak Press

45. Ma’an News Agency. (2019, March 13). Rudeineh: Washington us unable to achieve anything by itself Palestinian shot dead by Israeli forces for alleged stab attempt MA Retrieved from <http://www.maannews.com/Content.aspx?id=782829>

his fatal wounds and Yasser was left to bleed on the ground. Yasser’s family learned of his death through photographs circulated on social media and the Israeli army later confirmed it, denying his wife the right to see his body and informing her that his body would be withheld.

A petition filed by the Jerusalem Legal Aid and Human Rights Center (JLAC) on behalf of Yasser’s father for the release of his body is still pending.⁽⁴⁶⁾

This chapter discusses the Israeli legislative and judicial framework to legitimize withholding the bodies and remains of Palestinian martyrs. First, we focus on the British Mandatory Regulation 133(3), the military orders on the handling of moral remains and the 2018 amendment to the counterterrorism law. The remainder of the chapter examines the position of the Israeli judiciary, including legal petitions by human rights organization against the retention of the Palestinian dead that have been filed since the 1990s. How has the Court ruled on the issue and how have its rulings and reasoning evolved?

Before analyzing the legislation and the rulings, it is important to distinguish between three different forms of withholding: the temporary delay on the release of martyrs’ bodies on the grounds of public order and security; the indefinite retention of bodies under the pretext of using them as using them as bargaining chips in potential prisoner swaps; and the issue

46. HCJ 2852/19 Muhammad Fawzi Shweiki v. Military Commander in the West Bank.

of of unidentified bodies buried in the cemeteries of numbers. To help elucidate this distinction, we conclude the chapter by presenting a timeline that sketches the evolution of the practice of withholding bodies from 1945, the year the British emergency regulations were passed, to 2019.

Perpetual Emergency

The most frequently cited and disputed provision Israel uses to provide a legal veneer for the practice of withholding bodies can be traced back the Defence (emergency) Regulations of 1945. Promulgated by the High Commissioner for Palestine under his authority under the Palestine (Defence) Order in Council, 1937, the regulations incorporated a series of measures ostensibly geared towards protecting law and order.

The Emergency Regulation 133(3) of 1945 states that the power to conduct burial was vested on the District Commander, rather than the military commander; and the power of the district commander applied exclusively to the bodies of prisoners executed in central prisons in Acre and Jerusalem. The District Commander was required to bury the executed prisoners in the cemetery of the community to which he belongs.

The Emergency Regulation 133(3) was expanded during its amendment in January 1948 to encompass the power of the Military Commander in addition to

the district commander, and in addition expanded the jurisdiction beyond the scope of prisoners of war to encompass “the body of any person” to be buried in “any place.” The 1948 Amended Regulation 133(3) of the Defence Regulation of 1945 states: “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.”⁽⁴⁷⁾ This emergency law still stands today. As will be described subsequently, the sweeping and general powers granted to the Military Commander in the amended regulation would be used by the Israeli court as a basis for stretching its scope of application even further.

Rather than seeking to “win hearts and minds,” the emergency regulations and the counter-insurgency doctrine upon which they are based were bent on achieving wholesale coercion and control. This objective would continue to guide the practice of the Israelimilitary.⁽⁴⁸⁾

47. Copies of the regulations can be found at: (Palestine) Defence (Emergency) Regulations. The Palestine Gazette, No. 1442. Published by the British government, Palestine (27 September 1945), Regulation 133(3). Retrieved from <http://nolegalfrontiers.org/military-orders/mil029ed2.html>

48. French, D. (2012). Nasty not nice: British counter-insurgency doctrine and practice, 1945–1967. *Small Wars & Insurgencies*, 23(4-5), 744-761.

Following the Nakba, the ethnic cleansing of Palestine that saw the expulsion of 750,000 Palestinians, the demolition of hundreds of Palestinian villages and the creation of the State of Israel on their ruins, most of the provisions included in these emergency regulations were incorporated into domestic Israeli law in accordance with Section 3 of the Laws and Administration Arrangement Ordinance.⁽⁴⁹⁾ The emergency regulations were initially used by Israel against Palestinian citizens of Israel, subjected to the Israeli military rule from 1948 to 1966.⁽⁵⁰⁾

Indeed, Palestinian citizens of Israel objected to the validity of these emergency regulations, which suspended many of their civil and political liberties, as early as 1948. Ahmad al-Kharbutli was the first Palestinian citizen of Israel to file a petition before the Israeli High Court, challenging the legality of an administrative detention order – detention without charges or trial – issued against him based on article 111(1) of the Emergency Regulations of 1945. The Israeli Court, sitting as the High Court of Justice, decided that the emergency regulations are indeed applicable pursuant to the Laws and Administration Ordinance and as such the administrative detention order against al-Kharbutli was deemed lawful.⁽⁵¹⁾

49. Mehozay, Y. (2012). The Fluid Jurisprudence of Israel's Emergency Powers: Legal Patchwork as a Governing Norm. *Law & Society Review*, 46(1), 137-166.

50. Degani, A. Y. (2015). The decline and fall of the Israeli Military Government, 1948–1966: a case of settler-colonial consolidation?. *Settler Colonial Studies*, 5(1), 84-99.

51. HCJ 7/48: Al-Kharbutli v Minister of Defense et al. For an English translation of the petition see: <http://nakbafiles.org/nakba-casebook/al-karbutli-v-minister-of-defense-hcj-748/>

Following Israel's occupation of the West Bank, including East Jerusalem, and the Gaza Strip in 1967, the Israeli military argued that the emergency regulations were part of the existing legislation in the area, issuing a military order that extended the validity of these regulations to Palestinians who resided therein. Emergency regulations that authorized the Israeli army to detain Palestinians without charges or trial and carry out punitive home demolitions have been used extensively by Israel, particularly during large-scale crackdowns against Palestinian resistance to Israeli occupation.⁽⁵²⁾ In addition, emergency regulation 133(3) that authorizes the army to withhold corpses of deceased Palestinians has also been used extensively, albeit within a broad scope of interpretation that far exceeded the intended objectives of the original emergency regulations.

Restricting funerals on security grounds To guarantee the protection of public safety, security and order, the State argues that it is authorized to delay the release of the body of the deceased until certain restrictions are imposed on the funerals.

On 4 August 1992, two days after his arrest, Mustafa Mahmoud Mustafa Barakat died during Israeli interrogation following torture and ill-treatment. After an autopsy had been conducted, Barakat's family sought to recover his body and hold his funeral in his hometown of Anabta after noon prayers. The Israeli Civil Administration demanded guarantees from

52. Halabi, U. R. (1991). Demolition and Sealing of Houses in the Israeli Occupied Territories: A Critical Legal Analysis. *Temp. Int'l & Comp. LJ*, 5, 251.

Barakat's family and Anabta's local council that the funeral would be held at night and that public order would be maintained.

In the Barakat case, which continued to be used as a precedent for the practice until 2017, the Court recognized the reasonableness and the proportionality of such security-based restrictions.⁽⁵³⁾

Writing the majority decision, Justice Aharon Barak concludes:

“The military commander is authorized to order the funerals of those who died in a security-related incident to be held at night with the participation to be limited to family members. This authority is based on the general powers of the Military Commander to maintain order and security in the area. It is further enshrined in Regulation 133(3) of the Defence (emergency) Regulations.”⁽⁵⁴⁾

The Court did acknowledge that such conditions or delays violate the dignity of the dead and their loved ones to an extent, but such considerations are outweighed by the public interest of security. It is also left to the discretion of the Commander to determine the necessary and reasonable steps to maintain this balance.

In this case and the numerous petitions that have

53. 3933/92, Barakat v. OC Central Command, Piskei Din 36(5) 1.
54. Ibid at 5-6.

followed it, no genuine discussion was undertaken by the Court regarding the scope of Regulation 133(3) and whether it provides a sufficient and direct legal basis for the practice of retaining bodies. Even in cases where the Court ordered the release of the body of the deceased, such orders were based on the grounds of reasonableness.

While the Israeli army is authorized to withhold corpses of Palestinian residents of the OPT, the Israeli police was authorized to impose conditions on the return of the bodies of deceased Palestinian citizens of Israel and residents of occupied East Jerusalem upon the fulfillment of certain funeral arrangements and restrictions. The Police relied on Section 3 and Section 4A of the Police Ordinance as the legal source for the exercise of this power.⁽⁵⁵⁾

Section 3 lists the functions with which the Police are tasked, including maintaining public order and protecting life and property but it does not in any way, shape or form allude to the issue of delaying funerals and withholding corpses. Section 4A, meanwhile, enumerates the legal powers granted to the police, including denying access to certain areas or places and using reasonable force against a person or property for the purpose of performing an essential act or preventing harm.⁽⁵⁶⁾ Much like Section 3, Section 4A does not specifically list the delaying of funerals or the restriction of handing over corpses among the powers granted to the police. Following a

55. Police Ordinance (New Version) (1971).
56. Ibid, Sect 4A(2).

precedent-setting ruling by the Israeli High Court that the ordinance cannot be used as a source authorizing the withholding of corpses.⁽⁵⁷⁾ The Court required the use of a direct and clear legislation should the State seek to carry out this practice.⁽⁵⁸⁾

The Counterterrorism Law

On 7 March 2018, the Knesset approved an amendment to the Counterterrorism Law of 2016, that grants the Israeli police sweeping powers in combatting what it describes and defines as “acts of terror,” and replaces some of the old emergency regulations with a primary legislation that perform the same tasks.⁽⁵⁹⁾ The amendment, proposed by Public Security Minister Gilad Erdan and passed in response to the Court decision in the Jabareen case, authorizes the District Commander of the Israeli Police to delay the release of deceased Palestinian attackers’ bodies and impose major restrictions on their funerals.

The amendment specifies that the police is authorized to impose such conditions for the purpose of “protecting public safety and security, including the prevention of disturbances, incitement to terror or the

identification with a terrorist organization or an act of terror.”⁽⁶⁰⁾ Restrictions that the police are authorized to impose may include: limiting the number of participants in the funeral, deciding the identity of the participants, as well as the date and time of the funeral, the route it may take, and the items that the participants are prohibited from carrying during the funeral. In “special” circumstances, the police is even authorized to require a financial deposit from the organizers of the funerals to guarantee the a priori fulfillment of the conditions stipulated by the police. Such financial deposits may be imposed if there is a reasonable concern that the funeral procession may harm public peace or security and/or if the funeral may lead to incitement to or identification with what the law describes as terrorist groups or acts of terror.

The degree of detail included in the amendment reflects the extent to which Israel looks to impose control and surveillance over the Palestinian right to mourn their loved ones in peace and dignity. The conditions stipulated by the legislation capture Israel’s attempt to police every inch of the Palestinian public space, including spaces of death and burial, and to militarize expressions of pain, memory and grief.

Whether alive or dead, Palestinians are seen by Israel as a security threat. Curtailing this threat requires extreme steps that include severe surveillance over

57. HCJ 5887/17: Jabareen v. The Israeli Police (2017). For an English translation of the ruling, see: https://www.adalah.org/uploads/uploads/English_SCT_decision_release_bodies_Umm_al-Fahem_July_2017_FINAL.pdf

58. Ibid, para 5-6

59. Combatting Terrorism Law, 5776-2016, SEFER HAHUKIM [BOOK OF LAWS, the official gazette] 5776 No. 2556, p. 898.

60. Id, Art 70A(b) (2018).

grief and limiting or preventing acts of public solidarity. Such procedures and conditions, enshrined both in primary legislations and general government policy, buttress the structural violence that constitute one of the main pillars of Israel's necropolitical regime and colonial control.

Veneer of legitimacy;

Until the cabinet's decision of 1 January 2017, discussed in the previous chapter, the majority of petitions filed before the High Court demanding the release of alleged Palestinian attackers focused on the legality of withholding corpses for the purpose of maintaining public safety and order.

To withhold corpses, the military relied neither on a cabinet decision nor on regulation 133(3). Rather, it argued that returning corpses could result in violating public order and safety and that mass funeral processions, which entail the glorification of or identification with what the army describes as "acts of terror," can lead to incitement. But although Regulation 133(3) did not constitute the main legal basis for the retention, the State was required to bring it up during court hearings owing to its constitutional and administrative obligations to specify a primary legislation as a source of authority.

Withholding bodies as bargaining chips

The first petition to tackle the legality of the practice of withholding deceased Palestinians' bodies as bargaining chips was filed in 1994 by Israeli human rights organization Hamoked on behalf of the family of Hassan Abbas.

On 9 October 1994, Abbas, a member of the Qassam Brigades, the armed wing of Hamas, detonated himself in Jerusalem, killing three Israelis.⁽⁶¹⁾ Representing the State in the proceedings, the State-Attorney office conditioned the release of Abbas' body on the discovery of the missing body of Ilan Sa'don, an Israeli soldier who was killed by Hamas on 3 May 1989.⁽⁶²⁾

The petitioners, represented by Hamoked, argued that conditioning the release of Abbas' body on the discovery of Saadon's was an unreasonable consideration.

In the decision written by Chief Justice Meir Shamgar, the Court asserted that divulging the whereabouts of the killed Israeli soldier before releasing the body of Abbas was rather reasonable since it is a relevant consideration, based on the objectives of the law, and was given its due weight vis-v-vis the conflicting humanitarian considerations.

61, Profile of Hassan Abbas can be found in the official site of Hamas: <https://bit.ly/2kdISMt>

62. HCl 6807/94, 'Abas v. State of Israel.

For years, the Attorney-General directive published in 2004 notwithstanding, Shamgar's decision dictated the outcome of the Court's rulings on the legality of withholding corpses as bargaining chips. Focusing on reasonableness or the proportionality of the practice implicitly acknowledged that it had met the principle of legality and had been based on a specific, direct and explicit legal instruction. A thorough discussion of whether such authorization existed continued to be elusive.

The Court also authorized the State's decision to continue withholding the corpses or remains of Palestinian attackers even when the State changes the declared purpose of the withholding. The Awadallah Brothers' case offer one of many examples.⁽⁶³⁾

On 10 September 1998, Israeli occupation forces assassinated brothers Imad and Adel Awadallah, two commanders in the Qassam Brigades, in a hilltop farm near Hebron.⁽⁶⁴⁾ Their bodies were initially buried in the Adam Bridge cemetery, a cemetery for "enemy combatants," in the Jordan Valley. Israel initially refused to return their bodies to their families for proper burial unless guarantees are provided by the Palestinian Authority to maintain public order.⁽⁶⁵⁾ Israeli

63. HCj 9025/01: Awadallah et al

64. Hockstader, L. (1998, September 12). ISRAELI TROOPS KILL 2 SUSPECTED OF TERRORISM. The Washington Post retrieved from <https://www.washingtonpost.com/archive/politics/1998/09/12/israeli-troops-kill-2-suspected-of-terrorism/7e30dab7-60ef-493b-a129-7dc0a439acf1/?noredirect=on>

65. Hamoked. Withholding bodies of dead Palestinians for negotiation purposes: the case of 'A 9025/01. Retrieved from <http://www.hamoked.org/Case.aspx?cID=Cases0095>

authorities eventually agreed to release the bodies in 2005 but soon retracted when Israeli soldier Gilad Shalit was captured by Hamas in 2006. Hamoked filed an objection against Israel's ongoing refusal to deliver the bodies of the Awadallahs along with two others but the Court delayed the decision, arguing that it was not the right time to discuss their release due to a potential prisoner swap deal.

The Awadallah brothers' bodies were eventually released nearly four years after the prisoner exchange deal between Israel and Hamas.

Bargaining Chips

The question of using the bodies of deceased Palestinian attackers as bargaining chips in potential swap deal re-emerged following the decision of the Israeli cabinet to allow the continued withholding of Palestinian attackers' bodies until the release of the bodies of two Israeli soldiers captured by Hamas.

It was only in December 2017 that the Court finally ruled on the legitimacy – or lack thereof – of withholding bodies in accordance with Regulation 133(3).

On 14 December 2017, the Israeli High Court accepted a petition filed by JLAC and the Commission of Detainees and Ex-Detainees' Affairs on behalf of six Palestinian families whose loved ones' bodies are being withheld by Israeli authorities.

The Court ruled that the Israeli Cabinet's policy to withhold the bodies of deceased Palestinians as bargaining chips in negotiations was illegal. In a two-to-one vote, the three-judge panel decided for the first time that Regulation 133(3) of the Defense (Emergency) Regulations of 1945, used by Israel as the legal basis for this policy, does not explicitly authorize the Military Commander to withhold bodies of deceased Palestinians. Instead of ordering the immediate release of the bodies withheld by Israel, though, the Court adopted a compromising position that grants the State six months to come up with primary legislation that directly and explicitly permits the practice of withholding bodies.⁽⁶⁶⁾

The petitioners argued that the practice of withholding bodies has no clear, explicit and direct basis in domestic Israel law. Additionally, the practice infringes upon the dignity of the dead and that of their families, a constitutional right enshrined in the Basic Law: Human Dignity and Liberty, and constitutes a grave violation of international humanitarian law and international human rights law. The practice also denies the families the right to bury their loved ones in accordance with their religious and cultural norms, deprives them of the right to mourn and have a closure to their pain, and inflicts massive collective punishment upon the families.

The majority opinion, written by Justice Yoram Danziger, held that the practice of withholding the bodies of deceased Palestinian amounts to a breach

66. H.CJ 4466/16

of the dignity of the dead and their families and violates international law.⁽⁶⁷⁾

For the first time, the Israeli High Court ruled that Regulation 133(3) of the Defense (Emergency) Regulations does not authorize the state of Israel to withhold the bodies of deceased Palestinians so they can later be used in possible negotiations. The practice of withholding the bodies of war victims is so rare that, according to the ruling, Russia is the only other country besides Israel that implements it. The provision in the Russian Federal Burial Act that permits this practice was deemed illegal by the European Court for Human Rights.⁽⁶⁸⁾

Yet, despite the liberal arguments used in the majority opinion and instead of ordering the immediate release of withheld bodies, the Court attempted to strike a supposed "balance" and allowed the government a leeway by giving it a six-month period to enact a specific and primary legislation explicitly designed to deal with the issue of withholding bodies.

The minority opinion, written by Justice Neal Hendel, expanded the scope of application of Regulation 133(3), interpreting it in a way that authorizes the Military Commander to withhold the bodies of deceased Palestinians. The opinion failed to recognize the severity of the violations inflicted by this practice and even claimed that it met the principle of proportionality and that the purpose of

67. Ibid at para 28 of Danziger's opinion.

68. Ibid at para 33.

withholding the bodies - using them as bargaining chips in negotiations - was a significant and rightful one.

Though the Court did grant the State a six-month window to enact a specific law to serve the purpose of withholding as a means of bargaining, the State objected to the decision by filing a request to hold a Further Hearing before an expanded bench. Article 30 of the Court System law allows for holding further hearings into High Court rulings before a bench of five justices or more if the precedent ruled by the High Court contradicts a previous precedent by the same Court or if the precedent is deemed so important, severe or innovative that it warrants a further hearing.

Having accepted the State's request, the High Court held a Further Hearing to determine the legality of withholding corpses as bargaining chips under Regulation 133(3) on 17 July 2018. Held before a panel of seven justices, the hearing centered on the interpretation of Regulation 133(3) and its scope. Representing the families whose bodies were withheld by Israel, JLAC, the Commission of Detainees and Ex-Detainees' Affairs and Adalah, the Legal Center for Arab Minority Rights, argued that both a literal and purposive interpretation of the Regulation leaves no room for treating it as a sufficient legal basis for the practice of withholding the bodies as bargaining chips. They added that the application of this practice violates the principle of legality that orders authorities to act on the basis of

a clear and direct law, particularly when the action violates fundamental rights.⁽⁶⁹⁾

While the petitioners highlighted the violations of IHL and IHRL posed by the practice, The core of their arguments focused on Israeli administrative and constitutional law in response to the tendency of the Israeli High Court to give precedence to domestic Israeli law over international law, particularly as far as striking down domestic legislation is concerned.

On 9 September 2019, the High Court issued its final ruling, deciding in a 4-3 majority to reverse the initial precedent and declare the retention of corpses as bargaining chips as lawful.

Written by Chief Justice Esther Hayut, the decision essentially drafts the regulation anew. Chief Justice Hayut agrees that the text of the regulation says nothing about retention for purposes of negotiations, but she calls for adopting a purposive interpretation in which the subjective and objective purposes of the regulation, its values and the policy it seeks to advance are examined.⁽⁷⁰⁾

The "subjective" purpose of the regulation, the Court argued, is to provide the Military Commander with a flexible and effective tool to administer the burial of "any person" on security grounds.⁽⁷¹⁾

69. FH-HCJ 10190/17 The Military Commander in the West Bank v. Alayan et al.

70. Ibid at para 17 of Hayot's Rling.

71. Ibid at para 19.

The Court traces the evolution of regulation 133(3) and assumes that the expanded scope of powers included in the amendment as well as its more general tone hints to the intention of the British legislator to give the Military Commander a wide discretion. If the powers of the Military Commander are significantly restricted and narrowly interpreted, this would deem the Regulation void of meaning.

The “objective” purposes of the Defence Regulations as a whole is to offer the State effective measures to “fight terror” and protect state security.⁽⁷²⁾ Precisely because recovering the bodies of Israeli soldiers and releasing Israeli captives are at the heart of protecting state security, measures that help achieve this end should not be discounted. The court provides various examples of prisoner swaps between Israel and Hamas or Hezbollah, which included the exchange of corpses, as evidence for the efficiency of using corpses as bargaining chips in potential negotiations. This, of course, is a context that the British High Commissioner did not consider when he enacted the Defence Regulations, but the Defence Regulations should be interpreted in accordance with the current context that Israel faces.

The Court is aware that any measures that results in violating fundamental rights, such as the rights of the dead and their families to human dignity and family life, requires explicit authorization. The requirement of explicitness, however, is not absolute. It depends on the importance of the rights that are violated, the

72. Ibid at para 23

severity of the violation and the competing interests that the violation serves. Hayut concludes that while temporary burial violates the right to dignity to an extent, it does not violate the constitutive core of the right.⁽⁷³⁾ Moreover, the violation is proportionate because what the Court perceived as limited, exaggerated, and temporary infringement of the rights to dignity and family life are outweighed by the public interest to reclaim the bodies of dead Israeli soldiers.⁽⁷⁴⁾

According to the Ruling and the response of the military, Palestinian families can, in theory, visit their loved ones in the cemetery for enemy combatants, but the specific petitioners in this case are not entitled to do so for security reasons. The State acknowledges that preventing families from visiting their loved ones held in the Cemeteries of Enemy Combatants is an instrument to exert pressure on Hamas to negotiate.⁽⁷⁵⁾ The Court deemed such considerations reasonable.

The Jabareen Case

On 14 July 2017, Three Palestinian citizens of Israel from of Umm al-Fahm were gunned down by Israeli forces after allegedly killing two Israeli police officers outside al-Aqsa Mosque. The bodies of the three alleged assailants, Muhammad Ahmad Jabareen, Muhammad Hamed Jabareen, and Muhammad Ahmad Mfaddi Jabareen, were subsequently held by

73. Ibid para 27.

74. Ibid at 29.

75. Ibid at para 11

the Israeli police who set various conditions for their release and burial.⁽⁷⁶⁾

The police based its decision to withhold the three suspects' bodies on sections 3 and 4A of the Police Ordinance. In response to the decision, Adalah filed a petition before the High Court on behalf of the families of the three suspects, demanding the immediate release of their bodies for proper burial and the performance of autopsies on their bodies to determine the causes of death. The petitioners argued that retaining the bodies and setting conditions on their release have no legal basis in Israeli law due to the lack of a specific law that explicitly and directly authorizes such action.⁽⁷⁷⁾

On 25 July, The Israeli High Court accepted the petitioners' demand to release the bodies, ordering the police to return the bodies of the suspects to their families within 30 hours.⁽⁷⁸⁾ The request for conducting an autopsy on their bodies, however, was rejected.⁽⁷⁹⁾

The main legal question raised by the Court was whether the police is authorized to delay the release of assailants' bodies on the grounds of maintaining public order and safety.⁽⁸⁰⁾ The Court ruled that

76. Adalah. (2017, July 20). Adalah demands Israel immediately return bodies of Al Aqsa shooting suspects. Retrieved from <https://www.adalah.org/en/content/view/9167>

77. Full text of the petition filed by Adalah: https://www.adalah.org/uploads/uploads/Bodies_petition_July_2017.pdf

78. HCJ 5887/17: Jabareen v. The Israel Police. Full text of the English translation of the rulings can be found here: https://www.adalah.org/uploads/uploads/English_SCT_decision_release_bodies_Umm_al-Fahem_July_2017_FINAL.pdf

79. Ibid at para 13.

80. Ibid at para 12.

Section 3 of the Police Ordinance is a general section that lists the tasks of the police and does not provide an independent source of authority for retaining the bodies.⁽⁸¹⁾ Likewise, Section 4A does not offer any specific authorization for withholding bodies and is rather concerned with laying out the general powers granted to the police.⁽⁸²⁾ Despite ordering the release of the bodies, the Court maintained that the police is entitled to set terms and conditions on the funerals themselves for the purpose of preventing disturbances to public order.⁽⁸³⁾ It is in direct response to this ruling that the Knesset adopted an amendment to the Counterterrorism Law in which a specific and explicit authorization was granted to the police to retain the bodies of alleged assailants for security considerations.

Though the Jabareen and first Alayan precedents were less than five months apart, one can identify the difference in the State's response to the respective rulings. The Knesset swiftly responded to the Jabareen precedent by filling the lacuna with the enactment of a primary legislation.

Even though the Court paved the Way for the State to take the same route in the initial Alayan precedent, it insisted on the validity of a Mandatory regulation dating back to 1945. Why, then, did the State enact a (new?) law to authorize the police to temporarily retain the bodies of alleged assailants for consideration of public order and safety but refused to enact a law

81. Ibid at para 6.

82. Ibid at para 7.

83. Ibid at para 15.

that authorizes it to use alleged assailants' bodies as bargaining chips? One could hypothetically speculate that had the Knesset passed such a law instead of requesting a further hearing, the Law would have been eventually approved by the Court if a petition against its constitutionality were to be submitted.

The increasingly conservative approach of the High Court, its reluctance to intervene in state security matters, and the rarity of striking down primary legislation in general means that such a law would have survived the constitutionality test.

A detailed examination of this question is beyond the scope of this research, but two possible explanations can be suggested. From an international relations perspective, enacting a law that permits the use of dead bodies as bargaining chips would damage the State's reputation internationally, sparking widespread condemnation and criticism. Any measure that allows the State to maintain the practice while also avoiding bad publicity and unwarranted attention is preferable in the State's eyes.

Secondly, it appears that the State was confident that an expanded bench would eventually reinstate the constitutionality of the practice. At stake, as the State promotes, is the potential release of soldiers' body captured since 2014. The reaction of bereaved Israeli families during the Further Hearing of July 2018 offers a glimpse into the outcry that the Court would have encountered if it had overturned the practice.

Public and government-backed accusations of siding with "terrorists" and treading over the rights of soldiers' family may not be a legal consideration to be taken into account when deciding the case, but their role in determining the Court's final decision cannot be ignored.

Questions over the impartiality of the Court and the extent to which politics played a role in the recent reversal of the Alayan precedent should not be dismissed. The fact that the ruling was issued only a week before the parliamentary elections in Israel was viewed suspiciously by Palestinian families and their lawyers. Circumstantial arguments alone are insufficient to prove politicization, but the "xreative" interpretation of regulation 133(3) and the attempt to minimize the severity of the rights to dignity and family life that the retention of corpses entails clearly reveal the normative preference upheld by the Court. For the court, the abstract possibility of negotiating to release the bodies of two Israeli soldiers in the future trumps the actual, concrete and ongoing violations inflicted upon 52 families whose loved ones' bodies are retained, as well as hundreds languishing in the cemeteries for enemy combatants.

Beyond the recent precedent, the Court's original insistence to leave such decisions to the discretion of the State in previous cases has helped entrench the practice. Furthermore, the first Alayan ruling, in which the Court allowed the State to enact a law to permit the practice, leads us to a troubling surmise. The main problem that using dead bodies

as bargaining chips represents did not lie in the inherent immorality of the practice but rather in the absence of specific and explicit legal provision that authorizes it. It was a technical glitch that can be fixed with some patchwork rather than a legally and morally prohibited action that must be struck down unconditionally. The Court acknowledged that the practice was morally problematic but such ethical and humanitarian dilemmas are reduced to secondary problems. In previous rulings, they were trumped by the “public” interests; the violations they amounted to were deemed reasonable. In the first Alayan case, the Court asserted that these moral and humanitarian considerations can be sidestepped with a legislative act by the parliament of an occupying power. In the Further Hearing, the patchwork applied came in the form of a judicial rewriting of a British emergency regulation enacted nearly 75 years ago.

Cemeteries of Numbers

“Funerals are for the living, that’s for sure. It’s important to organize a decent burial Otherwise you can never heal inside.”⁽⁸⁴⁾

Elie Shafak

On 12 August 2010, thousands of Palestinians marched in the funeral of Mashour al-Arouri, a Palestinian fighter affiliated with the Democratic

84. Shafak, E. (2019). 10 Minutes 38 Seconds in This Strange World. London, UK: Viking.

Front for the Liberation of Palestine.⁽⁸⁵⁾ Mashour and two of his comrades had been killed on 18 May 1976 in an armed confrontation with Israeli occupation forces while leading an attack to avenge Israel’s killing of teenage girl Lina al-Nabulsi.⁽⁸⁶⁾ His body was promptly taken and languished in the “cemetery of enemy combatants” near Adam’s Bridge in the Jordan Valley for decades.

Following the establishment of the National Campaign for the Recovery of Palestinian and Arab War Victims’ Bodies and the Disclosure of the Fate of the Missing in 2007/2008, JLAC filed a petition before Israel’s High Court on behalf of al-Arouri’s ageing parents to request that his remains be returned to their home village of (NAME) for burial in the family cemetery.⁽⁸⁷⁾

The petition sought to locate, identify and exhume al-Arouri’s body from the cemeteries of numbers so his parents could give him a dignified burial before they die. But since the Israeli High Court was continuously adjourning similar pending petitions and tying the release of bodies from the cemeteries of numbers with the release of Gilad Shalit, the petitioners framed their demand somewhat differently. Instead of exclusively demanding the recovery of the body, the petitioners applied for a temporary order to allow the parents to access the place of burial of their son pending a final decision.

85. Al Jazeera Arabic. (2010, October 12). Funeral of Martyr al-Arouri 34 years later. Retrieved from <https://bit.ly/2mdqGCI>

86. Arab 48. (2010, August 31). 34 Years Later, for Palestinian artyr is Released from the Cemeteries of Numbers. Retrieved from <https://bit.ly/2ky5ruz>

87. HCJ 8306/09 Talab Saleh vvv. The Military Commander in the West Bank.

To the petitioners' surprise, the Israeli State Attorney accepted their request to open the grave, identify Mashour's body to return him to his family.⁽⁸⁸⁾

The expenses of conducting the DNA tests at the Israeli National Center for Forensic Medicine of Abu Kabir for identification purposes were paid by al-Arouri's family.

The search for Mashour's remains in the cemetery of numbers, explained at length in the report of the Abu Kabir Forensic Medicine Institute, exposed the demeaning conditions of burial and poor standards of the cemetery. The numbers on the metal placards attached to the graves were barely distinguishable due to the passage of time. The graves were small, covered with grass, and hardly separated from one another. DNA samples could only be taken from the teeth instead of the skeleton. The first grave-opening took place in February 2010 but the remains exhumed did not match the DNA sample taken from Mashour's family. In the second exhumation, conducted in June, the DNA sample extracted from the remains of one of the exhumed bodies matched al-Arouri's. The Israeli army agreed to return Mashour's body to his family in August, marking the first successful exhumation of a Palestinian martyr's body from the cemeteries of numbers following a court decision and through DNA tests.

A previous attempt to use the Israeli courts to force

88. All available information concerning the case of Mashour al-Arouri are provided by the Natttional Campaign.

an exhumation from the cemeteries of numbers occurred in the 1990s following a petition by Hamoked and genetic tests were conducted in the United States, but identification failed due to the negligent and outright contemptuous handling of the bodies in the Israeli cemetery of numbers. The conditions in these cemeteries were further exposed in a military investigative committee established by the Israeli Chief of Staff in 1999.⁽⁸⁹⁾

The Israeli military's mishandling of the process of identification and marking the graves in the cemeteries for enemy combatants was again highlighted by the High Court in several collective petitions hard in 2015-17.⁽⁹⁰⁾The Court's recommendation of creating a governmental body tasked with handling the process of identification led to the opening of a number of graves and conducting genetic tests. Yet, the State tied the question of the release of the identified bodies to the outcome of the Further Hearing.

With the High Court's endorsement of the retention of corpses as bargaining chips, the fleeting hope that many families had of burying their loved ones properly looks to have evaporated. For ageing parents who only wanted to honor their loved ones before they die, the High Court's decision deals a devastating blow. Even if the remains are eventually released after possible negotiations, they may not be alive to mourn their loved ones.

89. Findings of the Committee in Hebrew can be found here: <http://www.hamoked.org.il/items/7217.pdf>

90. HCJ 4422/15 Yousef Abu Basma v. Military Commander.

Legal timeline:

- September 1945: Enactment of the Emergency (Defence) Regulations by the British Mandate government in Palestine. Regulation 133(3) authorizes 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.”
- January 1948: Amendment of Regulation 133(3) to authorize 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 to whom and at what hour the said body shall be buried.”
- May 1948: The incorporation of the Emergency (Defence) Regulations into domestic Israeli legislation after the establishment of the Israeli state in the wake of the Nakba.
- 1964: Burial of first body in the cemeteries of numbers, according to the national Camapign.
- 1967: The issuance of a military order freezing the legal situation in the Occupied Territory and applying the Defense (Emergency) Regulations in the OPT by arguing that they were part of the legal regime therein.
- September 1976: Issuance of military order 384-01-09 concerning the collection, transfer, documentation, registration and burial procedures applicable to enemy soldiers in regular armies. Palestinian resistance fighters killed in lashes with Israeli forces are excluded from the order because they are classified by Israel as terrorists and infiltrators.
- 1977-1997: issuance and amendment of several military orders on the “treatment of the bodies of terrorists and infiltrators.” The orders lay down procedural guidelines but allow the Israeli army to bury the martyrs in cemeteries of enemy combatants and create a separate category for Palestinians killed in clashes with Israel, known as infiltrators and terrorists.
- August 1992: Decision by Israel’s High Court of Justice permitting the Israeli army and civil administration to impose restrictions on the funeral of Mustafa Barakat, a Palestinian who died under torture in Israeli custody, on security and public order grounds. The ruling becomes the basis for several future rulings in which the Court approves the military’s decisions to impose restriction on martyrs’ funerals.
- August 1994: For the first time after a Court order, the exhumation of a body from the Daughters of Jacob cemetery, a cemetery for enemy combatants, in search of the missing body of Palestinian-Jordanian fighter Issa Zawahreh. DNA tests conducted in the United States, also a first, show that the exhumed remains do not belong to Zawahreh.
- October 1994: Petition against the Israeli army’s decision to withhold the body of Hamas member Hassan Abbas in order to exchange it for information on the body of missing Israeli soldier. The High Court decides that withholding bodies as bargaining chips is reasonable and proportionate based on Regulation 133(3).

- October 1999: The appointment of an investigative committee by the Chief of Staff to trace and locate the remains of Issa Zawahreh and Bassem Sobeh in particular, and to examine all matters related to the conditions in the cemeteries for enemy combatants. The eventual report issued by the commission confirms that Israel's treatment of the bodies in the cemeteries of enemy combatants is negligent, disrespectful, and complicates the possibility of retrieving those bodies in the future.
- 2001-2004: The frequency of withholding martyrs' bodies by Israel soars to unprecedented levels in the wake of the second intifada.
- 2004: The Israeli Chief Attorney recommends halting the practice of withholding the bodies of Palestinians, which reached its peak during the beginning of the second intifada, unless there is a concrete prisoner swap deal in which the bodies can be used in exchange for captured or missing Israeli soldiers.
- 27 August 2008: The Jerusalem Legal Aid and Human Rights Center launches The launch of the National Campaign for the Retrieval of Palestinian and Arab War Victims' Corpses and the Disclosure of the Fate of the Missing. The day is declared as the National Day for the Recovery of Martyrs' Bodies.
- 10 August 2010: The family of Mashour Arouri recovers his remains, buried in the cemeteries of numbers since 1976, marking the first legal victory for the campaign.



- July 2012: Israel hands over the bodies of 91 Palestinian martyrs to the Palestinian Authority as a “goodwill” gesture for the resumption of peace negotiations.
- September 2015: Israel pledges to return the remains of 119 Palestinian withheld in its cemeteries for enemy combatants.
- October 2015: In response to a wave of stabbing attacks by Palestinians in Jerusalem and the West Bank, Israel adopts a package of measures to punish, repress and “deter” Palestinians, which include the withholding of assailants’ bodies on public order and security.
- January 2017: the Israeli cabinet issues a decision requiring, in principle, the return of alleged Palestinian attackers’ bodies pending security assurances. The cabinet laid out two exceptions to this rule: the body of the alleged attacker is affiliated with Hamas and thus his body can be used in potential negotiation for prisoner exchange; the attack allegedly carried out is exceptionally severe.
- March 2017: Hearing several petitions filed by JLAC and Hamoked, the Court orders the establishment of a governmental body tasked with organizing and managing these efforts to locate and identify bodies held in cemeteries for enemy combatants.
- July 2017: Following a petition by Palestinian human rights organization Adalah, the Court decides that the police is not authorized to withhold the bodies of three Palestinian citizens of Israel accused of killing Israeli soldiers. The Court decided that the police ordinance used to justify the delay of returning the bodies pending security assurances regarding the funeral does not constitute a direct and explicit statutory basis.
- March 2018: In response to Court decision, the Knesset adopts an amendment to the counterterrorism law authorizing the police to impose conditions and restrictions on the funeral of “alleged terrorists.”
- December 2017: in another petition contesting the constitutionality of Israel’s practice of withholding alleged attackers’ bodies as bargaining chips based on the cabinet decision, the Court decides in a 2-1 majority that Regulation 133(3) does not constitute a sufficient statutory basis that directly and explicitly allows the army to withhold bodies as bargaining chips.
- February 2018: Chief Justice Esther Hayut approves the request of the State to hold a further hearing into the court’s decision, arguing that it constitutes an important and sensitive precedent.
- July 2018: the Court holds a further hearing before a seven-judge panel to decide whether regulation 133(3) explicitly and directly authorizes the army to withhold bodies as bargaining chips.
- September 2019: The Court decides in a 4-3 majority that Regulation 133(3) authorizes the army to withhold bodies as bargaining chips, greenlighting the continued implementation of the cabinet decision.



THE **WARMTH**
OF OUR SONS

Chapter III:

Do the Dead have Rights

Israel's Retention of Corpses under International Law

*“The world so unsure,
unknowable
who knows – our griefs
may hold our greatest hopes.”*

Anne Carson.⁽⁹¹⁾

On 11 September 1973, the military junta of Chile waged a successful coup d'état against the democratically-elected Popular Unity Government of Salvador Allende.⁽⁹²⁾ The army proceeded to round up opponents of the coup in the National Stadium, turning it into a concentration camp where detainees were tortured, murdered and forcibly disappeared.⁽⁹³⁾ Among the “subversive” detainees was folk singer and guitarist Víctor Jara, who was severely tortured and had his fingers chopped before being shot to death by officer Pedro Pablo Barrientos Nuñez.⁽⁹⁴⁾ After receiving his bullet-riddled body, Víctor's wife Joan hastily organized a clandestine funeral and burial for him. 36 years later, Víctor's body was exhumed on the orders of judge Juan Fuentes not only to conduct an autopsy and determine the

91. Carson, A. (2015). *Plainwater: Essays and poetry*. New York City, NY: Vintage Books.

92. Miliband, R. (2018, September 11). *The Coup in Chile*. Berso Books retrieved from <https://www.versobooks.com/blogs/4016-the-coup-in-chile>

93. Waldstein, D. (2015, June 17). *In Chile's National Stadium, Dark Past Shadows Copa América Matches*. The New York Times. Retrieved from <https://www.nytimes.com/2015/06/19/sports/soccer/in-chiles-national-stadium-dark-past-shadows-copa-america-matches.html>

94. Luscombe, R. (2016, June 27). *Former Chilean military official found liable for killing of Víctor Jara*. The Guardian <https://www.theguardian.com/world/2016/jun/27/victor-jara-pedro-pablo-barrientos-nunez-killing-chile>

causes of his death, but also to give his wife, his fans and his compatriots the opportunity to mourn him in a public funeral and to grant him a dignified burial.⁽⁹⁵⁾

The collective expression of grief, denied by the dictatorship and suspended for decades, represented a closure and offered hope for obtaining accountability.

We expounded on the moral significance of honoring the dead with dignified burial in Chapter I, highlighting the political power of grief and the attempts to quell it. This chapter examines the deprivation of the right to dignified burial from the perspective of international law. How do international humanitarian law and international human rights law treat a practice that denies family members the right to reclaim the mortal remains of their loved ones? How has the European Court of Human Rights (ECTHR) handled similar practices of retaining the bodies of suspected assailants? And what are the limitations of international law in drawing clear obligations on states to hand over bodies of enemy combatants or alleged assailants in armed conflict?

Our review shows that both IHL and IHRL recognize the importance of searching for and handing over the bodies of the war dead and impose strict standards on the handling of their mortal remains. Yet, international law provisions are limited and do

95. Déllano, M. (2009, November 28). *El cantautor Víctor Jara recibirá un funeral 36 años después de su muerte*. El País Retrieved from https://elpais.com/internacional/2009/11/28/actualidad/1259362801_850215.html

not entail an absolute obligation on returning the bodies of the war dead. A more forceful obligation is imposed against desecrating, despoiling or mutilating the bodies whereas the obligation to hand over the bodies is subject to reciprocal agreements between the warring parties. One alternative option may be to treat the retention of bodies as cases of enforced disappearance but applying this category demands further interrogation into the fulfillment of conditions laid down by the definition of the crime of enforced disappearance.

International Humanitarian Law

The starting point for this discussion is that under customary international law and the laws of war, the West Bank, including East Jerusalem, and the Gaza Strip are recognized as occupied territory.⁽⁹⁶⁾ Since occupation is a sub-category of international armed conflict, relevant provisions in the Geneva Conventions dealing with the search for, return and handling of mortal remains apply.⁽⁹⁷⁾

Five customary IHL rules are relevant for the treatment of the war dead and their mortal remains

96. Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004, para 78. Retrieved from <https://www.refworld.org/cases,ICJ,414ad9a719.html>

97. Common Article Two of the Geneva Convention states: "In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

and gravesites.⁽⁹⁸⁾ Rule 112 on the Search for and Collection of the Dead; Rule 113 on the Protection of the Dead against Despoliation and Mutilation; Rule 114 on the Return of the Remains and Personal Effects of the Dead; Rule 115 on the Disposal of the Dead; and Rule 116 on the Identification of the Dead.⁽⁹⁹⁾ According to the study by Jean-Marie Henckaerts and Louise Doswald-Beck on customary IHL, all of the rules, with the exception of Rule 114, have been established by state practice as customary norms applicable in international and non-international armed conflict.⁽¹⁰⁰⁾ Yet, there has been a growing trend towards recognizing the customary nature of Rule 114 on the Return of the Dead in non-international armed conflicts, too.⁽¹⁰¹⁾

First codified in the 1929 Geneva Convention,⁽¹⁰²⁾ the obligation to dispose of the war dead respectfully was further consolidated in the 1949 Geneva Conventions. Article 17 of the First Geneva Convention stresses the importance of conducting proper and dignified burial. It states that parties to the conflict "shall further ensure that the dead are honourably interred, if possible according to the rites of the religion to which they belonged, that their graves are respected, grouped if possible according to the nationality of the deceased, properly maintained and marked so that

98. Petrig, A. (2009). The war dead and their gravesites. *International Review of the Red Cross*, 91(874), 341-369.

99. Henckaerts, J. M. & Doswald-Beck, L (2005). *Customary international humanitarian law: Volume 1, Rules (Vol. 1)*. Cambridge University Press.

100. *Ibid* Pp 406-417

101. *Ibid* at 412.

102. 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Art. 4, para 5 & 1929 Geneva Convention Relative to the Treatment of Prisoners of War, Art. 76, para 3.

they may always be found.”⁽¹⁰³⁾ Israel’s negligent and contemptuous handling of the bodies interred in the cemeteries for enemy combatants, as demonstrated by the searches to exhume bodies during the 1990s and the 2000s, failed to meet the most basic standards.

Issa Zawahreh, for instance, was reportedly killed in clashes with Israeli soldiers in occupied South Lebanon in February 1990. His mother, represented by Israeli human rights organization HaMoked, filed a petition before the Israeli HCJ to demand Israel disclose her son’s whereabouts amid conflicting rumors about the incident and allegations that he was still alive. After initially withholding any information on his whereabouts and denying in a response to the petition by HaMoked that he had been held or buried by any state body, Israel changed its version. It claimed that Zawahreh had been among those killed in the February 1990 clashes and was subsequently buried in the cemetery for enemy combatants near the Daughters of Jacob Bridge.⁽¹⁰⁴⁾

The Search for Zawahreh’s body, which began in 1994 at the oversight of a rabbi from the Military Rabbinate, exposed the failure of Israel to secure decent and dignified burial procedures for those buried in the cemetery. The graves were dug at an extremely shallow depth; some of the bodies

103. International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, Art. 17. Retrieved from <https://www.refworld.org/docid/3ae6b3694.html>

104. HCJ 5267/92, Abirijeh v. Minister of the Interior and the IDF Commander in South Lebanon.

were buried in trenches and not separately; the identification did not meet basic standards and many bodies were not even marked; and cemeteries were poorly maintained, leaving some of the graves at the mercy of animals in the vicinity.⁽¹⁰⁵⁾

This grim picture revealed during the search for Zawahreh’s body was further confirmed by the findings of a report issued by an Israeli military investigative committee. Appointed on 17 October 1999 by the Chief-of-Staff of the Israeli occupation forces to trace and locate the remains of Issa Zawahreh and Bassem Sobeh in particular and examine the conditions of the cemeteries for enemy combatants in general, the commission of inquiry found serious defects in the handling of the bodies, the incompatibility of the burial, identification and documentation procedures with Israeli military procedures and the insufficient maintenance of the graves.⁽¹⁰⁶⁾

In a ruling issued by the Israeli HCJ in 2017, the Court again criticized Israel’s mishandling of the bodies of enemy combatants and infiltrators.⁽¹⁰⁷⁾

It should be noted that the pressure exerted on the Israeli army following the exposure of information regarding the conditions in the cemeteries for enemy

105. Lein, Y. (1999). Captive Corpses. B’Tselem – the Israeli Information Center for Human Rights & HaMoked - Center for the Defense of the Individual Retrieved from https://www.btselem.org/sites/default/files2/publication/199903_captive_corpses_eng.pdf

106. A Hebrew version of the report of the Committee into the Matter of the Treatment of Enemy Casualties can be found here: <http://www.hamoked.org.il/items/7217.pdf>

107. HCJ 9781/16 Muhammad Atiyeh Sukar vet al. V. The Military Commander in the West Bank

combatants has led to a marked improvement in the procedures of burial and identification. Yet, Israel's negligent and demeaning practices concerning the burial, identification and documentation of those it described as enemy combatants or infiltrators had lasted for decades, clearly violating Article 17 of the First Geneva Convention. Moreover, the practice of refusing to return the bodies to the next of kin continues to be implemented.

Rule 114 of Customary IHL states that “parties to the conflict must endeavor to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon request of their next of kin.”⁽¹⁰⁸⁾

Unlike the absolute prohibition against the mutilation or despoliation of the bodies of the dead, which may amount to a war crime under the Statute for the International Criminal Court for constituting outrages upon personal dignity,⁽¹⁰⁹⁾ the practice of retaining enemy combatants' bodies, remains or ashes is not expressly prohibited. Rather, state parties are obliged to make attempts at facilitating the return of their respective dead, potentially through reciprocal agreements and when circumstances permit.⁽¹¹⁰⁾ Besides Article 17 of the First Geneva Convention, the obligation to facilitate the repatriation of the bodies and remains.

of the dead is also spelled out in Article 120 of the

108. Supra note 9 at 411

109. Ibid.

110. Supra note 13, Art. 17, para 3;

Third Geneva Convention,⁽¹¹¹⁾ Article 130 of the Fourth Geneva Convention,⁽¹¹²⁾ and Article 34 of Additional Protocol I.⁽¹¹³⁾ The framing of the obligation of repatriating the war dead's remains as laid out in Article 34 of Additional Protocol I stresses the reciprocal and consensual nature of the of the provision over the mandatory effect.

The return of the war dead's remains and their personal belongings is not only relevant for parties to the conflict, but also to the families of the dead, whose potential request for recovering their loved ones' remains is explicitly respected in Rule 114. Acknowledging the obligation of facilitating the repatriation of the war dead vis-à-vis their next of kin is based on the right to family life as explained by Rule 105 of Customary IHL⁽¹¹⁴⁾ and as spelled out in Article 27 of the Fourth Geneva Convention.⁽¹¹⁵⁾ State practice has identified prisoner swap agreements as one of the possible frameworks for repatriating the war dead, implying that there is no customary prohibition against the practice of using withheld remains of the war dead in future negotiations. It

111. International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135,, Art. 120, Para 6. Retrieved from <https://www.refworld.org/docid/3ae6b36c8.html>

112. International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Art. 130, para 2.

113. International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Art. 34, para 2 and para 3. Retrieved from <https://www.refworld.org/docid/3ae6b36b4.html>

114. Supra note 9 at 379

115. Supra note 82, Art. 27, para 2.

is one of many cases where the moral prohibition against a practice is much stronger than the legal constraints.

In addition to outlining basic requirements for the disposal of the war dead and stressing the obligation of facilitating their repatriation, customary IHL has dealt in detail with the issue of searching for and collecting the war dead.⁽¹¹⁶⁾ The obligation was first codified in Article 3 of the 1929 Geneva Conventions⁽¹¹⁷⁾ and later stipulated in Article 15 of the First Geneva Convention,⁽¹¹⁸⁾ Article 18 of the Second,⁽¹¹⁹⁾ Article 16 of the Fourth⁽¹²⁰⁾ and Article 8 of Additional Protocol II, which applies to non-international armed conflicts.⁽¹²¹⁾ Article 15 of the First Geneva Convention notes, for instance, that, at all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for the dead and prevent their being despoiled.

The bulk of the responsibility for initiating the search for the bodies of the war dead was shouldered by Palestinian families and their legal representatives.

116. Supra note 9 at 406

117. Supra note 12, Art. 3.

118. Supra note 13, Art. 15, para 1.

119. International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85, Art. 18, para 1. Retrieved from <https://www.refworld.org/docid/3ae6b37927.html>

120. Supra note 22, Art. 16, para 2.

121. International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, Art. 8. Retrieved from <https://www.refworld.org/docid/3ae6b37f40.html>

Only after court deliberations and many years did Israel start to make efforts towards locating and identifying the bodies. By then, the process of tracing and locating the remains of many war victims had become virtually impossible both due to the passage of time but mainly to Israel's failure to meet the basic standards of documentation, registration and identification. The Convention does not set forth clear criteria on what constitutes proper and sufficient search. For its part, the Israeli HCJ ruled that if the authorities exhaust their attempts and make honest efforts to locate and identify a specific body to no avail, there is no point in resuming the search procedures.⁽¹²²⁾ Questions hang over the definition of "honest efforts" particularly in a context where the difficulty of locating the bodies and remains stems from a clearly and systematically negligent practice by the occupying power.

Following the 2017 ruling, in which Israel pledged to create a unified body tasked with administering all the issues related to the location and identification of Palestinian war victims' remains, only isolated cases of searches based on genetic identification were undertaken.

Even in the few cases where such searches and DNA tests were conducted and yielded positive results, Israel linked the return of the remains, if identified, to the January 2017 cabinet decision that allows it to retain the bodies of Palestinians affiliated

122. HCJ 8359/01: Abu Meizar v. The State of Israel.

with Hamas or suspected of carrying out particularly severe attacks.⁽¹²³⁾

The Third Geneva Convention includes relevant provisions on the disposal of war prisoners' bodies.

Article 120 of the Third Geneva Convention states: "The detaining authorities shall ensure that prisoners of war who have died in captivity are honourably buried, if possible according to the rites of the religion to which they belonged, and that their graves are respected, suitably maintained and marked so as to be found at any time."⁽¹²⁴⁾

Since 2018, Israeli occupation authorities have retained the bodies of six Palestinian prisoners who perished in Israeli jails, releasing only one of them, Omar Younes, while withholding four others. These are: Aziz Oweisat, who died in an Israeli prison hospital on 20 May 2018 as he was serving a 30-year prison sentence;⁽¹²⁵⁾ Fares Baroud, who died in custody on 6 February 2019 after suffering from medical neglect and spending 17 years in isolation;⁽¹²⁶⁾ Nassar Taqatqa, who died in solitary confinement on 16 July

2019 after alleged mistreatment;⁽¹²⁷⁾ and Bassam al-Sayeh, who died of cancer on 8 September 2019, having also suffered from medical neglect.⁽¹²⁸⁾

It was also the struggle to retrieve the remains of a Palestinian prisoner that spearheaded the establishment of the National Campaign for the Recovery of Palestinian and Arab War Victims' Corpses and the Disclosure of the Fate of the Missing.

Anis Dawleh, then 24, commanded an attack on the headquarters of the Israeli military commander in the northern West Bank city of Nablus on 4 November 1968. He was injured and subsequently arrested during clashes with Israeli occupation forces and sentenced to life in prison.⁽¹²⁹⁾ In August 1980, Anis participated in a mass hunger strike in Ashkelon (Asqalan) prison, after which his health deteriorated. He reportedly died in a prison hospital on 31 August 1980 but Israel refused to hand his body over to his family.⁽¹³⁰⁾ Anis mother, who visited him in jail shortly before his death, desperately wanted to hand him a

123. See, for instance, HCJ 4241/15 Nouri v. The Military Commander in the West Bank. Nouri's body was identified following a DNA test, but the State delayed returning the body until a final decision on the constitutionality of retaining bodies is taken.

124. *Supra* note 21.

125. Middle East Monitor. (2018, May 21). Palestinian prisoner dies in Israel jail. Retrieved from <https://www.middleeastmonitor.com/20180521-palestinian-prisoner-dies-in-israel-jail/>

126. Nassar, T. (2019, February 8). Palestinian dies in 28th year of Israeli imprisonment. The Electronic Intifada Retrieved from <https://electronicintifada.net/blogs/tamara-nassar/palestinian-dies-28th-year-israeli-imprisonment>

127. Al Jazeera English. (2019, July 16). Palestinian prisoner dies in solitary confinement in Israeli jail Retrieved from <https://www.aljazeera.com/news/2019/07/palestinian-prisoner-dies-solitary-confinement-israeli-jail-190716074433939.html>

128. Addameer- Prisoner Support and Human Rights Association. (2019, September 9). Bassam al-Sayeh is the Third Palestinian Prisoner who Dies in Israeli Prisons in 2019 Retrieved from <http://www.addameer.org/news/bassam-al-sayeh-third-palestinian-prisoner-who-dies-israeli-prisons-2019>

129. Herzallah, R. (2018, January 3). Where is Anis Dawleh? Quds Network Retrieved from <https://bit.ly/3iAkjAs>

130. Qaraq, I. (2013, March 9). Israel Fears Anis Dawleh's Aparition in a Funeral. Miftah Retrieved from <http://www.miftah.org/arabic/Display.cfm?DocId=14639&CategoryId=2>

dignified burial and read al-Fatihah by his grave, but she died before fulfilling her dream, leaving the task of locating and reclaiming him to his brother Hassan. In 2010, Hassan Dawleh, represented by JLAC, filed a petition before the Israeli HCJ demanding the disclosure of his brother's whereabouts and the recovery of his body.⁽¹³¹⁾

The public attorney informed the Court it found no trace for Anis Dawleh and that his body was likely lost. After being instructed to continue the search, the public attorney responded that the only surviving detail of Dawleh was the forensic report explaining the causes of his death in prison. The Court ordered the case dropped in 2013, satisfied that the State had exhausted its attempts and made an honest effort to locate Dawleh's body but failed.

- Dawleh was not killed in the battlefield; failing to register and document his place of burial could not be possibly attributed to the "heat of the moment"; and most importantly, his case was not an isolated one. That the body of a prisoner who dies in prison, a facility completely controlled by the Israeli Prison Service, gets "lost" is an indictment against Israel's decades-long policy of treating dead Palestinians and their loved ones with negligence and disrespect. During the Further Hearing in July 2018, Israel claimed that despite initial shortcomings with respect to documentation, the State now takes all possible measures to mark and identify the bodies.

- The Geneva conventions and Additional Protocol I set important norms on the disposal and the treatment of the war dead and on their potential repatriation, but the wording is not sufficiently strong as to entail an absolute obligation of unconditional return.

Collective punishment

In addition to the potential violation of customary IHL rules on the treatment of the war dead, the retention of the war dead's bodies and denying their next of kin the right access their places of burial may amount to collective punishment. By withholding the bodies, Israel does not solely punish the individual it accuses of affiliation to a faction or of carrying out an attack. It also inflicts severe psychological pain on the family. Collective punishment is prohibited under Article 50 of the Hague Regulations of 1907, Article 87 of the Third Geneva Convention, and Article 33 of the Fourth Geneva Convention.

Israel argues that its retention of Palestinian war victims' bodies is not intended at punishing the dead or their families but rather as a tool of insuring security or assisting in reaching a prisoner swap deal. But regardless of the official motive, the psychological punishment of the families and denying them access to the places of burial of their loved ones as an instrument to pressure Hamas, for instance, lead unavoidably to collective punishment.

131. HCJ 8792/10 Dawleh v. the Military Commander in the West Bank.

Retention of bodies as Enforced disappearance

On 12 December 2018, Israeli occupation forces shot at Saleh Omar al-Barghouti, who was driving a taxi.⁽¹³²⁾ Israeli soldiers alleged that al-Barghouti committed a drive-by shooting on 9 December near the settlement of Ofra. An investigation by Israeli rights organization B'Tselem refuted the official Israeli version of events, which depicted the shooting of al-Barghouti as an act of self-defense. The report published by the Organization showed that al-Barghouti did not, and could not try, to flee or run anyone over.⁽¹³³⁾ The investigation described his shooting as extrajudicial killing.

Following the shooting, al-Barghouti was withdrawn to unknown location.

In a joint urgent appeal sent by Palestinian human rights organization Al-Haq to the Rapporteur of the Working Group on Enforced or involuntary Disappearances, the detention of al-Barghouti was classified as “enforced or involuntary disappearance” as defined by the Intentional Convention against Enforced disappearance. According to the letter, the detention of al-Barghouti met all three cumulative

132. Kabovich, Y. & Khoury, J. & Efrati, I. & Berger, Y. (2018, December 13.) Israeli Forces Kill Palestinian Suspected of Involvement in West Bank Terror Attack. Haaretz. Retrieved from <https://www.haaretz.com/israel-news/israeli-forces-fire-at-palestinian-suspected-of-involvement-in-west-bank-attack-1.6742974>

133. B'Tselem. (2019, January 30). “Contrary to Shin Bet (ISA) and IDF statements: Saleh Barghouti was shot point-blank in apparent extrajudicial killing.” Retrieved from https://www.btselem.org/press_releases/20190130_killing_of_saleh_al_barghuti

components of the crime: Deprivation of liberty against the will of the person; involvement of government officials, at least by acquiescence;; refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person.

While the detention of al-Barghouti clearly meets the first two components, establishing the third is more problematic. Israel did confirm that Saleh had died of his wounds in Hadassah hospital, but it refused to allow his family to see and identify his body and his corpse remains withheld by Israel.

Classifying retention of bodies as enforced disappearance provides the family with additional legal tools to challenge the practice, but this can only happen in occasions where there is a forced deprivation of liberty and complete concealment of facts. The refusal to allow the family to access the victim’s body and place of burial may be interpreted as concealment of his whereabouts.

International Human Rights Law

It is well established that international humanitarian law and international human rights law are not mutually exclusive but rather overlap significantly and may complement one another, particularly in situations of occupation.⁽¹³⁴⁾ In this context, the

134. Droegge, C. (2007). The interplay between international humanitarian law and international human rights law in situations of armed conflict. *Israel Law Review*, 40(2), 310-355.

instruments provided by IHRL offer a more substantial recognition of and protection for the rights violated by the practice of retaining the war dead's bodies.

Relevant to the treatment of the dead in a dignified and respectful manner and the rights of their next of kin are the prohibition of cruel, inhuman and degrading treatment under Article 7 of the International Covenant for Civil and Political Rights (ICCPR);⁽¹³⁵⁾ the right to family life as defined by Article 23 of the ICCPR and as protected by Article 17; the right to property (as far as the belongings of the dead are concerned) under Article 17 of the Universal Declaration of Human Rights;⁽¹³⁶⁾ the freedom of religion, which includes the right of the families to dispose of their dead in accordance with their religious beliefs and customs, under Article 18 of the UDHR, and Article 18(1) of the ICCPR; and the right to equality under Article 2 of the ICCPR.

As we could observe in the case law of these European Court for Human Rights (ECtHR), the main legal grounds to strike down a stator ban on returning the bodies of alleged terrorists to their families for burial is the disproportionate infringement of such a ban upon the right to family life and respect for private life.⁽¹³⁷⁾In response to terrorist attacks on the Nord-Ost

135. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Art. 7. Retrieved from <https://www.refworld.org/docid/3ae6b3aa0.html>

136. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Art. 17. Retrieved from <https://www.refworld.org/docid/3ae6b3712c.html>

137. SABANCHIYEVA V. RUSSIA JUDGMENT ECHR

theater in Moscow in 2002, the Russian parliament adopted a statutory ban on handing over the bodies of terrorist to their families and on disclosing their place of burial.

According to section 14(1) of the Federal Interment and Burial Act (Law no. 8-FZ) “persons against whom a criminal investigation concerning their terrorist activities has been closed on account of their death following interception of the said terrorist act shall be interred 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 disclosed.”⁽¹³⁸⁾Based on this provision, Russian authorities cremated the bodies of 95 Chechnyan insurgents suspected of attacking law-enforcement agencies in the town of Nalchik on 13 October 2005.

Two relatives of the deceased contested the constitutionality of the legislation that allows authorities to retain their loved ones' bodies before the Russian Constitutional Court. On 28 June 2007, the Constitutional Court rejected their complaint, stating that the ban on handing over the bodies of presumed insurgents was necessary and justified.⁽¹³⁹⁾ The Court stressed the legitimacy of the aims off the impugned provision, adding that: “ the interest in fighting terrorism, in preventing terrorism in general and specific terms and in providing redress for the effects of terrorist acts, coupled with the risk of mass

138. Ibid at para 27.

139. Ibid at para 33.

disorder, clashes between different ethnic groups and aggression by the next of kin of those involved in terrorist activity against the population at large and law-enforcement officials, and lastly the threat to human life and limb, may, in a given historical context, justify the establishment of a particular legal regime, such as that provided for by section 14(1) of the Federal Act, governing the burial of persons who escape prosecution in connection with terrorist activity on account of their death following the interception of a terrorist act.”⁽¹⁴⁰⁾

The dissenting opinion of Judge A.L. Kolonov held that legislation was incompatible with the constitution, noting that the ban on handing over the bodies of the deceased and on the disclosure of their place of burial is “absolutely immoral and reflect the most uncivilised, barbaric and base views of previous generations.”⁽¹⁴¹⁾ He also wrote that “The right of every person to be buried in a dignified manner in accordance with the traditions and customs of his family hardly requires special justification or even to be secured in written form in law. This right is clearly self-evident and stems from human nature as, perhaps, no other natural right. Equally natural and uncontested is the right of every person to conduct the burial of a person who is related and dear to them, to have an opportunity to perform one’s moral duty and display one’s human qualities, to bid farewell, to grieve, mourn and commemorate the deceased, however he may be regarded by society and the state, to have the right to a grave, which in

140. Ibid.

141. Ibid at 37

all civilisations represents a sacred value and the symbol of memory.”⁽¹⁴²⁾

Having exhausted their domestic legal venues, some of the applicants contested the statutory ban on delivering the bodies of their loved ones for burial before the ECTHR. They argued that the ban violates Article 8(1) of the European Convention on Human Rights, which states that “Everyone has the right to respect for his private and family life.”⁽¹⁴³⁾ They further argued that the conditions in which their loved ones’ corpses had been stored during the identification process and the circumstances of their participation in the process constitute a breach of Article 3 of the ECHR, which prohibits torture or inhuman or degrading treatment.⁽¹⁴⁴⁾

While the ECTHR agreed that the condition of storing the deceased’s bodies were not ideal and acknowledged the suffering and psychological pain inflicted upon the relatives during the identification process, it found no evidence that the suffering and the emotional distress constituted torture or inhuman or degrading treatment under Article 3.⁽¹⁴⁵⁾

As for the alleged violation of the right to private and family life, the ECTHR reiterated that the scope of

142. Ibid.

143. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Art. 8(1). Retrieved from Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5,

144. Supra note 47 at para 101

145. Ibid at 113.

the right is broad and covers the rights of relatives to bury their loved ones and attend their funerals.⁽¹⁴⁶⁾

The Court found that the “ authorities’ refusal to return the bodies of the applicants’ relatives with reference to section 14(1) of the Interment and Burial Act and Article 3 of Decree no. 164 of 20 March 2003 constituted an exception from that general rule and clearly deprived the applicants of an opportunity to organise and take part in the burial of their relatives’ bodies and also to know the location of the gravesite and to visit it subsequently.”⁽¹⁴⁷⁾

The ECTHR concluded that while the measures preventing releasing the bodies of these deceased to their relatives fulfill the legitimate aim of protecting public security and preventing disorder,⁽¹⁴⁸⁾ 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, and that the respondent State has overstepped any acceptable margin of appreciation in this regard..⁽¹⁴⁹⁾

As such the excessive scope of the measure, which did not even allow relatives to mourn their loved ones or pay their respects, did not meet the proportionality requirement laid out in Article 8(2) of the ECHR.⁽¹⁵⁰⁾

146. Ibid at 117.

147. Ibid at 122.

148. Ibid at 129.

149. Ibid at 146.

150. Article 8(2) states that “ There shall be no interference by a public authority with the exercise of this right [the right to private and family life] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The Dead and their Dignity

One legal and philosophical question that begs to be asked is whether the right of the dead to dignity is intrinsic or instrumental. In other words, is the right to dignified burial significant because of what it means for the living family of the war victim or because the dignity of the dead is an intrinsic right in and of itself?

While this question is important on the philosophical and the practical level, especially during exhumations and forensic archeology, it is beyond the scope of this discussion. Even if we do not conclude that the dead have an intrinsic right to dignity, their next of kin definitely possess this right.

In sum, it is clear that international human rights law and international humanitarian law do provide us with a basket of recommendations and rights that can be used in the quest to demand an end to the practice of retaining the corpses of the war dead, but it has to be pointed out that this basket is insufficient. To tackle the practice of retaining corpses, it is important not to limit it to international law but to use it as a possible option.



THE **WARMTH**
OF OUR SONS

Chapter IV:
The Silence of Others

***“I want to scrape at the earth with my teeth,
want to split the earth apart bit by bit
with dry, hot bites.
I want to mine into the earth until I find you
and kiss your noble skull
and take your shroud from you and bring you
back.”***

Miguel Hernández

Elderly women and men searching for the remains of their loved ones, stolen children scrambling for information about their biological parents, and human rights lawyers transcending borders and nationality in the pursuit of justice all were the protagonists of the Spanish documentary *The Silence of Others*, directed by Almudena Carracedo and Robert Bahar.⁽¹⁵¹⁾

The film told the story of María Martín López, whose mother Faustina López was executed by fascist vigilantes in September 1936 two months into the Spanish civil war. Faustina was then unshining the dead, and buried in a roadside mass grave in her hometown of Pedro Bernardo.⁽¹⁵²⁾ María, who was six at the time of her mother’s execution, dedicated her life to reclaiming the right of exhuming her remains and granting her a dignified burial. She died in 2014 with her mother still languishing in a roadside mass grave. Faustina is one of more than 100,000 people whose remains were dumped in a mass grave

151. Almodóvar, P. (producer), & Carracedo, A. (director), & Bahar, R. (director). (2018). *El Silencio de Otros*. Spain: Lucernam Films.

152. Supra note 87.

during or shortly after the 1936-1939 Spanish civil war. This chapter deals with the effort of families like Faustina’s to recover the remains of their lived ones, and bury them with dignity. It also traces the difficulties that have faced these families since the end of the Spanish dictatorship in 1975. The aim of this chapter is to put the Palestinian struggle for the recovery of martyrs bodies in a global context and to introduce a case whose lessons can be valuable for the development sustainable movement to retrieve the bodies.

Background

On 17-18 July 1936, Spanish army generals led by General Francisco Franco launched a military insurrection in the North African enclave of Melilla that quickly spread to mainland Spain.⁽¹⁵³⁾ Waged against the democratically elected Republican government of the Popular Front, a coalition of Leftist and Republican parties, the coup morphed into a three-year civil war that ravaged the country. According to tentative estimates, 200,000 people were killed or executed behind the lines and perhaps as many soldiers and fighters were killed in battle.⁽¹⁵⁴⁾

While both warring sides committed atrocities, the Spanish Civil War was not a conflict of equals. Not only was the repression carried out by the rebels

153. Graham, H. (2005). *The Spanish Civil War: A very short introduction*. Oxford: Oxford University Press.

154. Preston, P. (2012). *The Spanish holocaust: Inquisition and extermination in twentieth-century Spain*. New York City, NY: WW Norton & Company.

during the war quantitatively greater (the number of those killed in rebel-held zones was three times that of the killings in the areas held by the Republic), the origins, objectives and nature of the repression were inherently different. Rebel violence was predicated on a thoroughly planned project of extermination and elimination of the undesirables: the rural proletariat, the urban working-class, disobedient women and the progressive backbone of the Second Republic that sought to challenge the control of the landlords and the industrial bourgeoisie, the Catholic Church and the army. The coup was aimed at rooting out and destroying the Second Republic and all the ideas it stood for: agrarian reform, social justice, advancing women rights, democracy, and cultural diversity. The rebels were crucially backed by Nazi Germany and Fascist Italy, and their discourse of crushing a Jewish-Masonic-Bolshevik plot echoed that of the Nazis and fascists. Moreover, the same racist, Spanish nationalist discourse adopted in the colonial wars against the tribes of Morocco during the 1920s was to be employed against the Spanish proletariat. The brutal methods of repression used by Spanish soldiers in Africa were reproduced in the Spanish war. In short, the coup was a Reconquista, a nationalist crusade against equality, democracy and the emancipation of women.

Violence in the Republican zone, meanwhile, was a random (albeit on many occasions brutal) reaction to rebel bombardment and killings. It was also an uncontrollable yet inevitable expression of deep-seated and collective grievances by the landless and the poor against a centuries-long regime of

exploitation and disenfranchisement, personified by landlords and industrialists, the clergy, and right-wing supporters of the coup.⁽¹⁵⁵⁾

The official end of the war and the victory of the fascist movement led by General Francisco Franco paved the way for a concerted campaign of repression against Republicans and their social base. Nearly half a million became refugees, many of whom died in internment camps in France and at least 10,000 were deported to Nazi concentration camps in World War II.⁽¹⁵⁶⁾ The fate awaiting the defeated Republicans and their supporters in Spain was equally grim. Tens of thousands of prisoners were executed or died of disease and malnutrition behind bars.⁽¹⁵⁷⁾

Besides the “typical” punishment of imprisonment, other Republicans were transferred to Spanish concentration camps or enslaved and worked to death in the labor battalions, which continued to operate well into the 1950s.⁽¹⁵⁸⁾ Mass incarceration, executions, exile, fragmentation, social alienation and forced labor were all part of Franco’s meticulously planned process of “redemption and pacification” in postbellum Spain.⁽¹⁵⁹⁾

155. Preston, P. (2007). *The Spanish Civil War: reaction, revolution and revenge*. New York City, NY: WW Norton & Company.

156. Brenneis, S. J. (2018). *Spaniards in Mauthausen: Representations of a Nazi Concentration Camp, 1940-2015*. Toronto: University of Toronto Press.

157. Ruiz, J. (2005). A Spanish genocide? Reflections on the Francoist repression after the Spanish Civil War. *Contemporary European History*, 14(2), 171-191.

158. González-Ruibal, A. (2011). The archaeology of internment in Francoist Spain (1936–1952). In *Archaeologies of internment* (pp. 53-73). New York, NY: Springer.

159. *Supra* note 3 at page 434

Indeed, some prisoners of war and political prisoners sentenced to forced labor had to take part in the construction of Spain's largest monument, El Valle de Los Caídos, a basilica topped by a gargantuan cross, at the northern outskirts of Madrid.⁽¹⁶⁰⁾ Franco inaugurated the valley of the Fallen on 1 April 1959, the twentieth anniversary of the end of the Civil War, as a catholic-nationalist-military memorial celebrating his triumph and honoring the right-wingers killed during the war.⁽¹⁶¹⁾

Francisco's brainchild, the Valley of the Fallen illustrates an approach to memory politics that would go on to outlive even Franco himself by decades. Only one kind of memory was worth honoring and glorifying, that of the victors. The bodies of the right-wingers killed in the Republican zone were exhumed and transferred to the Valley of the Fallen, where they received official and bombastic ceremonies and were hailed as martyrs and heroes. Republican victims were not afforded this privilege.⁽¹⁶²⁾ In Asturias, where the repression during the war was particularly rampant in retaliation for the Asturian miners' uprising of October 1934,⁽¹⁶³⁾ families had to pay special fees to bury their loved ones.⁽¹⁶⁴⁾ Even when the location where their loved ones' bodies were dumped was known, families were scared of visiting the graves

160. Phelan, s. (2017, March 28). VALLEY OF THE FALLEN: INSIDE SPAIN'S MOST CONTROVERSIAL VISITOR SITE. *The Independent*. Retrieved FROM <https://www.independent.co.uk/travel/europe/general-franco-grave-valley-tourist-holiday-site-fallen-spain-fascist-dictator-spanish-civil-war-a7652841.html>

161. Hite, K. (2008). *The Valley of the Fallen: tales from the crypt*. In *Forum for Modern Language Studies* (Vol. 44, No. 2, pp. 110-127). Oxford University Press.

162. Aragüete-Toribio, Z. (2017). *Producing history in Spanish Civil War exhumations*. New York, NY: Palgrave Macmillan.

163. Langlois, W. G. (1980). Rumblyngs out of Spain: French Writers and the Asturian Revolt (1934-36). *MLN*, 95(4), 884-921.

164. *Supra* note 3, at page 445.

during the dictatorship.⁽¹⁶⁵⁾ Some corpses and remains of those murdered and executed were transferred to the Valley of the Fallen without the approval or the knowledge of their families.⁽¹⁶⁶⁾ The Valley of the Fallen was Franco's attempt to literally bury the atrocities committed by his regime by putting victims and perpetrators into the same mausoleum without the victim's families approval or knowledge.

This system of post-mortem segregation created, in Emilio Silva's words, a "funerary apartheid." As anthropologist Francisco Ferrándiz puts it, the dictatorship "forced the winners and the losers to inhabit quite dissimilar spaces of death."⁽¹⁶⁷⁾

Until his peaceful death on 20 November 1975, Franco maintained a reign of authoritarianism and state terror over Spain. During this four-decade rule, the heterogeneous, conflicting Republican memories and regional identities were silenced and erased while one homogenous, exclusive narrative held sway. The monopoly over the memory of the war is embodied by the mass graves. Stretching across the topography of Spain, mass graves draw a subterranean map of atrocities. They loom as silent witness to the hierarchy imposed during the dictatorship between bodies that matter and others that do not, between a memory that speaks and memories that cannot, between victors who monopolize the narrative and the vanquished who are denied a voice.⁽¹⁶⁸⁾

165. *Ibid* 450

166. *Ibid* at 455

167. Ferrándiz, F. (2019). Unburials, generals, and phantom militarism: engaging with the Spanish Civil War legacy. *Current Anthropology*, 60(S19), S62-S76.

168. Delgado, M. M. (2015). Memory, Silence, and Democracy in Spain: Federico García Lorca, the Spanish Civil War, and the Law of Historical Memory. *Theatre Journal*, 67(2), 177-196.

Forging the Pact of Forgetting

“My great fear is that we are all suffering from amnesia. . . It’s a system of power that is always deciding in the name of humanity who deserves to be remembered and who deserves to be forgotten.”

Eduardo Galeano.⁽¹⁶⁹⁾

On 6 December 1978, an overwhelming majority of 88.54% of Spanish citizens voted in favor of a new constitution.⁽¹⁷⁰⁾ The turnout in the referendum was 67.11%.⁽¹⁷¹⁾ That historic day is viewed as the culmination of Spain’s seemingly peaceful transition to democracy (1975-1978) but it was preceded by a euphemistically named the Pact of Forgetting.⁽¹⁷²⁾ A pact indicates an agreement and implies the prior existence of a national dialogue, but Spain’s “pact” was forged by its political elites and legitimized by an illusory and tacit popular consensus.⁽¹⁷³⁾ The Law of Amnesty, passed on 15 October 1977 by the first democratically elected parliament in Spain since February 1936, constituting the cornerstone

169. Younge, G. (2013, July 23). Eduardo Galeano: ‘My great fear is that we are all suffering from amnesia’. The Guardian Retrieved from <https://www.theguardian.com/books/2013/jul/23/eduardo-galeano-children-days-interview>

170. Glos, G. E. (1979). The new Spanish constitution, comments and full text. *Hastings Constitutional Law Quarterly*, 7(1), 47-128.

171. Serrano, A. & García G. (2018, December 6). The day Spain voted “yes” to the Spanish Constitution. *El País*. Retrieved from https://elpais.com/elpais/2018/12/06/album/1544090962_129576.html

172. Richards, M. (1997). ‘Pact of Oblivion’? Violence, Memory and Democracy in Spain. *South European Society and Politics*, 2(3), 140-148.

173. Shevel, O. (2011). The politics of memory in a divided society: A comparison of post-Franco Spain and post-Soviet Ukraine. *Slavic Review*, 70(1), 137-164.

of this pact.⁽¹⁷⁴⁾ Article 1 of the Amnesty Law grants a blanket amnesty to all politically motivated crimes and misdemeanors committed prior to 15 December 1976, the official start of the transition, regardless of their severity or outcome.⁽¹⁷⁵⁾ The Law orders the release of the remaining political prisoners and the expungement of the criminal records of all those convicted on political grounds during the dictatorship, restoring their civil and political rights. Critically, however, it equates the grave abuses, including crimes against humanity, committed by Francoists, with political dissent or labor organizing. It lays the foundation for a fragile reconciliation by striking a sham balance between the victors and the vanquished without recognizing that many of the vanquished had already been punished by the previous regime or that their struggle had been legitimate.⁽¹⁷⁶⁾ Supporters of blanket amnesty maintain that it is an ineluctable step towards unlocking the gates of democracy and stability in a highly polarized society.⁽¹⁷⁷⁾ One does not have to count on the knowledge of hindsight to realize that it was the Franco regime officials who have been the main beneficiaries of the ongoing absence of accountability.

174. Humphrey, M. (2014). Law, memory and amnesty in Spain. *Macquarie LJ*, 13, 25.

175. Law 46/1977, Art 1

176. Aguilar, P. (2008). Transitional or post-transitional justice? Recent developments in the Spanish case. *South European Society and Politics*, 13(4), 417-433.

177. *Ibid.*

The First Wave

Beneath a nation-wide carpet of reconciliation lay the common graves: scattered, unidentified, forgotten. The families did not forget. If during the dictatorship they had no choice but to clandestinely throw a flower near a common grave, the end of the dictatorship buoyed them to take one step forward by attempting to identify and rebury their loved ones.

Grassroots initiatives spearheaded by victims' families during the late 1970s and the early 1980s worked to reclaim memory on the local level and in small towns. They challenge the perceived consensus upon which the Pact of Forgetting was allegedly based, while also questioning dominant discourse that portrays the period of transition as a time of unequivocal silence.⁽¹⁷⁸⁾

The reclamation of memory was manifested by the removal of Franco-era symbols and the identification and exhumation of mass graves, known as fosas communes in Spanish.⁽¹⁷⁹⁾

Political scientist Paloma Aguilar Fernández refers to this short-lived and subsequently overshadowed phase of recovery of historical memory as the “first wave of exhumations.”⁽¹⁸⁰⁾

178. Davis, A. (2015). Enforcing the Transition: The Demobilization of Collective Memory in Spain, 1979–1982. *Bulletin of Hispanic Studies*, 92(6), 667-690.

179. Moreno, J. E. S. (2016). La exhumación de 1979 en Murcia. *Acción colectiva de familiares de fusilados republicanos durante la transición*. Ayer, (103), 147-177.

180. Aguilar, P. A. L. O. M. A. (2017). Las desconocidas fosas abiertas en la transición. *Tinta Libre*, 47, 28-29.

With no state support and sparse national press coverage, widows, siblings, friends and colleagues used simple farm tools to dig for the remains of their loved ones.⁽¹⁸¹⁾ Limited and local in scope but not isolated, this process of excavation, reburial and commemoration of executed Republicans created affective communities.⁽¹⁸²⁾ These bonds of solidarity and mutual aid bore emotional, material and symbolic significance as the local communities could finally come to terms with loss and grief. Key to this reckoning with loss were the funerals that would usually accompany the reburials. Populated by political slogans and flags of the leftist parties to which the executed were affiliated, some of these funerals, and indeed the exhumations themselves, reveal a different aspect of the first years of the transition. Whereas the political elites were concerned with stipulating collective forgetting as a clause for preventing chaos and instability, victims' families in the autonomous regions of Extremadura, Navarre, and La Rioja transformed the margins of freedom that the fall of the dictatorship had opened into spaces of collective memory and defiance. Sidelined from this local memory recovery were the parties of the center-left, mainly the Spanish Socialist Workers' Party (PSOE) and the Spanish Communist Party (PCE), whose leadership's commitment to the pact of silence at the time outweighed the inclination to claim their own martyrs.⁽¹⁸³⁾ Commemoration was left to the families or to activists in the local branches of these parties who maintained some independence from the dictates of the party leadership.

181. Aguilar, P. (2017). Unwilling to forget: local memory initiatives in post-franco Spain. *South European Society and Politics*, 22(4), 405-426.

182. *Ibid.*

183. *Ibid.*

This first wave of exhumations reached its apex around 1981 and though it continued until the 1990s, its initial momentum had by then long been dissipated. This can be attributed to several factors including the failed coup attempt of 1981, the lack of national support, the efforts of demobilization made both by the state and by the central parties, and the inability of the pioneers to sustain the movement. The first wave of exhumations relied heavily on direct action, led by small and extremely active, organized and tight-knit groups. While this composition was instrumental in protecting the movement from hijacking, unsustainability was its peril.⁽¹⁸⁴⁾

The Memory Explosion

“To those who say ‘Let the dead rest in peace’ I respond: Are the dead at peace? Are we at peace with them?”

Joan Manuel Serrat.⁽¹⁸⁵⁾

Literature on transitional justice shows that democratic consolidation depends upon striking a balance between stability and accountability.⁽¹⁸⁶⁾ This inevitably involves the adoption of a combination of transitional justice mechanisms. Sweeping or conditional amnesty is juxtaposed with or followed by trials for certain, particularly egregious crimes

184. Ibid.

185. Serrat, J. M. (2009, December 4). El segundo entierro de Víctor Jara. El País Retrieved from El segundo entierro de Víctor Jara

186. Olsen, T. D., Payne, L. A., & Reiter, A. G. (2010). The justice balance: When transitional justice improves human rights and democracy. *Human Rights Quarterly*. 32, 980.

and/or truth commissions, reparations and symbolic acknowledgment.⁽¹⁸⁷⁾

The Spanish case was not unique because during the first years of the transition because there was a prioritization of the state for stability over justice but rather that this state of affairs endured for decades.

The 1977 Amnesty Law continues to provide national courts with the normative framework to block any attempt to examine the crimes of the Civil war and the subsequent repression. Besides avoiding accountability for the crimes committed during this period, the dictatorship’s culture of explains the abundance of symbols, monuments, and public spaces that celebrate Francoism and its legacy 44 years after Franco’s death.⁽¹⁸⁸⁾

Yet, the muddled landscape of Spain’s memory politics has been drastically reshaped in the past two decades With the revival of Republican memories This revival of Republican memories was ushered by the quest to open the mass graves and unearth the ghosts and legacies of the past.⁽¹⁸⁹⁾ On 21 October 2000, Madrid-based journalist Emilio Silva, aided by a team of archeologists, initiated the exhumation of a

187. Mihr, A. (2018). *Regime consolidation and transitional justice: a comparative study of Germany, Spain and Turkey*. Cambridge University Press.

188. Tremlett, G. (2018, August 24). Yes, Spain should dig Franco up. But it must not bury the horror of his regime. *The Guardian* Retrieved from <https://www.theguardian.com/commentisfree/2018/aug/24/spain-franco-regime-dictator-burial-civil-war-fascism>

189. Ferrándiz, F. (2006). The return of Civil War ghosts: The ethnography of exhumations in contemporary Spain. *Anthropology today*, 22(3), 7-12.

mass grave outside the village of Priaranza del Bierzo in the autonomous community of Castile and León. Emilio believed that the remains of his grandfather Emilio Silva Faba, a Republican who was executed by fascist gunmen in October 1936, had been dumped in that ditch along with 12 others. On 20 May 2003, a DNA test definitively confirmed that the exhumed remains belonged to Emilio Silva Faba.⁽¹⁹⁰⁾ While this was not the first public exhumation, it was the first time that the remains of the Civil War disappeared had been identified through DNA tests. The exhumation led by Emilio Silva launched a new wave of exhumations that differed markedly from the first.⁽¹⁹¹⁾ Farm tools were replaced by forensic archeology as a means for localizing and excavating the mass graves. DNA tests reduced the uncertainty that engulfed the first wave of exhumations. The difference was not limited to form or methodology. Exhumations conducted during the first wave were local and limited in scope while second wave exhumations enjoyed national publicity and covered larger swaths of territory.

From 2000 to 2012, a year before Mariano Rajoy's right-wing government would cut public funding for exhumations, 332 mass graves had been opened and the remains of 6,300 victims were

190. CUÉ, C. E. (2003, May 20). de ADN confirma la identidad de un desaparecido de la Guerra Civil. *El País* Retrieved from https://elpais.com/diario/2003/05/20/sociedad/1053381603_850215.html

191. Labanyi, J. (2008). The politics of memory in contemporary Spain. *Journal of Spanish Cultural Studies*, 9(2), 119-125.

identified and recovered.⁽¹⁹²⁾ The figures appear modest in retrospect when considering the overall numbers of mass graves, that total more than 2,500 discovered mass graves containing the remains of an estimated 130,000 war victims.⁽¹⁹³⁾ Yet, before the first exhumation of October 2000, the very terrain of memory politics was an uncharted territory. Since then, Silva has co-founded the Association for the Recovery of Historical Memory (ARMH), a nongovernmental association dedicated to identifying remains and granting a dignified burial to the thousands missing in mass graves, breaking up with the Pact of Forgetting and quashing the Amnesty Law, and challenging the official narrative about the Civil War and its reverberations.⁽¹⁹⁴⁾ Numerous historical memory associations have sprouted on the local and regional level, mushrooming into a vibrant memory movement. The State Federation of Forums for Memory was created in 2004 as an umbrella group for the more openly leftist Forums for Memory.⁽¹⁹⁵⁾

The mobilization of Spain's historical memory movement for a law of historical memory sparked

192. Baquero, J. M. (August, 10 2015). En doce años solo se han abierto 332 de las más de 2.000 fosas comunes que hay en España. *El Diario* Retrieved from https://www.eldiario.es/sociedad/muestra-Espana-abandona-victimas-franquismo_0_417858516.html

193. Del Río, N. (2019, February 26). El mapa de la vergüenza en España: todas las fosas comunes de las víctimas de la Guerra Civil y el franquismo. *La Sexta* Retrieved from https://www.lasexta.com/noticias/nacional/mapa-vergüenza-espana-todas-fosas-comunes-victimas-guerra-civil-franquismo_201902265c7553260cf2e60c4243c6c5.html

194. Renshaw, L. (2016). *Exhuming loss: Memory, materiality and mass graves of the Spanish Civil War*. Routledge.

195. El Foro Por la Memoria. Retrieved from <https://www.foroporlamemoria.info/que-es-la-federacion-foros-por-la-memoria/>

what historian Helen Graham refers to as Spain's memorywars.⁽¹⁹⁶⁾

Led by the conservative Partido Popular (PP), critics of the process of recovering historical memory, many of whom chose to conceal their arguments behind a cloak of respectability and neutrality rather than outright support for Francoism, argue that historical memory initiatives are revisionist, divisive, and incite revenge.⁽¹⁹⁷⁾ Proponents of the historical memory movement, on the other hand, reiterate that real democracy cannot exist without justice and accountability and that an acknowledgment of the Spanish massacres is long overdue.⁽¹⁹⁸⁾

The rights-based, justice-oriented vision of the historical memory movement, the pragmatic, electorally influenced approach of the socialist workers party (PSOE), and the abortive campaigning of the right in its many shades coalesced and diverged to produce a compromised historical memory law.⁽¹⁹⁹⁾

On 31 October 2007, the Spanish Congress approved a final draft of the Historical Memory Law, recognizing for the first time the legal rights of defeated Republicans to reparation and acknowledgment.⁽²⁰⁰⁾ All

196. Graham, H. (2004). Coming to Terms with the Past: Spain's Memory Wars. *History Today*, 54(5), 29.

197. Heras, M. O. (2006). Memoria social de la Guerra Civil: la memoria de los vencidos, la memoria de la frustración. *Historia Actual Online*, (10), 179-198.

198. *Ibid.*

199. Blakeley, G. (2008). Politics as usual? The trials and tribulations of the Law of Historical Memory in Spain. *Entelequia. Revista Interdisciplinar*, 7, 315-330.

200. EFE. (2007, October 31). El Congreso aprueba la Ley de Memoria Histórica sin el apoyo del PP y de ERC. Retrieved from https://elpais.com/elpais/2007/10/31/actualidad/1193822222_850215.html

parties supported the bill with the exception of the right-wing PP and the leftist ERC, the Republican Left of Catalonia, who strongly supported the concept of historical memory but argued that the law in its current form was too conservative.⁽²⁰¹⁾ This critique was also voiced by the ARMH, which, despite acknowledging the progress the law achieves in the area of reparations and compensations, maintained that it continues to overlook two foundational tenets of transitional justice: truth and accountability.⁽²⁰²⁾

For the purpose of this report, the most relevant provisions of the revised Law are to be found in Articles 11-14, concerned with locating and identifying victims of the Civil War and the subsequent repression.⁽²⁰³⁾

Article 11 requires the relevant public authorities to “provide assistance,” if the family’s request it, to direct descendants of victims in the process of inquiring about, locating, and identifying the remains of their loved ones who were disappeared or executed during the war or the dictatorship and whose whereabouts remain unknown.⁽²⁰⁴⁾ Public assistance includes financial grants by the state to cover the expenses of search and identification operations.⁽²⁰⁵⁾

201. Beaumont, P. & Espinoza, J. (2007, November 3). Spain fights civil war's last battle. *The Guardian* Retrieved from <https://www.theguardian.com/world/2007/nov/04/spain.peterbeaumont>

202. ARMH. La Ley de memoria histórica y su desarrollo normativo: ni verdad ni justicia. Retrieved from *La Ley de memoria histórica y su desarrollo normativo: ni verdad ni justicia*

203. Ley de la Memoria Histórica (Ley 52/2007 de 26 de Diciembre)

204. *Ibid* Art. 11(1)

205. *Ibid* Art 11(2).

Article 12 states that the government shall develop a scientific and multidisciplinary protocol for action to ensure institutional collaboration and adequate intervention in the process of exhumations.⁽²⁰⁶⁾ This includes the creation of an updated map of mass graves in Spain.⁽²⁰⁷⁾

Article 13 deals with the issue of authorizing the excavations, exhumations and reburial of the remains of the disappeared.⁽²⁰⁸⁾ According to Article 14, since the activities associated with the location and eventual identification and transfer of the remains from mass graves constitute a public good and a social interest, temporary access to public (and even private) property containing mass graves may be permitted.⁽²⁰⁹⁾

These provisions offer the families of the disappeared and the missing an important redress and add a stamp of legality to their moral rights, entailing explicit obligations on the state and the public authorities. Yet, they proved insufficient.

While the law does require the state to “assist” in the task of locating, identifying and exhuming the remains of the disappeared, the main responsibility of initiating the process is “outsourced” to private citizens or associations representing them.⁽²¹⁰⁾ This particular limitation was criticized in a July 2014

206. Ibid Art 12(1)

207. Ibid Art. 12(2).

208. Ibid Art. 13

209. Ibid Art. 14.

210. Lerma, M. L. (2011). The Ghosts of Justice and the Law of Historical Memory. *Conserveries mémorielles. Revue transdisciplinaire*, (9).

report submitted by the Working Group on Enforced or Involuntary Disappearances to the United Nations Human Rights Council.

According to the report, “the measures provided for in the Act require action by the families requesting them and do not create a State obligation to act *ex officio*, and this has created a number of difficulties in the exercise of the rights contained in the Act.”⁽²¹¹⁾

Upon assuming power, the conservative government disregarded even the minimal obligation to provide any assistance. The new leader, Mariano Rajoy, pledged in his election campaign to “eliminate all articles in the law that talk about providing public funds for recovering the past,”⁽²¹²⁾ and fulfilled this electoral promise. The new government reduced public funding for projects of recovering historical memory, limiting it only to the opening of mass graves in 2012, and then completely cutting funding for exhumations in 2013.⁽²¹³⁾

This was a *de facto* annulment of the law.

Exhumation and recovery projects in Spanish autonomous regions such as Extremadura, Andalusia, the Basque Country, Catalonia and Galicia continued to advance due to independent

211. The Report of the Working Group on Enforced or Involuntary Disappearances, Mission to Spain, A/HRC/27/49/Add. 1, par. 21.

212. Junquera, N. *2013, October 5). La promesa que Rajoy sí cumplió. *El País* Retrieved from https://elpais.com/politica/2013/10/05/actualidad/1380997260_542677.html

213. *Europa Press* (2012, September 29). El Gobierno elimina el presupuesto de la Memoria Histórica. Retrieved from <https://www.elmundo.es/elmundo/2012/09/29/espana/1348927097.html>

projects developed by their regional administrations that did not rely on the support or interventions of the state government. ⁽²¹⁴⁾

Since there is no unified and consistent policy, however, the process in cities and towns controlled by the PP was deliberately derailed or left to the discretion of few politicians. ⁽²¹⁵⁾

Diego's father was a 41-year-old syndicalist and day laborer when was assassinated by fascist troops on 29 March 1937. The local authorities delayed authorizing the excavation of the Las Palmas mass graves on the Canary Islands for years, despite numerous petitions by the victims' families and local rights associations. ⁽²¹⁶⁾ "I am 90 years old and I want to bury the bones of my father before I die," wrote Diego González García in March 2016. "I still do not understand why the mass grave in the cemetery of Las Palmas, where my father Francisco González Santana is buried like a dog, has not been exhumed already." ⁽²¹⁷⁾ Diego passed away two and a half years after penning this open letter, never realizing his dream to put flowers on his father's grave. ⁽²¹⁸⁾

214. Supra note 51.

215. Supra note 13

216. Rodríguez, P. A. (2016, March 17). El último intento de sacar de una fosa a su padre: "Quiero llevar flores a su tumba antes de morir". Info Libre Retrieved from https://www.infolibre.es/noticias/politica/2016/03/17/quiero_llevar_flores_tumba_padre_antes_morir_46570_1012.html

217. EFE. (2016, March 17). "Tengo 90 años y quiero dar sepultura a los huesos de mi padre antes de morir». Retrieved from https://www.eldiario.es/canariasahora/sociedad/quiero-sepultura-huesos-padre-morir_0_495550850.html

218. Tercera Información. (2018, October 15). Fallece a los 92 años Diego González sin hacer realidad el sueño de recuperar los restos de su padre asesinado por los fascistas en Gran Canaria. Retrieved from <https://www.tercerainformacion.es/articulo/memoria-historica/2018/10/15/fallece-a-los-92-anos-diego-gonzalez-sin-hacer-realidad-el-sueno-de-recuperar-los-restos-de-su-padre-asesinado-por-los-fascistas-en-gran-canariaviagilinat>

The passage of nearly eight decades since the Civil War has already made identifying remains a difficult task, but as the UN Working Group explained, the lack of a clear legal or administrative framework and a unified national plan for exhumation and identification has further complicated the process. ⁽²¹⁹⁾

The institutional, bureaucratic and technical obstacles that occur before the exhumations are compounded by the absence of accountability mechanisms and a conspicuous passive judiciary. ⁽²²⁰⁾

Blocked at Home, Embraced in Argentina

"It is rather hypocritical to argue that exhumations re-open the wounds of the past for it is impossible to re-open a wound that has never been closed in the first place."

Ana Messuti. ⁽²²¹⁾

One Spanish judge, Baltasar Garzón, went against the grain and attempted to challenge the culture of impunity towards the excavation processes, for which he paid a heavy price. Taking on perpetrators of crimes against humanity is not a terra incognita for Judge Baltasar Garzón. In the course of his investigation of Operation Condor, a coordinated plot by six right-wing military dictatorships in South America to murder and disappear political opponents

219. Supra note 60 para 24.

220. Ibid at 37

221. Ana Messuti is a human rights lawyer from Argentina. She represented Spanish victims' families in the Argentinian Compliant. This quote is taken from an interview I conducted with her via email on 20 March 2019.

during the 1970s, Judge Garzón ordered the arrest and extradition of ex-Chilean dictator Augusto Pinochet on 16 October 1998. The international arrest warrant, ordered on charges of genocide, terrorism, and torture, was based on the principle of universal jurisdiction.⁽²²²⁾

Garzón was later to return to his argument that neither a statute of limitations nor amnesty laws could override investigations into crimes against humanity when he initially declared in 2008 the competence of the Audiencia Nacional (National High Court) to prosecute Civil War and Franco-era crimes.⁽²²³⁾ Garzón accused Franco and thirty-four of his collaborators of mass killings, torture and the systematic, general and illegal detention of political opponents.⁽²²⁴⁾ He also ordered the excavation of 19 mass graves, including the mass grave where poet and playwright Federico García Lorca was believed to have been buried after his assassination along with three others by fascist firing squads on 18 August 1936.⁽²²⁵⁾

In November 2008, Garzón dropped the case against the presumptive perpetrators after police confirmation that they were all dead. He transferred

222. Roht-Arriaza, N. (2000). The Pinochet precedent and universal jurisdiction. *New Eng. L. Rev.*, 35, 311.

223. Barbeito, M. Z. (2010). Investigating the Crimes of the Franco Regime: Legal Possibilities, Obligations of the Spanish State and Duties Towards the Victims. *International Criminal Law Review*, 10(2), 243-274.

224. Tremlett, J. (2008, October 17). Franco repression ruled as a crime against humanity. *The Guardian* Retrieved from <https://www.theguardian.com/world/2008/oct/17/spain>

225. Gibson, I. (1989). Federico García Lorca, A Life. Pantheon.

the jurisdiction over the questions of locating the unidentified victims in mass graves to the regional courts.⁽²²⁶⁾

Despite eventually dropping the case, Garzón's precedent remains a landmark in Spain's judicial history for two reasons. This was the first and only time a Spanish court would open criminal investigations into the crimes committed by Franco and his officials during the Civil War and the ensuing dictatorship. It was also an explicit challenge to the country's long-standing Amnesty law and its Pact of Forgetting, classifying the crimes associated with Francoism as crimes against humanity that circumvent any pact.⁽²²⁷⁾

Garzón's attempt to dispel a foundational fiction of Spain's democratic transition led to his own suspension pending trial.⁽²²⁸⁾

Two right-wing organizations filed a lawsuit against Garzón, accusing him of prevaricación (malfeasance in office), knowingly abusing his power and acting in contravention with an existing law, namely the Amnesty Law of 1977.⁽²²⁹⁾

Though the Spanish Supreme Court eventually

226. Burnett, V. (2008, November 18). Spanish Judge Drops Probe Into Franco Atrocities. *The New York Times* Retrieved from <https://www.nytimes.com/2008/11/19/world/europe/19spain.html?mtrref=www.google.com&gwh=15D24AA142CF68291FDC36357455646A&gwt=pay&assetType=REGIWALL>

227. Guarino, A. M. (2010). Chasing ghosts: Pursuing retroactive justice for franco-era crimes against humanity. *Boston College International and Comparative Law Review*, 33(1), 61-86.

228. *Supra* note 60 para 38.

229. Burbidge, P. (2011). Waking the dead of the Spanish Civil War: Judge Baltasar Garzon and the Spanish Law of historical memory. *Journal of International Criminal Justice*, 9(3), 753-781.

exonerated Garzón of the Prevaricación charges in 2012, it effectively removed any possibility of achieving accountability in Spanish courts. Garzón, incidentally, was suspended but over a separate case.⁽²³⁰⁾

The Court held that, by merely investigating Civil War and Franco-era crimes, Garzón committed a legal error though with no malicious intent. He violated the principle of legality and applied *ex post facto* norms.⁽²³¹⁾

The court added that potential crimes committed during the Civil War and the dictatorship are not admissible in court because the statute of limitations had long expired. It rejected as “fiction” Garzón’s argument that enforced disappearance, where the body remains missing, is a permanent crime and thus has no statute of limitations.⁽²³²⁾ The Supreme Court’s interpretation of the Amnesty Law and its formal approach to the application of customary international law deprived victims’ families of their access to truth and justice.⁽²³³⁾

Faced with an impasse at home, victims’ families sought different legal alternatives to circumvent prolonged impunity. Among those alternatives was filing a complaint, known as *la querrela Argentina*, before a federal court in Buenos Aires on 14 April 2010.⁽²³⁴⁾

230. Yoldi, J. & LÁZARO, J. M. (2013, February 9). Supreme Court convicts magistrate in Gürtel phone-tap case. *El País* Retrieved from https://elpais.com/elpais/2012/02/09/inenglish/1328795485_673812.html

231. Moreno Fonseret, R., & Candela Sevilla, V. (2018). *Amnistía y (Des) memoria en la transición española*.

232. Tamarit Sumalla, J. (2012). Los límites de la justicia transicional penal: la experiencia del caso español. *Política criminal*, 7(13), 74-93.

233. *Supra* note 60 para 39.

234. *Querrela 4591/2010, nominada ‘N.N. por genocidio y/o crímenes de lesa humanidad cometidos en España por la dictadura franquista entre el 17 de julio de 1936, comienzo del golpe cívico militar, y el 15 de junio de 1977, fecha de celebración de las primeras elecciones democráticas’.*

Invoking the universal jurisdiction doctrine and the extradition treaty between Spain and Argentina, Judge María Servini de Cubría issued arrest and extradition warrants against Franco-era officials and ministers in September 2013 and October 2014.⁽²³⁵⁾

In addition to the extradition and arrest requests, which Spain turned down, the judge also ordered the opening of mass graves. Official cooperation and responsiveness to her requests in Spain fluctuated, but a major advance was achieved in February 2016 when a mass grave in the town of Guadalajara was opened in accordance with the judge’s orders.⁽²³⁶⁾

Ascensión Vargas Mendieta, a member of the ARMH and 90 years of age at the time of opening the mass grave in 2016, had been among the plaintiffs in the Argentinian Complaint. Her father Timoteo, a socialist trade unionist, was extrajudicially executed on 15 November 1939, months after the end of the war. Since the remains exhumed from the mass grave in 2016 did not match the DNA sample, the Argentinian judge issued another exhumation order the following year to keep searching for Mendieta’s remains.

Ascensión, whose old age had not prevented her from accompanying the archaeologists in the excavation and exhumation process, finally recovered the remains of her father in 2017.⁽²³⁷⁾

235. BBC (2014, November 1). Argentina asks Spain to arrest 20 Franco-era officials. Retrieved from <https://www.bbc.com/news/world-latin-america-29868270>

236. Dowsett (2016 February 8). Spanish grave opened on order of Argentine judge unearths painful past

237. Junquera, N. (2017, June 11). Ascensión Mendieta recupera a los 91 años los restos de su padre, fusilado en 1939. *El País* Retrieved from https://elpais.com/politica/2017/06/09/actualidad/1497026126_358165.html

Searching for Closure

“What is the reason, in a democracy with forty years of trajectory behind it, that María Martín cannot exhume her mother’s remains?”

Robert Bahar.⁽²³⁸⁾

As debates rage in Spain over the potential exhumation of Franco’s corpse from the Valley of the Fallen in an effort to put an end to his glorification,⁽²³⁹⁾ the country remains an anomaly in Europe, with the dictator maintaining his aura and a legion of “legal” organizations openly trying to immortalize him.⁽²⁴⁰⁾

Meanwhile, the bones of unidentified Civil War victims continue to be condemned to funerary apartheid, without proper restitution or dignified treatment, casting an ominous shadow over a country at odds with its past.

238. Taladrid, S. (2019, January 10). Spain’s Open Wounds. *The New Yorker*. Retrieved <https://www.newyorker.com/news/dispatch/spains-open-wounds>

239. Junquera, N. (2019, June 4). Spain’s Supreme Court suspends the planned exhumation of Franco. *El País* retrieved from Spain’s Supreme Court suspends the planned exhumation of Franco

240. Junquera, N. (2018, June 26). Should the Valley of the Fallen be allowed to fall into ruins?. Retrieved from https://english.elpais.com/elpais/2018/06/25/inenglish/1529946432_858305.html. Historian Paul Preston writes: “There are no monuments to Hitler in Germany or Austria, nor to Mussolini in Italy.”

A turn in events recently has shown some change in attitude. A growing movement demanding the exhumation of Franco’s body from the mausoleum The Valley of the Fallen and for his reburial in his family cemetery gained a small victory and also refocused attention on the missing dead from the Spanish Civil War. On 24 September 2019, the Spanish Supreme Court unanimously rejected an appeal filed by Franco’s family members and the Francisco Franco Foundation against the removal of the dictator’s body from its tomb in the mausoleum.⁽²⁴¹⁾ The ruling came after a long battle in the courts after the Spanish parliament had voted in favor of Franco’s exhumation, paving the way for the socialist government of caretaker Prime Minister Pedro Sánchez to transfer Franco’s body to the family cemetery where his wife is buried. This symbolically charged move is seen as an important step towards demythologizing Franco and reframing the Civil War’s memory to its true horror. The struggle to trace, exhume and rebury Franco’s victims appears more daunting, however, as the passage of time and the legal, political and technical obstacles wear it down.

241. RINCÓN, R. (2019, September 2019). Supreme Court rules in favor of exhumation of Francisco Franco. *El País* Retrieved from https://elpais.com/elpais/2019/09/24/inenglish/1569317904_371961.html?ssm=TW_CM_EN

During this ongoing struggle, international human rights law and international humanitarian law have been among the tactics employed by victims' families and organizations seeking to recover these bones. Legal avenues are not the only tactic used to recover the bodies of those scattered across Spain. Above all, it is the struggle of the memory movement, grassroots associations, victims' families and local historians, archeologists and journalists as well as the solidarity of human rights lawyers from Argentina that have helped unearth some semblance of justice and recognition.

In Spanish, the seemingly benign word "Cuneta" means roadside ditch, but since cunetas have been home to so many mass graves (fosas comunes) the word now is now synonymous with grave. If Spain is to come to terms with its past and confront its ghosts, clearing those cunetas is a necessary step.

From a comparative perspective, reviewing and analyzing the Spanish experience offers an invaluable insight for Palestinians engaged in the struggle to recover the remains of their loved ones withheld by

Israel. This is not to say that the two legal situations are analogous or that the hurdles facing Palestinian and Spanish families are identical. Conceptually, the Spanish case has more in common with countries like Chile and Argentina. However, instruments used by victims' families and human rights associations to challenge the system of impunity can serve as an example for Palestinian civil society.

Rather, the primary aim of this review is to examine the instruments used by victims' families and human rights associations to challenge a much more powerful system of impunity. Some of the tactics used in Spain were also applied by Palestinian families and their lawyers such as filing collective petitions before the court to obtain exhumation orders. In Spain, victims' families reached a deadlock, the same deadlock Palestinians have reached when the Israeli High Court confirmed the constitutionality of holding captive the corpses of deceased Palestinians in September 2019.

Spanish associations maneuvered the impasse by invoking universal jurisdiction in Argentina and



putting pressure on the Spanish Government through the mission and reports of the Working Group on Involuntary or Enforced disappearances.

These options deserve a thorough examination in the Palestinian context, initially on the theoretical level.

Beyond providing a legal and theoretical toolbox, studying the Spanish case opens a space for building connections between Palestinian and Spanish victims' associations and civil society groups and for building a case to revive memory projects.

This can pave the way for a solidarity-based shared struggle against necropolitical hierarchy for the recovery of collective memory.



THE **WARMTH**
OF OUR SONS

Chapter V:
Song of the Unburied

Conclusion

“And there is the silence of the dead.

If we who are in life cannot speak

Of profound experiences,

Why do you marvel that the dead,

Do not tell you of death?

Their silence shall be interpreted

As we approach them.”

Edgar Lee masters.⁽²⁴²⁾

“One of the cruelest affronts was the expectations that pain should be hidden, away, buried, privatized – a lie manufactured so as to mask and uphold the social order that produces our many, unnecessary losses.”—CindyMilstein.⁽²⁴³⁾

The campaign reverted to several tactics, including litigation in Israeli courts, organizing a national day of action, publishing booklets, and mobilizing national and international public opinion, in order

242. Masters, E. L. (1915). Silence. Poetry, 5(5), 209-211.

243. Milstein, C. (Ed.). (2017). Rebellious Mourning: The Collective Work of Grief.. Chico, CA: Ak Press

to draw attention to the bodies languishing in the cemeteries of numbers and to return them to their loved ones. The parent-led struggle in 2015 gave an added momentum and urgency to the campaign and re-opened the Palestinian debate on historical memory and the silenced pain of the families waiting for closure. It also attempted to turn an issue that supposedly affects individual families into a general Palestinian cause around which the entire Palestinian community should organize. And while later campaigns such as “bidna wladna” We Want Our Sons,” initiated by American University of Jenin, the annual National Day of Action organized by the Campaign, statements published by the campaign to highlight the issue, helped keep the struggle alive, it lost much of its intensity and publicity once the vast majority of martyrs’ bodies were released in 2016.

However, the series of legal maneuvers, including the Israeli counterterrorism law amendment that allows the police to withhold martyrs’ bodies for security reasons, the cabinet decision in January 2017 that allows the military to use bodies as bargaining chips, and the HCJ decision in September 2019 that authorizes the military to maintain the practice,

stresses the importance of organizing collective, vocal, and sustained resistance against the retention of bodies.

Although the HCJ decision effectively closed the last legal channel available for Palestinians to challenge the constitutionality of withholding bodies, it should be treated as only the beginning of another phase in the struggle. As the Spanish struggle for the recovery of historical memory, exhumation and reburial of unidentified bodies has taught us, the legal struggle is yet but one element of the grassroots movement that should be built. Such a movement requires internal cohesion and strong local mobilization, which has significantly diminished in the last three years. It also requires constructing a discourse that centers victims' families while acknowledging the communal dimensions of their plight.

Not only should the families receive emotional support, efforts should be made to make sure that the process of identification and exhumation should not end with the death of direct relatives. Since many of the parents whose loved ones are buried in

cemeteries of numbers are ageing, an urgent effort should be made to take DNA samples for them and establish a DNA bank towards potential and future exhumation and identification. No less important is the act of sharing the stories of those willing to speak out and making sure that death of the direct relatives does not signal the end of the quest to reclaim the bodies. The right of families who choose to keep their grief private should, however be respected and understood as families have different responses and ways of coping with pain.

This range of different responses to loss was captured by American poet and essayist Claudia Rankine in her essay, "The Conditions of Black Life is One of Mourning." Looking back at the reaction of Mamie Till Mobley and Leslie McSpadden to the killings of their children Emmett Till and Michael Brown respectively, Rankine shows how the perception of body politics, collective vs. individual mourning, and the immediacy of burial differ among bereaved parents. In the case of Till, whose lynching was among the factors that sparked the Civil Rights movement, his mother chose to "challenge the etiquette of grief" by using

her son's lynched and disfigured corpse as evidence and warning. In the case of Michael Brown, whose killing by the Ferguson Police Department set in motion the Black Lives Matter movement against police brutality, his mother wanted to bury him as soon as possible, to take his body from public view and to grieve him on her own terms.

In a context where the state controls the entire process of mourning and burial, parents do not even have the opportunity to choose the way to want to express their grief because they are not even allowed to begin the process of coping. This is precisely why any attempt at telling the story of parents whose loved ones' bodies are withheld should not reproduce this system of emotional disenfranchisement and should prioritize their feelings even if it comes at the expense of how the community perceives the dead body.

This leads us to the issue of learning from the experiences of other peoples who have had to deal with suspended grief and with being denied the right to bury their loved ones or to access a physical and tangible closure.

The Spanish Historical Memory Movement that started in earnest at the turn of the century is out one example. Other movements include the Mothers and Grandmothers of the Plaza de Mayo, the families of the children who were disappeared in Ayotzinapa, Mexico, the Saturday Mothers in Turkey, the Families for Justice movement in Syria and many others. At the center of the efforts of these groups and family association lie the right to recover and mourn the body. While some of these movements remained limited to the affected families, others like in Spain and Argentina mushroomed into countrywide social movements that have sustained their efforts and organizing for decades, even outliving, on many occasions, the direct relatives of the victims.

While working to build a memory-based movement for the recovery and dignified burial of martyrs in Palestine, it is crucial to build solidarity with other global memory movements, to learn from their experiences in challenging silence and forgetting, and to insure that the Palestinian movement is sustainable particularly during periods when there is little development. This solidarity becomes all the more pressing in the face of the legal catch---22 that Palestinians have reached. To respond to this

impasse, it is not enough to study the possibility of using other international law instruments such as considering the framework of enforced disappearance or possibly universal jurisdiction and adding the issue of withheld bodies to the complaint before the International Criminal Court, we should also move beyond the legal framework by building a global movement that challenges and defies Israel policy in an international context.

The recovery of martyrs' bodies is not merely physical but rather involves the symbolic reclamation

of those Israeli was keen to condemn to oblivion. By remembering their names, telling their stories, supporting their families, contusing to pursue legal and popular means for their retrieval, Palestinian negate this system of erasure and dispossession.

While the parents are keen to reclaim the remains of their loved ones and feel the warmth of their sons again, Palestinians should make sure that even in the cases where physical recovery is delayed or denied, the families are never left alone and the unburiel are never forgotten.



THE WARMTH OF OUR SONS

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