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At the Supreme Court Sitting as the High Court of Justice

HCJ 4462/20

Before:	The Honorable Justice N. Hendel The Honorable Justice Y. Amit The Honorable Justice D. Mintz
Petitioner:	Mustafa Erekat
	v.
Respondents:	1. Military Commander of the Judea and Samaria Area [West Bank] 2. Minister of Defense
	Petition for an Order Nisi
Date of hearing:	18 March 2021 (5 Nissan 5781)
On behalf of the petitioner:	Attorney Sawsan Zaher; Attorney Hassan Jabareen
On behalf of the respondents:	Attorney Avi Milikovsky; Attorney Sharon Aviram

Judgment

Justice N. Handel:

1. On 1 January 2017, the Ministerial Committee on National Security Affairs made a decision concerning the "Uniform Policy on the Handling of Bodies of Terrorists" (B/171) (unclassified version), according to which –

    A. The bodies of terrorists will be returned subject to restrictive conditions set by security officials.
    B. The bodies of Hamas-affiliated terrorists will be kept by Israel.
    C. The bodies of terrorists who carried out a particularly heinous terrorist attack shall be kept by Israel." (Hereinafter: the original decision")

    Petitions filed against this decision were initially accepted but, at the additional hearing, an expanded panel of this court adopted my opinion in HCJ 4466/16 *Alian v. Commander of IDF Forces in the West Bank* (14 December 2017) (hereinafter: "Alian case"), and ruled

that regulation 133(3) of the Defense (Emergency) Regulations, 1945 (hereinafter: "the Defense Regulations") "authorizes the Military Commander to order the temporary burial of the bodies of terrorists or fallen enemy soldiers for reasons of national security or public safety, while ensuring the dignity of the deceased and his family, and for the purposes of negotiations for the return of IDF [Israel Defense Forces] soldiers, fallen soldiers, and Israeli citizens held by terrorist organizations" (HCJFH (Further Hearing) 10190/17 *Commander of Forces IDF in the Judea and Samaria Area v. Alian* (9 September 2019) (Hereinafter: "HCJFH Alian").

2. On 23 June 2020, Ahmed Mustafa Erekat (hereinafter: "Erekat") was shot by security forces "while carrying out a vehicle-ramming assault in which a woman Border Police officer was injured," in the words of the Respondents, and they have been holding his body since then. One week later, Erekat's father submitted a petition requesting an order for the return of his son's body, arguing that "holding the body in this case does not meet the conditions specified" in *HCJFH Alian*. During the first hearing of the petition (Justice Y. Amit, Justice A. Baron, and Justice O. Grosskopf), the Respondents' counsel confirmed that "no grounds have been found in the current cabinet decision for delaying the return" (page 2, lines 1-2 of the protocol of the hearing dated 22 July 2020); noted that there is an intention to alter this decision; and announced that a final decision regarding the continued holding of Erekat's body has not yet been made. On the same day, an order nisi was rendered instructing the Respondents to explain "why they will not release the son's body to the Petitioner at the earliest possible time."

   In the response affidavit, the Attorney General requested that the Respondents be given an opportunity to bring the issue before the Cabinet, emphasizing that if the original decision is not changed within a defined period of time "the temporary order that was issued will, unavoidably, be turned into an absolute order." The requested extension was granted, and on 7 September 2020, the Respondents stated that the Cabinet had decided:

   > "To revise decision No. B/171 dated 1.1.2017 of the Ministerial Committee on National Security Affairs and add that the return of the bodies of terrorists, regardless of their organizational affiliation, should be prevented if the terrorists killed or wounded an individual, or carried weapons.
   > When the issue of the imprisoned and missing persons is resolved, the decision will be reconsidered accordingly, subject to an assessment of the situation.
   > The Minister of Defense has the authority to deviate from this policy in special cases." (Hereinafter: **the new decision**).

   It was furthermore stated that the case of Erekat's body was examined in light of the new decision, and it was decided that the body should not be returned.

3. Following these developments, the Petitioner amended the petition. He contended that the new decision is not reasoned; that it is missing a factual and normative basis; that its

sweeping character is contrary to the position formulated by the Attorney General in 2004; that it exceeds its authority; that it completely breaches the balances that formed the basis of the majority decision in *HCJFH Alian*, and violates fundamental rights in a disproportionate manner. The Petitioner, additionally, objected to the determination that Erekat attempted to carry out a terror attack, and argued that the new decision must not be retroactively applied to his remains. In contrast, the Respondents, who filed an amended response affidavit, were of the opinion that the petition is groundless. They contended that the question of authority was decided in *HCJFH Alian*, and that the new decision does not exceed the bounds of reasonableness and proportionality: its purpose is identical to that of its predecessor; it is designed to advance a concrete exchange transaction; and it leaves much room for individual discretion. Hence, and in view of the limited scope of judicial intervention in Cabinet decisions, it should not be interfered with. In regard to Erekat's body, the Respondents argue that there is no impediment to applying the new policy since the family members have no "'inherent right' or 'reliance' on the fact that the decision regarding the return his body [...] will be made in accordance with the policy on captive and missing persons applicable at the time of the attack."

4. At the third hearing on the petition - held *ex parte* with the consent of the Petitioner – we were presented material concerning both the general policy and Erekat's individual case. In light of it, the Respondents were instructed to provide an update on the results of the process "concerning the establishment of rules relating to the new decision relevant to the petition." On 20 December 2020, the Respondents announced the formulation of guidelines clarifying "the procedure and the information that must be brought before the Minister of Defense, in order to determine, in accordance with the Cabinet's decision, whether the conditions for withholding the body of a terrorist are met", and the essential criteria for exercising the Minister's authority. The announcement was accompanied by an abbreviated version of the Chief of Staff's opinion that was presented to the Cabinet. The Respondents emphasized that although a "secondary consideration" was mentioned in it, the new decision "was made for the sake of the captives and the missing, and accordingly the body that is the subject of the petition at hand is being held solely for the sake of the captives and the missing." At the same time, the Respondents stated that an additional examination of Erekat's case led to the conclusion that it did not fall within the bounds of the exceptions to the holding of bodies of terrorists, and rejected the Petitioner's contentions regarding the issue of retroactive application. That, *inter alia*, because even before Erekat's death, the review of the policy of withholding bodies was disclosed in another legal proceeding (HCJ 921/20).

5. At the last hearing held on the petition on 18 March 2021 – which was also held *ex parte* and with the consent of the Petitioner – we were presented with the guidelines and the procedure that were established, and concrete data relating to Erekat, and an update was given regarding the status of all the bodies whose matter was examined in line with the established criteria. The Petitioner, on the other hand, requested to present a "report on the findings of a very well-known company", which disproves the classification of Erekat as a terrorist, and alleged that his body was being held for extraneous reasons. Following the

hearing, an additional update notification was submitted on 1 July 2021, containing an "overt paraphrase of the confidential criteria": "The criteria are confidential, but it can be revealed that that in the process of making a decision regarding each body, the criteria being considered pertains to the circumstances of the terror attack and its consequences; the characteristics of the terrorist; and the circumstances related to negotiations for the return of citizens of the State of Israel and IDF fallen soldiers. The notification was accompanied by a diagram of the decision-making process, and a confidential update notice from the head of the IDF Operations Division whose conclusion is that the continued holding of the bodies of the terrorists is "vital" especially "at this time".

6. In light of the developments specified above, I will propose to my colleagues to dismiss the petition, as it does not provide a ground for intervening in the decision to hold Erekat's remains at this time.

   Regulation 133(3) of the Defense Regulations states that "Notwithstanding anything contained in any law, it shall be lawful for a Military Commander to order that the dead body of any person shall be buried in such place as the Military Commander may direct. The Military Commander may, by such order, direct who may bury the body and at what hour said body shall be buried. Such 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". In accordance with the majority decision in *HCJFH Alian*, which I quoted at the beginning of my opinion, this regulation "authorizes the Military Commander to order the temporary burial of the bodies of terrorists or fallen enemy soldiers for reasons of national security or public safety, while ensuring the dignity of the deceased and his family, and for the purposes of negotiations for the return of IDF [Israel Defense Forces] soldiers, fallen soldiers, and Israeli citizens held by terrorist organizations." As stated, the Respondents clarified that there is no change in the purpose of the new decision, and that it, like its predecessor, focuses on advancing negotiations for the return of Israeli citizens and the bodies of IDF soldiers held by terrorist organizations. Therefore, since in the language of Regulation 133(3) and in its interpretation, there is no basis to the claim that the authority of the Military Commander is affected by the terrorist's organizational affiliation, or by the results of the terrorist act he sought to perpetrate, there is no defect in the new policy regarding the question of authority.

7. Far more complex questions arise in regard to the issue of discretion in view of the fact that, in comparison with its predecessor, the new decision expands the scope for the withholding of the bodies of terrorists, transforming the exception into the rule. Nevertheless, these questions do not lead to the conclusion that the decision to hold Erekat's body, at this stage, deviates from the bounds of reasonableness and proportionality.

   First, it should be noted that the re-examination of the original decision is in itself appropriate and consistent with the directive of this court, according to which "the competent authorities must at set times review the changing circumstances both relative to the general policy (i.e. the "likelihood" of a possible exchange agreement), and to the

'value' that keeping specific terrorists has for the competent bodies" (Alian case, paragraph 23 of my opinion, *HCJFH Alian*, paragraph 36 of the opinion of President E. Hayut). Admittedly, in the present case, this examination has actually led to the broadening of the policy concerning the withholding of bodies. However, there is no inherent flaw in this outcome given that changing circumstances may affect the appropriate balance in either direction.

Second, the notification submitted by the State's Respondents in the framework of HCJ 921/20 *Ka'abana v. Commander of IDF Forces in the West Bank* on 15 March 2020 - about six months after the new decision was made - reveals that the new decision was reached at the end of a lengthy process. It was stated that this process included preliminary staff work, and a "dialogue" between the Ministry of Defense and the National Security Council (Paragraphs 12-13 of the State's Response to the original petition), and that at the conclusion of the process "different and even conflicting professional opinions" were presented to members of the Cabinet on behalf of the Chief of Staff, the GSS (General Security Service) representative, and the Coordinator for Prisoners and Missing Persons in the Prime Minister's Office (paragraphs 35 and 46 of the response affidavit to the amended petition). This is, therefore, a decision made through due process and on the basis of a comprehensive examination of facts. Moreover, the material presented to us *ex parte*, with the consent of the Petitioner, indicates that at least at the present moment there is a rational connection between the new decision to expand the scope for withholding the bodies of terrorists and the purpose of returning the civilians and the bodies of fallen soldiers.

Furthermore, it has already been determined that "the circumstances that would justify a temporary burial of a body [...] can be regulated through the rules concerning the discretionary powers of the military commander, to the extent that it is possible to anticipate the relevant scenarios. This determination acknowledges the fact that the military commander's discretion cannot be restricted in advance to a rigid period of time, or to a closed list of scenarios, due to the situation at hand which by its very nature involves dynamic circumstances and variables related, *inter alia*, to the negotiation process with the relevant terrorist organization." (*HCJFH Alian*, paragraph 28 of the President's opinion). Following the remarks we made at the hearing, the Respondents regulated the discretionary powers of the competent authorities by means of rules detailing the relevant considerations, and the hierarchy between them (see above, para. 4), and re-examined the fate of all of the bodies held in their possession in the light of these criteria. The aforementioned recognition that exceptions exist, and that an individual examination is required in the case of each body, ensures that the new decision will also pass the test of the least harmful means. Admittedly, the harm caused by the original decision to the terrorists and their families was more limited, but the sad reality is that this also contributes to achieving the desired purpose - and, therefore, does not constitute a relevant alternative.

As for the test of proportionality in the narrow sense, I will only state that the material presented to us makes it possible to determine that at this time –

> "The Military Commander's decisions also meet the harm-benefit test. As I noted above, we are concerned with decisions that present a relatively minor violation of the right of the dead and their families to dignity, and not to the core of the right. What we are concerned with is essentially temporary burial that does not sever the link between the terrorists' families and their dead, and does not necessarily prevent them from visiting the temporary graves or even taking part in the funeral (subject, of course, to relevant security considerations). The proper burial of the terrorists, in accordance with their religious customs, and in a way that allows future identification of their bodies, further minimizes the violation of their dignity. Therefore, in weighing this violation against the substantial security purposes underlying the policy, by virtue of which the Military Commander's decisions were made, the scales tip, in principle, in favor of the latter". (Alian case, para. 24 of my opinion; *HCJFH Alian*, para. 36 of President Hayut's opinion).

Although the new decision accords greater weight to the considerations of security and the return of the captives than to the dignity of the deceased terrorist and his family, I was not convinced that the Military Commander's decision to act according to it and to withhold Erekat's body deviates - in the current circumstances - from the bounds of reasonableness and proportionality.

8. Is there, based on Erekat's individual characteristics, a cause for intervention in the Military Commander's decision? The answer is no. The Petitioner did not show cause for intervening in the Respondents' factual determinations as to the nature of the incident in which Erekat found his death - and the arguments regarding the date the new decision came into force are also unsubstantiated. The Military Commander derives his authority from Regulation 133(3) of the Defense Regulations, and although the exercise of authority contrary to the original decision may have raised significant difficulties (as the Attorney General also clarified), the picture is different when it comes to the temporary withholding of the body for the purpose of exhausting the re-examination of the policy, a process that began months before the death of Erekat. In any event, this delay does not prevent the continued withholding of the body after the competition of the review and the formulation of a permanent policy.

   After reading the opinion of my colleague, Justice Y. Amit, I will emphasize that in my view, the principle of the administrative legality - "according to which an administrative action cannot be executed without authorization" - was not violated in our case. As stated, the authority of the Military Commander to order the holding of bodies of terrorists for security reasons is enshrined in Regulation 133(3) of the Defense Regulations and does not derive from Cabinet decisions. These decisions, of course, affect the manner in which the commander's discretion is exercised, but they cannot constrict the scope of the authority conferred on him by the legislature, and, hence, it is clear that his decision in the matter of Erekat was made with authority- even if it deviated from the policy outlined by the original decision.

Above all, I will note that "under a longtime rule of our legal system, known as the Michlin rule, when the legislature directly grants a public official an authority whose use involves the exercise of discretion [...] The competent authority must use it at its own discretion, without being subject to binding instructions from its superiors." (RAA 4696/19 *Anonymous v. Remuneration Officer*, para. 17, (12 December 2019) (Hereinafter: "Anonymous Case"). Without reference to the specific limitations of this practice, which have been criticized in legal literature (see, for example, Yitzhak Zamir, **Administrative Authority** Vol. 941-946 (expanded second edition, 2011)), suffice it to say that the Military Commander "may take into account the policy established in the field in question, and to consider the advice of others, but the final decision is his, subject to the provisions of the law that empowered him." (Anonymous Case, para. 17, and the references therein). It was found that there was no flaw that warrants judicial intervention in the Military Commander's decision to withhold Erekat's body - aware that the Cabinet was re-examining the policy outlined the original decision, in light of the changes in the relevant facts.

9. Therefore, I will propose to my colleagues to dismiss the petition and revoke the order nisi. Underlying this decision is the consideration that at this time there is no cause to intervene in the matter. At the same time, the Petitioner will be granted the opportunity to raise again his objections against the discretionary component of the Military Commander's decision regarding Erekat - and the new decision on which it is based - six months after our judgment is rendered.

Justice [N. Handel]

Justice Y. Amit:

1. Ahmad Mustafa Erekat (hereinafter: "Erekat") was shot on 23 June 2020 in the course of an attempted vehicle-ramming attack. This is the conclusion reached by the security forces, and it is also the conclusion that emerges from the material presented to us. Hence, Erekat should be viewed as a terrorist, and this is the starting point of our discussion.

   Erekat's body has been kept in the refrigerator for over a year. Had my opinion been heeded, the order would have been rendered void soon after the order nisi was granted on 22 July 2020, and certainly now, after such a long period has elapsed. I will briefly explain my conclusion.

2. Withholding the bodies of terrorists in accordance with the Security Council's is closely related to the matter of the captives and the missing. The Hamas organization is holding two civilians who, due to personal circumstances, crossed the border into the Gaza Strip: Avera Mengistu in September 2014 and Hisham Shaaban al-Sayed in April 2015. For the past seven years, Hamas has also been holding the bodies of two IDF soldiers who fell

during Operation "Tzuk Eitan" ("Protective Edge") in the summer of 2014: the late Lt. Hadar Goldin and the late St. Sgt. Oron Shaul.

With the consent of the Petitioners, we heard the relevant security officers *ex parte*. I personally found it difficult to be convinced by the explanations and the materials presented to us by the various authorities, but naturally it is not possible to elaborate on this issue, nor did I base my decision on that. I will be satisfied with a remark that the discussion in HCJFH 10190/17 *Commander of Forces IDF in the Judea and Samaria Area v. Alian* (9 September 2019), (Hereinafter: "HCJFH Alian") was conducted under the assumption that holding the bodies of terrorists may contribute to advancing negotiations for the return of the civilians and the bodies of IDF soldiers held by the Hamas; and about four years have passed since then. In any case, we have seen time and time again in both constitutional and administrative law that "there is no stipulation that the chosen means will absolutely and definitely fulfill the purpose" (HCJ 6427/02 *Movement for the Quality of Government in Israel v. Knesset*, PD 61(1) 619, 706 (2006)), so the fact that the negotiations with Hamas have not yet borne fruit is not a decisive consideration.

3. It is not disputed that the State of Israel has a moral obligation to bring about the return of its citizens and its fallen soldiers. Generations of soldiers have been educated on, and have even sacrificed their lives and their physical welfare for, the ethos of not leaving a fellow soldier, alive or dead, on the battlefield. The policy regarding the holding of the bodies of terrorists is not intended for punitive purposes, but for negotiation purposes. This policy is one of the measures employed by the state, with no choice, in order to bring about the return of IDF soldiers and fallen soldiers, and Israeli citizens, held by terrorist organizations. However, for the purpose of the case before us I am not obliged to examine all of the ethical and moral questions relating to the policy of the holding of the bodies of terrorists and their use as "bargaining chips" in negotiations with Hamas.

4. When Erekat carried out the attempted vehicle attack, the Political-Security Cabinet's decision of 1 January 2017 was in force (hereinafter: "the first Cabinet decision"), according to which the bodies of terrorists affiliated with Hamas, or the bodies of terrorists who committed a particularly heinous terror attack, will be held by Israel. The rationale behind this decision was that the status of a body of a terrorist affiliated with Hamas, or a terrorist who carried out a horrific attack, is not analogous to the status of a body of an individual terrorist who is not affiliated with any organization. Similarly, in HCJ 6314/17 *Namnam v. Government of Israel* (4 June 2019), where the decision to prevent family visits to security prisoners from Gaza affiliated with Hamas was discussed, the state argued that there is a "relevant difference between the group of prisoners belonging to the Hamas terrorist organization, which holds Israeli civilians and the bodies of IDF soldiers in the Gaza Strip, and the other prisoners."

   It is not disputed that Erekat's case did not fall within the scope of the first Cabinet decision, and the Respondents confirmed this in their reply to the order nisi: "At the end of this examination it was found that the body does not meet the conditions set forth in the

aforementioned Cabinet decision [...] there is no dispute that the continued delay of the return of the body in question requires a change in the current Cabinet decision of 1 January 2017".

Presumably, when Erekat carried out the attempted vehicle attack, he did not plan his actions with the thought of what would or would not be done with his body, and so his or his family members' claim of "reliance" on the first Cabinet decision should not be recognized. But what is important in our case is that when the Military Commander continued to hold Erekat's body, he did so contrary to the first Cabinet decision, which was in force until 2 September 2020, when the Security Cabinet decided to apply the criteria for holding the bodies of terrorists to all terrorists, regardless of their organizational affiliation, whether they killed or injured anyone, or whether they carried a cold or hot weapon (Hereinafter: "the current Cabinet decision"). The current Cabinet decision joins a series of measures and steps taken by the state to advance effective negotiations with the Hamas organization for the release of Avera Mengistu and Hisham Shaaban al-Sayed and the return of the bodies of the late Lt. Hadar Goldin and the late St. Sgt. Oron Shaul.

5. The government decision made through the Political-Security Cabinet binds the military echelon, which is meant to implement the policy of the political echelon, subject to the principles of administrative law. An administrative body is meant to act in accordance with the internal guidelines in force, and not in accordance with new guidelines created following, or in wake of, the action that is the subject of the administrative directive, and this case is no different. The issues are simple and stem from the principle of administrative legality, according to which an administrative action cannot be executed without authorization, and "the greater the infringement on a right the greater the required authorization" (Justice Vogelman's judgement in the Alian case, para. 3).

   Note: I am prepared to assume that there may be exceptional cases where a change of the legal circumstances ought to be considered in light of a decision or directive that is due to take effect shortly. However, the case before us did not justify, in my view, deviating from the first Cabinet decision so that, in practice, Erekat's body was held illegally by the Military Commander for more than two months until the current Cabinet decision was made. In another case, where the application of "leverage" on the Hamas was also claimed – in the form of a ban on the entrance of first-degree female relatives of Hamas members into Israel for life-saving treatments - it was stated "the objective of returning captured and missing persons, despite its vast importance, which is not being disputed, cannot serve in and of itself to justify any measure whatsoever." (HCJ 5693/18 *Tziam v. Prime Minister*, para. 29 (26 August 2018)).

   In the case at hand, given that Erekat's body was held illegally, and not within the scope of the first Cabinet decision, I believe that the order should be rendered void, and that the court must order the release of the body. This is without prejudice to the authority of the Military Commander to set restrictive conditions that will ensure the maintenance of public order during the return of the body or its burial.

Justice [Y. Amit]

Justice D. Mintz:

I concur with the opinion of my colleague Justice N. Handel that the petition should be rejected and the order nisi granted should be revoked.

1. The basis for the above, as my colleague Justice Handel pointed out, is regulation 133(3) of the Defense (Emergency Regulations), 1945, which authorizes the Military Commander to order the temporary burial of the body of a terrorist for reasons of national security and public safety. The question of when temporary burial advances the security purpose is left to the discretion of the Military Commander (HCJFH 10190/17 *Commander of Forces IDF in the Judea and Samaria Area v. Alian*, para. 35 of the opinion of President E. Hayut (9 September 2017) (hereinafter: "the Alian case"), when the considerations necessitate military and security expertise (Compare: HCJ 8414/05 *Yassin, Head of the Rural Council Bil'in v. Government of Israel* PD 62(2) 822, 44 (2007) and the references therein). The role of the Political-Security Cabinet (hereinafter: "the Cabinet") is to provide a framework for the discretion of the Military Commander and give him guidelines on the exercise of his discretion. Therefore, holding the body of a terrorist contrary to the Cabinet's guidelines is not an illegal act, i.e. an action taken without authority in the words of my colleague Justice Y. Amit, but rather an error in the manner in which the authority was exercised (see in this regard: HCJ 1827/92 *Israel Manufacturers Association v. Minister of Finance,* PD 46(4) 368, 383 (1992); HCJ 2959/17 *Alshuamra v. State of Israel*, para.17 (20 November 2017); Criminal Appeal Request 3199/20 *Zaitsev v. State of Israel*, para. 1 of my opinion (12 August 2021)); and in the present case, an error in the determination of the necessary balance between security considerations on the one hand, and the dignity of the deceased and of his family on the other (Alian case, paras. 13, 29 of the President's opinion).

2. Moreover, the main difficulty found by my colleague Justice Amit in this case lies in the fact that Erekat's case does not fall within the scope of the first Cabinet decision of 1 January 2017 but within that of the second decision dated 2 September 2020 (Hereinafter: "the second Cabinet decision"). Therefore, in my colleague's view, his body was held illegally from the day it was seized and until the date of the second decision. However, despite the undisputed fact that Erekat did not belong to a terrorist organization, the confidential material submitted for our consideration indicates that he should be classified as a terrorist, and the withholding of his body by the Military Commander advances, from my perspective, the security purpose for which it is being held. This is despite the fact that the date of his death preceded the second Cabinet decision. In any case, even if it is possible to adopt the stricter approach, I still see no cause to order the body's release, and believe that the moderate approach which relies on the doctrine of relative nullity should be taken (see: HCJ 7647/16 *Association for Civil Rights in Israel v. Minister of Culture and Sports*, paras. 81-82 of the opinion of Vice President H. Meltzer (13 May 2020)).

3. Furthermore, I find it difficult to intervene in the discretion of the Cabinet and of the Military Commander. In their view, there is an advantage to holding the bodies of terrorists, even if they are not affiliated with any organization. This advantage, which cannot be measured at this time, may lead to the advancement of negotiations for the return of Israeli citizens and fallen IDF soldiers from Hamas' captivity. Therefore, in light of the overall considerations, and in view of the rule that maximum restraint must be exercised in the judicial review of a clear–cut political-security decision made by the Cabinet (see: HCJ 9594/09 *Legal Forum for the Land of Israel v. Ministerial Committee on National Security Affairs*, para. 13 (21 April 2010)), the solution proposed by my colleague, Justice Handel, according to which at present the petition will be dismissed, and at a future date the balance of interests may be re-examined, is an appropriate and proper solution. After all, the preservation of the dignity of the dead in relation to Erekat is being weighed against the preservation of the dignity of the fallen IDF soldiers held by Hamas, and against the value of the "redemption of the captives" that are being held by the Hamas. My colleague Judge Handel put it well in HCJ 4466/16 *Alian v. Commander of IDF Forces in the West Bank*, paragraph 15 of his opinion (14 December 2017):

> "Another general purpose derived from the State's fundamental values is the value of 'redemption of captives'. Whether this is an integral component of 'state security' or not, it is hard to question the significance accorded to this value within Jewish tradition and within the Israeli ethos. As aptly described by Deputy President M. Cheshin in the matter of Further Criminal Hearing 7048/97 *Anonymous v. Minister of Defense, PD 54(1) 721* (2000):
>
> > 'The commandment of redemption of captives—a commandment of the utmost order—was instituted for good reason, since all of Israel (and for our purposes not only Israel) are responsible for one another. An army's strength lies in the brotherhood of its soldiers, and this brotherhood binds both in times of battle and when a combatant falls captive in enemy hands. As in the oath of the Three Musketeers, as written by Alexandre Dumas "Tous pour un, un pour tous", a combatant will fight knowing that he is not alone, and that in times of need his friends will come to his rescue. We are commanded and adamant not to abandon the wounded in the field and, as with the wounded, we will not rest until our captives are freed. Combatants are akin to mountain climbers tied to each other by rope and fate, and a climber whose grip has failed and whose body is hurled into the abyss will be saved by his comrades.' (p. 747)"

There's nothing more to be said.

Justice [D. Mintz]

Therefore, it was decided as stated in the opinion of Justice v. Handel, which was joined by Justice D. Mintz, and against the dissenting opinion of Justice Y. Amit.

Delivered today, 18 August 2021 (10 Elul 5781)

Justice Justice Justice