



## **Joint submission to EMRIP and UN experts on the Israeli policy of withholding the mortal remains of indigenous Palestinians**

*Response to Call for Inputs: Comments on the Study on the Right to Land under the UN Declaration on the Rights of Indigenous Peoples, and the Report on the Right to Repatriation of ceremonial objects, human remains, and intangible properties under the UN Declaration on the Rights of Indigenous Peoples*

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### **For the attention of:**

- The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP);
- The Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967, Mr Michael Lynk;
- The Special Rapporteur on the rights of indigenous peoples, Mr Francisco Cali Tzay;
- The Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms Agnes Callamard;
- The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Mr Nils Melzer;
- The Special Rapporteur in the field of cultural rights, Ms Karima Bennoune; and
- The Working Group on Enforced or Involuntary Disappearances, Mr Luciano A. Hazan (Chair-Rapporteur).

### **1. Overview**

This submission is prepared in response to a call for inputs issued by the United Nations (UN) Expert Mechanism on the Rights of Indigenous Peoples (hereinafter ‘EMRIP’ or ‘the Expert Mechanism’) for its upcoming report on the repatriation of ceremonial objects and human remains under the UN Declaration on the Rights of Indigenous Peoples, a final version of which will be presented to the Human Rights Council at its 45<sup>th</sup> regular session in September 2020. The Expert Mechanism requested contributions from States, indigenous peoples, national human rights institutions, non-governmental organisations, and other stakeholders to this report.<sup>1</sup> This submission is made on behalf of three Palestinian and regional human rights

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<sup>1</sup> OHCHR, Report on Repatriation of ceremonial objects and human remains under the UN Declaration on the Rights of Indigenous Peoples, available at: <https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/CallforSubmissionsRepatriation.aspx>.

organisations, including: Jerusalem Legal Aid and Human Rights Center (JLAC), Al-Haq, Law in the Service of Man, Cairo Institute for Human Rights Studies (CIHRS). Al-Haq and CIHRS are non-governmental organizations in special consultative status with the UN Economic and Social Council (ECOSOC).

The submission is addressed to the Expert Mechanism as well as relevant UN special procedures mandate holders, including the Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967, Mr Michael Lynk, as well as relevant thematic mandates. This submission addresses a long-standing Israeli policy of withholding the mortal remains of indigenous Palestinians for the consideration of the Expert Mechanism and mandate holders. It seeks to draw attention to Israel's decades-long practice of holding onto the bodies of deceased Palestinians as well as the imposition of severe restrictions on their funerals and their families' mourning rituals.

For the past 12 years, the Jerusalem Legal Aid and Human Rights Center (JLAC) has been representing indigenous Palestinians in legal proceedings before Israeli courts with the aim of locating, identifying, and repatriating the withheld, missing, and disappeared bodies of their loved ones. JLAC has also exhausted the remedies available at Israeli avenues to substantively challenge the legal foundations upon which Israel bases the practice of withholding deceased Palestinians' bodies. In light of the ongoing implementation of this practice and the failure of the Israeli High Court of Justice (HCJ) to overturn the policy, it is of utmost importance that this issue be addressed in the report on the right to the repatriation of ceremonial objects, human remains, and intangible resources.

Israel's refusal to repatriate the mortal remains of indigenous Palestinians violates, *inter alia*, Article 12(2) of the UN Declaration on the Rights of Indigenous Peoples. It also contravenes the customary IHL rules on the disposal of the War Dead's bodies as well as the human rights to dignity, family life, religious freedom and cultural customs, and the prohibition against degrading or inhuman treatment.

## **2. Methodology and Conceptual Remarks**

This submission is divided into two sections. The first section offers a historical background of Israel's policy of withholding corpses in its various phases over the past five decades of Israeli military occupation, tracing its evolution from inconsistent application to a temporary halt, then to its re-escalation, culminating in the current efforts to regulate and systematize it through legislation and court rulings. The second section sketches the legal framework that institutionalizes the practice of withholding Palestinian corpses and the ways in which the Israeli judiciary has handled Palestinian petitions against this policy through a legal timeline that charts the most important developments the policy has undergone.

Before approaching the evolution of the practice, two conceptual remarks are necessary. First, framing Israel's regime of institutionalized oppression and domination over the Palestinian people and subsequently framing the status of the Palestinian people living under this regime is not merely a theoretical issue but rather has legal and practical ramifications.

The difficulty in placing all Palestinians in a single category stems from Israel's deliberate fragmentation of the Palestinian people since 1948. Israel strategically fragments the Palestinian people into four separate legal, political, and geographic domains comprising Palestinians within the Green Line, who are citizens of Israel; Palestinians in East Jerusalem, upon whom Israel conferred a 'permanent resident' status in 1967; Palestinians in the West

Bank and Gaza Strip, including Palestinians in refugee camps, who are subject to Israeli military laws; and Palestinian refugees and exiles abroad whose right of return to their homes, lands, and property Israel has systematically denied since the Nakba (‘catastrophe’) of 1948.

In 2017, a UN Economic and Social Commission for Western Asia (ESCWA) report found that Israel’s strategic fragmentation is the main tool of Israeli apartheid over the Palestinian people as a whole.<sup>2</sup> Today, Israel continues to entrench its strategic fragmentation of the Palestinian people on the ground in an effort to deny Palestinians the exercise of their inalienable rights, in particular their right to self-determination and the right of return to their homes, lands, and property.<sup>3</sup> Through this process of continued colonial oppression and domination, Israel’s strategic fragmentation of the Palestinian people has come to be accepted as normative by the international community, including within the UN system. As argued in the ESCWA report:

“The international community has unwittingly collaborated with this manoeuvre by drawing a strict distinction between Palestinian citizens of Israel and Palestinians in the occupied Palestinian territory, and treating Palestinians outside the country as “the refugee problem”. The Israeli apartheid regime is built on this geographic fragmentation, which has come to be accepted as normative. The method of fragmentation serves also to obscure this regime’s very existence.”<sup>4</sup>

Despite the difference in their legal status and positionality in the hierarchy of repression and rights violations, we argue that the entire Palestinian people living in historic Palestine are unified by their indigeneity. As such, discussing their rights within the framework of the UN Declaration on the Rights of Indigenous Peoples as well as EMRIP is essential for their recognition and protection. Notably, Israel’s strategic fragmentation since the Nakba does not undermine Palestinian peoplehood and indigeneity in Palestine since time immemorial. Israel’s definition as a ‘Jewish Nation-State’ and the myriad policies to bolster this definition directly negate the identity of the indigenous Palestinian people living on both sides of the Green Line and as refugees and exiles abroad, and perpetuates Israel’s institutionalized domination and oppression over them, as part of the commission and maintenance of the crime of apartheid.

Secondly, we argue that the Israeli practices of withholding the bodies of dead Palestinians, the denial of the Palestinian right to mourn and grieve, and the attempts to control or discipline spaces of death and dying are among the manifestations of colonial and apartheid control over the Palestinian people as a whole.

### **3. The Israeli policy of withholding the bodies of deceased Palestinians**

Since 1967, Israel has applied an inconsistent policy of holding onto the corpses and remains of hundreds of Palestinian and Arab combatants.<sup>5</sup> The dead were buried in what Israel refers to as “cemeteries for enemy combatants,” mass graves located in areas designated by Israel as

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<sup>2</sup> See UN ESCWA, *Israeli Practices towards the Palestinian People and the Question of Apartheid, Palestine and the Israeli Occupation*, Issue No. 1, UN Doc. E/ESCWA/ECRI/2017/1, p. 4.

<sup>3</sup> See Al-Haq, *Palestinian, regional, and international groups submit report on Israeli apartheid to UN Committee on the Elimination of Racial Discrimination*, 12 November 2019, available at: <http://www.alhaq.org/advocacy/16183.html>.

<sup>4</sup> See UN ESCWA, *Israeli Practices towards the Palestinian People and the Question of Apartheid, Palestine and the Israeli Occupation*, Issue No. 1, UN Doc. E/ESCWA/ECRI/2017/1, p. 37.

<sup>5</sup> Sam Gilbert, “Occupied bodies: Israel is withholding the bodies of war victims,” *Palestine Monitor*, 3 September 2013, available at: <http://palestinemonitor.org/details.php?id=be9o8za4973yvsu6l1oqp>.

closed military zones.<sup>6</sup> Palestinians refer to these gravesites as the “cemeteries of numbers” for their shared characteristic of numbered placards meant to mark each corpse. 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 bodies. The subsequent commission of inquiry appointed by the Chief-of-Staff confirmed that by July 2000, three cemeteries of numbers had been operated by the Israeli military, where a total of 349 Arab and Palestinian bodies had been secretly buried.<sup>7</sup>

Beyond the scattered information provided by the Israeli military, 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 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 the victims’ 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 resistance fighters were excluded from the military orders’ regulations on handling the bodies of dead soldiers because they were considered “infiltrators” by Israel. Many corpses were wrapped with plastic bags and 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 “cemeteries for enemy combatants” were revealed over the years. As recently as February 2020, two previously undisclosed sites where Palestinians are buried have been uncovered in a court-ordered list offered by Israel. The cemeteries of numbers constitute a paradigmatic model of the dehumanization of Palestinians, who are transformed into nameless, disposable bodies. According to figures compiled by the National Campaign for the Retrieval of War Victims’ Bodies, which was launched by JLAC in 2008, Israel has buried at least 400 Palestinian and Arab combatants in the Cemeteries of numbers since the 1960s.

From its inconsistent application and complete vagueness, the practice of withholding corpses of deceased Palestinians underwent a dramatic shift in 1994, but reasons for this shift were unclear. On 11 November 1994, Hisham Ismail Hamad, a teenage Palestinian resistance 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.<sup>8</sup> The attack was said to have been carried out in retaliation for Israel’s assassination of a high-ranking Islamic Jihad member.

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<sup>6</sup> Hanadi Qawasimi, “Cemeteries of numbers: Israel takes revenge on Palestinian corpses,” *The New Arab*, 28 November 2014, available at: <https://www.alaraby.co.uk/english/politics/2014/11/28/cemeteries-of-numbers-israel-takes-revenge-on-palestinian-corpse>.

<sup>7</sup> The Hebrew version of the Commission’s report can be found at: <http://www.hamoked.org.il/items/7217.pdf>.

<sup>8</sup> See UN Division for Palestinian Rights, *Chronological Review of Events Relating to the Question of Palestine*, 30 November 1994, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/D63E22C48DD2DB5F85256123004E466B>.

It killed three Israeli soldiers, in addition to Hamad.<sup>9</sup> Since then, withholding the corpses of Palestinians who carry out suicide attacks 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 a tactic for leverage 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 temporarily halted the policy of mass withholding of bodies. In fact, the Israeli government publically embraced an approach to return all the corpses and remains withheld in the “cemeteries for enemy combatants” in early 2015, but soon retracted that position.

The policy to withhold bodies *en masse* resurfaced in October 2015. Following a wave of individual attacks by Palestinians that began in earnest on 3 October 2015, the Israeli cabinet announced a package of punitive measures to quell and repress the uprising. These measures included punitive house demolitions, closures, and the withholding of corpses of alleged Palestinian attackers as collective punishment, in violation of international humanitarian law.<sup>10</sup> 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 “uniform policy” on handling the corpses of Palestinian attackers.

From October 2015 to June 2020, Israel withheld the bodies of more than 250 Palestinians, killed by the Israeli occupying forces or, according to substantial evidence, believed to have been extrajudicially executed after allegedly carrying out attacks against Israeli soldiers or settlers. By the end of May 2020, Israel had continued to withhold the bodies of 62 Palestinians, in addition to those buried in the cemeteries of numbers for decades.

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 or dawn and that no political slogans will be expressed. Many Jerusalemite families were ordered to bury their dead in a cemetery other than the family's traditional burial place. As a prerequisite for agreeing to hand over the bodies, Israel has also, on many occasions, ordered the families to provide guarantees that they would not hold autopsies and that they would bury the bodies within two hours of receiving them. This effectively renders impossible any investigation into the circumstances of the killings, disrupting the families' quests for truth and accountability. What's more, the conditions in which many of the bodies were held in the morgues for months were demeaning and caused the total disfiguring of the corpses to the point where they became unrecognizable upon being handed over. According to the Israeli authorities, 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 Palestinian Jerusalemites, however, such restrictions constitute yet another layer in a system that thrives on spatial domination and social control.

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287 (hereinafter ‘Fourth Geneva Convention’), Article 33.

Imposing strict constraints on funerals, denying those killed proper burial, and withholding or mishandling their corpses reflect Israel's treatment of dissident bodies as an ideological battleground for the articulation of sovereignty and the enunciation of symbolic power. For the colonial power, these dissident bodies are disposable and "othered," relegated to a status that deems them unworthy of the dignified posthumous treatment automatically guaranteed to the dead of the hegemonic colonizers. From their birth, indigenous Palestinians are forced to normalize a reality where their very existence on their ancestral lands is governed by a bureaucratic regime that condemns them to perpetual disposability and dispossession. The revocability of the status of Palestinians when they are alive extends to their death. Thus, punishing the dead by deeming their bodies disposable, ungrivable, unmournable and unworthy of a dignified treatment, is a form of cruel dehumanization and othering that targets the erasure and expropriation of their memory and the disciplining of their community.

Israel's multi-layered necropolitical regime marks the lives of indigenous 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 an emotional 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."<sup>11</sup>

In addition to the ambiguous loss inflicted upon the affected family, this necropolitical regime creates a hierarchy of grievable and ungrivable 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.

#### **4. Legal Timeline of the Policy of Withholding Palestinian Bodies**

This section offers a legal timeline of Israel's decades-long policy of withholding the bodies of deceased Palestinians to offer a clearer understanding of the history of this practice:

1. 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."
2. 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."
3. May 1948: Incorporation of the Emergency (Defence) Regulations into domestic Israeli law after the establishment of the Israeli state in the wake of the Nakba (or 'catastrophe') during which Zionist militias forcibly displaced two thirds of the indigenous Palestinian people from their homes, lands, and property, rendering

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<sup>11</sup> Boss, P. (1999). *Ambiguous loss: Learning to live with unresolved grief* (p. 5). Cambridge, MA: Harvard University Press.

them refugees in their own land and in the region, denied their right of return ever since.

4. 1964: Burial of the first body in Israel's cemeteries of numbers, according to the National Campaign for the Retrieval of War Victims' Bodies launched by JLAC in 2008.
5. 1967: Following the occupation of the West Bank, including East Jerusalem, and the Gaza Strip, as well as the occupied Syrian Golan, the Israeli occupying authorities issue a military order applying the British Emergency Regulations, including Regulation 133(3) in the occupied Palestinian and Syrian territories.
6. 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 confrontations with Israeli forces are excluded from the order because they are classified by Israel as "terrorists" and "infiltrators."
7. 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 military to bury Palestinians in cemeteries of enemy combatants and create a separate category for Palestinians killed in clashes with Israel, known as infiltrators and terrorists.
8. August 1992: Decision by Israel's High Court of Justice permitting the Israeli military and the Israeli civil administration to impose restrictions on the funeral of Mustafa Barakat, a Palestinian who died under torture in Israeli custody, on so-called security and public order grounds. The ruling becomes the basis for several future rulings in which the High Court approves the military's decisions to impose restrictions on funerals, even in cases where those killed had not been involved in alleged attacks (HCJ 3933/92, *Barakat v. OC Central Command*).
9. 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" is carried out, in search of the missing body of Palestinian-Jordanian resistance fighter Issa Zawahreh. DNA tests conducted in the United States, also a first, show that the exhumed remains do not belong to Zawahreh (HCJ 5267/92, *Alya Abu-Rijwa v. Minister of Defense*).
10. October 1994: Petition against the Israeli military'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 Ilan Sa'adon. The High Court decides that withholding bodies as bargaining chips is reasonable and proportionate based on Regulation 133(3) (HCJ 6807/94, *Abbas v. State of Israel*).
11. October 1999: Appointment of an investigative committee by the Israeli 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.
12. 2001-2004: The frequency of Israel's practice of withholding Palestinian martyrs' bodies soars to unprecedented levels in the wake of the second Intifada.
  13. 2004: Israel's Attorney-General 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.
  14. 27 August 2008: JLAC launches 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 Retrieval of Martyrs' Bodies.
  15. 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 National Campaign (HCJ 8306/09, *Talab Saleh v. Military Commander*).
  16. 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.
  17. September 2015: Israel pledges to return the remains of 119 Palestinian bodies withheld in its "cemeteries for enemy combatants."
  18. October 2015: In response to a wave of alleged attacks by Palestinians in Jerusalem and the rest of 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 grounds. Hundreds of bodies would be held in Israeli morgues in subsequent months, but most were gradually released.
  19. January 2017: The Israeli Cabinet issues a uniform policy requiring, in principle, the return of alleged Palestinian attackers' bodies pending security assurances. The Cabinet laid out two exceptions to this rule: the alleged attacker is affiliated with Hamas and thus his body can be used in potential negotiations for prisoner exchange; or the attack allegedly carried out is exceptionally severe.
  20. March 2017: In a hearing involving several petitions filed by HaMoked in 2015 and by JLAC (on behalf of 116 families) in 2016, the High Court orders the Defense Ministry to appoint an agent tasked with managing and integrating the efforts to locate and identify bodies held in cemeteries for enemy combatants. Following a long delay, the Israeli government appoints the agent, after which JLAC files a request for creating a DNA database to identify the bodies. In February 2020, the Israeli Defense Ministry publishes a list of 123 persons whose families are represented in the petitions. The place of burial of 106 of those was located while no information was available about the other sixteen. The list reveals that Israel buries martyrs in cemeteries not previously disclosed, such as the Menocha Nechona cemetery in the Naqab, a cemetery for the companionless where the majority of martyrs were buried in procedures conducted by private contractors. In a hearing on 10 February, JLAC renewed the demand for creating the DNA



database to identify the located bodies but the Israeli Defense Ministry argues that the decision to create this database involves policy considerations. The Court granted the Defense Ministry an additional two months to respond (HCJ 4241/15, *Anonymous v. Military Commander*; HCJ 4422/15, *Atta Hilal v. Military Commander*; HCJ 7857/16, *Youssef Abu Basma v. Military Commander*; HCJ 7859/16, *Jamila Moussa v. Military Commander*; HCJ 7861/16, *Muyassar Hamad v. Military Commander*; HCJ 9781/16, *Muhammad Attiyah Sukar et al. v. Military Commander*; HCJ 9939/16, *Taleb Youssef Jabari et al. v. Military Commander*).

21. July 2017: Following a petition by Palestinian human rights organization Adalah, the High Court decides that the police is not authorized to withhold the bodies of three Palestinian citizens of Israel accused of killing two 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 (HCJ 5887/17, *Jabareen v. The Israel Police*).
22. March 2018: In response to the Court decision, the Israeli Parliament (the Knesset) adopts an amendment to the Counterterrorism Law authorizing the police to impose conditions and restrictions on the funerals of alleged “terrorists” and the extraction of bails.
23. December 2017: In another petition contesting the constitutionality of Israel’s practice of withholding Palestinian 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 military to withhold bodies as bargaining chips (HCJ 4466/16, *Muhammad Alayan et al. v. Military Commander*).
24. February 2018: Israeli Chief Justice Esther Hayut approves a motion by the State to hold a further hearing into the Court’s decision, arguing that it constitutes an important and sensitive precedent.
25. July 2018: The Court holds a further hearing before a seven-judge panel to decide whether regulation 133(3) explicitly and directly authorizes the military to withhold bodies as bargaining chips. (FH-HCJ 10190/17, *The Military Commander in the West Bank v. Alayan et al.*).
26. September 2019: The Court decides in a 4-3 majority that Regulation 133(3) authorizes the Israeli military to withhold bodies as bargaining chips, greenlighting the continued implementation of the cabinet decision. Even though there is no explicit mention of using the bodies as bargaining chips in the regulation, the Court argued that such an objective could be surmised from a purposive interpretation of the Regulation.
27. May 2020: By the end of May 2020, Israel continues to withhold the bodies of 62 Palestinians in accordance with the Cabinet’s decision of January 2017, the longest-held, Abdel-Hamid Abu Surour, dating back to April 2016, in addition to hundreds buried in the cemeteries of numbers to whom the Cabinet decision also applies.

## **5. Conclusion**

In light of Israel's violation of the UN Declaration on the Rights of Indigenous Peoples, its widespread and systematic violations of international humanitarian law and international human rights law, and because the policy constitutes a prohibited form of collective punishment, amounts to ill-treatment, and may lead to enforced disappearance, Israel's withholding indigenous Palestinians' bodies should be treated with the utmost urgency.<sup>12</sup> This policy falls within the scope of the Expert Mechanism's report and we urge its inclusion. As such, we call on EMRIP to address this illegal policy and call for the immediate repatriation of the bodies of deceased Palestinians as well as an end to ongoing Israeli restrictions on Palestinian funerals and rituals of mourning, as violations of fundamental rights under international law.

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<sup>12</sup> See further legal analysis of this policy here: Al-Haq, Israeli High Court of Justice Upholds Israel's Policy of Withholding the Bodies of Palestinians Killed, 16 September 2019, available at: <http://www.alhaq.org/advocacy/15175.html>; Al-Haq, Newly Adopted Law to Withhold the Bodies of Palestinians Killed Breaches International Law, Must be Repealed, 14 March 2018, available at: <http://www.alhaq.org/advocacy/6261.html>; Al-Haq, From Killing to Burial: Questions Left Unanswered, 10 March 2016, available at: <http://www.alhaq.org/monitoring-documentation/6430.html>.