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At the Supreme Court
Sitting as the High Court of Justice

HCJ 1173/13
HCJ 1797/13
HCJ 2380/13

1. _____ **Damiati**
2. _____ **Damiati**
3. **HaMoked: Center for the Defence of the Individual,**
founded by Dr. Lotte Salzberger - RA

The Petitioners in HCJ 1173/13

1. _____ **Marshud**
2. _____ **Marshud**
3. **HaMoked: Center for the Defence of the Individual,**
founded by Dr. Lotte Salzberger - RA

The Petitioners in HCJ 1797/13

1. _____ **Zakarneh**
2. **HaMoked: Center for the Defence of the Individual,**
founded by Dr. Lotte Salzberger - RA

The Petitioners in HCJ 2380/13

All represented by counsel, Adv. Sigi Ben-Ari (Lic. No. 37566) et al.,
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Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

1. **IDF Commander in the Judea and Samaria Area**
2. **Minister of Defence**
3. **State of Israel**

Represented by the State Attorney's Office

The Respondents

Petitioners' Response to the Updating Notice on behalf of the State

According to the decision of the honorable court dated November 4, 2014, the petitioners hereby respectfully submit their response to the additional updating notice on behalf of the State dated November 2, 2014

The petitioners object to the deletion of the petitions and request the honorable court to schedule a hearing in the petitions, for the following reasons.

1. The three petitions, which were filed with the honorable court about a year and a half ago, concern the return of the bodies of petitioners' sons to their families for their burial according to their belief and creed. All cases concern bodies which are held by the respondents for about 12 years.
2. It should be noted that the family members, the petitioners in HCJ 1173/13 and in HCJ 2380/13 gave reference samples, at respondents' request, for their comparison with the samples which would be taken from the bodies. The family members, the petitioners in HCJ 1797/13 were not requested to do so.

The Updating Notice on behalf of the Respondents

3. In their updating notice the respondents claim that the possibilities to try to locate the bodies were exhausted, and therefore the petitions should be denied. The respondents note that the bodies were not held in the military cemeteries for enemy casualties and were not buried by the military. The respondent state that in their attempts to locate the bodies they turned to various entities, including the National Insurance Institute, the Forensic Institute, Israel Police, military agencies and private companies which were engaged by the National Insurance Institute and drivers who transferred the bodies to the cemeteries.
4. The respondents notified that based on examinations conducted by them, the bodies being the subject matter of the petitions in HCJ 1173/13 and in HCJ 2380/13 were apparently buried as unidentified bodies in cemeteries in the southern part of Israel with funding obtained from the National Insurance Institute. Military agencies opened specific graves (in some cases more than one body was removed from a grave), removed bodies, produced DNA samples, but eventually no match was found between said DNA samples and the DNA of the family members.
5. The respondents further notified that the body being the subject matter of HCJ 1797/13 was also buried as an unidentified body through the National Insurance Institute by a private company (EIS), apparently in another cemetery in the southern part of Israel. The registration of the specific burial place was not found, not even after an inquiry was made with the managing director of the above mentioned private company.
6. **Respondents' notice reveals a scandalous handling of the marking and burial of bodies of casualties, their future identification and return to their families. Said conduct severely violates the dignity of the dead and the dignity of their family members and runs contrary to fundamental constitutional rights and humanitarian international law.**

Precedents of severe deficiencies in respondent's handling of bodies of casualties

7. Unfortunately, respondents' scandalous handling of the bodies being the subject matter of the petitions at hand has precedents from past years in which the military encountered difficulties in the location and return of bodies to their families. One precedent is mentioned in respondents' response (HCJ 8792/10 **Dolah v. IDF Commander**) which concerns an omission in the location of a body of a person who passed away in an Israeli prison.
8. Two other cases concern two bodies which were handled by HaMoked in HCJ 5267/92 **Abirijeh v. The Minister of the Interior** and HCJ 4883/97 **Subah v. The Minister of Defence**, and which also raise severe question marks concerning the handling by the military, which is responsible for the burial of enemy casualties, of the marking and burial of bodies.
9. In HCJ 5267/92 **Abirijeh v. The Minister of the Interior** (hereinafter: **Abirijeh**) the mother of a Jordanian casualty petitioned, through HaMoked, to the High Court of Justice, to find out what happened to him. The respondent notified that the body was not buried by the IDF, and the honorable court, which did not find said notice satisfactory, ordered it to continue with the search. Only after the honorable court's order, the state retracted its previous notice and notified that the body was held in its possession and was buried in a cemetery for enemy casualties. However, the case did not end there, since the precise burial place of the body was not located and DNA samples had to be taken from several bodies that were buried in the grave in which the body of petitioner's son should have been buried or in close proximity thereto.

A copy of the court's decision in HCJ 5267/92 dated January 31, 1993 is attached and marked **P/20**.

Copies of the State's notices in HCJ 5267/92 dated January 29, 1993 and March 13, 1997 are attached and marked **P/21**.

10. In HCJ 4883/97 **Subah v. The Minister of Defence** (hereinafter: **Subah**) which concerned a petition which was filed by the family of a Jordanian resident who was killed in a clash with the IDF, the grave in which his body should have been buried, according to IDF records, was opened, but it turned out that this was not the case.
11. Following the severe deficiencies in the burial and marking of bodies which were revealed in the **Abirijeh** and **Subah** cases, the chief of staff at that time appointed, on October 17, 1999, a committee of inquiry to investigate the occurrences in these cases, to examine all aspects concerning the handling by the military of casualties' bodies and submit its findings, conclusions and recommendations. HaMoked, which has been engaged, for many years, in the humanitarian issue of the dignity of the dead, the handling of bodies and their return to the families, cooperated with the committee and transferred to it various materials.

A copy of the letter of appointment and the committee's report is attached and marked **P/22**.

12. Within the framework of the committee's activities, intensive efforts were made to identify the body being the subject matter of the **Abitijeh** case (as described in detail in the committee's report). Among other things, 16 graves were opened in an attempt to locate the body, and the deficiencies in the burial of the bodies being the subject matter of the two petitions were thoroughly investigated.
13. In its findings the committee, *inter alia*, points at the following deficiencies: unfamiliarity with the orders and failure to comply with them, deficiencies in the manner in which the bodies were buried (bodies were buried without a metal tag, the numbers of the bodies on the sacks were marked with a felt-marker which disappears over time, the signs which were put on the graves were removable, burial was made without a burial order of the GOC Command, graves

were dug as one pit with no separation, as a result of which bodies were interred closely together in a manner which makes it difficult to know if a certain body belongs to the grave which was opened), poor maintenance of the cemetery, burial by unprofessional soldiers, burial in places which were not designated for that purpose, failure to adequately mark the graves, etc.

14. In its recommendations the committee emphasized the following points:

Complementary procedures should be introduced concerning the transfer of the body from the place of the incident to the cemetery;

All bodies must undergo an external examination in the Forensic Institute before their burial;

The documentation of all procedures pertaining to the handling of the bodies and the manner by which such records are kept should be improved. Such records should include a detailed specification of the manner by which the body was handled from the moment it came into the possession of the military and until it was transferred to the military rabbinate (which unit took possession of the body, where was the body located at all times, etc.) and a detailed description of the burial procedure with an emphasis on the burial place;

A detailed procedure should be established for the burial of terrorists and infiltrators, which will also include provisions concerning the opening of the grave and the removal of the body from its grave;

The procedures concerning the handling of terrorists' bodies should be entrenched in General Staff Orders.

Respondents' response which reveals a scandalous conduct is not satisfactory

15. As aforesaid, the petitioners are of the opinion that respondents' response reveals a scandalous conduct with respect to the marking and burial of enemy bodies, their future identification and return to their families. Said conduct violates the dignity of the dead and the dignity of his family members and runs contrary to fundamental constitutional rights and humanitarian international law.

16. In view of the above-said and in view of the above described precedents, the petitioners are of the opinion that respondents' response is not satisfactory and that a hearing should be scheduled in the petition to enable the examination of fundamental issues concerning the handling of the bodies being the subject matter of the petitions.

17. It should be noted that even if the bodies being the subject matter of the petitions were interred in civilian cemeteries by this entity or another, the overall responsibility for the burial is imposed on the IDF. It is so noted, for instance, in section B of the response of the Israel Police to HaMoked dated March 3, 2004, concerning "the burial of Palestinians who committed suicide attacks".

A copy of the response of the Israel Police concerning the burial of Palestinians is attached and marked **P/23**.

18. Respondents' updating notice, which acknowledges that the bodies were held by them, does not reconcile with the norms concerning the burial of casualties and requires a response to

fundamental questions arising there-from, even if for the purpose of drawing conclusions for the future.

19. The respondents list in their response the various entities which were contacted by them for the purpose of making inquiries concerning the bodies. However, they fail to provide any documentation of the chain of events and actions which were taken from the moment the body came to respondents' possession and until it was interred (contrary to the recommendations of the inquiry committee). Thus, it is not clear whether the bodies were transferred to the Forensic Institute and how long they were kept over there, it is not clear whether actions were taken for the purpose of future scientific identification of the bodies and whether genetic profiles were produced there-from, it is not clear whether the bodies were transferred to the IDF later on and/or for temporary burial and where and whether a burial order was issued and by whom. In addition, there is no answer to the questions why the bodies were transferred for burial in a civilian cemetery through the National Insurance Institute, who ordered it and who approved it?
20. The respondents do not support their notice with documents and with a documentation of the inquiries which were made with the various agencies (as was done, for instance, by the respondents in H CJ 7047/01 **Jaber v. State of Israel**). Only these details may possibly enable to understand what additional actions and searches should be conducted for the location of the bodies.

A copy of the complementary response on behalf of the respondents in H CJ 7047/01 is attached and marked **P/24**.

21. In addition to all of the above, the petitioners are of the opinion that the respondents should be obligated to keep the genetic information which was obtained from the family members of the casualties and compare it with any genetic information which would be produced in the future from bodies which would be removed from their graves under these or other circumstances (like, for instance, the removal of bodies within the framework of future return to family members or within the framework of the transfer of bodies for burial in another location, etc.).
22. Moreover. The petitioners are of the opinion, in view of past and present experience, that the respondents should establish a genetic database of the bodies and the family members who gave samples for scientific identification, a database which may provide a solution in the future to the petitioners and family members of other casualties, who would request to receive and bury the body of their loved one.

In view of all of the above, the petitioners request the honorable court to schedule a hearing in the petition.

November 20, 2014

(signed)

Sigi Ben Ari, Advocate
Counsel to the petitioners