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Prisoners Dilemma: The International Law and Policy Implications of Israel's Detention and Prisoner Exchange Practices

Adam Reich

I. Introduction

In June 2006, Palestinian militants entered Israel through a 500-meter-long tunnel that had been dug under Israel's border with Gaza.¹ After entering Israeli territory, they killed two soldiers.² The militants also seized a young Israeli soldier in the raid.³ The soldier, Gilad Shalit, was just 19 years old at the time.⁴ Over the ensuing years, officials negotiated his release with Hamas, finally securing it on October 18, 2011.⁵ The Israeli public overwhelmingly showed a desire to bring Shalit home, with 63% supporting the exchange deal brokered by the Israeli government.⁶

In situations like this, Israel isn't negotiating with the government of another state. It is forced to deal with terrorist groups such as Hamas and Hezbollah. These organizations are known as proxy groups because while they are non-state actors, they are believed to have sponsorships from different Middle Eastern governments. As the old saying goes, actions have consequences. In negotiating with these groups, Israel is paying a high price: to secure Shalit's return, Israeli officials agreed to release 1,027 Palestinian prisoners.⁷

¹ Yakkov Katz, *Drive to Kidnap IDF Soldiers Up Since Schalit Deal*, JERUSALEM POST, Dec. 28, 2011, <http://www.jpost.com/Defense/Article.aspx?id=251281>.

² Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 Vand. J. Transnat'l L. 683, 761-62 (2009).

³ *Id.* at 761-62.

⁴ Ethan Bronner, *Israel and Hamas Agree to Swap Prisoners for Soldier*, N.Y. TIMES, Oct. 11, 2011, <http://www.nytimes.com/2011/10/12/world/middleeast/possible-deal-near-to-free-captive-israeli-soldier.html?pagewanted=all>.

⁵ Karl Vick, *Gildad Shalit Release: Israel's Joy Tempered by Memories of an Intefadeh*, TIME, Oct. 18, 2011, <http://www.time.com/time/world/article/0,8599,2097192,00.html>.

⁶ Kevin Murphy, *63% of Israeli Public Support Mass Prisoner Exchange for Gilad Shalit*, INTERNATIONAL MIDDLE EAST MEDIA CENTER, June 21, 2011, <http://www.imemc.org/article/61512>.

⁷ Ethan Bronner, *Israel Plans New Rules on Exchange of Prisoners*, N.Y. TIMES, Jan. 5, 2012, <http://www.nytimes.com/2012/01/06/world/middleeast/after-shalit-israel-changing-prisoner-exchange-rules.html?ref=world>.

Discussions about making such a deal invariably bring up discussions about how each side handles its prisoners. My thesis is that Israel's handling of prisoners and prisoner exchanges must be changed because its current practices tarnish its image to the point of undermining its standing internationally and its security at home. The international community holds Israel to the high standards provided by the entirety of the Fourth Geneva Convention. While Israel unquestionably has a need for security, the holding by the Israeli courts that the entirety of that Convention is not binding on the handling of suspected terrorists held in administrative detention is problematic. While the "humanitarian provisions" of the Convention are supposed to have binding effect, that does not seem to play out in practice. Specifically, the conditions Israel holds prisoners from proxy groups in do not conform to the humanitarian protections provided by international law; some of its practices are questionable even under the relaxed standards provided by Israeli domestic law. Consequently, if the Israeli government cannot abide by the limits its own courts place on it, it cannot expect to get any latitude from the international community when it comes to handling prisoners.

Beyond the image problem surrounding its handling of terror suspects in Israeli prisons, its willingness to conduct large-scale releases of those terror suspects threatens its security. Specifically, by engaging in prisoner exchanges with proxy groups to recover kidnapped soldiers, Israel undermines its security. The continuing ability to secure such deals does not deter proxy groups from kidnapping Israeli soldiers. Indeed, negotiations have made these kidnappings very lucrative for those groups. Because of the danger of future kidnappings continuing, Israel must change how it deals with proxy groups, but must do so in a way that will hold up in the face of public pressure to bring home its soldiers.

This essay will start by providing an overview of the kidnapping problem, Israel's handling and exchange of prisoners accused of terrorist acts and the law governing those practices. Part II will describe some of the prominent proxy groups involved in the kidnapping of soldiers and negotiations with the Israeli government conditioning their release on the release of terror suspects from Israeli prisons. Part III will discuss the provisions of international law relevant to the holding of and exchanging of prisoners. Part IV look at the applicability of those provisions and the consequences of Israel's practices. Part IV-A will look specifically at congruence of Israel's handling of these prisoners with international law. Part IV-B will focus on the policy consequences of Israel engaging in prisoner exchanges. Specifically, it will discuss the problem of "prisoner hyperinflation" that Israel has been experiencing in recent years, along with proposals to counteract the phenomenon, evaluating their feasibility. This paper concludes with a summary of the need for Israel to provide greater humanitarian protections for prisoners held in Israeli jails and to change its policy of negotiating mass prisoner releases in exchange for the return of Israeli soldiers, at least in the long run.

II. The Proxy Groups

Hamas and Hezbollah are two of the more prominent groups that regularly carry out attacks against Israel. Syria and Iran are believed use proxy groups like these to promote their political goals in Israel.⁸ The resources these states allegedly provide to these groups include training, equipment and financial support.⁹ In addition to the aforementioned forms of support, Syria has also provided safe haven and logistical support to both leftist and Islamist Palestinian

⁸ Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does A Democracy Have the Right to Hold Terrorists As Bargaining Chips?*, 18 *Ariz. J. Int'l & Comp. L.* 721, 742 (2001).

⁹ *Id.* at 742-43.

hard-liners.¹⁰ Using these groups can allow States to promote their political goals against Israel without directly combating it. According to U.S. officials, Iran tends to back “Islamist groups, like the Lebanese Shiite militants of Hezbollah (which Iran helped found in the 1980s) and Palestinian terrorist groups like Hamas, the Palestinian Islamic Jihad, and the Popular Front for the Liberation of Palestine-General Command.”¹¹ Iran has long been considered to be Hezbollah’s key arms supplier.¹² The U.S. Department of Defense estimates that Iran provides somewhere between \$100 million and \$200 million in support each year.¹³

Hezbollah carries out attacks against Israeli civilian targets on a regular basis.¹⁴ Hezbollah also carries out attacks against the Israeli military, with one purpose being to secure hostages. One example of this was an attack by Hezbollah members against an Israeli army convoy on July 12, 2006.¹⁵ Militants killed eight Israeli soldiers in the attack, while capturing two soldiers with the stated purpose of using them as ‘bargaining chips’ in an effort to secure the release of three Lebanese members of Hezbollah detained by Israel.¹⁶

In addition to Iran, Hezbollah receives the active support of Syria.¹⁷ According to experts, Iranian arms bound for Hezbollah regularly pass through Syria.¹⁸ Hezbollah was also able to carry out attacks against Israel from Lebanon because Syria allowed it to do so during its effective occupation of that state from 1990 to 2005.¹⁹

¹⁰ Holly Fletcher, *State Sponsor: Syria*, COUNCIL ON FOREIGN RELATIONS (February 2008), <http://www.cfr.org/syria/state-sponsor-syria/p9368>.

¹¹ Greg Bruno, *State Sponsors: Iran*, COUNCIL ON FOREIGN RELATIONS (October 23, 2011) <http://www.cfr.org/iran/state-sponsors-iran/p9362>.

¹² Bruno, *supra*.

¹³ Bruno, *supra*.

¹⁴ Rosen at 758.

¹⁵ Catherine Bloom, *The Classification of Hezbollah in Both International and Non-International Armed Conflicts*, 14 Ann. Surv. Int'l & Comp. L. 61, 62 (2008).

¹⁶ *Id.*

¹⁷ Fletcher, *supra*.

¹⁸ Fletcher, *supra*.

¹⁹ Fletcher, *supra*.

Hamas is the other prominent proxy group that attacks Israel, and the group involved with Gilad Shalit's kidnapping and detention. In addition to the raid where it kidnapped Shalit, it regularly attacks Israeli military and civilian targets alike. Hamas and its allies have conducted rocket attacks against Israel, firing thousands of rockets into Israel.²⁰ Syria is also believed to support Hamas, allegedly allowing them, along with other organizations like Palestinian Islamic Jihad, to maintain headquarters in Damascus.²¹

These proxy groups have flourished because of the support they receive from states. For these groups, the ends have indeed justified the means. The kidnapping of Israeli soldiers is but one example of a practice proxy groups engage in that runs counter to international law. When one looks closely at their practices, it can readily be seen that these groups operate in a manner that readily embraces actions which violate international law.

III. Applicable Law

International law has a bearing on what state actors and non-state actors alike can and cannot do. The rules and protections that govern a particular conflict may depend on what actors are involved. The ends do not justify the means in international law; there are limits to what states and non-state actors can do. Practices like the kidnapping of Israeli soldiers are actions that international law proscribes. Threshold rules exist for all, namely in the form of Common Article 3 of the Geneva Conventions. Those continuing violations of international law show a need for a change in policy on the part of the Israeli government when it comes negotiating with proxy groups, because continuing negotiations have not deterred such violations.

States in Israel position, that deal with non-state actors like proxy groups, do not get a blank check when provisions of international like the Third Geneva Convention don't govern a

²⁰ Rosen at 762.

²¹ Fletcher, *supra*.

particular conflict. Additionally what a state controls has a bearing on what provisions of international law it is subject to. For example, the influence Israel has over territories like the Gaza Strip subject it to the requirements of Fourth Geneva Convention. Nevertheless, in practice the Israeli government follows the interpretation of its domestic courts, which limit the applicability of the Fourth Convention. However, the Israeli government's practices toward suspected terrorists arguably fall short of even the liberal interpretation provided by the Israeli court. That gap in compliance harms Israel's image and undermines support for it in the international community. For Israel to present a credible argument to the international community that it deserves greater flexibility given its security situation, its government must approach full compliance with the humanitarian protections provided by the Fourth Convention.

A. International Law

Various provisions of international law dictate conditions for managing prisoners, including where they can be held and how they must be treated. The Geneva Conventions dictate that captured combatants are entitled to general protection, humanitarian treatment in captivity, and minimal respect.²² They also establish clear conditions, including “where and how a person may be held in captivity, the necessary food and medical treatment, the prohibition of trial for activities carried out during the course of fighting, and many others.”²³

Hostilities between Israel and proxy groups, as non-international conflicts, are governed by Common Article 3 of the Conventions. “In non-international conflicts, only Common Article 3 and the customary international law applicable in such conflicts will apply, including the

²² Gross at 743.

²³ *Id.*

principles of humanity, proportionality, distinction, and necessity.”²⁴ It provides protections for civilians and persons who are no longer involved in hostilities, including captured combatants. Common Article 3 prohibits violence against these protected persons.²⁵ It also prohibits outrages against their personal dignity and degrading or humiliating treatment and expressly prohibits the taking of hostages.²⁶ Common Article 3 ensures that an impartial humanitarian body, like the International Committee of the Red Cross, can offer its services to the parties involved in the conflict.²⁷

Another important protection provided by Common Article 3 is a prohibition on the taking of hostages.²⁸ Common Article 3 is not alone in proscribing such actions. The 1979 International Convention Against the Taking of Hostages also criminalizes hostage-taking.²⁹ Specifically, it provides that:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (...“hostage”) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage, commits the offence of taking of hostages.³⁰

It is important to note that, Article 12 of that convention states that it does not govern where the 1949 Geneva Conventions or 1977 Additional Protocols are controlling, insofar as those conventions require states to prosecute or hand over the hostage-takers.³¹ Article 34 of the Fourth Geneva Convention also prohibits it, while Article 147 classifies hostage-taking as a

²⁴ Laurie R. Blank, *Understanding When and How Domestic Courts Apply IHL*, 44 Case W. Res. J. Int'l L. 205, 211 (2011).

²⁵ Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Customary IHL: Practice Relating to Rule 96. Hostage-Taking*, INTERNATIONAL COMMITTEE OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule96.

²⁹ *Customary IHL: Practice Relating to Rule 96. Hostage-Taking*, supra.

³⁰ *Customary IHL: Practice Relating to Rule 96. Hostage-Taking*, supra.

³¹ *Customary IHL: Practice Relating to Rule 96. Hostage-Taking*, supra.

grave breach of the Convention.³² Article 75(2)(c) of Protocol I prohibits the taking of hostages “at any time and in any place whatsoever, whether committed by civilian or by military agents.”³³ The International Criminal Court (ICC) Statute also prohibits hostage taking, and extends the prohibition to both international and non-international conflicts.³⁴

Much of the Fourth Geneva Convention addresses issues regarding the law of occupation, including humanitarian access and rules governing the detention of civilians for security reasons.³⁵ The Fourth Geneva Convention is relevant, given Israel’s status, as an occupying power and a nation that regularly detains terror suspects. “[The Convention] outlines the rights and duties of the occupying power (or belligerent occupant) and sets out the law of how civilian populations are to be treated while the occupying power maintains effective control in the occupied territory.”³⁶ The convention aims to protect basic political and human rights of civilians under military occupation.³⁷

Article 49 prohibits transfers of protected individuals from occupied territory to the territory of the Occupying Power or another country, absent reasons like security of the population or imperative military reasons.³⁸ Article 76 is more specific, requiring protected persons accused of offenses to be held in the occupied country.³⁹

Israel is often criticized for the conditions it holds prisoners in administrative detentions in. Administrative detentions are authorized under Article 78 of the Fourth Convention as a tool

³² *Customary IHL: Practice Relating to Rule 96. Hostage-Taking*, supra.

³³ *Customary IHL: Practice Relating to Rule 96. Hostage-Taking*, supra.

³⁴ *Customary IHL: Practice Relating to Rule 96. Hostage-Taking*, supra.

³⁵ *Q&A on Hostilities between Israel and Hamas*, HUMAN RIGHTS WATCH (Dec. 31, 2008),

http://www.hrw.org/news/2008/12/31/q-hostilities-between-israel-and-hamas#_What_international_humanitarian.

³⁶ Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 Harv. Int'l L.J. 65, 66 (2003).

³⁷ *Id.*

³⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 49, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

³⁹ *Id.*, art. 76.

to counteract a perceived immediate danger to state security or public order.⁴⁰ It is a measure meant to be used only when absolutely necessary, with limits proscribed by Articles 42 and 78 of the Fourth Geneva Convention and Article 75 of Protocol I.⁴¹ Articles 27, 31-34, 64-79, 117 and 126 of the Fourth Geneva Convention also detail the rights of prisoners.⁴² However, some of the most recent controversies involve Article 116 of the Fourth Convention. While, Article 116 provides that internees should be allowed to “receive visitors, especially near relatives, at regular intervals and as frequently as possible,”⁴³ Israel has not consistently allowed these visits; having suspended the privilege for years in some cases.

Additional Protocol I, if controlling, would extend the application of the Third Geneva Convention to the conflicts between Israel and proxy groups. Protocol I was drafted in 1979 to add to the 1949 Geneva Conventions.⁴⁴ A conflict between a non-state actor and a state actor is considered a non-international conflict under the Third Geneva Convention, meaning that its provisions would not govern: the addition of Protocol I to the original Geneva Conventions allowed freedom fighters to be considered combatants, so long as they acted in accordance with international law.⁴⁵ Under Article 96(3), such groups are not entitled to all the protections of the Geneva Conventions and Protocol I they formally accept all of the attendant obligations.⁴⁶

The proxy groups are considered paramilitary groups under Article 43(3) of Protocol I.⁴⁷ “Protocol I requires that freedom fighters not intermingle with the civilian population, wear uniforms or other clear means of identification, and carry their weapons openly in order to ensure

⁴⁰ Fourth Geneva Convention, art. 78 cmt., Aug. 12, 1949, <http://www.icrc.org/ihl.nsf/COM/380-600085?OpenDocument>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Fourth Geneva Convention, art. 116.

⁴⁴ Gross at 741.

⁴⁵ *Id.*

⁴⁶ Amy Chiang, *An International and Islamic Perspective of Hamas*, 83 Chi.-Kent L. Rev. 1021, 1035 (2008).

⁴⁷ Gross at 741.

that other parties to the conflict know who they are fighting.”⁴⁸ Specifically, those requirements come from Section (b) of Article 43(3).⁴⁹ A suspect who is caught without meeting section (b)’s requirements is not entitled to a status as a lawful combatant and will not be treated as a prisoner of war.⁵⁰ The combatant still must be treated humanely and must be tried by a regularly constituted tribunal, as prescribed by the Geneva Conventions.⁵¹ Article 44(3) makes an exception to those conditions when the nature of the hostilities do not allow combatants to effectively distinguish themselves.⁵² However, it is understood that this not the type of conflict where members of the proxy groups can rely on that exception.

Israel and the United States are among the nations which have not signed Protocol I, because of concerns that giving it a binding effect would allow for terrorists to be recognized as combatants.⁵³ Their concern is at least partially attributable to Article 51, which could provide civilian status to insurgents and terrorists if they make themselves distinguishable from civilians.⁵⁴ A specific fear with Article 51 is that it could create a “revolving door” effect by allowing terrorists and insurgents to “engage in military operations and regain their immunity from retaliation once the engagement is over.”⁵⁵ Essentially, Protocol I would require an insurgent or terrorist to be disabled or killed while engaged in hostilities in order for a state to go after them. The only other way would be for them to otherwise be amenable to criminal process and trial.⁵⁶ In sum, the fear is that it would essentially permit “insurgents or terrorists to plan,

⁴⁸ *Id.* at 742.

⁴⁹ Chiang at 1034.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Geneva Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, Relating to the Protection of Victims of International Armed Conflicts, art. 44(3), June 8, 1977, 1125 U.N.T.S. 3.

⁵³ Gross at 745.

⁵⁴ Rosen at 771.

⁵⁵ *Id.*

⁵⁶ *Id.*

equip, and train for future battles with impunity.”⁵⁷ As a result, the Third Convention is not controlling, even when Protocol I’s expansion of the term “combatant” is considered.

In understanding the application of the rules of international law, it is important to look beyond the text of the aforementioned parts of international law. Their application in practice hinges on the willingness of sovereign states to abide by them. One factor that has a bearing on the weight a particular state gives to provisions of international law is the effect given to them by its domestic courts.

B. Israel’s Interpretation and Application of International Law

Israel’s domestic courts have had to consider the Geneva Conventions in judicial actions taken by parties against the Israeli government. The interpretations by the Israeli courts have had a bearing on the Israeli government’s handling of suspected terrorists. The courts have given the Israeli government significant flexibility when it comes to the restrictions the Conventions would place on its actions regarding suspected terrorists it holds in its prison.

The Israeli legal system classifies treaties signed by its government as either “declaratory” or “constitutive.”⁵⁸ A declaratory treaty is one which codifies international customary law; its provisions automatically become part of Israeli domestic law.⁵⁹ A constitutive treaty is one which contains new international law.⁶⁰ Such a treaty is said to bind Israel internationally, but not within its domestic system.⁶¹ For the provisions of a constitutive

⁵⁷ *Id.*

⁵⁸ Christopher C. Burris, *Re-Examining the Prisoner of War Status of Plo Fedayeen*, 22 N.C. J. Int’l L. & Com. Reg. 943, 980 (1997).

⁵⁹ *Id.*

⁶⁰ *Id.* at 981.

⁶¹ *Id.*

treaty to alter Israeli domestic law, it must be done by the legislative action of either the Knesset or a Cabinet Minister delegated such authority by the Knesset.⁶²

The Third Geneva Convention is considered a declaratory treaty by the Israeli courts.⁶³ Nevertheless, the applicability of the Third Convention's protections has depended on the courts' interpretation of who is entitled to the Third Convention's protections. Israel has consistently taken the position that the forces of proxy organizations like Hezbollah should not be seen as organizations which the Third Geneva Convention applies to.⁶⁴ The Israeli government contends that because they do not conduct their operations in accordance with the laws and customs of war, Article 4 holds that the Third Geneva Conventions' protections do not extend to their operatives.⁶⁵ The Israeli Supreme Court has upheld this position. In *Anon v. Minister of Defence*, the Court held that the petitioners, Lebanese citizens who were members of Hezbollah, were properly denied protections as prisoners of war.⁶⁶ The organizations they were associated with were considered paramilitary groups under Article 43(3) of Protocol I and the court believed that even if the petitioners had complied with international rules, they could not get POW status because with Lebanon disavowing responsibility for the organization, they could not be considered combatants.⁶⁷

The Israeli Supreme Court has held that the Fourth Geneva Convention is a constitutive treaty.⁶⁸ Consequently, Israeli courts do not consider it in evaluating challenges to actions taken by the military government in occupied territories.⁶⁹ It has accepted that the Fourth Geneva Convention applies only when a legitimate sovereign has been displaced, a theory known as the

⁶² *Id.*

⁶³ *Id.* at 983.

⁶⁴ Gross at 735.

⁶⁵ *Id.*

⁶⁶ *Id.* at 741-42.

⁶⁷ *Id.*

⁶⁸ Burris at 982.

⁶⁹ *Id.*

“missing reversionary” theory.⁷⁰ The Israeli government has stated that it does consider the “humanitarian provisions” of the Fourth Geneva Convention when it comes to the occupied Palestinian territory.⁷¹ It has not elaborated on what provisions of the Convention it considers “humanitarian provisions.”⁷²

What the Israeli Supreme Court has done is reviewed the actions of the Military Administration in the Occupied Palestinian Territory (OPT), looking at substantive provisions of the Fourth Convention.⁷³ Any rights for those in the occupied territories are instead derived from the Hague Convention of 1907.⁷⁴ The Hague Convention is considered controlling because it is considered a declarative treaty by the courts.⁷⁵ The Court has held that Article 49 of the Fourth Convention, insofar as it proscribes individual deportations of persons constituting a security threat, is not considered applicable to the OPT because it does not reflect customary international law.⁷⁶ Examples of provisions the Court has held as applicable to the OPT include “Article 23 (on free passage of humanitarian consignments, Article 64 (on penal legislation), and Article 78 (on security measures and internment).”⁷⁷

Israel considers Hamas to be a terrorist organization and classifies its members as terrorists.⁷⁸ Israeli courts reject the contention that Hamas members are freedom fighters.⁷⁹ The courts routinely charge Hamas members with terrorism-related offenses utilizing Israeli domestic law.⁸⁰ Israel defines an “unlawful combatant” in its Incarceration of Unlawful Combatants Law,

⁷⁰ Chiang at 1024.

⁷¹ Harvard Program on Humanitarian Policy and Conflict Research, *supra* at 5.

⁷² Harvard Program on Humanitarian Policy and Conflict Research, *supra*.

⁷³ *Id.*

⁷⁴ Burris at 982.

⁷⁵ *Id.*

⁷⁶ Harvard Program on Humanitarian Policy and Conflict Research, *supra* at 5.

⁷⁷ Harvard Program on Humanitarian Policy and Conflict Research, *supra*.

⁷⁸ Chiang at 1035.

⁷⁹ *Id.*

⁸⁰ *Id.*

enacted in 2002.⁸¹ The law defines an “unlawful combatant” as “a person who participated, whether directly or indirectly, in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel regarding whom the conditions stipulated in international humanitarian law for granting prisoner-of-war status do not apply.”⁸²

The divergence of the Israeli interpretation of international law, notably the Fourth Geneva Convention, from that various states and international bodies is what generates a lot of the criticism of Israel’s handling of prisoners. This divergence poses a threat to its standing with the international community.

IV. Israel Must Change its Policies Toward Prisoners and Prisoner Exchanges to Secure Its Standing Internationally and Protect Its Soldiers From Kidnappings

Israel’s policies toward prisoners, based on the interpretations by its domestic courts serve to undermine its standing in the international community. This problem stems in large part from the ambiguity behind what parts of the Fourth Geneva Convention the Israeli courts consider “humanitarian provisions” and binding on the government. By holding the Fourth Geneva Convention “constitutive,” rather than customary, the Israeli courts have left daylight between its domestic law and the international community’s position, giving weight to allegations that Israel’s policies violate the Conventions.

The problem goes beyond Israel’s standing in the international community. It goes to its security. Repeated kidnappings of soldiers for use as bargaining chips by proxy groups, as continuing violations of international law, show that Israel needs to change its policies because its current practices do not provide an effective deterrent. Continuing negotiations with proxy groups to secure the return of soldiers has created a phenomenon known as prisoner

⁸¹ Kevin Jon Heller, *Israeli Supreme Court Upholds Unlawful Combatants Law*, OPINIO JURIS (June 12, 2008, 12:21 PM), <http://opiniojuris.org/2008/06/12/israeli-supreme-court-upholds-unlawful-combatants-law/>.

⁸² *Id.*

hyperinflation. Israel has had to pay an ever higher price to bring a soldier home; it has made kidnappings a lucrative practice. To ensure the security of its soldiers, it much change how it deals with proxy groups and find a way to deter these kidnappings.

A. For Israel's Interpretation of its International Law Obligations to gain any Credibility, it Must Clearly Define and Consistently Observe "Humanitarian Provisions" of the Fourth Geneva Convention for Imprisoned Terror Suspects

When Israel engages a proxy group, whether in a conflict or in diplomacy, accusations that each actor violates international law are invariably leveled by supporters of each side. When those actors conduct a prisoner exchange, the criticism that circulates involves the handling and treatment of those each side holds in captivity. The prominent criticisms directed at Israel include its policies of moving prisoners from Occupied Palestinian Territory (OPT) into Israeli territory and denying families of those prisoners access to visit those held in custody. Proxy groups holding Israeli prisoners, on the other hand, face criticism for taking Israeli soldiers captive in the first place and for denying humanitarian aid to those they detain.

Much of the controversy surrounding Israel's practices relate to protections provided by the Fourth Geneva Convention. The Fourth Geneva Convention protects those under occupation. Palestinian human rights groups criticized the Shalit deal, contending that Israeli demands to deport some of the most dangerous terrorists to States more distant from its border, such as Qatar, Turkey, and the United Arab Emirates violated international law.⁸³ Palestinians contend that the Fourth Convention applies to the OPT.⁸⁴ Critics of Israel's policy assert that the protections of the Fourth Geneva Convention are controlling in their entirety because of the Israeli occupation in Gaza. Israel withdrew the last troops and vestiges of government presence

⁸³ Aidan Fishman, *Against Prisoner Exchanges, Pt. 2*, THE TIMES OF ISRAEL, Sep. 14, 2012, <http://blogs.timesofisrael.com/against-prisoner-exchanges-pt-2/>.

⁸⁴ Imseis at 68.

on September 12, 2005.⁸⁵ Because of that 2005 withdrawal, some argue that the Gaza strip is no longer occupied.⁸⁶ However, UN Secretary-General Ban Ki-Moon continues to consider Gaza occupied by Israel.⁸⁷ Similarly, the organization Human Rights Watch still considers Gaza to be occupied despite Israel's 2005 withdrawal of troops and settlers.⁸⁸ This is because Israel still controls Gaza's airspace, marine access, and land borders, along with various utilities.⁸⁹ From a legal standpoint, it is not necessary for the U.N. to acknowledge the absence of occupation in Gaza.⁹⁰ Nevertheless, from a political standpoint, such recognition would allow Israel to avoid being held to the more stringent legal standards required of occupiers by the Fourth Convention.⁹¹

The most significant part of the debate is not whether the Fourth Geneva Convention applies at all, but whether it applies in its entirety. There is some support for Israeli law's position that the Fourth Geneva Convention is not customary international law. The Bush Administration took a similar view, following the conclusion of the Goldsmith Memo, written by Jack Goldsmith, who was at the time an Assistant Attorney General in the Office of Legal Counsel. Goldsmith suggested that "operatives of international terrorist organizations were not protected persons" for purposes of Article 49 of the Fourth Convention.⁹² This was essentially based on a narrow interpretation of the phrase "find themselves," qualifying language in Article

⁸⁵ Elizabeth Samson, *Gaza Not Occupied, Says Hamas, So Where is the UN?*, THE JEWISH WEEK, Feb. 28, 2012, http://www.thejewishweek.com/editorial_opinion/opinion/gaza_not_occupied_says_hamas_so_where_un_0.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Q&A on Hostilities between Israel and Hamas*, HUMAN RIGHTS WATCH (Dec. 31, 2008),

http://www.hrw.org/news/2008/12/31/q-hostilities-between-israel-and-hamas#_What_international_humanitarian.

⁸⁹ *Id.*

⁹⁰ *Hamas Rejects Red Cross Demand to Prove Shalit is Alive*, REUTERS, June 23, 2011,

<http://www.haaretz.com/news/diplomacy-defense/hamas-rejects-red-cross-demand-to-prove-shalit-is-alive-1.369250>.

⁹¹ *Id.*

⁹² Memorandum from the Office of Legal Counsel, "Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention 8 (Mar. 18, 2004), 2004 WL 5660934 (O.L.C.) [hereinafter 2004 O.L.C. Memo].

49.⁹³ Goldsmith argued that Roman law viewed deportations as removal from one's home country and denying them the right of citizenship.⁹⁴ In effect, a terror suspect whose presence in the territory could not be considered happenstance or coincidence could not be a "protected person."⁹⁵ On the basis of that conclusion, the U.S. has transferred terror suspects out of territory it occupies.⁹⁶

Outside of the United States, that narrow interpretation of Article 49's protections has largely been rejected. Particularly noteworthy was the U.K. Supreme Court's decision in *Secretary of State for Foreign and Commonwealth Affairs v. Rahmatullah*. In that decision, the U.K. Supreme Court explicitly rejected Goldsmith's argument, believing that using happenstance or coincidence as a prerequisite would introduce an unwarranted restriction on the availability of the Convention's protections.⁹⁷ While it did not have the power to release him, as the United States continued to hold him, the Court found a prima facie breach of Article 49 in the transfer of Rahmatullah from Iraq to Afghanistan.⁹⁸ This view of a key U.S. ally, along with the aforementioned positions of the U.N. and various human rights organizations of Israel's influence in the Gaza Strip and the West Bank make it difficult to avoid applying provisions of the Fourth Geneva Convention to the Occupied Palestinian Territory. "[M]ost of the world community adopts the view that Israel's maximum legal claim to Palestinian territories is based

⁹³ 2004 O.L.C. Memo, *supra*. at 1.

⁹⁴ Pamela Hess, *Iraq Transfers War Crimes?*, UNITED PRESS INTERNATIONAL, Oct. 26, 2004, <http://www.informationclearinghouse.info/article7159.htm>.

⁹⁵ 2004 O.L.C. Memo, *supra*. at 12.

⁹⁶ Kevin Jon Heller, *UK Supreme Court Rejects Jack Goldsmith's Interpretation of GC IV*, *Opinio Juris*, (Nov. 1, 2012, 10:50 PM), <http://opiniojuris.org/2012/11/01/uk-supreme-court-rejects-jack-goldsmiths-interpretation-of-gc-iv/>.

⁹⁷ *Id.*

⁹⁸ *Id.*

on its control pursuant to the law of belligerent occupation, which imposes duties under the Hague and Fourth Geneva Conventions.”⁹⁹

However, where Israel conditions the release of terrorists from its prisons on their subsequently being deported from neighboring Palestinian territory, it’s difficult to believe that such conduct was truly what the framers of the Fourth Convention meant to prohibit in Article 49. The commentary for Article 49 discusses the “deportations” of World War II as being the central consideration of the authors in drafting that article.¹⁰⁰ This includes Nazi atrocities of mass transfers, such as trains to Auschwitz and individual transfers, such as “Night and Fog,” where captured French resistance fighters were taken to Nazi camps.¹⁰¹ Conflicts have changed since the Geneva Conventions came into being in 1949, with asymmetrical conflicts being more commonplace now. While there have been some attempts update the Conventions with the Additional Protocols and fill in some of the remaining gaps in international law, some linger. This is particularly true when one considers the continuing threat such individuals would pose to the security of Israeli soldiers and civilians, namely with regards to cross-border raids, as compared to the circumstances of World War II.

At the same time, Israel does need to do more to show a continuing commitment to humanitarian rights. Israel’s handling of conditions for administrative detentions is problematic because some of the actions its government has taken rightfully leave Israeli authorities open to legitimate criticism on humanitarian grounds. Among the problems in administrative detentions are holding prisoners without charges, holding them in solitary confinement and denying family visits to prisoners. International humanitarian law requires detainees held by Israel in relation to

⁹⁹ Chiang at 1024.

¹⁰⁰ Fourth Geneva Convention, art. 49 cmt., Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
<http://www.icrc.org/ihl.nsf/COM/380-600056?OpenDocument>.

¹⁰¹ Hess, *supra*.

the armed conflict to have a right to family visits. As mentioned, Article 116 provides that internees should be allowed to “receive visitors, especially near relatives, at regular intervals and as frequently as possible.”¹⁰² For a period of almost five years, beginning in June 2007, Israel suspended family visits for Palestinians from Gaza.¹⁰³ The measure affected over 800 detainees.¹⁰⁴ The condition was one factor that led to a mass hunger strike by 1,600 Palestinian prisoners seeking improved conditions and restoration of rights suspended while Gilad Shalit was held captive in Gaza.¹⁰⁵ The Israeli government finally agreed to let family visits resume in July 2012.¹⁰⁶

As stated previously, under its domestic law, Israel does consider itself bound by the humanitarian provisions of the Fourth Geneva Convention. If the interpretations by its domestic courts regarding what obligations the Israeli government must abide by under international law are to gain any legitimacy in the global realm, authorities must show that they take their humanitarian obligations seriously.

Managing prisoners from proxy groups has caused more than just image problems for Israel. A more immediate danger comes from its willingness to conduct mass-prisoner releases in exchange for the return of kidnapped Israeli soldiers. To ensure the security of its soldiers, Israel must consider a policy change on prisoners as well.

¹⁰² Fourth Geneva Convention, art. 116.

¹⁰³ *Gaza: ICRC Facilitates First Family Visits for Five Years*, INTERNATIONAL COMMITTEE OF THE RED CROSS, July 16, 2007, <http://www.icrc.org/eng/resources/documents/news-release/2012/israel-palestine-news-2012-07-16.htm>.

¹⁰⁴ *Id.*

¹⁰⁵ Isabel Kershner, *Palestinians in Jails End Hunger Strike*, N.Y. TIMES, May 14, 2012, http://www.nytimes.com/2012/05/15/world/middleeast/deal-to-end-hunger-strike-awaits-palestinian-prisoners-approval.html?_r=0.

¹⁰⁶ *Gaza: ICRC Facilitates First Family Visits for Five Years*, *supra*.

B. Israel Must Change How It Negotiates with Proxy Groups if it is to Counteract “Prisoner Hyperinflation” and Deter Future Kidnappings of its Soldiers

A clear and present danger to the security of Israel comes from its government’s willingness to agree to mass releases of imprisoned terrorists in exchange for the return of Israeli soldiers. Israel’s practice of exchanging prisoners with proxy groups to secure the release of its own soldiers has proven to be popular with its citizens. Nevertheless, it undermines Israel’s long term security by encouraging these groups to continue kidnapping soldiers, given that negotiations in these circumstances have become very beneficial for them. As mentioned, the kidnapping of Israeli soldiers is a continuing violation of international law on the part of proxy groups. The trend of “prisoner hyperinflation,” where Israel pays an increasingly higher cost for each citizen it brings home in deals with such groups, shows that a change needs to be made on the part of the Israeli government. Rather than deterring kidnappings of soldiers, Israel has made them a lucrative practice for proxy groups. The Israeli government has recognized this and recently signaled that it will change how it deals with those groups in such situations.

Negotiations with proxy groups have helped bring captives like Shalit home, but there is no denying Shalit’s release, like similar bargains by Israel in recent memory, came at a high cost. Among the 1,027 prisoners released from Israeli prisons were Amna Muna, Ahlam Tamimi, and Walid Anjes.¹⁰⁷ Muna was charged for luring a 16-year-old Israeli boy via the internet to Ramallah, who was then shot to death by two Fatah terrorists.¹⁰⁸ Tamimi and Anjes were involved in attacks which scores of civilians were injured and several killed at attacks at restaurants in Jerusalem.¹⁰⁹

¹⁰⁷ *The Gilad Shalit Prisoner Exchange: Background*, THE ISRAEL PROJECT, <http://www.theisraelproject.org/site/apps/nlnet/content3.aspx?c=ewJXKcOUJIIaG&b=7808887&ct=11299515#.UJ7-UocR6So>.

¹⁰⁸ THE ISRAEL PROJECT, *supra*.

¹⁰⁹ THE ISRAEL PROJECT, *supra*.

The decisions of Israeli authorities to continue negotiating with these proxy groups has contributed to larger problem, dubbed “prisoner hyperinflation.” Israeli-Arab prisoner exchanges have been occurring since 1948, but in the 1980s, Israel began paying a high price for prisoners.¹¹⁰ The first such negotiation resulting in a mass release of prisoners was the “Jibril Deal” with the Palestinian Liberation Organization (PLO).¹¹¹ In the Jibril Deal, Israel released 1,150 Palestinian political prisoners in exchange for three Israeli soldiers held by the Popular Front for the Liberation of Palestine (PFLP).¹¹² Israel and Hezbollah made three exchange deals in June 1996, June 1998, and June 2004.¹¹³ The June 2004 deal was the largest with Hezbollah, with Israel releasing 436 prisoners in exchange for the return of the remains of three Israeli soldiers and the release of an individual Hezbollah claimed was an Israeli intelligence officer.¹¹⁴ In Gilad Shalit’s release, Israel paid the highest “price,” releasing 1,027 prisoners in exchange for his return.¹¹⁵ The steady increase in the number of prisoners Israel has been paying to secure the return for each one of its citizens is why the price paid in release deals is said to be increasing, and why the phenomenon is called prisoner hyperinflation.

Israel is understandably looking to combat prisoner hyperinflation. Lawmakers and experts alike have put forth proposals to address the problem. A Likud lawmaker proposed a reduction of the prisoner-swap exchange rate by 10% to 20% each time a deal is struck.¹¹⁶ Another proposal by counter-terrorism expert Boaz Ganor involves creating a new framework to

¹¹⁰ *History of Israeli-Arab Prisoner Exchanges*, INSTITUTE FOR MIDDLE EAST UNDERSTANDING, <http://imeu.net/news/article002177.shtml>.

¹¹¹ INSTITUTE FOR MIDDLE EAST UNDERSTANDING, *supra*.

¹¹² INSTITUTE FOR MIDDLE EAST UNDERSTANDING, *supra*.

¹¹³ INSTITUTE FOR MIDDLE EAST UNDERSTANDING, *supra*.

¹¹⁴ INSTITUTE FOR MIDDLE EAST UNDERSTANDING, *supra*.

¹¹⁵ THE ISRAEL PROJECT, *supra*.

¹¹⁶ Nathan Jeffay, *Israel Hopes to Lower Future Swap Cost*, THE JEWISH DAILY FORWARD, Oct. 27, 2011, <http://forward.com/articles/144938/israel-hopes-to-lower-future-swap-cost/>.

limit who could be released in an exchange with a proxy group.¹¹⁷ The framework would differentiate between “terrorists” who harm civilians and “guerillas” who harm soldiers.¹¹⁸ Terrorists would not be freed until they finished their sentences, while guerillas would be held in prisoner of war camps run in accordance with the Geneva Conventions, and would be fair game for prisoner exchanges.¹¹⁹ Guerillas still imprisoned at the time of a peace deal could go free when such a peace deal is executed.¹²⁰

Israeli Defense Minister Ehud Barak commissioned a report in 2008, the findings of which were released in late 2011.¹²¹ The body that drafted the report was known as the Shamgar Commission. The Commission was assembled in 2008 after Israel had agreed to release four Hezbollah fighters and the bodies of approximately 200 Lebanese and Palestinians in order to secure the return of two bodies of Israeli soldiers to Israel.¹²² It recommended that Israel cease large-scale prisoner exchanges.¹²³ Barak wanted a policy to make clear to both opposing forces and the Israeli public what prices Israel would, and would not, be willing to pay in the future.¹²⁴ He also was concerned that the exchanges had undermined Israeli deterrence.¹²⁵ Indeed, the kidnapping of Israeli soldiers for use as bargaining chips remains a concern. The Israeli Defense Force has expressed concern that a number of tunnels being dug along the Israeli border with Gaza could be used to execute the kidnapping of another soldier in a cross-border raid.¹²⁶

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Talia Ralph, *Ehud Barak: Israel to Put an End to Lopsided Prisoner Swaps*, GLOBAL POST, Jan. 5, 2012, <http://www.globalpost.com/dispatch/news/regions/middle-east/israel-and-palestine/120105/ehud-barak-israel-prisoner-exchanges>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Yaakov Katz, *Panel to Recommend End to Mass Prisoner Swaps*, JERUSALEM POST, Jan. 5, 2012, <http://www.jpost.com/Defense/Article.aspx?id=252266>.

¹²⁵ *Id.*

¹²⁶ *Id.*

The Shamgar Commission's conclusions reflect an important realization by the Israeli Government that prisoner exchanges, while politically popular pose a long-term threat to the security of Israel's forces. The idea that the prisoner exchanges can be lucrative for proxy groups is not just theoretical; it is reality, as demonstrated by the prisoner hyperinflation phenomenon that has occurred since 1985. As such, it is in Israel's best interest to curb these exchanges, if not ceasing them entirely.

Such a decision would not be without consequences. There is no guarantee that it would lead proxy groups to stop trying to kidnap Israeli soldiers. Indeed, a critique of trying to have the Shamgar Commission develop a formula to restrain Israel's ability to negotiate with such groups is that it has no real chance of influencing actors like Hamas, Hezbollah and Iran.¹²⁷ The concern is that because they know Israel could turn around and choose to negotiate after all, they may still continue trying to kidnap troops to use as bargaining chips.¹²⁸ All things considered, the Commission's proposals are worth following because even if such a policy change ends up being more symbolic than anything else, it still communicates a meaningful message to proxy groups that the status quo is no longer acceptable.

Prison exchange agreements have been met with some resistance domestically. For example, in the prisoner exchange that led to Gilad Shalit's release, relatives of terror victims unsuccessfully attempted to get the Supreme Court of Israel to block the prisoner swap.¹²⁹ Nevertheless, political pressures may pose a greater problem with the dramatic shift in direction. A poll conducted in June 2011, around the time of the Shalit exchange, showed that

¹²⁷ See Amir Oren, *IDF Did Not Fail in Shalit Deal, the Israeli Public Did*, HAARETZ, Oct. 23, 2011, <http://www.haaretz.com/print-edition/opinion/idf-did-not-fail-in-shalit-deal-the-israeli-public-did-1.391450>.

¹²⁸ *Id.*

¹²⁹ Aidan Fishman, *Against Prisoner Exchanges, Pt. 1*, THE TIMES OF ISRAEL, Aug. 30, 2012, <http://blogs.timesofisrael.com/against-prisoner-exchanges-pt-1/>.

approximately 63% of the Israeli public supported the deal made by the Israeli government.¹³⁰ Such broad support for the practice of mass prisoner releases could conceivably create difficulty if the government were to refuse to engage in negotiations with proxy groups in near future.

The fact that a solid majority of Israelis seem to support the practice could create political pressure on the government officials that have to deal with future kidnappings of Israeli soldiers, and push them towards negotiations. The fact that the Israeli government delayed releasing the findings of the Shamgar Commission's report until Gilad Shalit was brought home¹³¹ suggests that it may recognize the potential unpopularity such a policy may experience if Israeli soldiers are taken captive, at least in the near future. In that sense, the political pressure could lead to a quick reversal of the policy change advocated by the Shamgar Commission. Consequently, while the Commission's suggestion may be the ideal position when it comes to deterring proxy groups from conducting a cross-border raid to try to collect new bargaining chips, it may not be the most realistic one to hold up in practice, given public sentiment. Instead, at least in the interim, it may be more practical to create a framework to counteract the prisoner hyperinflation occurring in recent years.

Of the other two proposals mentioned, the reclassification option has the advantage of curbing some of the concerns with prisoner exchanges at the present time, while giving the Israeli government a degree of flexibility when negotiating with proxy groups in the future. While the gradual reduction of the number of prisoners that can be released in an exchange deal might also be effective, if it proves too rigid as the number of prisoners the government can release decreases over time, it may crack under public pressure as well. Classifying prisoners into two distinct groups avoids some of the problems of the other two solutions because it give

¹³⁰ Murphy, *63% of Israeli Public Support Mass Prisoner Exchange for Gilad Shalit*, *supra*.

¹³¹ Katz, *supra*.

the government flexibility in terms of the number of prisoners it could choose to release in any deal, while keeping the prisoners with the greatest potential to commit future hostile acts towards protected groups like civilians out of any potential bargain.

As the advocate for the reclassification policy, Boaz Ganor points out, if executed properly it can be carried out in such a way that a proxy group might be forced to accept a deal where “guerillas” but not “terrorists” are released. Ganor suggested publishing the names of the Israeli-held prisoners being offered and setting up a broadcast on television where the prisoners could make a case for their freedom. By holding firm to these distinctions and Israel and using strong propaganda, Israel could get the groups to accept an exchange only involving “guerillas” for Israelis. In addition to solving the problem of releasing those who kill civilians, it could help keep the violence directed towards the military and away from civilians.

While on its face this option would not have the same deterrence value as the Shamgar Commission’s recommendation that no negotiations take place whatsoever, it may prove to be a more sustainable one while public opinion leans in favor of negotiating an exchange with proxy groups. In the long run, not negotiating prisoner releases would have the highest deterrence value to these groups, but only when public opinion is willing to support it can it truly succeed. If public opinion were to shift against mass prisoner releases for Israelis overall, then a policy such as the Shamgar Commission’s proposal could be put into effect at a later date.

V. *Conclusion*

When it comes to dealing with imprisoned terror suspects, Israel faces an image problem on two fronts. By deviating from the Fourth Geneva Convention regarding some of the conditions it holds its prisoners in, Israel leaves itself open to criticism that undermines its support in the international community; a problem which is magnified by ambiguities in its

domestic interpretations are regarding its obligations under international law. By showing a willingness to conduct large-scale prisoner release to bring kidnapped soldiers home, Israel has weakened its standing relative to proxy groups, rather than deterring those groups from conducting such kidnappings.

With Israel's occupation of Palestinian territories, a lot of the controversies over its practices naturally stem from the Fourth Geneva Convention. While Israeli law holds that only the humanitarian provisions of the Convention bind its government, the international community is skeptical of such an assertion. This division may reflect how the changing nature of conflicts has created certain gaps in the original 1949 Conventions, even with some of the efforts to update them. However, for Israel's domestic interpretation of its obligations to gain any credibility in the international community, it must do more when it comes to holding prisoners in humane conditions, namely in ways like ensuring that family visits are not suspended for years at a time.

From a policy standpoint, Israel's willingness to negotiate prisoner exchanges with proxy groups has created challenges. While negotiating undermines Israel's ability to deter groups from carrying out cross-border raids to secure new "bargaining chips," broad public support in Israel for deals to secure the return of that nation's soldiers has often forced the Israeli government to negotiate with those groups, and conduct mass prisoner releases in the process.

Israel remains caught between the proverbial rock and a hard place. It must do what it can to combat attacks and attempts at kidnapping its soldiers by proxy groups even if it means contending with public pressure to make deals to bring its kidnapped soldiers home. Over time, the relative price Israel has had to pay for each Israeli soldier has increased significantly, resulting in the problem of "prisoner hyperinflation."

When a proxy group does succeed in kidnapping members of the Israeli military, Israel must try to effectively deter future kidnappings. For the foreseeable future, since political pressure may make it difficult for Israel to stop agreeing to mass-prisoner releases for the return of its soldiers, it must consider other ways to improve its position in these situations. Using a framework where prisoners are classified as either “terrorists” or “guerillas,” where only the latter group, defined as those who target military forces rather than civilians, can be released in any negotiations with a proxy group may be a more viable option. By allowing the government to continue to have some flexibility in negotiating with these groups, while also creating a framework that ensures the offenders who are most dangerous to the civilian population will not be released, Israel can improve its bargaining position and limit the potential dangers in agreeing to prisoner exchanges with proxy groups.