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# Leave No Man Behind: The United States and Israel Face Risks in Their Prisoner Release Policies

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## I. INTRODUCTION

“Leave no man behind.” This ancient motto touched the hearts of soldiers and inspired patriotism. But to what extent do we honor this principle? At all cost or reasonable cost? What is the price on life, especially the life of one who fell prisoner when fighting for his country? And to what extent do we endanger the rest?

In the words of Member of the Canadian Parliament Irwin Cotler, “human rights has emerged as the secular religion of our time, as an organizing idiom of the contemporary political culture.”<sup>2</sup> Both the United States and Israel have paid extortionate sums to terrorists in order to honor this motto, as in the Gilad Shalit and Bowe Bergdahl exchanges.<sup>3,4</sup> By repeatedly trading prisoners and giving in to terrorist threats, these governments have

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shortsightedly increased the influence of terror groups. All in all, the core question should be whether the ancient dictum “leave no man behind” is still relevant when countries are caught in the conundrum of unconventional and asymmetric war.

This article discusses the dangers of hostage exchanges as a counter-terrorism policy, both in the case of Israel and in light of the U.S. decision to exchange Taliban leaders for Sergeant Bowe Bergdahl. Section II reviews the recent Bowe Bergdahl exchange and its implications. Section III examines the hostage exchange history of both countries. Section IV provides a look at some of the challenges Israel faced with previous prisoner deals, and Section V suggests some possible policy changes. Section VI presents the conclusions and projections.

## II. THE BERGDAHL EXCHANGE

The United States recently exchanged Sergeant Bowe Bergdahl for five senior Taliban leaders.<sup>5</sup> Bergdahl was captured in 2009 after he allegedly walked away from his military post in Paktika Province in eastern Afghanistan.<sup>6</sup> This exchange stirred up debate regarding U.S. national security policy. Former UN Ambassador John Bolton criticized the exchange, saying, “[i]t has long been America’s unwavering, bipartisan policy not to negotiate with terrorists, especially for the exchange of hostages.”<sup>7</sup> The controversy focused on two aspects, the definition of a terror group and the status of Bergdahl—as a “hostage” or as a “prisoner of war.”<sup>8,9</sup>

Until recently, U.S. government officials had always referred to Bergdahl as a hostage or captive, but never as a “prisoner of war.”<sup>10</sup> However, in a June 2, 2014, press briefing, State Department spokeswoman Jen Psaki referred to Bergdahl as a “prisoner of war” for the first time.<sup>11</sup> Yet when asked about the status of the Taliban detainees at Guantanamo Bay, she danced around the issue.<sup>12</sup> Psaki said, “I think that’s a pretty broad ques-

tion, so...I just don’t have anything for you on that.”<sup>13</sup>

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This change in terminology by the U.S. government regarding Bergdahl could have major implications for Taliban detainees. Since 2001, the Bush administration distinguished the Taliban detainees as “enemy combatants”<sup>14</sup> and not “prisoners of war.”<sup>15</sup> The former are war criminals imprisoned worldwide, including in the Guantanamo Bay detention camp.<sup>16</sup> The

latter enjoy the protection and privileges set out under the 1949 Third Geneva Convention Relative to the Treatment of Prisoners of War.<sup>17</sup> The Obama administration has also refused to recognize the Taliban detainees as prisoners of war.<sup>18</sup> The new categorization of Bergdahl as a prisoner of war might unintentionally assist the Taliban. According to *The Daily Beast's* Josh Rogin, “now experts are worrying that the Taliban will start calling its captured [combatants] ‘prisoners of war,’ too.”<sup>19</sup> This could be perceived as legitimizing the Taliban.

Each of the five senior Taliban officers released in exchange for Bergdahl spent over twelve years in captivity at the Guantanamo Bay detention camp.<sup>20</sup> They are currently under a “loose form of house arrest for a year” under the watch of Qatar.<sup>21</sup> According to a senior Qatari official, they received resident permits and “will not be treated like prisoners.”<sup>22</sup> Furthermore “no U.S. officials will be involved in monitoring their movements while in the country.”<sup>23</sup> The five Taliban officers are:

- Mohamed Fazl Akhund, the former Chief of Staff of the Taliban forces, who is wanted by the UN for war crimes. Akhund commanded forces to massacre hundreds of civilians and played a key role in planning the 9/11 terrorist attacks with al-Qaeda;<sup>24</sup>
- Abdul Haq Wasiq, the former Deputy Chief of the Taliban Intelligence Agency. He “was central to the Taliban’s efforts to form alliances with other Islamic fundamentalist groups [that] fight [sic] alongside the Taliban against U.S. and Coalition forces after the 11 September 2001 attacks”;<sup>25</sup>
- Khairullah Khairkhuwa, the former Minister of Interior and a founding member of the Taliban who was close to both Mullah Omar and Osama bin Laden;<sup>26</sup>
- Noorulallah Noori, the former head of the Taliban administration of Afghanistan’s northern zone. Noori was also the governor of Balkh province, and is responsible for “ethno-sectarian massacres”;<sup>27</sup> and,
- Maulvi Mohamed Nabi Omari, the former commander of a border patrol unit during the years the Taliban ruled Afghanistan.<sup>28</sup>

The Taliban is a terror group despite some claims otherwise.<sup>29</sup> White House National Security Council spokeswoman Caitlin Hayden stated that the Taliban is not on the list of Foreign Terrorist Organizations (FTOs) released by the State Department.<sup>30</sup> However, it has been on the list of Specially Designated Global Terrorists (SDGT) since July 2002.<sup>31</sup>

The National Counterterrorism Center also lists “Taliban Presence in Afghanistan” as a terror group.<sup>32</sup> It seems inconsistent that on the one hand, the White House refused to categorize the Taliban as a terror group; yet on the other hand, it is still offering a 10 million dollar reward for any information that could lead to the capture of the Taliban leader, Mullah Omar.<sup>33</sup> This reward was regarded as an effort to “fight against international terrorism.”<sup>34</sup> Moreover, the State Department has designated the Taliban’s sister network—the Tehrik-i-Taliban Pakistan (TTP),<sup>35</sup> and its affiliated group, the Haqqani Network<sup>36</sup>—as terror groups.<sup>37</sup> The Haqqani Network held Bergdahl for most of the time during his captivity.<sup>38</sup> The White House seems to be deceiving itself when it says that it did not negotiate with terrorists, as Hayden told *ABC News* that the United States “did not negotiate with the Haqqanis” for the freedom of Bergdahl.<sup>39</sup>

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As evidenced by the decade-long Iraq conflict, there is no negotiable peace with a terror group. While some terrorist groups, such as the Irish Republican Army (IRA), have laid down their arms following a peace agreement, their goals differ greatly from those of the insurgency forces in Iraq. The IRA never attempted to use terrorism to destroy the British mainland. Rather, although some IRA terrorists were dispatched to carry out attacks, this pattern differentiates what was arguably the most effective of all the contemporary terrorist organizations.<sup>40</sup> Others, such as ISIS, al-Qaeda, and Boko Haram, have proven unwilling to compromise, fondered on romantic and maximalist excitement, and have achieved little. The recent conflict within Iraq between the Sunni insurgent, al-Qaeda offshoot Islamic State in Iraq and al-Sham (ISIS),<sup>41</sup> and the U.S.-installed Shia government, shattered the United States’ decade-long efforts in the region.<sup>42</sup> The United States might have to invade Iraq to secure peace in the region.<sup>43</sup> Thus, this recent exchange together with Obama’s attempted negotiations with Hamas, the Taliban, and terror groups alike are sending a message that the United States can be bled into submission, which encourages stronger opposition.<sup>44</sup> Thus, the 6,843 American lives lost in the War on Terror were arguably put to waste.<sup>45</sup>

### III. HISTORY OF AMERICAN AND ISRAELI PRISONER RELEASE DEALS

The overwhelming Israeli public support for the exchange of Gilad

Shalit, an Israeli soldier who was kept in captivity by Hamas for five years, did not last long.<sup>46</sup> According to the Israel Democracy Institute, a 2011 poll showed, to varying degrees, almost 78 percent of the Israeli public supported the exchange for Gilad Shalit.<sup>47</sup> However, with recent events, a 2014 poll showed that 80 percent of the public now opposes releasing terrorists who are murderers.<sup>48</sup> Similarly, according to *USA Today* and the Pew Research Center's survey, only 34 percent of the public supported the Bergdahl exchange, while 43 percent disapproved of the deal.<sup>49</sup> In general, both the American and Israeli publics disapprove of prisoner release deals, especially as a prerequisite to resume peace talks.<sup>50</sup> In the author's opinion, such agreements and deals are a sign of weakness and, as noted by Moran Azulay, "will only encourage more killings and terrorism."<sup>51</sup>

The tragic recent murder of three Israeli teens, Eyal Yifrach, Naftali Fraenkel, and Gilad Shaar, is further evidence of this encouragement factor.<sup>52</sup> The kidnappers intended to use their hostages as bargaining chips and to give the Hamas brand another popularity boost.<sup>53</sup> One of the three boys phoned the police about their kidnap, but the Israeli Defense Force (IDF) did not respond to the call until seven hours later, mistaking it as a hoax.<sup>54</sup> The kidnappers killed the boys immediately after the call, believing that the IDF was after them.<sup>55</sup> Although the recent kidnapping did not lead to prisoner exchanges, if not for the government's previous actions feeding into the growing appetite of Hamas and the Palestinian Authority (PA), and into the outrageous demands of terror groups, the boys would not have been kidnapped and their lives probably spared.<sup>56</sup>

The U.S. policy of "no negotiation with terrorists" has two important effects: deterrence of violence in general and the political marginalization of extremists in particular. Effective deterrence is built upon the prevention of attacks and strict penalties when perpetrators are caught. On the other hand, terrorist organizations are emboldened when their tactics bear fruit. Any victory over the West is used for propaganda and recruitment, and grabs more attention than pamphlets and speeches. In recent months, ISIS has turned this into a major tactic, as their videos of beheading civilian journalists grabbed front-page headlines around the world.<sup>57</sup>

A similar phenomenon has occurred for Israel, which has carried out

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several prisoner exchanges in recent years. Releasing prisoners prematurely damages Israel's deterrence capability, especially when the terrorists in question express no remorse and publicly state their intention to strike again.<sup>58</sup> Although Israel negotiated with the PA for the Gilad Shalit exchange, in actuality, more Hamas terrorists were released. This was due to the disproportionate number of Hamas activists in Israeli prisons. Instead of marginalizing extremists, this exchange gave Hamas a substantial popularity and confidence boost.<sup>59</sup>

These two events are not the first times the United States and Israel cut deals with terror groups. The Israeli government is known for its willingness to exchange at all costs. By 2014, Israel released seventy-eight Palestinian prisoners as a gesture and precondition to resume peace talks with the PA.<sup>60</sup> This release gesture was not the first concession Israel had to make. In 2011, the Israeli government freed 1,027 Palestinian prisoners in exchange for Gilad Shalit, 280 of whom were directly involved in the killing of 569 Israeli civilians.<sup>61</sup> Moreover, on July 16, 2008, in exchange for the remains of two IDF soldiers killed in the Second Lebanon War, Israel released Lebanese prisoner Samir al-Quntar, four Hezbollah fighters, and the remains of 199 Palestinian and Lebanese fighters.<sup>62</sup> Hezbollah named this swap a "Divine Victory."<sup>63</sup> The Lebanese government declared July 16, 2008, a national holiday to celebrate the exchange.<sup>64</sup>

Israel's history of disproportionate exchanges reaches back over half a century, to the Sinai War of 1956, in which it exchanged 5,500 Egyptian soldiers for four captured IDF soldiers.<sup>65</sup> To obtain the release of fifteen IDF soldiers captured during the 1967 Six-Day War, Israel returned 4,338 soldiers and 889 civilians to Egypt, 533 soldiers and 366 civilians to Jordan, and 367 soldiers and 205 civilians to Syria.<sup>66</sup> In 2004, Israel traded 400 Palestinian prisoners, around thirty Arab fighters, the remains of fifty-nine Lebanese, and a German Hezbollah supporter for the remains of three IDF soldiers and Israeli businessman Elhanan Tannenbaum.<sup>67</sup> Also in 2008, Israel exchanged Nissim Nasser, a Lebanese spy, for the remains of up to twenty IDF soldiers killed during the Second Lebanon War.<sup>68,69,70,71</sup> As the list went on, Israel paid increasingly extortionate prices to have its soldiers returned, dead or alive.

Although the U.S. government has the "no negotiation with terrorists" policy, it has not completely exempted itself from such negotiations. In 1979, the Carter administration unfroze USD 11 billion in Iranian assets in exchange for dozens of American hostages held in Tehran.<sup>72</sup> According to *Time* magazine's Michael Crowley, "[d]uring the Iraq War, the Bush administration cut deals with Sunni insurgents in Iraq's Anbar province—working with and even paying people [that] had been killing American soldiers."<sup>73</sup>

America has even assisted terrorists without the need for arm-twisting over hostages. Following the 2001 invasion of Afghanistan, journalists made much of the fact that America had supplied billions of dollars to the Taliban's mujahideen, elements of which later evolved into the Taliban.<sup>74,75</sup> In the contemporary Middle East, President Obama proposed providing USD 500 million to assist Syrian rebel groups, despite admitting that the resources could reach the hands of extremists.<sup>76</sup> Within a few months he changed tactics and began supporting Syrian dictator Bashar Assad's allies in fighting ISIS.<sup>77</sup>

Most of these policies would be highly unpopular with the public, and the government goes to great lengths to avoid publicity about such deals. The Iran-Contra affair ended with President Reagan sequestering himself from the public before making a public apology from the Oval Office.<sup>78</sup> The Bergdahl affair has the potential to be just as dangerous for the Obama administration. Like Reagan, President Obama has been accused of offering money to sanctioned organizations and concealing information from the American public. Reports recently arose that the Pentagon offered money in ransom for Bergdahl, but that it was stolen by an Afghan middleman.<sup>79</sup> Furthermore, investigative journalist and pundit Paul Sperry has argued that the administration dragged out Bergdahl's mandatory court marshal in order to avoid bad press before the 2014 midterm elections.<sup>80</sup>

#### IV. DANGEROUS IMPLICATIONS OF RELEASING TERRORISTS

Israel has often paid little or no attention to the backgrounds of the terrorists it released, whose freedom would likely replenish the ranks within the hierarchy. The most direct and palpable effect of releasing terrorists is their elevated rate of recidivism. According to Almagor, the Israeli Terror Victims Association, at least 80 percent of the released terrorists return to terrorism.<sup>81</sup> Since 1993, close to 1,000 released terrorists were re-arrested.<sup>82</sup> The Café Hillel bombing and the Tzrifin bombing, both of which took place on September 9, 2003, as well as the Negohot terror attack on September 26, 2003, were all perpetrated either by or with the aid of a released terrorist.<sup>83</sup> Those who were freed in the 2004 Tennenbaum deal have subsequently murdered at least thirty-five Israelis as of April 2007.<sup>84</sup> Altogether, since 2000, released terrorists were responsible for the deaths of over 180 Israelis, and they have wounded many more.<sup>85</sup>

In 2006 Hezbollah abducted IDF soldiers in an attempt to negotiate the release of Samir al-Quntar.<sup>86</sup> His four murder victims from the Haran family included a four-year-old girl, Einat, whose head he smashed with a rifle butt and crushed against a rock.<sup>87</sup> Hezbollah succeeded in freeing this

high-profile murderer in the aftermath of the ensuing Second Lebanon War in exchange for the bodies of two of the kidnapped IDF soldiers.<sup>88</sup> Quntar remains unrepentant; he told the French media,<sup>89</sup> “I haven’t for even one day regretted what I did.”<sup>90</sup> He encourages others to follow his lead, and has received honors and praise from the PA, Lebanese, Syrian, and Iranian political hierarchies.<sup>91</sup> He told *Future TV*, a Lebanese station, that, “Allah willing, I will get the chance to kill more Israelis.”<sup>92</sup> The whole affair was a major boost to Hezbollah’s standing in the Arab world and has had severe repercussions for Israel.<sup>93</sup>

We are likely to see a similar result in terms of recidivism after the Bergdhal deal. Most of the five senior Taliban leaders that were released had extensive connections with al-Qaeda, and two are wanted as war criminals for killing thousands of civilians.<sup>94</sup> There is no reason not to expect them to return to their old ways, particularly because Qatar cannot be expected keep a watchful eye on the released detainees based on its past record.<sup>95</sup> “We know that many wealthy individuals in Qatar are raising money for jihadists in Syria every day,” a senior U.S. intelligence official told *The*

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*Daily Beast.*<sup>96</sup> “We also know that we have sent detainees to [Qatar] before, and their security services have magically lost track of them.”<sup>97</sup> In 2008, the Bush administration transferred Jaralla al-Marri from Guantanamo Bay detention camp under promises similar to the ones provided about the five Taliban leaders.<sup>98</sup> Six months later, al-Marri escaped to the United Kingdom.<sup>99</sup> The five Taliban leaders may well escape Qatari watch, return to their previous posts, and carry on terrorist attacks against the United States.

Moreover, Mohamed Fazl Akhund, along with several Taliban commanders, has “long-standing contact with al-Qaeda.”<sup>100</sup> Releasing them might link the two terror groups together.<sup>101</sup> Two of the Taliban detainees are wanted for war crimes for the murder of thousands of Afghani Shi’ites.<sup>102</sup> In a classified Senate briefing, Robert Cardillo, a Deputy Director of National Intelligence, stated that four of the five Taliban leaders released would eventually return to the front line.<sup>103</sup> The U.S. intelligence assessment on these five Taliban leaders was completed in 2013.<sup>104</sup> Thus, the Obama administration had full knowledge of the probable recidivism when it released these terrorists.<sup>105</sup>

According to the U.S. Chairman of the House Permanent Select

Committee on Intelligence, Mike Rogers, this exchange sends a message to terror groups that “there is some value in a hostage that it didn’t have before.”<sup>106</sup> This new precedent set forth by the Bergdahl exchange may lead to the broader issues surrounding kidnapping, blackmail, negotiation, gestures of release, and exchange.

## V. OPTIONS FOR POLICYMAKERS

### *“Life Without Parole” Bill*

Israeli legislators have confronted what they see as a similar lack of responsibility by their leaders by proposing bills limiting the executive’s power to release prisoners. The “Life Without Parole” bill passed the preliminary reading in the Knesset on June 11, 2014.<sup>107</sup> If this bill passes another two hearings, the President will no longer be allowed to pardon criminals.<sup>108</sup> This amendment to the Basic Law of the President of the State will allow judges to negate any future possibility of amnesty at the time of giving the sentence.<sup>109</sup>

This bill would effectively prevent any future prisoner releases between Israel and terror groups. If enacted, Israel might be able to restore its long-lost deterrence power and give the terror groups reason to think twice before abducting any more Israelis. This concrete policy will provide guiding principles and recommendations for Israel’s future interactions with terror groups.

There are setbacks to the policy.<sup>110</sup> Justice Minister Tzipi Livni is one of three ministers who opposed the bill because “[it] will hurt the ability of future governments to maneuver.” But according to Naftali Bennett, the “goal of this bill [is] [t]o disconnect the release of terrorists from diplomatic issues, there is no connection between them.”<sup>111</sup> In response, Ron Kerman, father of a bus bombing victim, told Arutz Sheva radio, “politicians would always find ways to get around the law to release terrorists...who would crudely deceive the rule of law and ethics, and free more terrorists.”<sup>112</sup>

Although the bill is far from perfect, it is better than the concessions the Israeli government has employed. According to Ze’ev Elkin, the chairman of the Knesset Foreign Affairs and Defense Committee, “[e]very terrorist organization has to understand that it does not pay to kidnap... [because] criminal kidnapping of [this] sort puts terrorists in jail [instead of] free[ing] them.”<sup>113</sup> If the bill passes, the freed prisoner will continue the previous sentence in addition to the conviction for the new crimes. This will indefinitely put all freed terrorists on retroactive probation.<sup>114</sup> This

will effectively reduce the number of kidnaps and kidnap attempts because even the terror groups would want to avoid wasted efforts.<sup>115</sup>

*New Knesset Proposal for Exchanges with a One-for-One Ratio*

Israeli Member of Knesset (MK) Elazar Stern of the Hatnua Party recently submitted a bill that encourages a one-for-one exchange ratio.<sup>116</sup> This new bill calls on the adoption of the Shamgar Commission reports.<sup>117</sup> The Shamgar Commission was established in 1995 and led by the retired Chief Justice, Meir Shamgar, of the Supreme Court of Israel.<sup>118</sup> It was first formed to investigate the assassination of Prime Minister Yitzhak Rabin.<sup>119</sup> In July 2008, the then-Defense Minister Ehud Barak reformed the commission to formulate recommendations for future prisoner exchange deals.<sup>120</sup> The recommendation submitted to the government is strongly against large-scale exchanges for kidnapped soldiers.<sup>121</sup> In addition, it encourages the government to establish an official oversight unit for all negotiations on prisoner swap deals.<sup>122</sup>

MK Stern's bill proposes that Israel only engage in exchanges with a one-to-one ratio, one terrorist for one living soldier.<sup>123</sup> The terror group will be allowed to choose from a closed list of terrorist prisoners determined by Israel.<sup>124</sup> It is incumbent on Israel not to enter into any more deals of living terrorists for bodies of IDF soldiers.<sup>125</sup> But, Stern's bill will allow the government the option of "freeing up to [ten] terrorists without receiving any prisoners in return" to advance negotiation.<sup>126</sup> According to MK Stern, "this bill has two central advantages. One is reducing the 'profit-

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 .....

ability' of kidnapping . . . [and] second is reducing internal public pressure during negotiations in such events."<sup>127</sup>

The evolution of these exchanges reveals higher demands by the various factions and increasing disproportion in the exchanges—both inuring solely to the benefit of terror groups. Hamas reportedly raised its demands from the release of 450 prisoners to 1,027 for the release of Gilad Shalit.<sup>128</sup> The Hamas Prime Minister at the time, Ismail

Haniyeh, flatly stated that Israel could no longer refuse to release prisoners with "blood on their hands."<sup>129</sup> With such a cold-blooded mentality terror groups are using human lives as bargaining chips. Unless America enacts restrictions such as those in MK Stern's proposed bill, this new precedent

set in the Bergdahl case will undoubtedly endanger the lives of many, just as Israel's releasing terrorists has further endangered Israelis.

### *Death Penalty for Terrorists*

A unilateral approach as regards negotiations is not enough of a deterrence effect. Risk-averse strategies need both diversification and contingencies. Another possible method to diversify the approach to deterrence would be to begin imposing the death penalty for egregious acts of terrorism.<sup>130</sup> This is legal under U.S. federal law and international law in the case where the terrorist in question has killed one or more people.<sup>131</sup> However, there are challenges. War crimes must be taken to the International Criminal Court (ICC), of which the U.S. and Israel are not participants.<sup>132</sup>

After the 2012 UN General Assembly, Palestine was promoted to a "non-member observer state," and is eligible to join some of the international agencies and conventions, including the ICC.<sup>133</sup> On May 8, 2014, seventeen international human rights organizations, thirteen of which are Palestinian organizations, petitioned PA President Mahmoud Abbas to join the ICC.<sup>134</sup> The petition advised Abbas to sign onto the Rome Statute and turn to the ICC for the lack of accountability for the war crimes committed during the Israeli-Palestinian conflict.<sup>135</sup> However, according to the former Chief Prosecutor of the International Criminal Court, Louis Moreno-Ocampo, Palestinians will be under "intense scrutiny" for war crimes if they decide to bring the ICC into the conflict.<sup>136</sup> Furthermore, both the United States and Israel object to the PA's "attempt to bypass peace talks" by joining international agencies and conventions.<sup>137</sup>

Moreover, both the U.S. and Israel formally withdrew their intent to ratify the Rome Statute after having signed it, and neither are willing to face the repercussions of being subject to the ICC's jurisdiction.<sup>138</sup> Israel launched a campaign earlier this year claiming that it would bring Abbas to the ICC for supporting and aiding terror groups.<sup>139</sup> Even though both sides talked about turning to the ICC to solve this decades-long conflict, it is unlikely that such an event would occur.<sup>140</sup>

The United States has prosecuted terrorism cases in the U.S. court system, both in civilian criminal courts and military tribunals, since September 11, 2001.<sup>141</sup> With such depth behind this conflict and the potential of being subject to ICC scrutiny, neither country is willing to adhere to the ICC's jurisdiction.<sup>142</sup> Thus, countries should prosecute terrorists in their own courts for the war crimes committed.

The author has previously published an article that addresses this

unconventional angle on sentencing terrorists.<sup>143</sup> If any Israelis are abducted, an immediate execution of terrorists that had been serving out a life sentence will be carried out. In this way, Israel could deter potential terrorist attacks. It must be noted that the author in no way encourages the use of the death penalty *per se*, and is merely illustrating a less-discussed possibility in terms of a future deterrence and response to kidnap and blackmail.

## VI. CONCLUSIONS

In conclusion, both the United States and Israel face seemingly unending terrorist threats. Samir al-Quntar advised Hamas leaders to stick to their demands and wait for Israel to concede during the negotiations of the Shalit deal.<sup>144</sup> He said, “the enemy’s government will consent to the names demanded.”<sup>145</sup> Quntar’s lesson learned from his decades of involvement in anti-Israel violence is that Israel will concede to terrorism. By giving in to the demands of terror groups, the United States and Israel appear vulnerable and give terror groups a logical reason to continue terrorism. To

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quote Professor Alan Dershowitz, they do it “because it works.”<sup>146</sup> By engaging in unequal trades of prisoners, the United States and Israel are encouraging terrorism.

The reaction to terrorism in the international forum, and specifically in the context of conflicts in the Middle East, has consistently been one that rewards the perpetrators. The forgiving

nature of the international community creates an incentive for terror groups to perpetuate their behavior. Giving Arafat a seat at the UN General Assembly legitimized terrorism and lent moral equivalency between lawful and terror states (and groups) that unabashedly murder innocent civilians.<sup>147</sup>

According to author Shmuel Rosner, when facing terrorism and negotiating with terrorists, the heads should not lose to the hearts.<sup>148</sup> Although the intentions of both the United States and Israel are admirable, such half-baked decisions to engage in unequal exchanges with terror groups must come to an end. A firm policy would reduce the number of kidnappings and exchanges because even the terror groups would try to avoid wasted efforts. Since the Shalit deal, the number of kidnapping attempts of IDF soldiers skyrocketed from eleven in 2011, to twenty-six in

2012.<sup>149</sup> In 2013, the number of kidnapping plots rose to fifty, eleven of which were direct attempts to use the kidnapped soldiers in exchange for terrorists incarcerated in Israeli prisons.<sup>150</sup> Such an increase of kidnapping attempts could be attributed to “the Palestinians’ success in brokering the Shalit deal”; one compared with 1,027 is a deal that is too sweet not to repeat.<sup>151,152,153,154,155</sup>

This tragedy is foreseeable. The Hamas officials vowed to abduct “a new Gilad.”<sup>156</sup> The murder of the three boys should be a wakeup call for both governments. Under no circumstances should governments engage in such unequal trades. The long-term results are disastrous, whether the release of thousands of terrorists or the death of innocent soldiers and civilians. As a matter of practicality, safety, morality, and commitment to international law, the U.S. and Israeli governments should stand together against such one-sided concessions and idealistic policies.<sup>157</sup> Let’s not lose more Yifrachs, Fraenkels, and Shaars. May today’s deaths be remembered as tomorrow’s lesson.*f*

## ENDNOTES

- 1 The author especially wishes to express his indebtedness to Grace Ruizi Guo and Matityahu Wanderman, who helped to prepare this article. Ms. Guo is currently a law student at the Liberty University School of Law. She earned her Honors Bachelor of Arts at the University of Toronto studying a combined specialty of Political Science and Economics. Mr. Wanderman earned his BA at Wheaton College, Massachusetts, and is now finishing his MA in history at the Hebrew University of Jerusalem.
- 2 Irwin Cotler served as the Minister of Justice and Attorney General of Canada from 2003 to 2006. He was also a professor of law at the McGill University and director of the Human Rights Program. Irwin Cotler, Human Rights in the New International Legal Order, *Israel in the New World Order: Third Annual Public Policy Day June 21, 1991*, at 51, 52 (1992) (on file with the Jerusalem Center for Public Affairs).
- 3 Gilad Shalit, an Israeli Defense Soldier, was kidnapped by the Hamas and held for five years. In exchange for him, the Israeli government swapped 1,027 Palestinian prisoners.
- 4 Bowe Bergdahl, an American soldier, was kept in captivity by the Taliban for five years. In exchange for him, the U.S. government released five senior Taliban officers who were imprisoned in the Guantanamo Bay detention camp.
- 5 Associated Press, “A Timeline of Sgt. Bowe Bergdahl’s 2009 Capture in Afghanistan to 2014 Release,” *Fox News*, June 6, 2014, <<http://www.foxnews.com/us/2014/06/06/timeline-sgt-bowe-bergdahl-200-capture-in-afghanistan-to-2014-release/>>.
- 6 Ibid.
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- 12 Ibid.
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- 14 Michael Crowley, "Obama Didn't Negotiate with Terrorist for Bergdahl," *Time Magazine*, June 2, 2014, <<http://time.com/2809612/bowe-bergdahl-obama-tali>>.
- 15 Ibid.
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- 17 *Geneva Convention Relative to the Treatment of Prisoners of War*, International Committee of the Red Cross, Articles 14 – 20, August 12, 1949.
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