

2018

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Recommended Citation

Aviv Yeini, Shelly, "Weighing Lives: Israel's Prisoner-Exchange Policy and the Right to Life" (2018). *Minnesota Journal of International Law*. 309.

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Article

Weighing Lives: Israel's Prisoner-Exchange Policy and the Right to Life

Shelly Aviv Yeini*

Abstract

The state of Israel has engaged in many prisoner-exchange deals involving large numbers of released prisoners in exchange for only a few Israeli captives. The Jibril Agreement and the Shalit prisoner exchange has set the price tag of one Israeli captive to the equivalent of several hundreds of prisoners. Israel's prisoner-exchange policy is suggested to contribute to a cycle whereby more lives are lost, which raises many important questions with regard to the right to life. Such a high price tag on Israeli life encourages more kidnappings, which results in further prisoner exchanges—and so forth. It is also claimed that released prisoners sometimes resume their involvement in terrorism, which causes a further loss of lives.

This study aims to understand the motivations of Israel to engage in such unbalanced prisoner exchanges, to analyze Israel's prisoner-exchange policy with reference to various aspects of the right to life, and finally, to offer guidelines and improvements to the current policy to better address the right to life principles.

INTRODUCTION

This research examines the right to life implications of different aspects of Israel's prisoner-exchange policy. The intention is to identify the strengths and weaknesses of such policy and to offer guidelines that bring the prisoner-exchange practice more in line with right to life principles.

* Shelly Aviv Yeini is a Ph.D. Candidate at Bar-Ilan University, Faculty of Law. I thank Professor Christof Heyns for his valuable ideas and comments. Without him, this work would not have been possible.

Over the years Israel has engaged in many unbalanced prisoner-exchange deals with its Arab neighbors, involving large numbers of released prisoners in exchange for only a few Israeli captives.¹ In the first years after the formation of the state of Israel in 1948, such exchanges were usually performed in the aftermath of a war where both negotiating parties were states.

Over time the conflicts in which Israel was involved changed from state-based warfare to guerrilla-based warfare. In this context a model of “extortion” exchange has developed, with “terrorist organizations holding Israeli soldiers and civilians hostage, with their release conditional on the release of hundreds of imprisoned members of these organizations.”²

Israel has always preferred to free Israeli captives by force but has consistently paid a steep price for the release of its captives when this option is unavailable.³ As of the late 1960s terrorist organizations have adopted a pattern of “hit and run,” taking Israeli hostages to areas beyond the reach of Israel’s security services in demand of the release of prisoners.⁴ It is estimated that in total Israel has released about 7,500 prisoners in exchange for fourteen living captives and the bodies of six soldiers.⁵

Notable incidents followed by exchange deals include the hijacking of the TWA Boeing in 1969, and the kidnappings of Avraham Amram in 1978, eight Nahal soldiers in 1982, Yosef Fink and Rachamin Alsheikh in 1986, Itamar Iliyah in 1997, Elhanan Tannenbaum and the Har-Dov captives in 2000, and Ehud Goldwasser and Eldad Regev in 2006.⁶ However, the prisoner-exchange deals concerning Jibril and Shalit were the most influential and large-scale.

1. Off. of the IDF Spokesman, IDF’s Spokesperson’s Unit Information, INT’L COMM’N FOR MISSING ISRAELI SOLDIERS, <http://www.mia.org.il/idfxheb.html> (last updated July 2005).

2. Yoram Schweitzer, *Israel: Hostage to Its Soldiers’ Captors?*, in STRATEGIC SURVEY FOR ISRAEL 2010 25, 25 (Shlomo Brom & Anat Kurz eds., 2010).

3. *Id.*

4. *Id.*

5. Draft Bill for Principles for the Redemption of Captives and Missing Persons, 5776–2015, HH (Knesset) No. 1847 p. 20 (Isr.).

6. Ariel Gilboa, The Influence of “The Cost” in Negotiations for Release of Captives from Terrorist Organizations 27–28 (2010) (unpublished M.P.P. thesis, The Hebrew University of Jerusalem), http://public-policy.huji.ac.il/upload/Thesis_HE/Ariel_Gilboa_thesis.pdf.

The Jibril Agreement of 1985 was a watershed in the history of Israeli-Arab prisoner exchange. The deal was the release of three captured Israeli soldiers in exchange for 1,150 prisoners, 80 of whom were said to have had “blood on their hands,” a term referring to prisoners convicted of murder.⁷ As a result, the Jibril deal set the “exchange rate” for following exchanges.⁸

The Shalit prison exchange began on June 25, 2006 when Hamas, together with the Palestinian Popular Resistance Committees and the Jaysh al-Islam, carried out an assault on the Kerem Shalom border crossing in Israel, taking Israeli Defense Forces (IDF) Corporal Gilad Shalit hostage in the process.⁹ The abductors threatened, explicitly in some reports, to execute Shalit if their demands were not met.¹⁰ Israel’s failure to discover where Shalit was held captive left it with no military option and, consequently, no alternative but to enter into negotiations with Hamas.

During more than five years of negotiations, Israel remained in the dark regarding the soldier’s whereabouts, and very little was known about his physical and mental wellbeing.¹¹ In October 2009 Israel released twenty female prisoners in return for a sign of life of Shalit.¹² Eventually, in October 2011, Israel and Hamas struck a deal to release Shalit in exchange for 1,027 prisoners,¹³ 454 of whom were described to have had “blood on their hands.”¹⁴

In addition to Israel’s primary objective to bring Shalit home unharmed, it also wanted to ensure that convicted terrorists, once released, would not resume terrorist activity against

7. Yoram Schweitzer, *A Mixed Blessing: Hamas, Israel, and the Recent Prisoner Exchange*, 14 STRATEGIC ASSESSMENT 23, 34 (Jan. 2012).

8. Ziv Bohrer & Mark J. Osiel, *Proportionality in War, Protecting Soldiers from Enemy Captivity, and Israel’s Operation Cast Lead—“The Soldiers are Everyone’s Children,”* 22 S. CAL. INTERDISC. L.J. 637, 652 n.90 (2013); see also Ronen Bergman, *Gilad Shalit and the Rising Price of an Israeli Life*, N.Y. TIMES (Nov. 9, 2011), <http://www.nytimes.com/2011/11/13/magazine/gilad-shalit-and-the-cost-of-an-israeli-life.html>.

9. Lesley Terris & Orit Tykocynski, *Inaction Inertia in International Negotiations: The Consequences of Missed Opportunities*, BRIT. J. OF POL. SCI. 701, 710 (2016).

10. Gilad Shalit, *Held Hostage in Gaza for More Than Five Years, Released on 18 October 2011*, B’TSELEM, http://www.btselem.org/gaza_strip/gilad_shalit (last visited Feb. 19, 2018).

11. Terris & Tykocynski, *supra* note 9, at 710.

12. *Id.*

13. *Id.*

14. Schweitzer, *supra* note 7, at 34.

Israel.¹⁵ This objective was based on Israel's experiences of past exchanges. According to Al-Magor, an organization for Israeli terror victims, "eighty percent of all terrorists released in the last three decades, either as a gesture of good faith to the Palestinians or as part of prisoner-exchange deals, have returned to terrorist activities."¹⁶ Israel's intelligence agencies claim that forty-five percent of those released in previous prisoner-exchange deals returned to terrorist activity, and the former head of Mossad argues that the Tannenbaum deal alone resulted in the murder of 231 Israelis by released prisoners.¹⁷

To avoid the risk of further terror attacks after the Shalit prisoner transaction, 163 of the prisoners were expelled to the Gaza Strip and 43 abroad.¹⁸ Furthermore, it was agreed that the freed prisoners who were expelled to Gaza would stay there and would not be able to return to their homes in the West Bank for periods of up to twenty years, depending on their risk level.¹⁹ Upon demonstration of good behavior, they would gradually be able to return to the West Bank.²⁰ Prisoners who were released to their homes in Israel are not allowed to enter the West Bank, while those released to the West Bank are obligated to report to local police stations as a prearranged condition thereof.²¹

Despite these arrangements, some prisoners released as part of the Shalit prisoner-exchange have already caused the loss of Israeli lives thereafter. These released prisoners publically expressed their will to re-engage in terror soon after their release.²² According to Shabak, Israel's security agency, in 2013 alone, forty terror attacks involving ex-prisoners released as part of the Shalit prisoner-exchange were blocked by the agency.²³ Different Israeli news sources report that by now six Israelis have been murdered by released prisoners of the Shalit

15. Terris & Tykocynski, *supra* note 9, at 710.

16. Bohrer & Osiel, *supra* note 8, at 653 n.94; *see also* News in Brief II, HAARETZ (Dec. 4, 2007), <http://www.haaretz.com/print-edition/news-in-brief-ii-1.234506>.

17. Bohrer & Osiel, *supra* note 8, at 653 n.94; *see also* Bergman, *supra* note 8.

18. Schweitzer, *supra* note 7, at 29.

19. *Id.*

20. *Id.*

21. *Id.*

22. Boaz Ganor & Ophir Falk, *De-Radicalization in Israel's Prison System*, 36 *STUD. CONFLICT & TERRORISM* 116, 124 (2013).

23. Shabak, *Yearly Report for 2013*, <https://www.shabak.gov.il/publications/Pages/study/2013.aspx> (last visited May 22, 2018).

prisoner-exchange.²⁴ At the time of writing this study, two Israeli civilians are reported to be held by Hamas, both of whom are claimed to be mentally ill, as well as the bodies of soldiers Oron Shaul and Hadar Goldin.²⁵

This study will not engage in a classification of the Israeli-Arab conflict according to international and humanitarian law, nor will it attempt to classify the status of prisoners from both sides under Geneva Conventions. For convenience, Israeli soldiers and bodies thereof will be referred to as “captives,” and the prisoners exchanged as “prisoners.” While such terms are not necessarily legally accurate, since they do not capture the differences which might affect the legal status of the parties involved, they serve to get the conversation going.²⁶

I. ISRAEL’S READINESS TO NEGOTIATE PRISONER-EXCHANGE DEALS ON NUMERICALLY LOSIDED TERMS

One might find Israel’s readiness to strike such unbalanced prisoner-exchange deals somewhat baffling. However, Israel has unique cultural and social characteristics which motivate it to negotiate with captors, and to set an extremely high price tag on Israeli life. But, the Shalit prisoner-exchange has undermined the relative consensus status of such traditions, and placed it at the center of social debate and controversy.

24. Tamar Pileggi, *Palestinians Freed in Shalit Deal Killed 6 Israelis Since 2014*, Times of Israel (July 20, 2015), <http://www.timesofisrael.com/palestinians-freed-in-shalit-deal-killed-6-israelis-since-2014>; Yoav Zitun, *Shalit Deal Death Toll, 4 Years On*, YNETNEWS.COM (July 20, 2015), <http://www.ynetnews.com/articles/0,7340,L-4681905,00.html>.

25. Jack Khoury, *After a Year of Silence, Israeli Bedouin Asks Hamas to Release His Son*, Haaretz (Apr. 9, 2016), <http://www.haaretz.com/israel-news/premium-1.713420>; Jack Khoury & Shirley Seidler, *Hamas Official: Mengistu Isn’t Mentally Unstable, Captured During Gaza War*, Haaretz (July 17, 2015), <http://www.haaretz.com/israel-news/1.666501>; Reut Rimerman & Ahiya Raved, *Goldin, Shaul Families Slam PM Over Reports of Outlandish Hamas Demands*, Y Net News (July 5, 2016), <http://www.ynetnews.com/articles/0,7340,L-4824377,00.html>

26. See generally Eliyahu Winograd, *The Commission of Inquiry into the Events of Military Engagement in Lebanon 2006: Final Report* 502 (Jan. 2008).

A. MOTIVATION FOR PRISONER-EXCHANGE DEALS

1. Old-time Jewish Traditions

Scholars point out that the questions over prisoner exchange is an area where two often-rival elements of the character and nature of the state of Israel, the Jewish element and the democratic one, are actually in harmony.²⁷ The framework for prisoner exchange is rooted in Jewish legal tradition (“Halacha”).²⁸ The rescue of captives is considered a basic obligation under the Halacha and has been followed in Jewish communities for generations.²⁹ To some, the Talmudic discussion might sound archaic and outdated. However, ministerial bodies and the Israeli Supreme Court often use references to the Talmud when prisoner-exchange deals are legally challenged.³⁰

Per the Halacha, captivity is perceived as the worst thing that can happen to a person. This approach is based on a specific interpretation of Jeremiah 15:2: “And it shall be that when they say to you, ‘Where should we go?’ then you are to tell them, ‘Thus says the LORD: “Those destined for death, to death; And those destined for the sword, to the sword; And those destined for famine, to famine; And those destined for captivity, to captivity.””³¹ Babylonian Talmud introduces Rabbi Johanan’s interpretation whereby the verse presents a scale of severity, as captivity holds the potential to include any of the other options listed above.³²

27. CAPTIVES 151 (Merav Mack ed., Van Leer Jerusalem Inst., Zalman Shazar Ctr., 2014).

28. *Id.* at 152.

29. Ruth Levush, *Israel: Legal Aspects of Prisoner Exchanges*, LIBRARY OF CONGRESS, L.L. File No. 2014-010825 (June 2014), <http://www.loc.gov/law/help/reports/pdf/2014-010825%20IL%20RPT.pdf>.

30. See MICHAEL VIGODA, REDEEMING PRISONERS OF WAR AND BODIES IN EXCHANGE FOR RELEASING TERRORISTS, (2008) (an opinion submitted to the Shamgar Commission on October 7, 2008).

31. *Jeremiah 15:2*.

32. See Gittin 45a (June 12, 2017) http://www.come-and-hear.com/gittin/gittin_45.html; Eytan M. Goldschein, *Gilad Shalit & Prisoner Exchange: A Talmudic Perspective*, SSRN (May 16, 2011), <https://ssrn.com/abstract=1843225>.

Scholars explain that the power to control a fellow human being, to be objectified by its captors and to be at their complete mercy without a shred of free will, is worse than death.³³ However, the obligation to redeem a captive is not without its limits. The Mishnah in Gittin states that a captive can only be redeemed for their monetary value because of Tikkun Olam—“repairing the world.”³⁴ Tikkun Olam has two alternative meanings according to the Talmud in this regard: one is that redeeming a captive above value places an unreasonable financial burden on communal funds; and alternatively, that redeeming captives above value encourages more kidnappings.³⁵

The monetary value of a captive was a person’s worth in the slave market, at a time where people could be considered legitimate merchandise.³⁶ A different approach was to determine the captive’s value with reference to their contribution to society.³⁷ The discussion to determine a person’s price tag is not in line with the notion of the “protect life principle”—namely, that a life may not be taken to protect anything else.³⁸ According to this view, life in some contexts is seen to be of “immeasurable value.”³⁹ Such a notion is in line with the biblical idea that each human was created in the image of God, and is thus the representative of God on earth.

The argument here concerns that of the possibility of encouraging more kidnappings, and the risks it imposes on the lives of members of the community. The Talmud explains that if the Jewish community were to redeem captives above market value, it will encourage kidnappers to target the Jewish community further.⁴⁰

Most Talmudic rabbis have adopted the approach that forbids redeeming captives above value because it encourages further kidnapping. However, the Knesset Yechezkel writes that

33. VIGODA, *supra* note 30 at 153.

34. Gittin 45a, http://www.come-and-hear.com/gittin/gittin_45.html, June 12, 2017; Eytan M. Goldschein, *Gilad Shalit & Prisoner Exchange: A Talmudic Perspective*, (May 16, 2011), <https://ssrn.com/abstract=1843225>.

35. *Id.*

36. *Id.*

37. *Id.*

38. Christof Heyns, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 14 (H.R. Rep No. 32–39, 2016).

39. Christof Heyns & Thomas Probert, *The Right to Life and the Progressive Abolition of the Death Penalty*, in MOVING AWAY FROM THE DEATH PENALTY 214, 215 (2015).

40. Radvaz, *Responsa on Shulchan Aruch: Yoreah Deah* ch. 40.

in some circumstances, the Jews will be persecuted and kidnapped regardless.⁴¹ He concludes that “one must look long and hard before deciding not to redeem a Jewish soul at risk of death.”⁴² In the old days the question of whether the redemption of a prisoner, and its price, encouraged further kidnappings could only be answered by the community’s instincts and life experiences. Nowadays, however, research is available to guide such considerations. Research analyses on prisoner swaps in Israel show that, as expected, the “cost” of redemption indeed does encourage future kidnappings.⁴³ Furthermore, a “resilient” approach of non-negotiation has the power of stopping specific types of kidnappings altogether.⁴⁴ This does not, however, remove the problem that if each life is of infinite value, it is impossible to balance one life against many in a meaningful way.

2. Israeli Soldiers as “Everyone’s Children”

Some scholars argue that Israel’s current captivity policies stem above all from the increasing influence of the ethos that Israeli soldiers are “everyone’s children.”⁴⁵ The IDF is perceived as a central national institution and enjoys wide social approval within Israel, a country deeply divided on most other issues.⁴⁶ Israeli society as a whole is deeply committed to the well-being of its combat soldiers and their families.⁴⁷ Even the most outspoken critics of Israeli policy serve in the IDF when required, despite the legal option of conscientious objection.⁴⁸ In fact, in the years 2005–2007, only 125 soldiers applied for

41. Goldschein, *supra* note 32, at 12; Knesset Yechezkel, *Responsa on Shulchan Aruch: Yoreah Deah* ch. 38.

42. Goldschein, *supra* note 32, at 12; Knesset Yechezkel, *Responsa on Shulchan Aruch: Yoreah Deah* ch. 38.

43. Gilboa, *supra* note 6.

44. *Id.*

45. *See, e.g.*, Bohrer & Osiel, *supra* note 8, at 647.

46. *Id.* at 647–48.

47. *See Id.* at 648.

48. *See, e.g.*, Itay Blumenthal, *Peace Now Chief Does Reserve Duty in West Bank*, YNETNEWS.COM (Apr. 19, 2015), <http://www.ynetnews.com/articles/0,7340,L-4648489,00.html> (describing how Yariv Oppenheimer, the Director of Peace Now, an non-governmental organization, and one of the most outspoken critics of Israeli settlements in the West Bank, nevertheless served as a reservist in the Settlements, describing it as his “civilian duty.”). Oppenheimer explained, “I want to believe that when the day comes that the order is not to guard settlements, but to vacate settlements, then my friends on the right would do the same.” *Id.*

conscientious exemption from service.⁴⁹

This ethos, that soldiers are everyone's children, is not new, and has influenced Israel's decision making for decades. Its origins have different theories. Some attribute it to the increase of parental involvement in the army.⁵⁰ Others attribute it to the "doubts Israelis now harbor with regard to recent national decisions about recourse to force,"⁵¹ changes in the masculine identity of men, who can now be seen as vulnerable and child-like, and the perception of threats within Israeli society.⁵² Another possible explanation is that, unlike Israel's early days, the present generation of parents are ex-soldiers themselves, who can better relate to the implications of military service as a result of mandatory military service in Israel.⁵³

This strong personal identification with the soldiers and their family members creates an urgency in redeeming those held captive, as a family's uncertainty regarding their child's condition is perceived as worse than death:

The captive is living-dead, dying bit by bit. In contrast to the dead, he senses his death for a long time. The blood of the captive's family is also spilled: The family lives in paralyzing uncertainty, pinned without a target date or liberation on the horizon. The relatives experience captivity as a black hole that swallows their lives Society's sense of responsibility for the captive is a manifestation of solidarity towards one of the group, just because he is one of the group.⁵⁴

In the original text, "one of the group" is "*ben hahavura*," which has a double meaning—both one of the group and the group's child or son.

49. Daniel Statman, *Critical Reflections on the Exemption of Pacifists from Military Service*, 31 TEL AVIV U. L. REV. 669, 703 (2009).

50. See, e.g., Bohrer & Osiel, *supra* note 8, at 643.

51. *Id.*

52. See, e.g., Zipi Israeli & Elisheva Rosman-Stollman, *Men and Boys: Representations of Israeli Combat Soldiers in the Media*, 30 ISRAEL STUD. REV. 66 (2015).

53. EDNA LOMSKY-FEDER & EYAL BEN-ARI, THE MILITARY AND MILITARISM IN ISRAELI SOCIETY 304–05 (1999).

54. AVI SAGI & YEDIDIA Z. STERN, BAREFOOT HOMELAND: ISRAELI REFLECTIONS 223–24 (2011).

The ethos of “everyone’s children” has fueled many decisions made by the Israeli government. Some of these decisions are perceived as positive while others are not. Israel’s withdrawal from Lebanon was largely attributed to public pressure, mobilized by the “Four Mothers Movement,” an NGO led by women whose soldier-sons were fighting in the conflict.⁵⁵ However, “the ethos of ‘everyone’s children’ has sometimes compromised military actions, leading the IDF to prioritize casualty avoidance so highly as to impair its ability to accomplish military goals.”⁵⁶

Israel’s endless efforts to redeem captives reassure parents about their children’s future military service, and contribute to the legitimacy of the IDF in Israeli society. There is an unwritten agreement in Israeli society whereby eighteen year-olds contribute a few years of their lives to protect the state, and Israel, in return will spare no effort in keeping them alive and well. While global criticism regarding Israel’s action during wartime is that it disproportionately targets Palestinian civilians, Israelis criticize their leadership for over-protecting Palestinian civilians at the expense of Israeli soldiers.⁵⁷

Public pressure to redeem captives is massive, and in the age of modern media and social networks, such pressure is unavoidable. Decision makers are finding it harder and harder to make sound and balanced decisions due to constant pressure from the media and captives’ families to redeem captives at any cost.⁵⁸ Scholars point out that the effect of public pressure has been increasing over the years:

[E]ven national leaders who previously opposed prisoner exchanges, such as current Israeli Prime Minister Binyamin Netanyahu, have bowed to public pressure and approved deals even more generous than those they once vehemently opposed. In fact, with each such transaction, Israel has found itself agreeing to release even more prisoners in return for each Israeli soldier.⁵⁹

55. Bohrer & Osiel, *supra* note 8, at 645.

56. *Id.*

57. See, e.g., Jason Burke, *Gaza School Attack Denounced As ‘Criminal Act’ by UN Chief*, GUARDIAN (Aug. 3, 2014), <https://www.theguardian.com/world/2014/aug/03/israel-air-strike-un-school-gaza-rafah>.

58. VIGODA, *supra* note 30, at 2.

59. Bohrer & Osiel, *supra* note 8, at 652.

Public pressure is effective because it is directed at the softest spot of Israeli society—the soldiers, many of whom are still regarded by some as children. The most common argument against the non-negotiation approach is “imagine if it was your child.” In Israel, where most families have (or will have) family members in active military service or reserves, this question is always a loaded one, and never easily answered.

B. RECENT DEBATES IN ISRAELI SOCIETY

The “redeem at any cost” approach, influenced by the “everyone’s children” ethos, is only one side of the equation. In recent years, as the cost of redemption grew higher, critics have challenged prisoner-exchange policies. It is widely accepted that the actions of the Israeli government have, in fact encouraged further kidnappings of soldiers.⁶⁰ Israeli actions also serve to demean the worth of Arabs, whose lives are implicitly seen as worth only a fraction of those of Israelis, thus perpetuating harmful perceptions of inequality and contributing to the dehumanization of Israel’s neighbors who might be perceived as of a “lesser value.”

Scholars observe that the Israeli discussion regarding captives is shaped by four different elements: political representatives, the security and intelligence community, captives’ families, and the media.⁶¹ The changing balance of power among those elements leads to different actions and possible outcomes.⁶²

1. Legislative Attempts to Limit the Scope of Prisoner-exchange Deals

In 2010 the Shamgar Committee was appointed to propose principles for conducting negotiations for the release of captives. The Committee’s conclusions have not yet been released to the public.⁶³ After the Shamgar Report was released to the government, several bills were introduced in the Knesset, some

60. Winograd *supra* note 26, at 503.

61. Mack, *supra* note 27, at 198.

62. *Id.* at 199.

63. Levush, *supra* note 29, at 5 (explaining that although the Shamgar Committee, which was appointed in 2010, presented its report to the government in January 2012, the report was classified as “highly secret” and has not been fully disclosed to the Israeli public).

of which have been said to reflect the exact recommendations of the report. Several bills aimed to limit the government trade-off during prisoner-exchange deals to one prisoner in exchange for one Israeli captive.⁶⁴ Another aspect of the bills was the attempt to worsen the condition of convicted terrorists within Israeli prisons.⁶⁵ So far, none of the bills have matured into actual law, as all have been stopped at different stages of the legislative process.

More subtle bills, which amended existing laws to limit the scope of prisoner-exchange practices, have accomplished more than the aggressive bills above. In 2014, the Knesset approved Basic Law: President of the State (Amendment – Prohibition on Release of Murderers) Bill. This bill aimed to limit the president's power to pardon offenders of the most serious crimes and to limit prisoner-exchange deals to only prisoners who have not committed murder.⁶⁶ The amendment has not gained sufficient support at the Knesset Plenum, and has been left out of the statute book. However, two separate amendments were passed to completion, which restricted governmental rather than presidential powers of clemency.⁶⁷

Among the Laws that were passed is Government Law (Amendment No. 9) (Release of Prisoners for State or Security Considerations) 5774-2014, which introduces restrictions on the power of the government and its members to authorize, initiate, or pursue prisoner releases for "state or security reasons."⁶⁸ In addition it establishes that exchanged prisoners are released on probation, and authorizes the re-arrest of prisoners in

64. Among such bills are: Draft Bill Principles for the Redemption of Captives and kidnapped Persons, 5774–2014, HH (Knesset) No. 2437 p. 19 (Isr.); Draft Bill Principles for the Redemption of Captives and Kidnapped Persons, 5771–2011, HH (Knesset) No. 3626 p. 18 (Isr.); Draft Bill Principles for the Redemption of Captives and Missing Persons, 5776–2016, HH (Knesset) No. 1847 p. 20 (Isr.); Draft Bill, Principles for the Redemption of Captives and Missing Persons, 2018, HH (Knesset) No. 5047 p. 20.

65. See Draft Bill Principles for the Redemption of Captives and Missing Persons, 2016, HH (Knesset) No. 1847 p. 20, art. 3 (Isr.); Draft Bill, Principles for the Redemption of Captives and Missing Persons, 2018, HH (Knesset) No. 5047 p. 20, art. 4 (Isr.).

66. Draft Bill for Prohibition on Release of Murderers (Legislative Amendment), 5774–2014, HH (Knesset) No. 2113 p. 19 (Isr.).

67. Levush, *supra* note 29 at 8; Government Law (Release of Prisoners for State or Security Considerations), 5774–2014, SH No. 2467 p. 730 (Isr.) amending Government Law, 5761–2001, SH No. 1780, p. 168 (Isr.) (as amended); Draft Bill for Parole (Legislative Amendments), 5774–2014, HH (Knesset) No. 2113 p. 19 (Isr.).

68. Levush, *supra* note 29, at 8.

accordance with conditions enumerated by the law.⁶⁹ The law thus does not forbid prisoner exchange, nor does it set a solid exchange ratio, but rather regularizes the procedure of prisoner selection to be exchanged.⁷⁰ Even though the amendment clearly aims to limit prisoner-exchange deals, it can be viewed as giving it some legislative and permanent approval.

Parole Law (Amendment No. 14), 5775-2014 prohibits the Parole Committee from reviewing early release requests of prisoners serving life sentences for acts of murder which the courts have determined to be exceptionally heinous, unless at least fifteen years have passed from the day of the sentencing; the sentence cannot be commuted to less than forty years.⁷¹ The classification of the severity of the murder committed is under the authority of the court, which as a result has the power to determine in a given case whether a prisoner could be a candidate for an exchange deal in the future.⁷²

The amendments above, are still relatively new, and their actual influence is yet to be discovered, however, they could theoretically diminish prisoners' re-engagement in terror, which is a tempting belief to which to subscribe. The promise of a fast-lane to re-imprisonment combined with the prohibition on the release of exceptionally heinous murders clearly sits well with the expectation to avoid second-time offenders.

Since the Parole Law does not specify the elements to account for exceptionally heinous murder, the respective doctrine is to be developed gradually by the courts as relevant cases are discussed and analyzed. Israeli courts have interpreted that the goal of those components is not to deter prisoners from re-engaging in terror, since it is clear that imprisonment does not deter ideological terrorists, but to keep such prisoners behind bars for as long as possible.⁷³ Not any murder classified as a terror act constitutes such crime. The essence and circumstances of the crime are the relevant factors, and not the motive behind it.⁷⁴ Elements which would often be regarded as "exceptionally heinous" include *inter alia* the murder of children and babies, murder committed while abusing the victims' trust,

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. D.Cr.C. 51040-11-14/8 Israel v. Hashia (Sept. 4, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

74. *Id.* at 7.

murder involving torture, and murders involving multiple victims.⁷⁵

It is not clear whether such doctrine would in fact help to prevent lives lost because of released prisoners. When reviewing cases of released prisoners who reengaged in terror, not all original cases necessarily constitute an exceptionally heinous crime.⁷⁶ Therefore, the new offenses would not be prevented by the new amendment. It is, however, too soon for this argument to be made, mostly since the doctrine is still being developed and expected to evolve over time.

2. Death Penalty to Terrorists Bill

Some argue that a possible solution to the cycle of prisoner exchange is to impose the death penalty on terrorists.⁷⁷ Such policy must be universally applied:

[T]he murder of the Palestinian boy by three Israelis in a recent event [reference to the kidnapping and murder of Mohammed Abu Khdeir] [was] an egregious act of terrorism, and the death penalty may be appropriate. Similarly, the Palestinians who murdered the three Israeli teens could be punished by death penalty.⁷⁸

One proposal is to execute terrorists who have been serving out a life sentence as an immediate response to an abduction as soon as it occurs.⁷⁹ Such an approach seems to be in contradiction with many human rights as well as the basic

75. *Id.*; D.Cr.C. 53758-07-13 Israel v. Ali Amtirat, (Dec. 15, 2015) Nevo Legal Database (by subscription, in Hebrew) (Isr.). Judge Diskin in Hashia counts “the intention to cause damage greater than the killing committed” as an element of “exceptionally heinous murder.” D.Cr.C. 51040-11-14/8 Israel v. Hashia (Sept. 4, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.). It is unclear whether she refers to greater damage in the form of the attempt of more killings, or to a rather ambiguous damage, such as political damage. *Id.* The facts of the case in question combined with her opinion that not every terror-murder is necessarily an exceptionally heinous one, lead to the conclusion that the first interpretation is the correct one. *Id.*

76. *E.g.*, *Abbas Demands Terrorists’ Release from Prison*, ALMAGOR, http://al-magor.com/?page_id=251com/?page_id=251 (last visited Feb. 23, 2018).

77. Justus R. Weiner, *Leave No Man Behind: The United States and Israel Face Risks in Their Prisoner Release Policies*, 39 FLETCHER F. WORLD AFF. 7, 17–20 (2015).

78. *Id.* at 25.

79. *Id.* at 18.

principle of the rule of law.

Another approach is to reintroduce the death penalty into the Israeli legal system—not as an immediate response to an abduction as described above, but as a punishment ruled by the court after conviction. As a result, “exceptionally heinous” murderers would be executed after conviction, and thus be effectively un-exchangeable.⁸⁰ Avigdor Lieberman, Israel’s current Minister of Defense, based his 2015 party’s election campaign on this approach, with the phrase “death to terrorists” as its slogan.⁸¹

Lieberman’s party members, together with other Knesset members, initiated a bill aimed at amending the penal code, so as to impose capital punishment on terrorists convicted of murder, with a simple majority of judges.⁸² Simultaneously, Knesset member Sharon Gal and others initiated a similar version of the same bill.⁸³ The explanatory notes of both bills mentioned prisoners exchange as one of their justifications.⁸⁴ The bills were heavily criticized by politicians throughout the political spectrum, scholars and activists.⁸⁵ In an opinion presented to the Ministers Legislative Committee by the Israel Democracy Institution, it was argued that imposing the death penalty on terrorists might actually encourage kidnappings, since the period of time during which the trial takes place could serve as an opportunity for terrorist organizations to kidnap soldiers and civilians and use them as bargaining chips to prevent the execution of their members.⁸⁶

80. Ruth Levush, *Israel: Provisions on Parole of Convicted Murderers*, LIBRARY OF CONGRESS (ISR.) (Nov. 6, 2014), <http://www.loc.gov/law/foreign-news/article/israel-provisions-on-parole-of-convicted-murderers/>.

81. TOI Staff, *Defense Minister Slams UN Criticism of Azaria Sentence*, TIMES ISR. (Feb. 24, 2017 5:42 PM), http://www.timesofisrael.com/defense-minister-slams-un-criticism-of-azaria-sentence/?fb_comment_id=1273636549398488_1274723612623115#f215a0e299f54e8.

82. Draft Bill, *Death Penalty for People Convicted of Terrorism (Legislative Amendments)*, 2015, HH (Knesset) No. 567588 p. 20, 2221 (Isr.) (amending Israel: Penal Law, 5737-1977).

83. *Id.* at 1157.

84. *Id.*

85. See e.g., *EU Condemns Israel’s ‘Terrorist’ Bill, Says Death Penalty is Inhuman*, AL BAWABA NEWS (Jan. 4, 2018, 11:34 AM), <https://www.albawaba.com/news/eu-condemns-israels-terrorist-bill-says-death-penalty-inhuman-1069196>.

86. See MORDECHAI KREMNITZER & AMIR FUCHS, ISR. DEMOCRACY INST., DRAFT BILL, *DEATH PENALTY FOR PEOPLE CONVICTED OF TERRORISM (LEGISLATIVE AMENDMENT)*, 2015, (Mar. 16, 2017), https://en.idi.org.il/media/3728/death_penalty_1732016.pdf.

It was also suggested that a simpler, more humane way to stop prisoner exchanges is to forbid such deals altogether rather than kill prisoners.⁸⁷ Sharon Gal's bill was finally put to vote and rejected by the Knesset in the preliminary vote stage by an overwhelming majority of 94:6.⁸⁸

In 2017, Lieberman's party presented the bill once again.⁸⁹ On January 3, 2018, the new bill was put to preliminary vote and approved by the Knesset by a scarce majority of 51:49.⁹⁰ The bill still needs to be approved in three additional Readings (voting rounds) in order to emerge as a law—and even then, it is expected to confront judicial review and intervention, which might disqualify it as unconstitutional.

The bill, controversial as it is, might find some support within the general public. According to research conducted by the Israel Democracy Institute in October 2015, approximately 53% of the Jewish interviewees agreed with the statement that “every Palestinian who has perpetrated a terror attack against Jews should be killed on the spot, even if he has been apprehended and no longer poses a threat.”⁹¹ Meanwhile, 70.4% of the Jewish interviewees also regarded the punishments that Israeli courts usually impose on Palestinians who have carried out terror attacks as “too light.”⁹²

Analysis of the data shows that there is a correlation between people who demonstrated their desire to punish terrorist Palestinians more harshly in the aforementioned survey and the people who showed mistrust in Israeli institutions and their capability to deal with terrorism.⁹³ It is possible that Israelis do not trust their justice system and

87. *See Id.*

88. *See* Press Release, Knesset, Death Penalty to Terrorists Bill Rejected in Preliminary Vote, (July 15, 2015), http://main.knesset.gov.il/News/Press_Releases/Pages/press150715-ko.aspx.

89. *See* Draft Bill for Death Penalty for People Convicted of Terrorism (Legislative Amendments), 5778-2017, HH (Knesset) No. 4638 (Isr.); *see also* Draft Bill for Death Penalty for People Convicted of Terrorism (Legislative Amendments), 5778-2017, HH (Knesset) No. 4622 (Isr.) (featuring similar content).

90. *See* Press Release, Knesset, Death Penalty for Terrorists Bill Approved in Preliminary Reading (Jan. 4, 2018), http://knesset.gov.il/spokesman/eng/PR_eng.asp?PRID=13714.

91. ISR. DEMOCRACY INST., THE PEACE INDEX – OCTOBER 2015, 2 (2015), http://www.peaceindex.org/files/Peace_Index_Data_October_2015-Eng.pdf.

92. *Id.* at 4.

93. *See* מחבליים מנוטרלים בזירות פיגוע הריגת, ISR. DEMOCRACY INST. (Nov. 10, 2015), <https://www.idi.org.il/articles/2858>.

government to keep perpetrators behind bars, and therefore seek to achieve justice by their own means. As such, the prisoner-exchange policy may very well contribute to such mistrust.

The questions presented by the Democratic Institute were echoed in a debate throughout Israeli society regarding the El'or Azaria trial. Azaria is an Israeli soldier who shot an apprehended Palestinian man who a few minutes before had stabbed Azaria's friend. Azaria was sentenced to only eighteen months in prison.⁹⁴ It has been argued that prisoner-exchange deals have had a "cardinal effect" on the public's support of Azaria's actions, and that they have contributed to the notion that people need to take the law into their own hands and kill perpetrators at the scene.⁹⁵ This is due to the "contempt of the penal procedure" created by Israel's prisoner-exchange policies.⁹⁶ In other words, there is a sentiment among people that justice is not being achieved, since a perpetrator who is brought to trial and convicted may not need to complete his time in prison as they might be released the next day through an exchange. When people lose trust in the system, they tend to seek their own means of justice. This is a dangerous phenomenon that harms the very core of democracy.

It is interesting to note that by the same logic of killing prisoners to avoid prisoner-exchange deals, there is the notion of killing Israeli captives at the scene to avoid such deals. Up until recently, the IDF "Hannibal Directive" guided soldiers to use maximum force to prevent the capture of Israeli soldiers, even at the risk of harming them in the process.⁹⁷ Scholars interpreted the Directive as implying that captive-exchange deals have such devastating implication on Israel, in which the state believes it would be better if the soldier did not make it to captivity alive.⁹⁸

94. See Mil. Appeal 182/16, El'or Azaria v. Chief Military Prosecutor (Feb. 21, 2017), <https://storage.googleapis.com/ch2news-attach/2017/07/%D7%A4%D7%A1%D7%A7%20%D7%93%D7%99%D7%9F%20%D7%A1%D7%95%D7%A4%D7%99%20%D7%A1%D7%9E%D7%9C%20%D7%90%D7%9C%D7%90%D7%95%D7%A8%20%D7%90%D7%96%D7%A8%D7%99%D7%94.pdf>; Ian Fisher, *Elor Azaria, Israeli Soldier Who Killed Wounded Assailant, Gets 18 Months in Prison*, N.Y. TIMES (Feb. 21, 2017), <https://www.nytimes.com/2017/02/21/world/middleeast/elor-azaria-israel-sentence.html>

95. סכנה ברורה ומיידית, ISR. DEMOCRACY INST. (Apr. 3, 2016), <https://www.idi.org.il/articles/2121>.

96. *Id.*

97. See CAPTIVES, *supra* note 27, at 209.

98. *Id.*

The directive was abolished in 2011 because of the different interpretations by different ranks in the IDF and the criticism that the directive had attracted.⁹⁹

II. LEGAL APPLICATION OF THE RIGHT TO LIFE TO THE ISRAELI-ARAB PRISONER-EXCHANGE CUSTOM

The Universal Declaration of Human Rights proclaimed in article 3 that “everyone has the right to life.”¹⁰⁰ The right to life is protected in article 6 of the International Covenant on Civil and Political Rights as well, stating that “every human being has an inherent right to life. This right shall be protected by law. No one should be arbitrarily deprived of his life.”¹⁰¹ Such definition gives the right to life a unique status, as it is the only right in the International Bill of Human Rights described as “inherent.”¹⁰² Scholars suggest that the Covenant treats the right to life to the individual similarly as states’ right to self-defense, which is also described as “inherent.”¹⁰³ It does not derive its validity from international instruments and their ratification by states; rather, it exists independently. The right to life does not cease in times of war; only then it is interpreted with reference to international humanitarian law.¹⁰⁴

In its first General Comment on the right to life under the ICCPR, the Human Rights Commission (HRC) noted that “the right to life has been too often narrowly interpreted.”¹⁰⁵ The Committee asserted that the inherent right to life “cannot be understood in a restrictive manner and that states need to adopt

99. Amos Harel, *Israel's Military Chief Orders to Revoke Controversial 'Hannibal' Directive*, HAARETZ (June 28, 2016, 6:40 AM), <https://www.haaretz.com/israel-news/premium-idf-chief-orders-to-revoke-controversial-hannibal-directive-1.5402252>.

100. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 3 (Dec. 10, 1948).

101. International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.

102. NIGEL Rodley & MATT POLLARD, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 2 (3d ed. 2011).

103. *Id.* at 246.

104. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶25 (July 8).

105. Human Rights Comm., Gen. Comment No. 6: Article 6 (Right to Life), ¶ 5, U.N. Doc. CCPR/C/GC/6 (1982); see ELIZABETH WICKS, *THE RIGHT TO LIFE AND CONFLICTING INTERESTS* 7 (2010).

positive measures to protect it.”¹⁰⁶ States are obliged to respect and protect the right to life—to refrain from extrajudicial killings while also actively keeping people’s lives safe.¹⁰⁷ International tribunals have adopted the positive obligation of the right to life in various cases.¹⁰⁸

In *Barbato v. Uruguay*, the HRC found a violation of the right to life when state officials were held responsible by an act or omission for not taking enough measures to protect life.¹⁰⁹ In the *Velasquez Rodriguez* case, the Inter-American Court determined that states must not only refrain from killing individuals, but also ensure the full exercise of the right to life, by preventing, investigating and punishing any violation.¹¹⁰ The jurisprudence of positive obligation under the right to life is said to be most developed under the European Court of Human Rights (ECHR).¹¹¹ In *Oneriyildiz v. Turkey*, the Court recognized a duty on the state to create and develop a legislative and administrative framework to provide effective deterrence against threats to the right to life.¹¹² In *Osman v. UK*, the ECHR emphasized the positive obligation upon state parties to preserve the lives of those in their jurisdiction by effective criminal law provisions and law enforcement machinery, as well as preventive operational measures when necessary.¹¹³ In *Kaya v. Turkey*, it was determined that the right to life was breached due to the absence of an effective criminal law regime in one of the state’s regions.¹¹⁴

The “protect life” principle assumes that each life is of immeasurable value.¹¹⁵ The mere act of prisoner exchange is in conflict with such a notion in the sense that it puts a price tag on prisoners’ lives and uses people as bargaining chips. The disproportional trade is problematic both in the sense that both

106. WICKS, *supra* note 105, at 68.

107. *Id.* at 212.

108. Ryszard Piotrowics, *States’ Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations*, 24 INT’L J. REFUGEE L. 181, 187 (2012).

109. See Human Rights Comm., *Gilmet Dermit v. Uru.*, U.N. Doc CCPR C 17 D 84-1981, IHRL 2560 (1982).

110. *Velasquez Rodriguez v. Hond.*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988).

111. WICKS, *supra* note 105, at 68.

112. *Oneriyildiz v. Turk.*, 2004-XII Eur. Ct. H.R. 79.

113. *Osman v. UK*, 1998-VII Eur. Ct. H.R. 3124.

114. *Kaya v. Turk.*, 1998-I Eur. Ct. H.R. 324.

115. Heyns & Probert, *supra* note 39, at 215.

sides implicitly agree that Israeli lives are worth more, and in a practical sense when such trade encourages Hamas to capture Israeli soldiers to promise further trades, and for Israel to keep prisoners detained to be able to participate in future trades.

Additionally, the right to life can be found in Israeli law as well, under Basic Law: Human Dignity and Liberty. The Law establishes that “[t]here shall be no violation of the life, body or dignity of any person as such.”¹¹⁶

Prisoner-exchange equation involves both identifiable life at hand (the soldier who will be killed if not swapped) and the risk of statistical lives (future victims of terror attacks). In addition, there is a vague threat to human lives emerging from the deterioration of trust in the legal system and the threat of reintroducing the death sentence.

A. WEIGHING LIVES

The fields of morals and ethics have long tried to tackle the issue of conflicting rights to life. While the protect life principle assumes that each life is of immeasurable value, the violence reduction approach, which is of a utilitarian nature, seeks to minimize the net quantity of human lives lost.¹¹⁷

The problematic nature of the weighing of lives is often demonstrated by the hypothetical trolley problem.¹¹⁸ Imagine that a trolley’s breaks have failed, and there are five people on the track who will be killed unless the driver diverts to another track. Diverting would save the original five people, but kill one person standing on the second track. Most people feel that diverting the trolley is justified due to the net gain in human life.¹¹⁹ When analyzed, there is a slight discomfort with the fact that the driver is taking explicit action to kill the person on the second track as he diverts, but, the action/omission aspect does not seem to bother us as much. If we take the scenario whereby an innocent healthy person walks into a hospital, people would tend to think that it would be morally abhorrent for a doctor to kill the person in order to use his organs to save the lives of five others. Although the two problems have similar elements—killing one to save five—Thompson explains that the scenarios

116. Basic Law: Human Dignity and Liberty, art. 2, 1992, S.H. 150 (Isr.).

117. Heyns & Probert, *supra* note 39, at 215–17.

118. WICKS, *supra* note 105, at 79–101.

119. *Id.* at 153.

are different as “deflecting a threat from a larger group to a smaller one” is different from “bringing a different threat to bear on the smaller group.”¹²⁰

After, the September 11 events, an incident where a deranged man had seized an aircraft in January 2003 and threatened to fly it into the European Central Bank in Frankfurt led to a right-to-life-centered discussion in Germany.¹²¹ A German court was to determine the constitutionality of Section 14 of the Air Safety Act which provided that the armed forces might, to prevent the occurrence of an especially serious accident, divert an aircraft, force it to land, or carry out direct action against an aircraft if it could be assumed that the aircraft was going to be used against human life.¹²² All steps were to be taken by giving due consideration to necessity and proportionality.¹²³ The court stated that a human life must be protected regardless of its prospective duration and that human beings were not to be treated as mere objects of the state.¹²⁴

The court’s decision was criticized by scholars who noted that while the notion that “one life cannot be set off against another” is desirable to apply, sometimes “there may be no other way than to start counting lives.”¹²⁵ It is, however, not clear what the scope of the balance is. This is can be viewed as even from a utilitarian perspective, but it is not so easy to assess whether more lives would be saved in the long term. Michael J. Sandel, a Harvard professor, notes that even if more lives are saved in a single scenario, it might have a broader negative consequence for society as a whole such as weakening the norm against murder and increasing people’s tendency to take the law into their own hands.¹²⁶ Such consequences could harm the right to

120. Judith Jarvis Thomson, *RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY* 83 (William Parent ed., 1986).

121. Raymond Youngs, *Germany: Shooting Down Aircraft and Analyzing Computer Data*, 6 *INT’L J. CONST. L.* 331, 332–48 (2008).

122. *Id.*; Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], 1 BvR 357/05, Feb. 15, 2006, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/02/rs20060215_1bvr035705.html; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 1772/02, Jun. 30, 2005, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2005/06/rk20050630_2bvr177202.html.

123. *Id.*

124. *Id.*

125. Michael Bohlander, *In Extremis—Hijacked Airplanes, “Collateral Damage” and the Limits of Criminal Law*, 2006 *CRIM. L. REV.* 579, 592 (2006).

126. MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 32–33 (2010).

life concept and bring more casualties than the lives that were saved.

Different right to life approaches lead to different possible actions in the kidnapped soldier scenario. First, at the moment of the kidnapping, if applying the German court approach, then the Hannibal Procedure is forbidden as it breaches the soldier's right to life. As a result, he may not be used as an object to avoid exchange, and is entitled to the state's protection even in the case whereby he will not be exchanged and surely killed.

When examining the soldier's right to life in captivity, as well as weighing it against future victims' right to life, it is not the standard scenario of sacrificing one life to save many—but a scenario of sacrificing one to *potentially* save many. The life of the identified soldier at risk is not weighed against other identified people whose lives are currently under threat. The lives on the other side of the scale are “statistical people,” whose death may be prevented. The Israeli policy of expelling released prisoners is an attempt to change the statistics. There is also the attempt to have it all: release the captive soldier and avoid incurring future victims. How does such a possibility affect the life-weighting balance? Or in other words, do statistical people bear the right to life in the same way as identifiable ones?

B. IDENTIFIABLE PEOPLE VERSUS STATISTICAL LIVES

Joseph Stalin purportedly said, “The death of one man is a tragedy, the death of millions is a statistic.”¹²⁷ It is largely agreed upon in the sphere of psychology that people are often willing to allocate greater resources to save the lives of identified beings rather than to save equal (or even greater) numbers of unidentified or statistical victims, a phenomenon known as the “Identifiable Victim Effect.”¹²⁸ While identifiable victims naturally produce a greater empathic response from people, it affects public policy as well.¹²⁹

127. See I. Glenn Cohen, et al., *Statistical versus Identified Persons: An Introduction*, in IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE, 1, 3 (I. Glenn Cohen, et al. eds., OUP 2015). See also Leonard Lyons, Loose-Leaf Notebook, WASH. POST (Jan. 30, 1954) at 9, PROQUEST.

128. T.C. Schelling, *The Life You Save May Be Your Own*, in PROBLEMS IN PUBLIC EXPENDITURE ANALYSIS (Samuel Chase ed., 1968); Karen E. Jenni & George Loewenstein, *Explaining the Identifiable Victim Effect*, 14 J. RISK & UNCERTAINTY (1997).

129. Jenni & Loewenstein, *supra* note 127.

Governments and policymakers have to make decisions involving the dilemma of identifiable people versus statistical lives all the time, usually in terms of the allocation of funds and health care. Given the reality of limited funds, policymakers need to determine whether to allocate funds to treat identifiable patients rather than to invest in prevention. The preference of identifiable victims has manifested into a legal norm called “the rule of rescue.”¹³⁰ The general statement is that “saving the lives of some persons who are in need here and now may justify investing much energy and money, even if it is clear that society could prevent many more deaths by investing such resources in prevention.”¹³¹ Albert Jonsen, who coined the term of “Identifiable Victim Effect,” explains that the moral instinct to “save the doomed” is a deontological imperative, more compulsory than rational.¹³² Scholars interpret it as based on human solidarity.¹³³ Some argue against it and claim that it is flawed as a legal concept—since it enshrines the value of solidarity over fairness and justice in an undesired way.¹³⁴ Dan W. Brock argues for the principle of the “equal moral worth of all human lives.”¹³⁵ According to this principle all human persons deserve equal moral concern and respect, and that, all else being equal, saving more lives rather than fewer is morally better, so long as the beneficiaries are chosen fairly.¹³⁶ So, all else being equal, identified and statistical lives have equal moral value.¹³⁷

While most legal fields prefer identifiable lives, there is an exception. Statistical lives are of most importance in the realm of environmental law, where they are supposed to be protected, sometimes at all costs.¹³⁸ Theoretically, statistical lives are of

130. Albert R. Jonsen, *Bentham in a Box: Technology Assessment and Health Care Allocation*, 14 J. L., MED. & ETHICS 172, 172–74 (1986).

131. Marcel Verweij, *How (Not) to Argue for the Rule of Rescue: Claims of Individuals versus Group Solidarity*, in IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE, *supra* note 127, at 137.

132. Jonsen, *supra* note 129, at 174, *quotations added*.

133. Verweij, *supra* note 130, at 145.

134. See Deborah A. Small, *On the Psychology of the Identifiable Victim Effect*, in IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE, *supra* note 127, at 18.

135. Dan W. Brock, *Identified Versus Statistical Lives: Some Introductory Issues and Arguments*, in IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE, *supra* note 127, at 43.

136. *Id.*

137. *Id.*

138. Lisa Heinzerling, *Statistical Lives in Environmental Law*, in IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE,

living persons, but can also concern the unborn. While there seems to be an agreement that unidentifiable living people have a right to life, there is academic disagreement regarding the unborn.¹³⁹

C. ACCOUNTABILITY FOR THE LOSS OF LIVES

The protection of the right to life has two components: the prohibition of arbitrary deprivations of life, and “the requirement of proper investigation and accountability where there is a reason to believe that an arbitrary deprivation of life may have taken place.”¹⁴⁰ In fact, the failure to hold violators accountable (starting with an effective investigation) is itself a violation of the right to life.¹⁴¹

The accountability aspect is compromised when prisoners are released from prison in contradiction to the legal process and its outcomes. Such breach of the right to life often leads to mistrust in the justice system and the state, and may lead to further infringements of the right to life in the form of vigilantism.¹⁴² The phenomena of vigilantism and the deterioration of the norm against taking lives can be linked to prisoner exchanges as in the *El'or Azaria* case and the “Death to Terrorists” bills.

supra note 127, at 174.

139. Richard P. Hiskes, *The Right to a Green Future: Human Rights, Environmentalism, and Intergenerational Justice*, 27 HUM. RTS. Q. 1346, 1364 (2005); Burns H. Weston, *The Theoretical Foundations of Intergenerational Ecological Justice: An Overview*, 34 HUM. RTS. Q. 251, 262 (2012). Since, out of the many cases of released prisoners who killed once again, I have not managed to find victims who were not born at the prisoner's release date, I will not further engage in the unborn question, and assume that relevant statistical lives to the prisoner-exchange issue belong to living yet unidentifiable people.

140. Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Rep. on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/26/36 (Apr. 1, 2014).

141. *Kaya v. Turk.*, 129 Eur. Ct. H.R. at ¶ 114.

142. Paul H. Robinson & Sarah M. Robinson, *Shadow Vigilante Officials Manipulate and Distort to Force Justice from an Apparently Reluctant System*, in THE VIGILANTE ECHO: THE VIRTUES AND VICES OF VIGILANTE ACTION 9 (Forthcoming 2018); J. Paul Grayson, *Vigilantism in Canada and the United States*, 16 LEGAL STUD. F. 21 (1992); Les Johnston, *What is Vigilantism?*, 36 BRITISH J. CRIMINOLOGY 220, 229 (1996); Brian J. Phillips, *Inequality and the Emergence of Vigilante Organizations: The Case of Mexican Autodefensas*, 50 COMP. POL. STUD. 1358 (2017).

Accountability requires a transparent, clear and just process, while the concept of prisoner exchange is foreign to a normal and typical democratic legal process. Rather, it somewhat resembles the grant of impunity, as prisoners are released from prison before serving their time, due to exterior motives rather than personal relevant circumstances (such as good behavior, for example). International human rights law generally holds impunities as being incompatible, especially with regard to the right to a fair trial and the right to an effective remedy.¹⁴³ Impunities are described as one of the main reasons for the reoccurrence of violence.¹⁴⁴ Impunity, as interfering with the accountability requirement of the protection of the right to life, could in itself be accounted a breach of the right to life:

Under international law, violations of the right to life involve both the taking of individual life by State actors . . . and a failure by the State to exercise due diligence to prevent killings by non-State actors. Violations also result from the failure to adequately investigate, properly identify and hold perpetrators to account and to provide reparation to the victims. The Special Rapporteur recalls that impunity under such circumstances is in itself a violation of the right to life¹⁴⁵

The release of prisoners is indeed a failure to hold perpetrators accountable and to provide reparation to the victims.

Ben Saul, a scholar in international law, specifically terrorism and human rights, has examined the differences between impunity for terrorists and other perpetrators.¹⁴⁶ He argues that some of the justifications for impunity, such as

143. See, e.g., *Chumbipuma Aguirre v. Peru* ('Barrios Altos'), Judgment, Inter-Am Ct. H.R. (ser. C) No. 75, ¶ 51(2)(c) (May 14, 2001); Human Rights Comm., Gen. Comment 20, Article 7, ¶ 15 (Forty-fourth session, 1992), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).

144. Diala Barnabas Chinaedu, *Arbitrary Executions, Perpetrators and Impunity* 8 (October 28, 2011). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1965453.

145. Heyns, *supra* note 141, at 8 (Addendum 1, Mission to Mexico).

146. See Ben Saul, *Forgiving Terrorism: Trading Justice for Peace, or Imperiling the Peace?*, in *FRESH PERSPECTIVES ON THE "WAR ON TERROR"* 189 (M. Gani & P. Mathew eds., 2008).

national reconciliation and the restoration of harmony, do not apply to terror crimes, since they attack the very institutions of the state and the community that the state protects.¹⁴⁷ On the other hand, Saul argues that amnesties for terrorism may be appropriate where it is sectarian and affects significant parts of the population, or in specific cases where lives are at imminent risk.¹⁴⁸ Although Saul refers to large-scale risk, such as escalating violence from a sector which will be appeased by the grant of impunities, in the prisoner-exchange scenario there is also a life at risk—the captured. The argument for saving other lives is in line with the protect-life principle, whereby the right to life may be breached only to save other lives.

D. THE RIGHT TO LIFE AND THE “DEATH TO TERRORISTS” BILL

As described in Section I above, the “Death to Terrorists” bill is still pending. It is important to note that its approval would not be in line with the protect-life principle, which determines that life can only be taken to save other lives. However, international law does allow some room for the punishment of death (ICCPR Article 6.2),¹⁴⁹ and therefore some argue that it is not inherently abolitionist in its approach.¹⁵⁰ However, it is at the very least “progressively abolitionist.”¹⁵¹

The abolitionist approach is attributed to international law since it requires the abolition of capital punishment either immediately or by taking steps in this direction.¹⁵² This approach is reflected in article 6.6 of the ICCPR which states that nothing in Article 6 “shall be invoked to delay or to prevent the abolition of capital punishment by any State Party.”¹⁵³ The progressive abolitionist approach was later reaffirmed in Resolution 2857 (XXVI) stating that “in order fully to guarantee the right to life . . . the main objective to be pursued is that of progressively restricting the number of offenses for which capital punishment may be imposed, with a view to the desirability of

147. *Id.* at 201.

148. *Id.* at 205–06.

149. Weiner, *supra* note 78, at 17.

150. Heyns & Probert, *supra* note 39, at 215.

151. *Id.* at 214–26.

152. *Id.*

153. *Id.* (quoting G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Mar. 23, 1976)).

abolishing this punishment in all countries;”¹⁵⁴ as well as the Second Optional Protocol of the ICCPR 1981, stating that “all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life.”¹⁵⁵

International law strictly forbids states that have abolished the death sentence to re-introduce it.¹⁵⁶ The state of Israel never officially removed the death penalty from its book of laws, but is considered “de-facto abolitionists” since it has passed the threshold of not committing any execution for more than ten years.¹⁵⁷

In this Author’s opinion, even the classic arguments for the death penalty which are based on deterrence (an argument that is heavily contested as it is),¹⁵⁸ are not relevant in this case. Generally speaking, people who engage in terror have strong ideological motives and are willing to die for their cause, and are thus not likely to be deterred by the punishment of death; it might actually encourage terrorists by granting them status of “martyrs” after executed by the enemy.¹⁵⁹ A much more effective way to stop the prisoner-exchange cycle is to stop altogether the exchange of prisoners, rather than executing them as a “preventive measure.” It seems that such a law would only benefit the government who will be spared of the need to make a controversial and highly explosive decision (whether it chooses to exchange or refuses to do so).

154. *Id.* at 218 (quoting G.A. Resolution 2857 (XXVI), Capital Punishment (Dec. 20, 1971)).

155. *Id.* at 218–19 (quoting G.A. Res. 44/128, Second Optional Protocol to the International Covenant on Civil and Political Rights, Annex (Dec. 15, 1989)).

156. *See generally* Piandiong v. Phil., Communication No. 869/1999, U.N. Doc. CCPR/C/70/D/869/1999 (2000), at §7.4 (discussing reintroduction in the context of the Philippines obligations under the Covenant).

157. *See generally* Heyns & Proberts, *supra* note 39, at 220 (discussing the threshold requirements to of de-facto abolitionists).

158. *Id.* at 216; John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005).

159. Thomas M. McDonnell, *The Death Penalty - An Obstacle to the 'War Against Terrorism'?*, 37 VAND. J. TRANSNAT'L L. 353, 402-403 (2004).

III. IMPROVEMENT AND REGULATION OF PRISONER-EXCHANGE POLICY TO BETTER COMPLY WITH THE RIGHT TO LIFE

A. LIMITATIONS TO THE SCOPE OF PRISONER EXCHANGE

Even though there were several attempts to limit the scope of prisoner exchange, none were successful. Such limitation is important in the context of the right to life in order to minimize the risk to future potential victims by released prisoners, as well as to discourage future captivation attempts. Setting such limitations on the scope of prisoner exchange policy might be easier to legislate soon after an exchange is made, when no identified captives are at stake. Such timing would solve the identified versus statistical lives dilemma, as at that point in time all relevant lives would be statistical. That being said, waiting for a time of no captives at all might undesirably postpone and hold back much-needed legislation that can change the face of the upcoming exchange and its implications.

First and foremost, in order to comply with the protect-life principle, the prisoner-exchange policy must be limited to living captives rather than the dead bodies thereof. The right to life applies to all living human beings. While there is disagreement regarding the incipient moment of the right to life, as well as a discussion regarding its expiration in ambiguous situations such as brain death, it is clear that once a person is completely and utterly dead, he no longer has a right to life.¹⁶⁰ Since the state of Israel and its institutions have reported that prisoner exchanges have caused further killings,¹⁶¹ such risk can only be taken by the state to save another life. Thus, an exchange to save a living captive will be in line with the right to life while an exchange to return a captive body is not. While the family whose loved one's body is kept as a bargaining chip has a clear desire to receive the body, from a public perspective, it does not meet the threshold of the immeasurable value of human life that the protect-life principle sets.

The utilitarian and the violence-reduction approach would favor a strict limitation upon the ratio of released prisoners in exchange for a captive, preferably a 1:1 ratio. Setting an equal

160. L. Gira, *Human Constitutional Right to Life: The Criminal Law Protection Issues*, Chisinau 1095–1102 (2004).

161. *Infra* Introduction.

“value” to Israeli and Arab lives could contribute to greater equality between the parties and prevent the act of demeaning Arab lives. Such equality might create a better starting point for future peace negotiations. Golda Meir was famous for saying “Peace will come when the Arabs will love their children more than they hate us”¹⁶²—this is, of course, an Israeli perspective of how Israel’s neighbors perceive the sanctity of life. A 1:1 ratio might help to refute such perceptions within Israeli society.

Israel’s current policy of setting the conditions of release, such as the expulsion of released prisoners and demands for registration at police checkpoints, are also desirable from a violence-reduction perspective and are required to be further developed. However, even though desirable from a right-to-life point of view, such limitations might be in contrast with other protected rights and constitute cruel and inhuman treatment.

B. HOW TO SOLVE THE LIVES-WEIGHING DILEMMA?

It is clear that a fair and just answer to the question of weighing lives cannot be offered. Daniels and Sabin, both Harvard scholars, argue that in such cases the answer might be procedural: “When we lack consensus on principles that tell us what is fair . . . we may nevertheless find a process or procedure that most can accept as fair to those who are affected by such decisions. That fair process then determines for us what counts as a fair outcome.”¹⁶³ Other Scholars, such as Rivka Weill, have similarly indicated that the best way to maintain and control prisoner exchange policies is by process-based limitations, rather than content-based limitations.¹⁶⁴

Daniels and Sabin refer to the allocation of healthcare funds, but their proposal could be adapted to any situation that involves the weighing of lives. Their doctrine, named “accountability for reasonableness,” includes four conditions to assure that such decisions are taken by a fair process: publicity condition, relevance condition, revision and appeals condition, and regulative condition.¹⁶⁵ In short, they require that the process is transparent—the decisions and the grounds for

162. Golda Meir, Speech given to the National Press Club, Washington (1957).

163. NORMAN DANIELS & JAMES E. SABIN, *SETTING LIMITS FAIRLY* 4 (2002).

164. Rivka Weill, *Exodus: Structuring Redemption of Captives*, 36 *CARDOZO L. REV.* 177 (2014).

165. DANIELS & SABIN, *supra* note 163, ch. 4.

making them must be accessible to the public; the grounds for the decisions should be ones that fair-minded people would find relevant under the given constraints; the decision made must be subjected to revision and appeal; and finally there must be some form of regulation to ensure that the conditions are met.¹⁶⁶ This Article adds the condition of equality, which may be read into the second condition (relevancy), but it needs to be stated clearly and separately. The policy of prisoner exchange must apply equally to all living captives. Weill has addressed the equality problem in prisoner exchange policy arguing that “[r]eacting on an ad hoc basis to terrorist kidnapping, as states currently do, invites biased decision-making. Knowing the identity of the victim and allowing society to develop empathies towards her affects the societal decision on how much to concede, if at all.”¹⁶⁷

For that matter, a captive soldier cannot have a “higher value” than a civilian with a mental illness (such as current living captives). All considerations and grounds for the decision should apply equally to all people in accordance to the equal moral worth of all human lives principle.

It is important to note that it’s possible Israel follows some of the above recommendations, but in the absence of the publicity condition and a regulative framework for such decision, the current decision-making process remains unknown. However, it can be argued that a public protocol would harm the chances to strike a prisoner-exchange deal due to its sensitive nature and since it involves an element of national security. Such an argument cannot be valid though, due to its broad applications on Israeli citizens, and since such deal risks their lives.

The implementation of the accountability for reasonableness framework to the prisoner-exchange decision-making process can contribute towards greater fairness of the final decision made, but just as important is the sense of fair process in the public perception. As was described in Section II above, prisoner exchanges breach the right to accountability and remedy.¹⁶⁸ Meanwhile, they interfere with the justice procedure and are foreign to the democratic principles of the rule of law. The accountability for reasonableness doctrine might help amend such holes in the public’s trust in the system, since the

166. *Id.*

167. Weill, *supra* note 164, at 233.

168. *See Id.*, at Section II.

decision-making process would be public, well-designed and have a legal base on which to rely.

Another approach could be to let the public directly decide on the life-weighting issue. Referendums are one of the institutions of direct democracy that are said to express peoples' will better than the institutions of representative democracy.¹⁶⁹ Such decisions made by the people might make the final decision appear more legitimate in the people's eyes, and prevent the negative effects of breaching the accountability component of the right to life. That being said, referendums are not free of problems and flaws: they are susceptible to manipulation, they do not have to follow a formal process that includes debate and expert advice involving all voters, and are often set up in an all-or-nothing, yes-or-no fashion, which thus fails to capture the complexities of the issue at hand.¹⁷⁰ Even if one could find a creative manner to fit the subtleties of the prisoner-exchange decision into a referendum, it is not guaranteed that the result would benefit Israeli society. Referendums might cause tension and violence within society due to the explosive issues with which they concern.¹⁷¹ However, a prisoner-exchange referendum might overcome the manipulation obstacle. Since prisoner-exchange policy is not identified with a single party or political wing, and is extremely controversial within the different parties themselves, there is a chance that parties will not try to manipulate it since it holds an inherent political risk. Politicians might be pleased to be relieved of having to make an unpopular choice no matter what they choose. It is important to note that the outcome of undermining representatives' accountability is often described as another negative effect of the referendum device.¹⁷²

169. See generally MARK CLARENCE WALKER, *THE STRATEGIC USE OF REFERENDUMS* (2003) (discussing the legitimacy and use of referendums in politics).

170. *Id.* at ch. 6.

171. *Id.*

172. Maija Setälä, *On the Problems of Responsibility and Accountability in Referendums*, 45 EUR. J. POL. RES. 699 (2006).

C. STRENGTHENING THE NORM AGAINST CAPITAL
PUNISHMENT

In light of the re-introduction of the discussion on capital punishment that prisoner exchange brings, it is important not only to reject such bills, but also to take action towards the abolition of capital punishment in Israel. Even though Israel has de facto abolished the death sentence it is still in the state's book of laws. It is clear that once the death sentence has been abolished it cannot be re-introduced. The state of affairs, however, is not clear regarding de facto abolishers. State representatives should take responsibility and make it impossible to re-introduce such punishment in Israel. If such an amendment would be passed before the next exchange, it will block the populist argument in favor of "death to terrorists" from emerging again once an exchange is to be made. At the time of writing this study, negotiations are ongoing over a prisoner exchange, and therefore this matter is both crucial and topical.

IV. CONCLUSION

Lopsided prisoner-exchange deals have been struck down by the Israeli government since Israel's early years. Recently, Israel has been at the center of public controversy, as criticism regarding the harmful effects of such policy has emerged.¹⁷³ The Jewish tradition of captive redemption such as "Mitzvah Raba" alongside the ethos that soldiers are everyone's children have motivated Israel to negotiate with captors, and to set an extremely high price tag on Israeli life.

While Israel's willingness to go to extreme lengths to save a single life shows great social solidarity and demonstrates the sanctity of life, it also feeds a cycle whereby more lives are lost. Such a high price tag on Israeli life encourages more kidnappings, which concludes in further prisoner exchanges, and so forth. It is also claimed that released prisoners are resuming their involvement in terrorism and causing further loss of lives.¹⁷⁴

173. See generally Bohrer & Osiel, *supra* note 8 (discussing reactions to prisoner exchange agreements in Israel).

174. *Id.*

The negative effects of prisoner exchange has led to bills that aim to limit the scope of the exchange into a ratio of one prisoner in exchange for one captive. While those bills have been rejected, moderate restrictions have been placed on prisoner-exchange policy by Government Law (Amendment No. 9) and Parole Law (Amendment No. 14). The prisoner-exchange policy does not only affect the right to life of those at risk by the released prisoners, it also harms the right to life in a broader sense. The accountability aspect is compromised when prisoners are released from prison in contradiction to the legal process and its outcomes, and resembles the grant of impunity. Prisoner exchange has also brought a new discussion on the death penalty, which has led to the “Death to Terrorists” bill, which was recently approved in the preliminary voting round. It is suggested that prisoner exchange has contributed to the weakening of the norm against the death punishment in Israel, alongside a weakening in the public’s trust towards the justice system and the state. In addition, the prisoner-exchange policy might be a cause for vigilantism in Israeli society and a perception that an attacker should be killed at the scene rather than be captured by law enforcement forces.

When examining the prisoner-exchange policy with reference to the right to life, the analysis must consider the weight of identifiable lives versus that of statistical lives, which is a complicated situation that often involves many unknown factors. While the “rule of rescue” principle prefers the lives of identifiable people, it is now challenged by the principle of “equal moral worth of all human lives”, which claims that all else being equal, saving more lives rather than fewer is preferable as long as the beneficiaries are fairly chosen. While the above principles originally refer to healthcare policies, they can be adapted and applied to prisoner exchange policies as well.

This Article has suggested a few modifications of Israel’s prisoner-exchange policy, in order to put it more in line with the right to life and to minimize some of its harmful consequences. Its suggestion includes the limitation of the scope of exchange to a 1:1 ratio of living captives only. As the life-weighting dilemma cannot have a single, just solution, a fair procedure must be adopted for the decision-making process. It has suggested the adoption of the “accountability for reasonableness” doctrine, with the addition of the equality condition in accordance to the “equal moral worth of all human lives” principle. This Article argues that Israel’s policy is lacking a public and transparent regulative framework for prisoner exchange, more than

anything else.

Referendums are also a device that could be taken into consideration with regards to the prisoner-exchange issue. As prisoner-exchange decisions are often criticized as populist decisions of politicians caving into public pressure, a referendum would reflect the true will of the people rather than the people's will translated by the media and social networks. It may contribute to a sense of accountability for the exchange by the people themselves, and subdue their feelings that the process is unjust and undemocratic, and rooted in breach of the accountability aspect of the right to life.

Until such policy is adopted, and given the deterioration of the norm against the death penalty brought by the prisoner-exchange issue, Israeli representatives must demonstrate responsibility and block any attempts of a re-introduction of capital punishment. Since international law is at the very least progressively abolitionist and does not allow for the re-introduction of capital punishment, the best way to block such attempts would be to remove capital punishment from the Israeli law books once and for all.