Detaining Unlawful Enemy Combatants In Israel: A Matter of Misinterpretation?

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Abstract Legal experts have been debating the constitutionality of detaining “unlawful enemy combatants” not entitled to lawful combatant’s rights, immunities and privileges, in the so-called “war on terror”. The article argues against the territorial and over-individualized interpretation given to the Unlawful Enemy Combatant Act of 2002 by the Israeli Supreme Court. Namely, that the purpose of the Unlawful Enemy Combatant Act establishes an “ordinary” administrative detention mechanism to be used beyond Israel’s borders (i.e. in Gaza and Lebanon but not in Israel or the West Bank), and which requires the showing of an “individual threat” emanating from the detainee to state national security. The article defends an associative theory of culpability for detaining enemy combatant.

1 Introduction: Supreme Emergency, Terror and Detention

Since the terrorist attacks of September 11, 2001 legal experts have been debating the constitutionality of detaining unlawful enemy combatants not entitled to lawful combatant’s rights, immunities and privileges, in the so-called “war on terror”. Some have even proposed the United States enact “administrative” or “preventative” detention laws that would authorize the detention of suspected terrorists outside the normal American criminal system.

1George P. Fletcher, ‘On Justice and War: Contradictions in the Proposed Military Tribunals’ (2002) 25 Harv JL & Pub Pol’y 635, 638; George C. Harris, ‘Terrorism, War and Justice: The Concept of Unlawful Enemy Combatant’ (2003) 26 Loy LA Int’l & Comp L Rev 31; Mark David ‘Max’ Maxwell & Sean M. Watts, “‘Unlawful Enemy Combatant’: Status, Theory of Culpability or Neither’ (2007) 5 J Int’l Crim Justice 19.

2Matthew C. Waxman, ‘Administrative Detention of Terrorists: Why Detain, and Detain Whom?’ (2009) 3 J Nat’l Sec L & Pol’y 1; Benjamin Wittes, Detention and Denial: The Case for Candor After

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This debate is part and parcel of a much larger debate regarding the protection of human rights in times of emergency, and the need for new constitutional frameworks and concepts to deal with the new threats. The paradigm case of ultimate emergency concerns the presence of an imminent threat to the existence of the state and to the collective survival of the nation, which necessitate extraordinary measures. Major acts of terrorism often trigger off mass hysteria, but they do not pose such an imminent existential danger.

However, the indiscriminate killing of innocent civilians, which is often orchestrated in methods that induce mass panic, does present an imminent supreme threat to our deepest shared constitutional values and commitments. This is a twofold threat: on the one hand, terrorist attacks and operation methods undermine the social legitimacy of the government, since it is perceived as unable to maintain national security and public peace; on the other, the government’s response to terrorist attacks is often excessive and panic-driven breaching constitutional rights and the rule of law. Thus, the “war on terror” is a locus of constitutionalism under extreme conditions: constitutional structures and institutions (i.e., judicial review and separation of powers doctrine) are required to accommodate the tensions and to strike a (new?) balance between security and rights.

In this respect, detention law in the contexts of counterterrorism and counterinsurgency maneuvers between two very different and characteristically opposed constitutional commitments: security and freedom, and tracks the conservative-liberal division along the fault lines of community versus individual and passive versus active judicial review. Nevertheless, detaining unlawful enemy combatants has its own set of legal difficulties and dangers that requires specified detailed consideration and judgment. This article discusses a specific question of whether unlawful enemy combatants can be detained—and on which terms—in order to facilitate the release of hostages, POWs and MIAs being held by terrorists and militia groups.

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*Guantanamo* (Brookings Institution Press, 2011). But compare Deborah N. Pearlstein, ‘Detention Debates’ (2012) 110 Mich L Rev 1045; David Cole, ‘Out of the Shadows: Preventative Detention, Suspected Terrorists, and War’ (2009) 97 Cal L Rev 693, 694; John P. McLoughlin, Gregory P. Noone & Diana C. Noone, ‘Security Detention, Terrorism and the Prevention Imperative’ (2009) 40 Case W Res J Int’l L 463.

3George P. Fletcher, *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton University Press 2002) 2–9; Bruce Ackerman, ‘The Emergency Constitution’ (2004) 113 Yale LJ 1029; Laurence H. Tribe & Patrick O. Gudridge, ‘The Anti-Emergency Constitution’ (2004) 113 Yale LJ 1801; Mark Tushnet, ‘Controlling Executive Power in the War on Terrorism’ (2005) 118 Harv L Rev 2673 Ronald Dworkin, *Is Democracy Possible Here?* (Princeton University Press, 2006) 24–51; Amanda L. Tyler, ‘Suspension as an Emergency Power (2008) 118 Yale LJ 600.

4Ackerman, ibid 1031; Michael Walzer, *Arguing about War* (Yale University Press, 2004) 33; Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (5th edn, Basic Books, 2015) 250.

5William J. Brennan Jr., ‘The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises’ (1988) 18 Isr YB Hum Rts 11.

6David Cole, ‘Enemy Aliens’ (2002) 54 Stan L Rev 953, 955–956; Mark Tushnet, ‘Defending Korematsu?: Reflections on Civil Liberties in Wartime’ (2003) Wis L Rev 273.

7Dworkin (n 3) 25.
To answer this question, the article explores some general questions regarding our constitutional commitments to personal and collective responsibility and about institutional competence under the extreme conditions of asymmetric war. Asymmetry war makes for micro-battles and small-scale engagements. Hostage taking has been weaponized by terrorist groups in a way that pushes liberal democracy to its limits.

The detention of unlawful enemy combatants for the goal of facilitating the release of hostages, POWs and MIAs is a challenge that Israel has been confronting for three decades. I wish to speak about the Israeli experience, not because Israel’s detention policies are flawless or because the Israeli Supreme Court’s record in reviewing detention policies and individual detentions is impeccable. They are not, and some mistakes have been made over the years. In fact, I will argue that the Israeli Supreme Court’s decisions, prohibiting detention of unlawful enemy combatant to facilitate the release of POWs hampered the ability of the government to counter the use of hostages as a weapon by terrorist organizations. Moreover, if we follow the sequence of legal decisions and military events in this matter, it appears that they have contributed to the escalation of the conflict. In the absence of legal and military means to secure the release of hostages and POWs, Israel went to two failed wars in Gaza and Lebanon. Thus, the Israeli constitutional experience can provide insights into the difficulties, dangers, principles and institutional competence of courts vis-à-vis the political branches in confronting this challenge. My review of the historical development and Israeli legal cases is utilized for that end.

But the article main thrust is not descriptive but normative. The article argues against the territorial and over-individualized interpretation given to the Detention of Unlawful Enemy Combatant Act of 2002 by the Israeli Supreme Court. Namely, that the purpose of the Unlawful Enemy Combatant Act establishes an “ordinary” administrative detention mechanism to be used beyond Israel’s borders (i.e. in Gaza and Lebanon but not in Israel or the West Bank), and which requires the showing of an “individual threat” emanating from the detainee to state national security. The article defends an associative theory of culpability for detaining enemy combatants: the detention should be based also on who they are (i.e., high ranking commander versus low ranking officers or “field” soldiers); on collective national goals (i.e., in order to release Israeli MIA soldiers); and not only on what they might do. Additionally, constitutional frameworks (i.e., the proportionality requirement) should be reframed accordingly to satisfy the demands and principles of the associative theory of culpability.

The Article proceeds as follows: In part 2 I analyze the nature and essence of detentions debates and the need for a substantive argument and institutional designs to answer detention related questions and dilemmas. In part 3 I describe the legal
battle over the detention of unlawful enemy combatants in Israel. In part 4 I assess the Israeli Supreme Court’s position in a military and political context. In part 5 I defend and propose an associative theory of culpability for detaining enemy combatants in order to secure the release of hostages and POWs.

2 Detention Debates

Since 9/11 the discussion about detention of unlawful enemy combatant has proceeded in a bipolar manner. At one pole of the debate, scholars critically examined whether the detention of a person designated as unlawful enemy combatant accords with the International Laws of War. At the second pole, scholars assessed the constitutionality of detentions of Taliban fighters and Al Qaeda terrorists by the United States and the standards of judicial review and judicial deference. Most of the constitutional litigations and discourse has revolved around the Suspension Clause of the U.S. Constitution, and the attempts by Congress and the Executive Branch to limit the applicability of the writ of habeas corpus to detainees held at Guantanamo bay. I do not wish to dwell here about the legal and scholastic controversy over the precise definition of the term unlawful enemy combatant nor the definition of the related term “terrorism” properly so called. For the sake of argument, I wish to understand the nature of the debate about detentions of irregular fighters such as guerrilla fighters, freedom fighters, terrorists and the like.

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9Yoram Dinstein, ‘Unlawful Combatancy’ (2003) 79 Int’l L. Stud 151; Manooher Mofidi & Amy E. Eckert, ‘Unlawful Combatant or Prisoners of War’ (2003) 36 Cornell Int’l LJ 59; Derek Jinks, ‘The Decline Significance of POW Status’ (2004) 45 Harv Int’l LJ 367; Shlomy Zachary, ‘Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?’ (2005) 38 Isr L Rev 378; Marco Sassoli, ‘Query: Is There a Status of ‘Unlawful Combatant?’” (2006) 80 Int’l L Stud Ser US Naval War Col 57.

10Samantha A. Pitts-Kiefer, ‘Jose Padilla: Enemy Combatant or Common Criminal?’ (2003) 48 Vill L Rev 875.

11Stephen J. Schulhofer, ‘Checks and Balances in Wartime: American, British and Israeli Experience’ (2004) 102 Mich L Rev 1906; Trevor W. Morrison, ‘The Middle Ground in Judicial Review of Enemy Combatant Detentions’ (2009) 45 Willamette L Rev 453; Nino Guruli, “A Justifiable Self-Preference”? Judicial Deference in Post-9/11 Control Order and Enemy Combatant Detention Jurisprudence’ (2014) 3 Cambridge J. Int’l & Comp. L. 884.

12U.S. Const. Article I, § 9, cl. 2: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”.

13Richard H Fallon & Daniel J Meltzer, ‘Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror’ (2007) 120 Harv L Rev 2029; Brian R. Farrel, ‘Habeas Corpus in Times of Emergency: A Historical and Comparative View’ (2010) Pace Int’l L. Rev. Companion 74; Stephen I. Vladek, ‘The New Habeas Revolutionism’ (2011) 124 Harv L Rev 941; Amanda L Tyler, ‘The Forgotten Core Meaning of the Suspension Clause’ (2012) 125 Harv L Rev 901; Joshua Alexander Gletzer, ‘Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment after Boumediene and the Relationship between Habeas Corpus and Due Process’ (2012) 14 U. Pa. J. Const. L. 719; Lee Kovarsky, ‘A Constitutional Theory of Habeas Power’ (2013) 99 Va L Rev 753.
Some academic commentators argued that current detention policies (and detention debate itself) are founded on double standard and blatant hypocrisy, sacrificing the liberties of minority groups (noncitizens) in order to further the majority’s security interests. Others, contended that “we are too embarrassed to confront our detention policy needs more directly”, and critique the “lack of candor”. Some even asserted that the concept of enemy combatant is characterized by “plasticity” that “renders it unhelpful as a tool for legal regulation and that whose indeterminacy vests vast discretion in the Executive.” In other words, the state want to have it both ways: treat unlawful enemy combatant as POWs without giving them the rights, privileges and immunities of POWs. Alternatively, to treat unlawful enemy combatant as criminal without securing due process and other basic constitutional rights.

There is certainly some truth in these claims. Nonetheless, part of the difficulties surrounding the concept of unlawful enemy combatant are the result of the conflicting values and the need to balance security and personal liberty. Other difficulties are the result of the persistent disagreements regarding who lawfully may be held in detention and under what procedures. Legislators, government officials, judges and ordinary citizens disagree on imperative questions about detentions in these contexts: Who may be detained, under what circumstances, who bears the burden of proof (and by what measured of evidence), what kind of evidence is admissible, how the courts or military tribunals should handle evidence (such as statements) obtained involuntary, and by what process detainees were to be afforded to challenge their status.

The lack of consensus and the wide range of moral, political and legal disagreements in these issues has been the elephant in the room. Some of the disagreements and controversies fall under the category of, what I call, “substantive disagreement”. Namely, these are disagreements regarding substantive detention policies that should be adopted and substantive detainees’ rights that should be protected. These disagreements, however, are not the only type of disagreements that stand at the core of the detention debate. Controversies emerge also about structural issues and about the proper overall constitutional (or international) mechanisms that provide, determine and review the detentions of unlawful enemy combatants. Namely, counterterrorism detention requires an institutional design, which specify how the legislator, the courts and the executive branch negotiate the sharing of decision making authority over detentions. Often these two types of detention related disagreements are intertwined and create a Gordian knot of disagreements that could not be easily dismantled.
Let me now return to the question at the heart of this Article: can a democratic state detain unlawful enemy combatant in order to facilitate the release of hostages? It is clear that this is a substantive question, and some substantive answer is required. It is also clear that if disagreement arise regarding the correct answer to this question, there is a need for an institutional design to resolve this disagreement. In the next chapter I review the litigations about the detention of unlawful enemy combatant in Israel.

3 The Legal Battle: Detaining Unlawful Combatants in Israel

In the late 1980s several Lebanese nationalities have been held in Israel in administrative detention by the State of Israel, according to the Emergency Powers (Detention) Law of 1979 (hereinafter: Detention Law). Their detention was maintained solely for the purpose of being used as “bargaining chips” for negotiations with Islamic militia groups, which were believed to be holding Prisoners of War and MIAs from among the Israeli security forces. On April 12, 2000 an expanded bench of the Israeli Supreme Court delivered a judgment, which some have regarded “as a cornerstone in the legal field of human rights in Israeli constitutional law”. The Court held that the State of Israel was not empowered to hold the Lebanese detainees in administrative detention under the Detention Law, and ordered their release from detention and their return to Lebanon.

The issue before the Court was the proper interpretation of the term “reasons of state security”, used by Article 2 of the Detention Law, which empowered the

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20 The Lebanese were first prosecuted and convicted for belonging to a hostile organization and for participating in attacks against the IDF (Israel Defense Force), and were sentence to different periods of imprisonment. After completing their sentences, they were not released. At first, they were held in detention awaiting the implementation of the deportation decrees, and later were held in administrative detention. See Orna Ben-Naftali & Sean S. Gleichgevitch, ‘Missing in Legal Action: Lebanese Hostages in Israel’ (2000) 41 Harv. Int’l. L. J. 185; Eithan Barak, ‘Under Cover of Darkness: Ten Year Game with Human Lives as “Bargaining Chips” and the Supreme Court’ (1999) 8 Israel Journal of Criminal Justice 77.

21 See generally: Itzhak Zamir, ‘Administrative Detention: Directives of the Attorney General on the Matter of Administrative Detention under the Emergency Powers (Detention) Law, 5739–1979’ (1983)18 Isr. L. Rev. 150.

22 Further Hearing [F.H.] 7048/97 Anon. v. Minister of Defense, 54(1) P.D. 721 (12.4.00).

23 Emanuel Gross, ‘Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy have the Right to hold Terrorists as Bargaining Chips’ (2001) 18 Ariz. J. Int’l. & Comp. L. 721.

24 The decision overturned the Court’s previous ruling in the same case, which held that the welfare of Israeli captives and missing persons was a matter of state security and that Lebanese detention was justified for there were no other means to achieve the desired result, which would cause less damage to the Lebanese detainees’ personal freedom. Administrative Detention Appeals [A.D.A.] 10/94 Anon. v. Minister of Defense, 53(1) P.D. 97 (13.11.97).
Minister of Defense to order the detention of a persons that state security or public safety requires their detention. The majority of the Court reasoned that the Detention Law does not authorize the detention of a person, who does not himself constitute a threat to national security and that this interpretation reflects the proper “delicate” balance between the rights of the individual to freedom and dignity and the interests of national security and public safety. The dissenting opinion rejected the claim that the detainees were “hostages” or “bargaining chips” in negotiations. Instead, it argued that the detainees as Hezbollah fighters, have knowingly and deliberately tied their fate to the fate of the war against Hezbollah, thus the detention did not violate the principle of personal responsibility.

Consequent to this ruling, other detainees petitioned the Supreme Court asking their release, one of which, Mustafa Dirani,25 personally culpable for the kidnapping and holding of the missing IDF navigator Ron Arad, arguing that they too do not pose a specific threat to Israel’s national security.26 The Court dismissed the appeals on the ground that the State has established the appellants personally constitute a danger to national security. However, it was clear to many that maintaining their detention on the ground of personal threat could not be sustained for long.

It should be noted that petitions by POWs’ family members to the Israeli Supreme Court at that time, attempting to block the release of the Lebanese, were rejected.27 However, President Judge Barak noted in obiter that the Knesset (Israel’s parliament) can legislate a law that will allow the continuation of the other detainees from Lebanon due to their definition as unlawful combatants and that such a legislation would not be perceived as an attempt to bypass the Court’s ruling.28

In light of these developments, and in the absence of an effective legal tool to hold enemy combatant, while terrorist organizations are allowed to hold Israeli soldiers indefinitely, the Knesset enacted the Detention of Unlawful Combatant Law of 2002 (hereinafter: Unlawful Combatant Detention Law). According to the Unlawful Combatant Detention Law, the IDF Chief of Staff is authorized, pursuant to an investigation and a hearing, to order the detention of unlawful enemy combatant, whose release constitute a threat to national security. Section 7 of the Unlawful Combatant

25Mustafa Dirani was the “head of security” of the Lebanese Shiite Muslim Militia Amal, associated with Syria, when his men captured Cap. Ron Arad, an Israeli air force navigator who was shot down over southern Lebanon in October 1986. Up until May 1988, Dirani was responsible for the captivity and interrogation of Arad. In 1987, Dirani started contacts with Iranian sources, and was eventually expelled from Amal and established his own militia group, the “Believing Resistance”. According to Israeli intelligence sources, Dirani and his group either sold Arad to Iranian forces or allies. In the night of May 21, 1994 Israeli commandos abducted Dirani from his house in the Biqa’ Valley in central Lebanon. While Israel knew that Dirani no longer held Arad, security authorities hoped he possessed vital information about the missing navigator that may lead to his whereabouts. At that time, Israel also hoped that Dirani may be used as a valuable “bargaining chip” for negotiations about Arad’s release. Uri Sagie, Lights Within the Fog (Yedioth Ahronoth Books, 1998); Ronen Bergman, By Any Means Necessary: Israel’s Covert War for Its POWs and MIAs (Kinneret, 2009).
26A.D.A. 5652/00 Shayke’ Abd-al-Karim ‘Ubayd v. Minister of Defense, 55(4) P.D. 913.
27H.C.J. 2967/00 Arad v. The Knesset, 54(2) P.D. 188; H.C.J. 10154/03 Arad et al. v. Knesset, not published.
28Ibid 191.
Law establishes a presumption of threat emanating from a person which is a member of a terrorist organization. The detention is not limited in time, although it is subject to judicial review periodically (every six months).

The constitutionality of the Unlawful Combatant Detention Law was appealed soon after its promulgation. At first, the Court refused to decide the claim regarding the unconstitutionality of the Unlawful Combatant Detention Law after the appellants were released in a prisoner exchange deal. Three years later in a landmark decision—C.A. 6659/06 Anon. v. State of Israel—the Court rejected the claim of unconstitutionality. However, the Court interpreted the new legislation in light of both Israel’s Basic Law: Human Dignity and Liberty and the International laws of wars. The Court held that “unlawful combatant” should be treated as a subset of “civilians”, protected by the Fourth Geneva Convention. Thus, the Court rejected the government’s claim that the Unlawful Combatant Detention Law establishes a new classification meant to provide for the detention of members in a terrorist organization under the modern reality of asymmetric war. Instead, the Court explained that the Convention permits detention of civilians where detention is absolutely necessary to the security of the state and is subject to judicial review. Moreover, the Court held that the Unlawful Combatant Detention Law established an “ordinary” administrative detention mechanism to be used beyond Israel’s borders (i.e. in Gaza and Lebanon but not in Israel or the West Bank), and which requires the showing of an “individual threat” emanating from the detainee. By interpreting the Unlawful Combatant Detention Law as an extraterritorial preventative detention tool, to be used along with the domestic Detention Law arrangement, the court dodged the hard question of “personal responsibility” versus “guilt by association” of persons belonging to terrorist organizations. Moreover, the Court totally ignored the fact that the Unlawful Combatant Detention Law was meant to legitimized the detention of unlawful enemy combatants in order to facilitate the release of Hostages and POWs. By interpreting the law to provide ordinary detention, the Court avoided the social costs (in legitimacy terms) associated with invalidating primary legislation.

Since this decision, the Court reviewed numerous administrative detentions appeals according to the Unlawful Combatant Detention Law—most of which in regard to members of Hamas and Islamic Jihad from the Gaza Strip. In all these

29C.A. 3660/03 Shayke’ Abd-al-Karim ’Ubayd v. State of Israel, (8.9.05). For an early critique of the Unlawful Combatant Detention Law see the Position Paper prepared by the Israel Democracy Institute: Hilly Modrik Even-Khen, Unlawful Combatants or Unlawful Legislation? On the Unlawful Combatant Law 2002 (Supervised by Mordechai Kremitzner, the Israeli Democracy Institute, 2005). Even-Khen & Mordechai Kremitzner argued that the Unlawful Combatant Detention Law did not respect the limitation imposed by Israel’s Basic Laws, which seek to insure minimal interference with human liberty, and are also inconsistent with the conventions of international law.
30Greg Myre, ‘Israel Agrees to Free Arabs in a Swap with Militants’ The New York Times (25 January 2004); Ian Fisher, ‘Hezbollah Hails Trading of Prisoners’ The New York Times (26 January 2004).
3162(4) 329 (11.6.2008).
32Ibid. See also Cole (n 3) 736.
cases the Court required the detainee himself posed a threat to the State.\textsuperscript{33} Thus, the implementation of Unlawful Combatant Detention Law can be outlined as follow:

(1) The legal ground for temporary moving suspected terrorists from the zone of combat during warfare\textsuperscript{34};

(2) The normative base for detaining terrorist operatives that their interrogation has not provided sufficient evidence for criminal indictment\textsuperscript{35};

(3) The ground for a continued incarceration of convicted terrorists after completing their sentences, who pose a unique threat to state security if released.\textsuperscript{36}

All that said, it is terribly important to note that since its enactment the Unlawful Enemy Combatant Detention Law was not used in order to achieve or detain “bargaining chips”, to be used in negotiations over the release of hostages and POWs held by terrorists groups in Gaza and Lebanon.

4 The Court’s Jurisprudence in a Military and Political Context: The Middle Eastern Meat Market

A dominant perception among detention scholars is that “Israeli Courts have put in place a strong, robust, system of judicial checks”,\textsuperscript{37} and that although the terrorist threat has “intensified, there has been no major effort to flout these safeguards openly or to overturn them by legislation”.\textsuperscript{38} In this section I wish to consider the Court’s jurisprudence regarding detentions in a military and political context. Namely, the weaponization of hostage taking by terror groups and the social fabric of the Israeli society.

The first time that Israel exchange prisoner with a terrorist organization was in the beginning of the 1970s and the price tag was “one for one”.\textsuperscript{39} The 1970s have shaped the tactic of “hostage taking” as the preferred weapon of choice of terrorist

\textsuperscript{33}Crim. A. 7446/08; ADA 6169/10 \textit{Sahid v. State of Israel}, 31.8.10; ADA 1510/09 \textit{Atamana v. State of Israel}, 2.4.09; ADA 6958/09 \textit{Anonymous v. State of Israel}, 14.9.09; ADA 886/10 \textit{Atamana v. State of Israel}, 2.3.10; ADA 6165/09 \textit{Shahade Sofi v. State of Israel}, 31.8.09; ADA 2283/10 \textit{Shahade Sofi v. State of Israel}, 6.6.10; ADA 9256/09 \textit{Anonymous v. State of Israel}, 22.11.09; ADA 5273/09 \textit{Pariya v. State of Israel}, 22.7.09; ADA 6961/09 \textit{Anonymous v. State of Israel}, 14.9.09; ADA 6574/09 \textit{Abu Awone v. State of Israel}, 30.8.09. See also Shmuel Ronen, \textit{The Unlawful Enemy Combatant Detention Law: The Application in the Gaza Strip} (Bar-Ilan University, 2015).

\textsuperscript{34}\textit{Anon.} (n 31) (President Judge Beinish).

\textsuperscript{35}\textit{Sahid} (n 33); ADA 2595/09 \textit{Doctor Hamadan Zuﬁ v. State of Israel}, not published; ADA 3313/11 \textit{Sarsak v. State of Israel}, not published.

\textsuperscript{36}\textit{Anon.} (n 31); ADA 3410/09 \textit{Anon. v. State of Israel}, not published; ADA 6409/10 \textit{Abdala Amudi v. State of Israel}, not published.

\textsuperscript{37}Schulhofer (n 11) 1931.

\textsuperscript{38}Ibid 1931.

\textsuperscript{39}On January 1, 1970, a night watchman in a village in northern Israel, who was abducted by the Palestinian Fatah organization. More than a year later the night watchman was freed in exchange for Mahmoud Hijazi, a Fatah prisoner in Israel. Hijazi was wounded and captured in Fatah’s first
groups around the world in general, and in the Middle East in particular. This was a win-win situation regardless whether the terrorist stated goals and demands (i.e. the release of prisoners) were met, since the primary goal of world attention was achieved by the act of hostage taking itself. In the beginning of the 1980s the price tag of prisoners exchanged increased dramatically, 9 soldiers for almost 6000 detainees and prisoners—including some high profile arche-terrorists. It should also be noted that during this period the pressure placed by the family members of POWs and MIAs on the Israeli government and the heads of the IDF to release their loved ones increased dramatically also. This fact should probably be attributed to changes in the Israeli society, the weakening of the collective political ideologies and rise of liberal forces that placed the individual at the center of attention.

In the middle of the 1980s the situation changed again and another adversary has appeared: Shiite fundamentalist Islamism. Iran hoped to export its Islamic revolution to Lebanon, and both Syria and Iran sought to use the Shi’ites as proxy force against Israel. With the Support of Damascus, Teheran helped organize, arm, train, inspire and unite various Shi’ites groups into the movement that became known as Hezbollah—“party of God”.

It is important to understand that Iran and Hezbollah have used hostage taking and kidnapping as a weapon from the beginning. Utmost importance, to secure the release of the fellow comrades and family relative. But kidnapping served also their political purposes: first, they focused world’s attention the Shiite organization and its cause; second, they terrorized foreign nationals in Lebanon, which led many of them to flee the country.

Hezbollah hostage taking tactic were adjusted to western political reality, taking advantage of the weakness of western democracies by using the media and public opinion to pressure decision-makers in the west. Similar to other terrorist groups the Hezbollah justified the use of hostage taking by focusing on the imbalance between the “western imperialist countries”

military attack on Israel, January 1, 1965, and sentenced to death, which was commuted on appeal to 30 years in prison. Bergman (n 25) 23–24. At first, The Israeli government placed the responsibility for the kidnapping on the Lebanese government and the IDF retaliated a day after by blowing up a Lebanese radar position and taking nine Lebanese soldiers and 12 civilians captive. However, since the abduction of the night watchman was by the Palestinian Fatah organization, they refused a deal, which will not include their members. Ibid 24–26.

The major exchanges in the 1980s were the result of a military blunder. On September 3, 1982, two Palestinian fighters outsmart an IDF outpost during the first Lebanon War. Eight IDF soldiers surrendered without a fight and were taken prisoners. Six of the prisoners were held by the Fatah, while the remaining two were held by another Palestinian faction, led by Ahmad Jibril. Six Israeli prisoners were released in exchange for more than 4700 Palestinians and Lebanese. The remaining two soldiers, as well as a third IDF prisoner were released, in an exchange known as the “Jibril deal” for 1150 Palestinian prisoners and detainees in Israeli jails.

Daniel Byman, ‘Should Hezbollah Be Next?’ (2003) 82 Foreign Aff 54, 57. Although Hezbollah is a Lebanon based group—with Bekaa Valley as its strong-hold, it has cells on every continent, and its highly skilled operatives have committed horrifying attacks as far away as Argentina. Before September 11, 2001, it was responsible for more American deaths than any other terrorist organization.

Bergman (n) 167.
Detaining Unlawful Enemy Combatants In Israel … and the oppressed Islamic states in the middle east. However, Hezbollah’s complete disregard to basic humanitarian needs has become well-known through out the middle east. As a matter of fact, in order to increase the magnitude of its hostage taking effect, Hezbollah engaged a psychological warfare against the hostages’ families (not divulging basic humanitarian information and many time engaged in deception) calculating that it would cause a rift between the families and the state’s political leadership—which often was very successful since it was built on the requirement to balance private interest and the common good.

As aforesaid in the late 1980s and the beginning of the 1990, Israel tried to counter Hezbollah’s tactic of hostage taking by resorting to high profile prisoner taking like Dirani and Ubeyed. This tactic was successful against the standing armies of its Arab neighbors, but useless against Hezbollah, since the “bargaining chips” achieved were of no importance to the leaders of Teheran—the sponsors of Hezbollah. And this is were the legal battle in Israel itself stated also to take affect and prevented or at least hampered any new initiatives to achieve better human assets to a trade deal with Hezbollah.

The crucial point is that Palestinian terror groups were now inspired by Hezbollah hostage taking tactics. On June 25, 2006 Hamas terrorists penetrated Israel through an underground tunnel, emerging near the Israeli farming village of Kerem Shalom. They attacked an Israel Defense Forces (IDF) outpost and a tank stationed there. Two soldiers were killed, while a third soldier, Gilad Shalit, was captured and taken into the Gaza Strip. In response, the IDF apprehended dozens of Hamas personnel in the West Bank, among them members of the Palestine Authority cabinet and Legislative Assembly. In addition, the IDF carried out a series of operations in the Gaza Strip, and fighting continued for five months before a ceasefire was achieved. While Hamas forces suffered hundreds of losses, the military goal of releasing Shalit was not achieved. At the end of five years negotiations, Israel and Hamas agreed to exchange more than 1000 Palestinian prisoners for Shalit, who has been held in Gaza.

While the conflict in the Gaza Strip following Shalit abduction was still raging, a new front opened in the Lebanon border. On July 12, 2006, Hezbollah staged an unprovoked attack across the Lebanon Israel Border in which two Israeli soldiers

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44On June 21, 1972 an Israeli Commando unit participated in operation Crate 3, an operation to kidnap 5 Syrian intelligence offices to facilitate the release of 3 Israeli airmen that were held captive by Syria.
45Daniel Friedmann, The Purse and the Sword: The Trials of Israel’s Legal Revolution (Oxford University Press, 2016).
46Ian Fisher & Steven Erlanger, ‘Israelis Batter Gaza and Seize Hamas Officials’ The New York Times (Gaza, 29 June 2006).
47Sleman Al-Shafhe, Captive: A View from Gaza (Yedioth Ahronoth Books, 2009).
48Ethan Bronner, ‘Israel and Hamas Agree to Swap Prisoners for Soldier’ The New York Times (Jerusalem, 11 October 2011); Ethan Bronner & Stephen Farrell, ‘Israeli Soldier Swapped for Hundreds of Palestinians’ The New York Times (Jerusalem, 18 October 2011).
were taken hostage and three soldiers were killed. Five more soldiers were killed when IDF forces entered Lebanon in an attempt to rescue the taken Israeli soldiers. That very day Israel launched a full scale military attack on Lebanon, which came to be called the Second Lebanon War. However, explicit goal of releasing the captured soldiers was not achieved by force but rather by a prisoner exchange.

The world Known publicist Ronen Bergman argued that: “if we follow the sequence of dealing with prisoners and MIA affairs, it appears that the sacred principle of ‘We don’t abandon soldiers in the field’ has turned on its maker. Only in recent years has the principle become the excuse, or at least trigger, for two failed wars. From a painful humanitarian issue, a natural byproduct of wars and the ongoing conflict, the affairs of Israel’s various prisoners and MIAs and the attempts to move them out of a state of stasis have often become a dominant factor that itself makes history and leads to escalation of the conflict.” However, from a legal point of view, we are not exempt of wondering whether the lack of legal tools to counter the terrorist tactics have also contributed to the escalation and to the fact that hostage taking have become a strategic problem and a trigger for war.

5 Discussion

The argument for detaining unlawful enemy combatants as bargaining chips in the contexts of counterterrorism and counterinsurgency overlap a great deal with the argument for detaining prisoners of war in the context of a conventional war. That is, the starting point of discussion is the treatment of POWs, and we should rethink this basic concept of our jurisprudence of war and assess whether it can survive and apply it to a world besets with nontraditional threats that terror.

But the detention of unlawful enemy combatants to be used as a “bargaining chip” has its own set of difficulties and dangers that require detailed consideration and judgment. Under the international law of armed conflict, individual enemy fighters can be captured and held for the duration of hostilities without a trial. They and their commanders are not personally responsible for the attack, since they acted in the name of the nation.

49Zachary Myers, ‘Fighting Terrorism: Assessing Israel’s Use of Force in Response to Hezbolla’ (2008) 45 San Diego L Rev 305.
50Rory McCarthy, ‘Hizbullah Leader: We Regret the Two Kidnappings that Led to War with Israel’ The Guardian (Jerusalem, 28 August 2006).
51Bergman (n 25). See also Hamed Mousavi, ‘The Israel-Lebanon War of 2006 and the Failure of US Foreign Policy’ (2015) J Pol & L 130.
52The main privileges of POW under international treaty provisions, prisoners of war are required to disclose only their name, rank, and serial number. Fletcher (n 3) 6.
53Fletcher (n 3) 6.
54See the Hague Convention of 1907 which provide that after “the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.”
55Tamar Meisels, ‘Combatants—Lawful and Unlawful’ (2007) 26 L & Phil 31, 35.
power. Thus, the paradigm of conventional war is based on collective rather than personal responsibility. If the individuals detained as combatants engaged in fighting for the enemy, they cannot be tried for acts of violence that are normal and standard in fighting wars, and they must be released when hostilities cease. As combatants, they may be liable for war crimes, but not for violations of the criminal code of the country they have attacked. Indeed, over the past millennium some prisoners of war were tried for crimes under international law, but the vast majority were simply released, either while hostilities were still ongoing or shortly after hostilities came to an end, and were repatriated to their home countries or exchanged for prisoners by still deeply distrusted enemies. In other words, POWs are to be released by the states immediately after the cessation of hostile activity.

The argument for the military detention of prisoners of war is built upon war’s two features: first, conventional wars are intensely coercive on the individual soldiers and commanders, who are required to participate in the war regardless of their personal will. The immunities and privileges accorded to soldiers from criminal prosecution, acknowledge this and enables them to stop fighting without being killed. Second, conventional wars are intensely collective experience, and while they are fought by individuals, these individuals are not engaged in their own self-defense but rather in the defense of the collective, to which they attach great value. Thus, POW’s rights, immunities and privileges are accorded only to those who engaged in this collective activity. When conventional fighting ends, we immediately hold military-to-military talks to discuss terms for the cessation of hostilities and the return of captured prisoners. Prisoners exchange are made, although some of these prisoners may still harbor violent intentions and abilities to harm our country. This is because we acknowledge that the driving force of conventional war is collective rather than personal will. In this sense the detention of POWs is based on the mutual understanding that war is a collectivizing experience.

The detention of unlawful enemy combatants arises, mainly, in the context and conditions of asymmetry war. The theory and practice of POWs detention was intended to deal with what we now call “conventional” warfare—were two armies are engaged and each one is pretty much like the other in organization and armaments. In the conditions of asymmetry, by contrast, there is only one army, organized, armed and disciplined by a modern state. On opposite sides of the barricades are a

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56 However, it is far from clear, as domestic law is concerned, who has the authority to end wartime detention, see Deborah N. Pearlstein, How Wartime Detention Ends, 36 Cardozo L. Rev. 625 (2014).
57 Fletcher (n 3).
58 Pearlstein (n 56).
59 The widely accepted approach refers to a situation where neither party expects in good faith a continuation of hostile activities. See Yoram Dinstein, The Laws of War (Shoken, 1983) 124; Zachary (n 9) 391.
60 Walzer (n 4) 340.
61 Ibid 341.
62 Ibid xiv.
sovereign state or a combination of sovereign states, on one side, and non-state actor
63 on the other side of the barricades.64

Under the circumstances of asymmetric war, given the overwhelming power of the
army and the weakness of the insurgents, the only protection the insurgents have is
the cover of their own people’s home and neighborhoods and by assimilating among
the civilian population. Thus, asymmetric war commonly involves an enemy whose
fighters could not be identified with similar precision and is unlikely to end soon.
Alternatively, the insurgents may take advantage the fact that the regular army follows
the recognized rules of war (in regard to distinguishing civilians from soldiers and
in regard to the treatment of POWs).

It is terribly important to notice that the insurgents’ tactics create reasonable
disagreements as to the way they should be treated by the regular army. And the
basic precept of moral equality of the soldiers that lies at the heart of the laws of war
is put into question. Some may view the insurgents as war criminals that should be
tried for their crimes, while other will question the collective or coercive element of
action, which as explained above is the basis for a military detention of POWs.

Of course, the attempt to deal with the insurgents by the ordinary tools of criminal
justice is likely to fail. Since the focus under the criminal justice procedures is on the
individual culprits. The individual acts on his own, not as an agent of the collective.
The individual is incarcerated according to his personal guilt since he was given the
opportunity to correct his behavior in light of the general moral norms of society.
And the criminal justice procedure is deliberately tilted in favor of defenders.

Under these terms, and taking into account the likelihood that the insurgents will
capture soldiers and civilians of the other side, and breach the rules concerning the
treatment of POWs and MIS, the disposition of unlawful enemy combatants becomes
the subject of intense public attention, particularly to the extent the fate of the state’s
own prisoners’ lives are at stake.

One might expect the state to prioritize the repatriation of especially young, old,
and sick prisoners.

Finally, there are two typical understandings of associative culpability I wish to
refute: the first expressed by Hannah Arendt where everyone guilty none is. The
second, is that every member of the group is guilty in the same sense or manner.
Both associative understandings are wrong, when one take into account war’s two
features: coercion and collectivism. The coercions element of war is not equally
distributed on participating soldiers and commander—high ranking commanders
and officials are less coerced to participate in the war than low level commander
or field soldiers. This is of course generally speaking, and a judicial determination
could help to determine the amount of culpability that should be assigned to a specific
person in order to establish his period of detention. The collective element could also
be measured by the court, and can serve an ameliorative or humanistic purpose of
mitigating detention. The distinction, as seen above, between personal and collectivist
responsibility is not sharp when it comes to asymmetric wars, but a matter of degree.

63 Paul Gilbert, New Terror, New Wars (Edinburgh University Press, 2003) 7–8.
64 Tamar Meisels, ‘Combatants—Lawful and Unlawful’ (2007) 26 L & Phil 31.
6 Conclusion

The detention of unlawful enemy combatant is not an act of government alone. This is a collective endeavor of one nation against another non-state collective. Understanding the coercive and collective nature of this struggle is highly important in order to facilitate the judgments that legislators, public officials and judges make about detention policies as well as individual detention.

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