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# **Israel: Legal Aspects of Prisoner Exchanges**

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# Israel: Legal Aspects of Prisoner Exchanges

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**SUMMARY** Israel has engaged in prisoner-swap deals numerous times throughout its history. The release of members of organizations it considers to be terrorist organizations and of those convicted of terrorism-related offenses has been increasingly contested by the Israeli public.

Members of victims' families and victims' organizations have petitioned the Supreme Court to impose limits on presidential and governmental discretion to approve prisoner releases. In response to claims made by petitioners the Court has established requirements for mandatory prior notice and disclosure of the names of prisoners whose release is being considered. The Court has also recognized the procedures that must be followed to enable members of victims' families to object to the release of the killers of their loved ones. The Court, however, refrained from reviewing the merits of governmental decisions to release prisoners or to determine that they were adopted without legal authority and refused to order the government to adopt any fixed rules that would determine principles for future negotiations.

In 2010 a committee was appointed by the Minister of Defense to review Israel's past practices of prisoner releases and determine principles for conducting negotiations for the release of captives. The committee's report was presented to the Israeli government in 2012. The report, however, remains classified, and the guidelines proposed by the committee have not been published.

A government bill to authorize judges to sentence persons who have committed murder for nationalistic motives to life without parole is currently being considered by the Knesset (Israel's Parliament). The Bill proposes to remove the authority of the President to grant clemency to persons who have been sentenced to life without parole, thereby making it impossible in the future to release convicted murderers under circumstances provided by law either as part of a prisoner-swap deal or as a gesture of good faith in negotiations with the Palestinian Authority. If adopted into law, this Bill would apply only to persons convicted of murder and not to those convicted of lesser offenses or to detainees held by the Israel Defense Forces.

## I. Introduction

There is an ongoing public debate in Israel over the "cost" of releasing nationals held by groups considered by the country to be terrorist organizations. The debate over prisoner exchanges in Israel reflects a moral as well as religious dilemma. The rescue of those in captivity, known in Hebrew as *pidyon shevuyim*, has traditionally been considered a basic obligation under Jewish

law and has been followed in Jewish communities for generations. The obligation to rescue captives under Jewish law is not, however, without limits.<sup>1</sup>

Israel has engaged in prisoner-swap deals with terrorist organizations numerous times during its history.<sup>2</sup> While the circumstances that have led to the capture of Israelis by terrorist organizations have varied, the cost involved in their release has steadily increased. The last release in 2011 involved the exchange of 1,027 Palestinian prisoners, including hundreds that had been convicted of murder-related offenses in Israeli courts, for the release of one Israeli soldier. The soldier, Gilad Shalit, had been abducted by the military wing of Hamas from inside Israel's borders in June 2006 and held captive by Hamas for over five years.<sup>3</sup>

As with prisoner exchanges, many Israelis have contested the release of members of terrorist organizations as gestures of good will in the course of negotiations with the Palestinian Authority. Since August 2013 Israel has released seventy-eight Palestinians "in three batches as part of a framework deal that led to eight months of negotiations with the Palestinian Liberation Organization (PLO). Israel refused to release a final batch of 26 terrorists when it appeared the talks would not be extended past their nine-month deadline."<sup>4</sup>

The appropriateness of releasing terrorists in exchange for Israelis held by terrorist organizations has been the focus of a review by a special committee appointed by the Minister of Defense. In addition, various aspects of prisoner releases have been reviewed by Israel's Supreme Court in response to petitions filed by members of families of victims and by victims' organizations.

Discontent with the mounting cost of prisoner exchanges has led to the introduction of a number of bills in the Knesset. These bills called for limiting the power of the President of the State to grant clemency and commute sentences of terrorists convicted of murder, as well as for generally restricting governmental discretion on the release of terrorists.<sup>5</sup>

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<sup>1</sup> See Baruch S. Davidson, *Is Prisoner Exchange A Jewish Value? Judaism's Take on Redeeming Prisoners*, CHABAD.ORG, [http://www.chabad.org/library/article\\_cdo/aid/1668252/jewish/Is-Prisoner-Exchange-A-Jewish-Value.htm](http://www.chabad.org/library/article_cdo/aid/1668252/jewish/Is-Prisoner-Exchange-A-Jewish-Value.htm) (last visited June 12, 2014).

<sup>2</sup> A partial list covering prisoners exchanges, from the hijacking of the 1968 El-Al and the 1969 TWA flights up to the kidnapping of two Israeli soldiers near the Lebanese border in 2006, is available in Ariel Gilboa, *The Influence of "The Cost" in Negotiations for Release of Kidnapped [Persons] from Terrorist Organizations* (Final Thesis for the Degree of Masters in Public Policy, The Hebrew University, Jan. 2010), [http://public-policy.huji.ac.il/upload/Thesis\\_HE/Ariel\\_Gilboa\\_thesis.pdf](http://public-policy.huji.ac.il/upload/Thesis_HE/Ariel_Gilboa_thesis.pdf) (in Hebrew).

<sup>3</sup> See Ruth Levush, *Prisoner Swap Deals Under Israeli Law*, IN CUSTODIA LEGIS (Nov. 16, 2011), <http://blogs.loc.gov/law/2011/11/prisoners-swap-deals-under-israeli-lawwhats-the-worth-of-one-life-prisoner-swap-deals-under-israeli-law/>.

<sup>4</sup> Herb Keinon & Lahav Harkov, *Cabinet Okays Bill Curbing Presidential Powers to Free Terrorists*, JERUSALEM POST (June 8, 2014), <http://www.jpost.com/Diplomacy-and-Politics/Israel-okays-bill-that-would-limit-pardons-of-Palestinian-terrorists-355657>.

<sup>5</sup> Information on proposed bills is available on the Knesset website at <http://main.knesset.gov.il/Activity/Legislation/Pages/default.aspx>.

This report analyzes the legal aspects of the release of terrorism detainees as well as of those convicted by Israeli courts of terrorism-related offenses. The report covers Israeli law as applicable at the time of its writing and will be updated as necessary.

## **II. Shamgar Committee on Determination of Principles for Conducting Negotiations for Release of Captives**

In response to increasing concerns voiced by the Israeli public, in 2010 then-Israeli Minister of Defense Ehud Barak appointed Retired Supreme Court Justice Meir Shamgar to head the Committee on Determination of Principles for Conducting Negotiations for the Release of Captives. The Committee reviewed Israel's past prisoner exchanges and was tasked with proposing new principles for conducting negotiations for the release of Israeli captives in the future.

The Committee determined that its recommendations would not apply to the release of Gilad Shalit, who was in captivity at the time of its appointment. The Committee interviewed senior military officials after Shalit's release, however, and considered the lessons learned from the negotiations for his release before adopting its recommendations. According to Shamgar, the Committee deliberated not only on "how to conclude negotiations, but also on whether to conduct negotiations, and on what are the permitted boundaries and the [relevant] determining authorities."<sup>6</sup>

The Committee presented its report to the government in January 2012.<sup>7</sup> The first time the military cabinet reportedly conducted a hearing to discuss the Committee's recommendations, however, was two and a half years later, on June 5, 2014. The recommendations were discussed in connection with a bill promoted by the Bayit Yehudi political faction regarding prisoner releases.<sup>8</sup> Having been classified as "highly secretive," the Committee's report has not been disclosed to the Israeli public.

In a press conference held on January 5, 2012, subsequent to the issuing of the report, Committee Chairman Shamgar disclosed that the Committee had recommended the transfer of responsibility from the Prime Minister's Office to the Ministry of Defense for both negotiating on prisoner releases and maintaining contact with captives' families. The Committee had further recommended that prisoner-swap deals in the future would be brought to the government for approval only after reaching an understanding with the "kidnapping" side.<sup>9</sup>

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<sup>6</sup> Gili Cohen, *The Shamgar Committee: There Is a Need to Toughen Positions in Future Negotiations on Release of Captives*, HAARETZ (Jan. 6, 2012), <http://www.haaretz.co.il/news/politics/1.1610579> (this and other translations from Hebrew in this report by author, R.L.).

<sup>7</sup> *Id.*

<sup>8</sup> Barak Ravid, *The Cabinet Will Discuss the Recommendations of the Shamgar Committee on Captives' Deals*, HAARETZ (June 5, 2014), <http://www.haaretz.co.il/news/politics/.premium-1.2340159> (in Hebrew); for information regarding the proposed legislation see part III of this report.

<sup>9</sup> Amir Buchbut, *Shamgar: "To Revoke the Subject of Captives from the Prime Minister,"* WALLA NEWS (Jan. 5, 2012), <http://news.walla.co.il/?w=/9/1891423> (in Hebrew).

Reacting to the Committee's recommendations, Minister Barak commented at the time that it was important

to stop the slippery slope on which we have gradually found ourselves since the first Gibril deal, through the second Gibril deal and Tenenbaum and up to Gilad himself. . . . [I]n the area where we live, a state that cherishes life will not be able to act efficiently and ensure in the long run the general interests of all [its] citizens if we do not change the rules, the reality, or the results as they were in the swap deals in the last 25 years.<sup>10</sup>

### III. Proposed Legislation on Limiting Presidential and Executive Authority for Prisoner Releases

On June 11, 2014, the Knesset preliminarily approved Basic Law: President of the State (Amendment – Prohibition on Release of Murderers) Bill.<sup>11</sup> This Bill is the latest of several bills that have been introduced by Knesset members in recent years to limit presidential and executive powers to engage in the release of prisoners in exchange for Israeli nationals or as a gesture of good will in negotiations.<sup>12</sup>

The Bill had been submitted by the Bayit Yehudi faction Chairwoman Ayelet Shaked and additional Knesset members following the prisoner releases in the latest round of talks with the Palestinians.<sup>13</sup> The Bill proposes to limit presidential powers to grant clemency or commute life sentences of convicted murderers.<sup>14</sup>

Specifically, the Bill proposed to empower any court that sentences a person convicted of murder under section 300 of the Penal Law, 5737-1997 to a life sentence to “determine, for special reasons to be registered, that the President of the State will not grant [the convicted person] clemency and will not lessen his/her sentence. . . .”<sup>15</sup> Under section 300 of the Penal Law, a life sentence must be imposed on a person who has been convicted of the premeditated causation of the death of another.<sup>16</sup>

According to explanatory notes of the bill,

Israel has released a great number of terrorists as part of transactions for release of captives or as political gestures. The reality led to the absurd situation in which terrorists

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<sup>10</sup> Cohen, *supra* note 5.

<sup>11</sup> Basic Law: President of the State (Amendment – Prohibition on Release of Murderers) Bill No. 2113/19, <http://www.knesset.gov.il/privatelaw/data/19/2113.rtf>.

<sup>12</sup> *See, e.g.*, Release of Hostages and Kidnapped, Private Member Bill No. 2437/19, <https://www.knesset.gov.il/privatelaw/data/19/2437.rtf>.

<sup>13</sup> Lahav Harkov, *Bayit Yehudi Furious as Netanyahu Delays Vote on Limiting Prisoner Releases*, JERUSALEM POST (June 1, 2014), <http://www.jpost.com/Diplomacy-and-Politics/Bayit-Yehudi-furious-as-Netanyahu-delays-vote-on-limiting-prisoner-releases-355020>.

<sup>14</sup> Basic Law: President of the State (Amendment – Prohibition on Release of Murderers) Bill No. 2113/19

<sup>15</sup> *Id.*

<sup>16</sup> Penal Law 5737-1997, LAWS OF THE STATE OF ISRAEL (Special Volume).

that committed murderous actions as part of their fight against the State of Israel are released a long time before completing their sentence. This fact constitutes a moral failure that [reflects] a devaluation of the severity of actions committed by terrorists and of the authority of the legal system in Israel. Additionally, currently the sentence of murderers [can be] commuted even if they conducted murders that are excessive in their severity, like murder of children.

This bill is intended to correct this state of affairs and prevent a situation where because of pressures . . . it will be decided to grant clemency as part of prisoner exchanges or as political gestures to terrorists that conducted murders.<sup>17</sup>

Prime Minister Binyamin Netanyahu had initially prevented a vote on the Bill in a government meeting on June 1, 2014, in consideration of a legal opinion issued by the Government Legal Adviser, Yehuda Weinstein. The opinion found a discrepancy between the Bill's explanatory notes, which focused on the intent to prevent the release of terrorists who had been convicted of murder, and the Bill's proposed language, which was more general and applied to other convicted murderers.<sup>18</sup> Weinstein has also reportedly expressed dismay that the government would want to pass a law that would restrict its discretion for many years to come.<sup>19</sup>

On June 7, 2014, however, the Israeli government approved a decision to promote the Bill on the basis of the report's recommendations and resolve the discrepancy between the text of the law and its explanatory notes.<sup>20</sup> The amended text has been preliminarily approved by the Knesset plenum. According to a Knesset press release on June 11, 2014, the Bill proposed that

when special reasons exist, the court will be authorized to sentence a person who has been convicted of murder for nationalistic motives to a full penalty of life imprisonment without the possibility for commuting the penalty or receiving clemency from the President of the State [life without parole]. In addition, the bill is also intended to enable the court to determine that in murder cases that are especially heinous, such as in the murder of children, there will not be a possibility of commuting the penalty and clemency for the murderer.<sup>21</sup>

In accordance with Knesset rules, following its passage in the preliminary hearing, the Bill has been transferred to a Knesset committee for preparation for the second and third readings. The Bill will be adopted into law only after a majority vote in both readings.<sup>22</sup>

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<sup>17</sup> Basic Law: President of the State (Amendment – Prohibition on Release of Murderers) Bill No. 2113/19.

<sup>18</sup> Yonatan Lis & Revital Hovel, *Netanyahu Prevented a Vote on a Law to Prohibit Release of Terrorists*, HAARETZ (June 1, 2014), <http://www.haaretz.co.il/news/politics/1.2337403> (in Hebrew).

<sup>19</sup> *Id.*

<sup>20</sup> Yonatan Lis, *At the End of a Hotly Debated Hearing: The Government Approved the Law that Would Prevent Clemency for Terrorists*, HAARETZ (June 8, 2014), <http://www.haaretz.co.il/news/politi/1.2342472#.U5Sggm-wjgc.email> (in Hebrew).

<sup>21</sup> Press Release, Knesset, Approved in Preliminary [Plenum Vote]: Clemency for Murderers Will Not Be Possible (June 11, 2014), <http://main.knesset.gov.il/News/PressReleases/Pages/press110614-aq.aspx> (in Hebrew).

<sup>22</sup> See *The Knesset Work: Legislation*, KNESSET, [http://knesset.gov.il/description/eng/eng\\_work\\_mel2.htm](http://knesset.gov.il/description/eng/eng_work_mel2.htm) (last visited June 10, 2014).

#### IV. Judicial Review of Prisoner Releases

Family members of terrorism victims and victims' organizations have contested the release of terrorists, especially those involved in the killing of their loved ones. The following is a summary of the most recent decisions rendered by the Supreme Court in petitions filed by victims' families and organizations.

##### A. H CJ 8646/13 Schijveschuurder v. State of Israel

The latest decision by the Supreme Court on this issue was rendered on December 26, 2013.<sup>23</sup> The petitioners lost five members of their family in the terrorist bombing on August 9, 2001, at the Sbarro restaurant in Jerusalem.<sup>24</sup>

Among other things, the petitioners requested the Court to determine that granting clemency to convicted prisoners, including two of the perpetrators of the bombing whose release they objected to, could only be made in accordance with Basic Law: The President of the State<sup>25</sup> and with Victims of Crime Rights Law 5761-2001.<sup>26</sup> They also argued that any release of convicted terrorists must be made in accordance with clear criteria that have been properly adopted. The petitioners further requested the disclosure of the Shamgar Committee's report on Determination of Principles for Conducting Negotiations for the Release of Captives.<sup>27</sup>

Expressing sympathy with the petitioners' pain, Justice Miriam Naor nevertheless rejected the petition. She held that the issues raised by the petitioners in this petition had already been addressed in two earlier decisions, H CJ 5413/13 Almagor v. State of Israel,<sup>28</sup> and H CJ 5606/13 Schijveschuurder v. State of Israel.<sup>29</sup>

##### B. H CJ 5413/13 Almagor v. State of Israel

On August 11, 2013, the Israeli High Court of Justice rejected a petition by Almagor, the Association of Victims of Terrorism, and by members of victims' families to void a governmental decision to release Palestinian prisoners convicted of terrorism offenses as a good-

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<sup>23</sup> H CJ 8646/13 Schijveschuurder v. State of Israel [Dec. 26, 2013], <http://elyon1.court.gov.il/files/13/460/086/c03/13086460.c03.pdf> (this and all other cited court decisions are in Hebrew).

<sup>24</sup> For information, see Suzanne Goldenberg, *The street was covered with blood and bodies: the dead and the dying*, THE GUARDIAN (Aug. 9, 2001), <http://www.theguardian.com/world/2001/aug/10/israel1>; see also Omri Efraim, *Decade later, Sbarro attack still haunts victims*, YNETNEWS (Oct. 8, 2011), <http://www.ynetnews.com/articles/0.7340.L-4106884.00.html>

<sup>25</sup> Basic Law: The President of the State § 11(B), SEFER HAHUKKIM [SH] No. 428, p. 118 (5724–1964), English translation available at [http://knesset.gov.il/laws/special/eng/basic12\\_eng.htm](http://knesset.gov.il/laws/special/eng/basic12_eng.htm).

<sup>26</sup> Victims of Crime Rights Law 5761-2001, SH No. 1782, p. 183, *as amended* (in Hebrew).

<sup>27</sup> H CJ 8646/13 Schijveschuurder v. State of Israel.

<sup>28</sup> H CJ 5413/13 Almagor v. Government of Israel, <http://elyon1.court.gov.il/files/13/130/054/s04/13054130.s04.pdf>.

<sup>29</sup> H CJ 5606/13 Schijveschuurder v. State of Israel, <http://elyon1.court.gov.il/files/13/060/056/101/13056060.101.pdf>.

will gesture during the course of renewed peace negotiations between Israel and the Palestinians.<sup>30</sup>

The subject of the petition is Government Decision No. 640, which was adopted by the Israeli government on July 28, 2013.<sup>31</sup> This decision authorized the government to convene a ministerial team that would determine the conditions, timing, and criteria for selecting prisoners to be released during peace negotiations, but required the names of those selected to be publically published.<sup>32</sup>

The Court rejected the petitioners' claims regarding the ministerial committee's alleged lack of jurisdiction and noncompliance with notice requirements. Court President Asher Grunis, with Justices Elyakim Rubinstein and Zvi Zilbertal concurring, held that the government was authorized to adopt a decision on entering into political negotiations and on the release of prisoners, and that there was no need for an explicit authorization to this effect in primary legislation.

This conclusion, according to Grunis, was based on two earlier decisions by the High Court.<sup>33</sup> Unlike a declaration of war, he held, for which a decision of the full government is mandated by Basic Law: The Government,<sup>34</sup> a decision to release prisoners or enter into political negotiations does not require a full quorum under any law.<sup>35</sup>

Grunis also rejected the petitioners' claim that their rights under the Victims of Crime Rights Law 5761-2001<sup>36</sup> had been violated because they had not been afforded the opportunity to express their objections in writing. He reiterated the previously established principle that rights under this Law are not fully applicable to cases where clemency is not obtained through "a regular" criminal process but rather through a political agreement.<sup>37</sup>

Considering the tight time frame applicable under the circumstances, and the state's willingness to follow the established practice of allowing victims to express objections within forty-eight

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<sup>30</sup> H CJ 5413/13 Almagor v. Government of Israel.

<sup>31</sup> Approval of Opening of Political Negotiations Between Israel and the Palestinians in Accordance with the Prime Minister's Announcement Regarding the Negotiations and Authorization of the Ministerial Team for the Release of Palestinian Prisoners in the Course of the Negotiations, Government Decision No. 640 of July 28, 2013, <http://www.pmo.gov.il/Secretary/GovDecisions/2013/Pages/des640.aspx> (in Hebrew).

<sup>32</sup> *Id.*

<sup>33</sup> H CJ 5413/13 Almagor v. Government of Israel, para. 6 (referring to H CJ 1539/05 & 5272/05 Institute for Research of Terrorism and Assistance for its Victims v. the Prime Minister, <http://elyon1.court.gov.il/verdictssearch/HebrewVerdictsSearch.aspx>, and <http://elyon1.court.gov.il/verdictssearch/HebrewVerdictsSearch.aspx>, respectively (both in Hebrew)).

<sup>34</sup> Basic Law: The Government (2001) § 40(a), [http://knesset.gov.il/laws/special/eng/basic14\\_eng.htm](http://knesset.gov.il/laws/special/eng/basic14_eng.htm).

<sup>35</sup> H CJ 5413/13 Almagor v. Government of Israel, para. 6.

<sup>36</sup> Victims of Crime Rights Law 5761-2001, SH No. 1782, p. 183, *as amended*.

<sup>37</sup> *Id.* para 7 (referring to H CJ 7523/11 Almagor – Organization of Victims of Terrorism v. the Prime Minister, <http://elyon1.court.gov.il/files/11/230/075/n05/11075230.n05.pdf> (in Hebrew)). For information on the *Almagor* decision, see Levush, *supra* note 3.

hours prior to the release of prisoners, Grunis refused to require that the state permit victims to object in writing under the procedures established by the Law. He also concluded that there was no need to extend the period available for objections beyond the forty-eight hours period offered by the state.<sup>38</sup>

Further rejecting the petitioners' claims, Justice Grunis determined that decisions regarding the release of prisoners, especially those adopted in the course of political negotiations, are within the authority and discretion of the government based on its responsibility to further the state's foreign relations and ensure public security.<sup>39</sup>

Considering the circumstances that existed in that case, the Court rejected the claim that the decision to release the prisoners by the method determined in the government decision was affected by an extreme lack of reasonableness. The Court also rejected the claim that the government decision in this regard suffered from any other defect that required judicial intervention.<sup>40</sup>

### **C. HCJ 5606/13 Schijveschuurder v. State of Israel**

On August 13, 2013, two days after rendering the decision in HCJ 5413/13 Almagor v. State of Israel, the Supreme Court rejected a petition by members of the Schijveschuurder family,<sup>41</sup> the same petitioners in the previously discussed decision in HCJ 8646/13 Schijveschuurder v. State of Israel. The Court reiterated that it would refrain from intervening in decisions to release prisoners either as part of prisoner-swap deals or as an expression of good will in negotiations because of the political nature of such decisions.<sup>42</sup>

The Court further rejected the petitioners' claims that the planned prisoners' release to which they objected violated the clemency authorities of the President. According to the Court, the procedures that applied to the prisoners' release in this case complied with the requirements established in the earlier case of HCJ 9446/09 Karman v. Prime Minister of Israel.<sup>43</sup> According to these requirements the petitioners as well as other bereaved families had a right to obtain information on prisoners that might be released and to direct their objections to their release to the clemency department of the Ministry of Justice. Their objections must also be forwarded to the President of the State.<sup>44</sup>

The Court rejected the petitioners' request to require the adoption of fixed criteria for prisoner releases. Justice Tzvi Zilberstein stated for the Court that "there is a difficulty in tying the

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<sup>38</sup> Victims of Crime Rights Law 5761-2001, SH No. 1782 p. 183, as amended.

<sup>39</sup> *Id.* para. 10.

<sup>40</sup> *Id.*

<sup>41</sup> HCJ 5606/13 Schijveschuurder v. State of Israel, <http://elyon1.court.gov.il/files/13/060/056/101/13056060.101.pdf>.

<sup>42</sup> *Id.* ¶ 5.

<sup>43</sup> HCJ 9446/09 Karman v. Prime Minister of Israel, <http://elyon1.court.gov.il/files/09/460/094/n03/09094460.n03.pdf>.

<sup>44</sup> HCJ 5606/13 Schijveschuurder v. State of Israel, ¶ 7.

discretion of the determining agency to harsh criteria when it is impossible to foresee in which future cases, and under which conditions it will have to adopt decisions on these difficult issues.”<sup>45</sup>

## V. Conclusion

The release of convicted violent terrorists or members of terrorist organizations in prisoner exchanges or as good-will gestures has been the subject of fierce public debate in Israel. Objections to prisoner releases have mounted in view of the constant rise in the cost associated with such transactions. Public disagreement was particularly vocal over the number of Palestinians released by Israel—1,027—in exchange for Gilad Shalit.

Arguments against the cost associated with prisoner exchanges have focused on their utility—namely, the increased motivation of terrorist organizations to kidnap Israeli soldiers to free their members, thereby affecting Israeli counterterrorism deterrence efforts. Strong objections were similarly expressed to “lessening the severity of terrorists’ actions and the authority of the legal system in Israel,”<sup>46</sup> as a result of commuting the sentences of murderers, specifically those who committed murderous offenses that are extraordinary in their severity, such as the murder of children. In addition, many Israelis, particularly families of terrorism victims, have rallied against the release of these killers. They have demanded the adoption of transparent criteria and procedures for terrorists’ release.

In response to the mounting concerns associated with prisoner-swap deals, a committee was appointed to study Israel’s experience in this area and to propose new principles for conducting negotiations for the release of Israeli captives in the future. The committee’s report was issued in 2012 but has not been publically disclosed and remains classified. According to media reports, however, there is no doubt that among its recommendations was the introduction of a more conservative approach to Israel’s future engagement in prisoner-swap deals and a limitation on the price that can be paid to obtain the freedom of captives.

The implementation of presidential authority to grant clemency and commute sentences, and of governmental compliance with procedural requirements involving prisoner releases, has been repeatedly reviewed by the Supreme Court. The Court has established specific requirements with regard to providing notice to victims’ families, disclosing the names of prisoners considered for release, and providing opportunities to object to the release. The Court refused, however, to order the government to adopt criteria that would limit governmental discretion in the future. It has similarly refused to order a public disclosure of the Shamgar Committee report and its recommendations.

In the absence of a judicial restriction on prisoner releases, opponents of prisoner releases have called for restricting governmental and presidential authority in this area by legislation. Currently, a government bill is being prepared for second and third readings before the Knesset

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<sup>45</sup> *Id.* ¶ 8.

<sup>46</sup> Press Release, Knesset, *supra* note 21.

plenum. This bill, however, is limited in scope and appears to apply only to the release of persons convicted of murder.

If passed, the bill will not affect the government's future discretion to engage in the release of persons convicted of offenses less serious than murder, nor will it affect government discretion to release persons detained by military authorities who have not been convicted by Israeli courts. Although not subject to the restrictions established by the bill, governmental discretion in these cases is not unlimited. As discussed above, the government must comply with the requirements for notice and consideration of victims' families' objections that were established by the Supreme Court. In addition, the government will also be guided by the recommendations of the Shamgar Committee, recommendations that so far have not been publically disclosed.

The legal developments in this area reflect uncertainty as to whether Israel will engage in prisoner-swap deals of the type conducted in the Shalit case in the future. If the latest government bill on restricting clemency and commuting life sentences for convicted murderers passes, persons convicted of murder for nationalistic motives will not be released in future prisoner-swap deals. With regard to other prisoners, from the little that was made public about the Shamgar Committee's recommendations, it appears that "Israel will release only a few security prisoners and not tens or thousands . . . in return for one Israeli captive, in order to prevent [future] mega deals for prisoner exchanges."<sup>47</sup>

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<sup>47</sup> Gili Cohen, *The Shamgar Committee: There Is a Need to Toughen Positions in Future Negotiations on Release of Captives*, HAARETZ (Jan. 6, 2012), <http://www.haaretz.co.il/news/politics/1.1610579> (translated from Hebrew by R.L.).