

PROPORTIONALITY IN WAR: PROTECTING SOLDIERS FROM ENEMY CAPTIVITY, AND ISRAEL'S OPERATION CAST LEAD—"THE SOLDIERS ARE EVERYONE'S CHILDREN"

ZIV BOHRER[†] AND MARK OSIEL^{*}

I. INTRODUCTION

On October 18, 2011, Israel struck a prisoner-exchange agreement with the Palestinian organization Hamas: Israel released 1027 Palestinian prisoners (jointly responsible for the death of some six-hundred Israelis) in return for one Israeli soldier, Gilad Shalit.¹ Past experience has amply proven that many of those released will return to further violence.² Yet, within Israeli society, the deal was broadly accepted.³ Elsewhere, however, the reaction was quite different, with many of Israel's most prominent and ardent supporters condemning the exchange.⁴

How are we to account for such disparate responses? What features of Israeli and, conversely, American society might explain this variation? Were foreign commentators correct in attributing the discrepancy to contrasting political cultures and mores?⁵ Such a quick and facile account

[†] Faculty of Law, Bar Ilan University; Research Fellow 2012-2013, Sacher Institute, Faculty of Law, Hebrew University; Visiting Research Scholar 2011-2012, University of Michigan Law School; Ph.D. 2012, Tel-Aviv University. This author wishes to thank the Fulbright Foundation for its support. All translations of sources originally in Hebrew are my own.

^{*} Aliber Family Chair, College of Law, University of Iowa; B.A. 1977, University of California, Berkeley; M.A. 1978, University of Chicago; J.D., Ph.D. 1987, Harvard University.

1. See Ronen Bergman, *Gilad Shalit and the Rising Price of an Israeli Life*, N.Y. TIMES MAG., Nov. 9, 2011, <http://www.nytimes.com/2011/11/13/magazine/gilad-shalit-and-the-cost-of-an-israeli-life.html> (describing the details of the exchange).

2. See *infra* note 94 and accompanying text.

3. See *Survey: 79% of Respondents in Favor of Shalit Deal, 14% Opposed*, GLOBES (Oct. 17, 2011), <http://www.globes.co.il/news/article.aspx?did=1000690626>.

4. E.g., *Romney, Cain Under Fire at Feisty GOP Debate*, FOXNEWS.COM (Oct. 19, 2011), <http://www.foxnews.com/politics/2011/10/18/romney-cain-under-fire-as-feisty-gop-debate-begins> (summing up the Republican candidates' response to the Shalit Exchange); Robert Mnookin, *Israel's Deals with the Devils*, WALL ST. J. (Oct. 17, 2011) ("Here the Israelis made what seems to be a crazy deal.").

5. E.g., Nathan Guttman, *Shalit Deal Shows Culture of Two Nations*, THE JEWISH DAILY FORWARD (Oct. 25, 2011), <http://forward.com/articles/144823/shalit-deal-shows-culture-of-two-nations>

should at least give us pause, given the notorious analytical wooliness of such concepts and their enduring elusiveness to genuine empirical assessment. Even if there is something to them, such sweeping, broad-brush theories require refinement and careful qualification. How do such considerations of political culture bear upon the legal discourse that has, for the most part, ignored them?

Israel's readiness to negotiate prisoner exchanges on such numerically lopsided terms reflects the extraordinary value that the country attributes to protecting its soldiers from the perils of enemy captivity. That valuation finds expression in how the country understands its duties under international law. In fact, Israel's deep commitment to its citizen-soldiers explains many key Israeli decisions of recent years that have struck outsiders as puzzling, even perverse. These decisions prominently include the proportionality assessments, both *jus ad bellum* and *jus in bello*, conducted during the country's 2008–2009 military campaign in Gaza, against the Palestinian armed organization Hamas, known as "Operation Cast Lead."⁶

The law of war imposes two types of proportionality assessments.⁷ The first, *jus ad bellum* proportionality, governs the decision to resort to force in the first instance and influences the overall scale of permissible violence.⁸ The way in which a victim state responds to armed attack must not exceed the measure of force required to address the specific threat to its

(stating that the difference between the American and Israeli reactions to the Shalit deal "underlined a significant, and often studiously ignored, difference in the two countries' political culture"); Yochi J. Dreazen, *Unlike in Israel, Missing U.S. Soldiers' Plight Not a National Struggle*, NAT'L J. (Oct. 18, 2011, 5:28 PM), <http://www.nationaljournal.com/unlike-in-israel-missing-u-s-soldiers-plight-not-a-national-struggle-20111018>; Jim Michaels, *Israeli Soldier Swaps Raise Questions*, USA TODAY (Oct. 14, 2011, 7:20 PM), <http://www.usatoday.com/news/world/story/2011-10-13/israel-deal-prisoners-freed-terrorists/50761188/1>.

6. 'Operation Cast Lead,' as the Israel Defense Force named it, extended from December 27, 2008, through January 18, 2009. IDF Spokesperson Announcement, *IDF Launches Operation 'Cast Lead'* (Dec. 27, 2008), <http://www.idfblog.com/2008/12/27/idf-launches-operation-cast-lead/>; IDF Spokesperson Unit Blog, *Cast Lead: Materials related to the Gaza defensive operation from December 27, 2008–January 18, 2009*, <http://www.idfblog.com/category/security-issues/operation-room/operation-cast-lead/page/2/>. See also, *Rain of Fire: White Phosphorous in Gaza*, HUM. RIGHTS WATCH (Mar. 25, 2009), <http://www.hrw.org/features/rain-fire-white-phosphorus-gaza>.

7. "Proportionality" is a colloquial expression and is not the accurate legal term used in the relevant *jus in bello* and *jus ad bellum* norms. The accurate terminology is presented *infra* Part III, B-C, along with in-depth analyses of these norms.

8. For further discussion of this issue, see *infra* note 170 and accompanying text.

national security posed by that attack.⁹ The second type of proportionality is *jus in bello*, which regulates tactical and operational conduct once an armed conflict has begun.¹⁰ This norm demands that all belligerents, aggressor, and/or aggrieved not inflict incidental civilian harm that would be clearly excessive in relation to the military advantage anticipated from a given use of force.¹¹ In determining its response to Hamas attacks, (i.e., in determining its Operation Cast Lead-related actions), Israel was therefore duty-bound to assess proportionality in both respects. And in both respects, its assessments were strongly influenced by its desire to protect soldiers from becoming captured by the enemy.

Israel reaction in Operation Cast Lead was more forceful than its reaction to prior enemy attacks of a similar nature.¹² Because of this, some commentators charged the Israel Defense Force (“IDF”) with less sensitivity than in the past to the likelihood of civilian casualties on the Palestinian side.¹³ A United Nations body went so far as to conclude that Israel, by inflicting such casualties, violated *jus ad bellum* and *jus in bello* proportionality duties,¹⁴ accusations Israel vigorously denied.¹⁵

9. For further discussion of this issue, see *infra* note 170 and accompanying text.

10. INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977, 2207 (1987) (stating that the *in bello* proportionality norm “is not concerned with strategic objectives.”).

11. For further discussion of this issue see *infra* note 247 and accompanying text.

12. See *infra* notes 126 to 158 and accompanying text (discussing the gradual increase in the scale of Israel’s responses to Hamas’s attacks). See also, Galit Ragan, *Adjudicating Armed Conflict in Domestic Courts: The Experience of Israel’s Supreme Court*, 13 Y.B. INT’L HUMANITARIAN L. 61, 82 (2010) (stating, “In late 2008 the IDF initiated a month-long, large-scale military operation in the Gaza Strip, which included both ongoing aerial strikes and the deployment of ground forces. Operation ‘Cast Lead’ presented the most intense level of hostilities between the IDF and Palestinians in the history of the region.”). Ragan’s statement is somewhat inaccurate, since the armed conflict in 1948 was larger in scale.

13. See, e.g., David Enoch, *Reflections on the War in Gaza*, 1 MISHPATIM AL ATAR 11, 11, 13, 19–20 (2009) (in Hebrew); Ofer Shelah, *State of Derailed*, NRG MA’ARIV (Jan. 23, 2012), <http://www.nrg.co.il/online/1/ART2/329/453.html> (in Hebrew); Anshel Pfeffer, *IDF Officer: Gaza Civilians Risked to Protect Israel Troops During War*, HAARETZ.COM (Feb. 3, 2010, 9:24 AM), <http://www.haaretz.com/news/idf-officer-gaza-civilians-risked-to-protect-israel-troops-during-war-1.262686>. See also Uri Avnery, *Operation Cast Lead and Just War Theory*, 38 AZURE (2009), available at <http://www.azure.org.il/include/print.php?id=520>.

14. HUMAN RIGHTS COUNCIL, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48, ¶¶ 1883–95 (2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> [hereinafter GOLDSTONE REPORT]. See also Press Release, Richard Falk, United Nations Special Rapporteur for Human Rights in the Occupied Territories: On the Crisis in the Gaza Strip (Dec. 27, 2008), available at http://gazasiège.org/docs/gaza_crisis_08/GazaCrisis_UN_Falk_Pressrelease_12_27_08.pdf (describing

In the ensuing legal debate, both supporters and critics acknowledged that Israel's aim of protecting soldiers from death or serious injury powerfully influenced its conduct.¹⁶ The central question was whether its leaders accorded undue weight to this consideration, beyond what international law permits.¹⁷ That legal discussion took place at too high a level of generality, however, and so ignored how strongly Israel's military policymaking and battlefield behavior were influenced by its more specific commitment to ensuring that its soldiers did not fall into enemy hands.¹⁸ In contrast to legal commentators, scholars within other fields, such as security studies, international relations, and political science, widely acknowledged the significance of this specific consideration in the country's military decisionmaking.¹⁹ Some considered it even more influential than Israel's more obvious preoccupation with avoiding battlefield casualties.²⁰

When making the proportionality assessments that international law requires, how much weight may a state legitimately accord the objective of protecting its soldiers? Properly understood, this concern with "force protection," as it is generally described, encompasses not only risk of death and injury during armed conflict itself, but also risk of capture and sustained captivity in enemy hands thereafter.²¹ This Article examines this

Israel's action as a "disproportionate military response" because it "killed and injured hundreds of civilians"; the term "response" implies a violation of *jus ad bellum* proportionality, while the issue of civilian casualties alleges a violation of *jus in bello* proportionality).

15. STATE OF ISR., THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS 1-4 (2009) [hereinafter OPERATION IN GAZA].

16. *Id.* at 56 (" Hamas chose to base its operations in civilian areas . . . in many cases, the IDF could not forego a legitimate military objective without undermining its mission and jeopardising both its *soldiers* and Israeli civilians. In those circumstances, the result of Hamas' approach was to make it difficult, and sometimes impossible, for IDF forces to avoid harm to civilians and civilian structures." emphasis added); GOLDSTONE REPORT, *supra* note 14, ¶¶ 696(a), 698-99.

17. Compare OPERATION IN GAZA, *supra* note 15, at 44-48, 56, with GOLDSTONE REPORT, *supra* note 14, ¶¶ 696(a), 698-99.

18. See *infra* notes 162, 275-280 and accompanying text.

19. See sources cited *infra* notes 162, 275-280.

20. Amos Harel, *After Shalit, Some IDF Officers See a Dead Soldier as Better than Abducted*, HAARETZ (Nov. 11, 2011, 1:06 AM), <http://www.haaretz.com/print-edition/news/after-shalit-some-idf-officers-see-a-dead-soldier-as-better-than-abducted-1.393039>. See also Bergman, *supra* note 1, at 3 ("The issue has become a generator of history rather than an outcome of it.").

21. See GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 284 (2010) (defining "force protection" as military casualty aversion); Gabriella Blum, *The Laws of War and the "Lesser Evil"*, 35 YALE J. INT'L L. 1, 56, 59 (2010) (suggesting that states are legitimately concerned, in general terms, with their soldiers' well-being; thus implicitly referring to a

aspect of force protection to better understand and evaluate Israel's recent practices. Israel braves such challenges *in extremis*. But these challenges approximate those faced by any democratic society confronting armed adversaries who flagrantly flout central principles of international criminal and humanitarian law.

Part II excavates the historical and sociological roots of Israel's decision to prioritize force protection, and more specifically, its overriding objective of preventing troops from subjection to enemy custody. Part III sketches the factual background to Operation Cast Lead, particularly Israel's enemies' increasing attempts to capture Israel's soldiers. Part III further shows how Israel's concern with capture-avoidance influenced its assessments of *jus ad bello* and *jus in bello* proportionality during Operation Cast Lead. It then evaluates the legality of these assessments. Part IV concludes that Israel's stance on the legal issues, as applied to the facts of its wartime conduct, is defensible. However, it acknowledges that, during Operation Cast Lead, some Israeli soldiers may have misinterpreted the concept of proportionality to authorize greater priority to force protection than international law in fact permits.

II. THE ROOTS OF ISRAEL'S FORCE-PROTECTION POSITION

A. ISRAEL'S MILITARY CASUALTY AVERSION

Though Israel has long displayed particular sensitivity to its military casualties,²² force protection has increased in policy salience since the 1980s.²³ Beginning with the 1973 war and its aftermath,²⁴ the Israeli people have become increasingly suspicious of their political and military leaders, the wisdom of whose war-related decisions was widely questioned and politically controversial, both at home and abroad.²⁵ Israel's increased

concern that extends beyond the more specific concern with casualty aversion). Usually concerns to the well-being of soldiers other than from death or injury are ignored.

22. GUNTHER E. ROTHENBERG, *THE ANATOMY OF THE ISRAELI ARMY* 201 (1979) ("Despite 30 years of intermittent wars, Israelis have a low tolerance of military casualties. . .").

23. See DAN HOROWITZ & MOSHE LISSAK, *TROUBLE IN UTOPIA* 244 (1989); EFRAIM INBAR, *ISRAEL'S NATIONAL SECURITY* 95 (2008).

24. ALFRED KATZ, *GOVERNMENT AND POLITICS IN CONTEMPORARY ISRAEL, 1948–PRESENT*, at v (1980).

25. HOROWITZ & LISSAK, *supra* note 23, at 171; Arie Perliger, *The Changing Nature of the Israeli Reserve Forces: Present Crises and Future Challenges*, 37 *ARMED FORCES & SOC'Y* 216, 224–25 (2011); Meira Z. Weiss, *The Postmodern State and Collective Individualism: A Comparative Look at Israeli Society and Western Consumer Culture*, 40 *SOC. SCI. J.* 269, 272 (2003).

involvement in controversial military activities also weakened social bonds among its members.²⁶

Growing doubts about national leadership, combined with weakened social solidarity, have left many Israelis less inclined than in the past to accept major personal sacrifice for public goals.²⁷ Nonetheless, even today, only a small minority declines to undertake military service, whether by conscientious objection or other, less lawful, means.²⁸ But those who support such draft avoidance have substantially increased. While the majority of Israelis still serve willingly in the armed forces,²⁹ the portion of young conscripts seeking to avoid *combat* positions is considerable.³⁰

Service in the reserves has seen a similar development. Israeli law authorizes subjecting Israeli citizens to reserve duty for several weeks per year, into their forties.³¹ Yet the IDF does not call up all those whom it legally may. Those who exercised combat responsibilities as conscripts are

26. For the Israeli Left, the decisive developments to this effect were the First Lebanon War, as well as the personal experience of military service in Gaza and the West Bank. For the Israeli Right, IDF participation in forcibly evacuating settlements in the occupied territories was more important. These settler displacements took place from Sinai in the early 1980s and from Gaza in 2005. See SERGIO CATIGNANI, *ISRAELI COUNTER-INSURGENCY AND THE INTIFADAS* 178–79 (2008); REUVEN GAL, *A PORTRAIT OF THE ISRAELI SOLDIER* 147–51 (1986); HOROWITZ & LISSAK, *supra* note 23, at 149, 219; GUY BEN-PORAT ET AL., *ISRAEL SINCE 1980*, at 9, 13, 169–70, 175–76 (2008); Perlinger, *supra* note 25, at 226.

27. See BEN-PORAT ET AL., *supra* note 26, at 117, 122–24, 157–58; Weiss, *supra* note 25, at 272–74. An additional factor has been the general rise in individualism in Western societies.

28. The substantial increase during recent decades in attempts by Israelis to shirk mandatory military service, for ideological and other reasons, reflects these social processes. Reasons for avoiding service include: (a) conscientious objection (which Israeli law acknowledges); (b) political objection to military service, due chiefly to IDF activities in the West Bank; and (c) the forgery of medical documents. Such draft evasion still, however, takes place among only a small minority of Israelis. See BEN-PORAT ET AL., *supra* note 26, at 157–58; Weiss, *supra* note 25, at 274; CATIGNANI, *supra* note 26, at 173–79.

29. See Eyal Ben-Ari, *Masks and Soldering: The Israeli Army and the Palestinian Uprising*, 4 *CULTURAL ANTHROPOLOGY* 372, 383 (1989); Weiss, *supra* note 25, at 272–74.

30. BEN-PORAT ET AL., *supra* note 26, at 124 (describing a slow and continuous decline in the willingness of conscripts to join combat units).

31. See *id.* at 157 (summarizing the legal duties of reserve service). Israeli law allows enlisted personnel and officers to be called up for reserve duty, within a three-year period, for an accumulated duration of fifty-four days or eighty-four days, respectively. For those in certain vital positions, the period extends to 108 days. The law also allows calling citizens up for further time when emergencies arise. See *Service in the Military Reserves Law, 5768-2008*, arts. 7–8 (Isr.). Israeli law allows citizens to be required to perform annual military reserve service until age forty (for enlisted personnel), forty-five (for officers) and forty-nine (for certain vital positions). *Defence Service Law (Consolidated Version), 5746-1986*, art. 36A (Isr.).

today much more likely to be called up.³² This may evoke resentment among those who are repeatedly called up, who come to feel that they are asked to assume a disproportionate share of the burdens of national defense.³³ As people assume greater obligations as parents and professionals within the civilian workforce, these military duties often become more onerous, which further exacerbates resentments.³⁴ Many Israelis shirk reserve duty, often through questionable invocations of different exceptions within Israeli military service law, heightening public suspicions that burdens of service are distributed unevenly and unfairly. These pervasive suspicions, in turn, weaken the willingness of still others to serve.³⁵ All of this fosters increased expectations among those who do serve that the state will be mindful of its uneven allocation of responsibilities, and, as a result, will not take undue advantage of their willingness to make greater personal sacrifices than fellow citizens.³⁶

Public concern for the fate of fellow citizens who must make such sacrifices is enhanced by the grave doubts Israelis now harbor with regard to recent national decisions about recourse to force. This diminished trust has increasingly led parents of soldiers, many of whom are former soldiers themselves, to monitor security issues with considerable skepticism.³⁷ These developments have led many Israelis to consider the country's young

32. BEN-PORAT ET AL., *supra* note 26, at 125. *See also* Gabriel Ben-Dor, Ami Pedahzur & Badi Hasisi, *Israel's National Security Doctrine Under Strain: The Crisis of the Reserve Army*, 28 ARMED FORCES & SOC'Y 233, 235–36 (2002) (explaining that “the number of soldiers leaving the reserve army early has increased faster than the proportion of new soldiers recruited to the conscript (compulsory draft) army”).

33. *See* BAR DADON, INST. FOR ADVANCED STRATEGIC & POL. STUD., POLICY STUDIES: THE NEED FOR AN ECONOMIC MODEL FOR THE IDF RESERVES 11 (1999), *available at* <http://www.iasps.org/policystudies/ps40.pdf> (“The 1990s have also been characterized by debates over the unequal distribution of the burden of reserve duty and the low motivation among reservists.”); Perliger, *supra* note 25, at 223, 232.

34. YAACOV LIFSHITS, THE ECONOMICS OF PRODUCING DEFENSE: ILLUSTRATED BY THE ISRAELI CASE 136 (2003) (describing reserve duty in Israel as “imposing a heavy burden and arousing serious questions of sharing and social justice”). *See also* Perliger, *supra* note 25, at 219 (stating that if all the periods of military service are added up, “Israeli reservists usually devote five to six years of their life to military service.”); Yinon Cohen, *War and Social Integration: The Effects of the Israeli-Arab Conflict on Jewish Emigration from Israel*, 53 AM. SOC. REV. 908, 910–11 (1988) (citing a study, undertaken when more undertook reserve service than today, showing that this obligation was inducing Israelis to emigrate.).

35. *See* BEN-PORAT ET AL., *supra* note 26, at 124–25, 158; Perliger, *supra* note 25, at 223, 232.

36. *See* Perliger, *supra* note 25, at 232–33.

37. EDNA LOMSKY-FEDER & EYAL BEN-ARI, THE MILITARY AND MILITARISM IN ISRAELI SOCIETY 304–05 (1999); Hanna Herzog, *Family-Military Relations in Israel as a Genderizing Social Mechanism*, 31 ARMED FORCES & SOC'Y 5, 10 (2004).

soldiers to be, as the current expression there has it, “everyone’s children.”³⁸ The troops are seen as members of the Israeli family, and this familial conception of the country’s military lends broad public support to the military institution, irrespective of the country’s deep ideological divisions and citizens’ persistent doubts about its top leadership.³⁹

These social trends have put increasing pressure on such leadership to ensure, almost at any cost, the welfare of those who serve in combat roles,⁴⁰ so as to prove that Israel is united in its unwavering commitment to their well-being.⁴¹ The sociological dynamics at work are clear enough, even if their psychological underpinnings may be circuitous and elude empirical demonstration.⁴² Few Israelis today would doubt that the social contract has been implicitly redrawn so that military casualties and unnecessary soldier hardship are less readily tolerated.⁴³ National leaders now recognize that public support for any military commitment is precarious, perilously so, and depends on the severity of the risk to which soldiers are subjected.⁴⁴ In such circumstances, maintaining social solidarity—even in the face of clear, enduring threats to basic security interests—requires new appreciation for the human right to life, even that of ground troops at war. The significance of this development far

38. LOMSKY-FEDER & BEN-ARI, *supra* note 37, at 313 (observing that “[t]he image of the soldier in public debate is becoming more dependent, more vulnerable—more childlike”—due partly to “the greater involvement of parents in the army”). *See also infra* note 62 and accompanying text.

39. *See* TAMAR KATRIEL, COMMUNAL WEBS: COMMUNICATION AND CULTURE IN CONTEMPORARY ISRAEL 71–91 (1991); GAL, *supra* note 26, at 110; Herzog, *supra* note 37, at 19. *See also*, BEN-PORAT ET AL., *supra* note 26, at 134; CATIGNANI, *supra* note 26, at 178–79 (both discussing current official attempts to maintain public support for IDF).

40. THE COMMISSION TO INVESTIGATE THE LEBANON CAMPAIGN IN 2006, THE SECOND LEBANON WAR, FINAL REPORT 400–01 (2008) [hereinafter WINOGRAD REPORT] (in Hebrew). The Commission found that, during the Second Lebanon War, IDF troops had absorbed from the rest of Israeli society the strong aversion to sustaining military casualties, which reduced their combat initiative by inducing a “lack of . . . perseverance [by soldiers] . . . in the presence of . . . casualties.” The Commission also concluded that: “The message of the supreme importance of the minimization of casualties conveyed by the high command (and the political level) affected the way in which missions were planned” and conducted. *See also* INBAR, *supra* note 23, at 95, 228–29.

41. *See* Sergio Catignani, *Motivating Soldiers: The Example of the Israeli Defense Forces*, 34 PARAMETERS 108, 115 (2004); Yoram Schweitzer, *Israel: Hostage to Its Soldiers’ Captor*, in STRATEGIC SURVEY FOR ISRAEL 2010, 25, 32–33 (Shlomo Brom & Kurz Anat eds., 2010), available at [http://www.inss.org.il/upload/\(FILE\)1283427072.pdf](http://www.inss.org.il/upload/(FILE)1283427072.pdf).

42. *See* Bergman, *supra* note 1, at 3 (“Israeli society’s inability to tolerate even a single soldier held in captivity results in popular movements that have tremendous impact on strategic decisions made by the government Why this is the case is difficult to say, because it requires a plumbing of the Israeli psyche.”).

43. *See supra* note 23.

44. WINOGRAD REPORT, *supra* note 40, at 401. *See also* INBAR, *supra* note 23, at 95, 228–29.

outweighs the increased divisiveness—more widely reported abroad, to be sure—of Israeli society over other issues, like prerogatives of the Orthodox, assimilation of recent immigrants, or the dispute over occupation of the West Bank. It is even possible that the country has become more sensitive to military casualties than to those of Israeli civilians.⁴⁵

The pervasive influence of this new social ethos, as it may be called, significantly influences military decisionmaking at all levels: tactical, operational, and strategic.⁴⁶ It creates incentives for Israel to avoid military engagements altogether, and to restrict their scope when they are inescapable.⁴⁷ Israel's retreat from Southern Lebanon in 2000 illustrates these trends.⁴⁸ That withdrawal in significant part resulted from public pressure, mobilized by the "Four Mothers Movement," an organization led by women whose soldier-sons were fighting in the Lebanese conflict.⁴⁹

There is little doubt, however, that 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 its military goals, even domestically uncontroversial ones.⁵⁰ For example, the governmental inquiry into the 2006 Second Lebanon War concluded that national leadership had sent the IDF into war without being prepared to

45. INBAR, *supra* note 23, at 229 ("Recently . . . [t]here is greater tolerance for civilian casualties than for military losses."); Shelah, *supra* note 13 (quoting former Minister of Defense and Chief of Staff Shaul Mofaz for stating, on the first day of the Second Lebanon War: "The public takes it hard when soldiers are harmed, harder than it takes it when civilians are harmed, especially during war"). Sagi and Stern also state, with regard to captured soldiers:

In general the Israeli does not excel in being overly sensitive to a human's life, his suffering and distress. We have developed a thick skin In this context, it is fascinating to discover that there is one issue that trembles the Israeli sensitivity seismograph, and awakens us from the moral indifference towards the "other." Every Israeli knows the names of the captives . . . and fears for their fate. . . . The Israeli society is invested up to the tips of its collective nerves on behalf of the captives.

Avi Sagi & Yedidia Stern, *kama shave shavuy ysraely* [*The Price of an Israeli Captive*], HAARETZ (Nov. 29, 2011), available at <http://www.haaretz.co.il/misc/1.1528916>.

46. WINOGRAD REPORT, *supra* note 40, at 400–01; INBAR, *supra* note 23, at 95, 228–29.

47. See Yossi Kupperwasser, *The Next War with the Hizbollah: Should Lebanon Be the Target?* 11 STRATEGIC ASSESSMENT 19, 24 (2008).

48. See GABRIELLA BLUM, ISLANDS OF AGREEMENT: MANAGING ENDURING ARMED RIVALRIES 200–01 (2007).

49. See ANDREA O'REILLY, MOTHERS & SONS: FEMINISM, MASCULINITY, AND THE STRUGGLE TO RAISE OUR SONS 242 (2001). See generally *Background*, FOUR MOTHERS, <http://www.4mothers.org.il/peilut/backgrou.htm> (last visited Feb. 5, 2013).

50. Similar inefficiencies from increased concern with force protection appear to arise elsewhere as well. See, e.g., Jeffrey Record, *Force-Protection Fetishism: Sources, Consequences, and (?) Solutions*, 14 AIR & SPACE POWER J. 4, 6 (2000) (criticizing the American policy).

tolerate the number of casualties the conflict was likely to cause.⁵¹ The perceived imperative of avoiding military casualties had led political leaders to press commanders in ways that compromised mission objectives.⁵² For instance, commanders were encouraged to rely heavily on airpower, where ground forces would likely have been more tactically effective.⁵³ Commanders were also encouraged to position ground forces so as to limit direct face-to-face contact with the enemy, to curtail combat during daylight, and to allow their retreat upon suffering even modest casualties.⁵⁴ These policies were counterproductive, the Commission concluded, because they prolonged the period during which ground forces were exposed to enemy attacks. Hence, such policies may have increased, not diminished, Israeli military casualties.⁵⁵ The questionable casualty-aversion policy of discouraging ground tactics by delaying the forces and reducing their effectiveness, subjected civilian residents of Israeli border towns to more serious and sustained rocket attacks.⁵⁶

B. PROTECTING SOLDIERS FROM CAPTIVITY AND THE POLICY OF PRISONER EXCHANGE

Israel is peculiarly concerned with ensuring that its soldiers do not fall into enemy hands.⁵⁷ Its Supreme Court has noted this, writing of “the prime interest of the State of Israel in returning its sons to its borders.”⁵⁸ This

51. WINOGRAD REPORT, *supra* note 40, at 397.

52. *Id.* at 401.

53. *Id.* at 318, 331, 412, 522-524; INBAR, *supra* note 23, at 228.

54. *Id.* at 314, 401.

55. *Id.*

56. WINOGRAD REPORT, *supra* note 40, at 314, 397, 401; INBAR, *supra* note 23, at 228 (arguing that national leaders were mistaken in doubting the public’s willingness to abide military casualties).

57. See *supra* note 5; DANIEL BYMAN, A HIGH PRICE: THE TRIUMPHS AND FAILURES OF ISRAELI COUNTERTERRORISM 185 (2011) (describing it as “an area of intense Israeli vulnerability”); Bergman, *supra* note 1, at 3; Avnery, *supra* note 13 (stating, sarcastically: “the IDF is the only army in the world whose soldiers are ‘kidnapped’ rather than ‘captured’”).

58. CrimFH 7048/97 John Does v. Ministry of Defence, ¶ 24 [2000] (Isr.) available at http://elyon1.court.gov.il/files_eng/97/480/070/a09/97070480.a09.pdf. In this opinion, Chief Justice Barak uses the term “sons” (“BANIM” in Hebrew) and not “children” (“YELADIM”) as a paraphrase to *Jeremiah* 31:16–17, which reads:

Thus saith the LORD; Refrain thy voice from weeping, and thine eyes from tears: for thy work shall be rewarded, saith the LORD; and they shall come again from the land of the enemy. And there is hope in thine end, saith the LORD, that thy sons shall come again to their own border.

If one currently conducts a search on Google, the Hebrew sentence “VE SHAVU BANIM LE’GVULAM,” which means “and the sons shall come again to their own border,” the vast majority of search results discuss the issue of the captured Israeli soldiers; very few such websites discuss Bible-related issues or the once-common Zionist use of this biblical passage to inspire Jewish immigration to Israel.

objective affects decisions in ways in which other force-protection concerns, such as combat casualty avoidance, do not.⁵⁹ There is even some tension between these two concerns. Hence, the IDF sometimes requires its soldiers to assume considerable risks to reduce the likelihood that the enemy will capture fellow soldiers.⁶⁰

The particular concern with captivity avoidance has its roots in longstanding Jewish ideas about the community's duty to save a community member who has fallen into captivity.⁶¹ Yet, as with its policy on casualty aversion, Israel's current captivity-avoidance position stems from the increasing influence of the "everyone's children" ethos.⁶² The public's commitment to force protection, in both these forms, helps maintain support for the army as a central national institution within a

59. For instance Sagi and Stern state, in the context of the Second Lebanon War:

Would Israel have gone to war with Hezbollah if the incident had ended differently, with the killing of all the soldiers in the patrol? There is no way of knowing, but past events suggest the answer would be no. It appears the quick trigger fingers of last summer were an expression of our heightened sensitivity to "redeeming captives." For the most part, the Israeli public believes that returning our captives is, simply, a necessity.

Sagi & Stern, *supra* note 45.

60. For example, when an enemy tries to capture an Israeli soldier, rules of engagement require fellow soldiers to risk their lives, and even, to a limited degree, the life of the soldier in danger of capture, to prevent him from falling into enemy hands. *See* Harel, *supra* note 20 (describing, in general terms, these classified rules of engagement, and indicating that certain commanders apparently misinterpreted them in ways that further increase the risks to captured soldiers).

61. Michael Vigoda, Redeeming Prisoners of War and Bodies in Exchange for Releasing Terrorists, (2008) (Isr.), available at <http://www.justice.gov.il/NR/rdonlyres/7A431F34-8041-4BEC-A973-67403125A180/23809/69pidionshvuyml.doc> (discussing traditional Hebrew law on the subject). *See also* Bergman, *supra* note 1, at 3.

62. *See* Bergman, *supra* note 1, at 4 (describing the public campaign by a captured soldier's mother as helping effectively pressure the government to accept the terms of the Jibril exchange). Public discussion of those terms clearly reflected the then-emerging connection between the notion of soldiers as everybody's children and the aim of protecting soldiers from capture. *Id.* Shelah also laments the following:

The whiny festival around Gilad Shalit, just like expressions such as "our children" and "I sent my child to the army" exemplify that the hysteria around the "holy army totem pole" has reached a point in which it is doubtful whether the army can fulfill its destinations or make rational decisions.

Shelah, *supra* note 13; Michaels, *supra* note 5 (quoting Israel's Ambassador to the United States as stating in an interview: "Gilad Schalit [sic] is like a son to each and every one of us"); *For Gilad*, YNETNEWS.COM (July 25, 2008, 9:13 AM), <http://www.ynetnews.com/articles/0,7340,L-3573031,00.html> ("Singer Aviv Geffen on Tuesday performed his new song 'Hayered Shel Kulanu' ('Everybody's child'), which he wrote for Gilad Shalit, at a rally calling for the kidnapped IDF soldier's return."). For sources indicating that intense captivity concern has arisen from the same social processes that had made force protection, more generally, a central policy goal and acute public preoccupation, see Vigoda, *supra* note 61, at 16; Bergman, *supra* note 1, at 3, 11.

country deeply divided on so many other issues.⁶³ This strong support further reassures the decreasing portion of Israeli citizens who carry the burden of combat service and their family members that Israeli society as a whole is deeply committed to their well-being.⁶⁴

The strong personal identification with the soldiers and their family members created by the ethos of “everyone’s children” at least partly explains the special significance Israel accords to protecting soldiers from captivity.⁶⁵ When a soldier dies or is seriously injured, there is at least some clarity about his or her condition. In contrast, captors maintain considerable secrecy regarding captured soldiers’ conditions, so as to maximize the political leverage gained from their custody over them. Gilad Shalit, for example, was held captive by Hamas for more than five years.⁶⁶ During this time, the International Committee of the Red Cross (“ICRC”) was never permitted to visit him, which is a violation of international law.⁶⁷ In all that time, Hamas released only one videotape of him, one audio tape, and three letters to his family.⁶⁸ Hamas’s refusal to allow normal communication was especially disconcerting to Israelis. Their expression of

63. See WINOGRAD REPORT, *supra* note 40, at 507. The Winograd Report implies that a new social ethos attributing superordinate value to safeguarding soldiers from captivity is now threatening Israel’s security. The Commission nevertheless acknowledges that this same ethos may also strengthen social solidarity. That possibility receives little weight, however, and is virtually dismissed on the grounds that Israeli society is too divided on too many central issues, including those bearing on military policy, to speak intelligibly of any consensually uniform ethos. An opinion poll taken after the Shalit exchange nonetheless disclosed that three-quarters of the population endorsed it. *Id.*

64. Yoram Schweitzer, *A Mixed Blessing: Hamas, Israel, and the Recent Prisoners Exchange*, STRATEGIC ASSESSMENT 23, 37 (2012). USA Today quoted Israel’s Ambassador to the United States as stating:

Our soldiers have to know that when we send them out to the field of battle to risk their lives for us . . . if . . . they fall captive, that the state of Israel is going to do everything in its power to try to get them back.

Michaels, *supra* note 5. See also Schweitzer, *supra* note 41, at 32–33.

65. See Danny Kaplan, *Commemorating a Suspended Death: Missing Soldiers and National Solidarity in Israel*, 35 AM. ETHNOLOGIST 413, 414 (2008).

66. Gilad Shalit: *Released after 5 Years in Terrorist Captivity*, Israel Ministry of Foreign Affairs (Oct. 18, 2011), <http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Behind%20the%20Headlines-%20Six%20months%20in%20terrorist%20captivity%2011-Jan-2007.aspx> (stating that Shalit was held from June 25, 2006 until October 11, 2011).

67. GOLDSTONE REPORT, *supra* note 14, at ¶¶ 74, 1342–43; *Gaza: ICRC Demands Proof that Gilad Shalit Is Alive*, INT’L COMM. RED CROSS (June 23, 2011), <http://www.icrc.org/eng/resources/documents/news-release/2011/israel-palestine-news-2011-06-23.htm> (stating that such restrictions violate international law).

68. *Hostage to Hamas: Gilad Shalit’s Five-Year Ordeal*, FRANCE 24 (Oct. 12, 2011), <http://www.france24.com/en/20111012-hostage-to-hamas-gilad-shalit-five-year-ordeal-israel-palestinians-gaza>.

this concern often revealed an intensity that would seem almost melodramatic to outsiders:

One can understand—and should respect—the acute Israeli concern for the captives’ well-being. Their blood cries out from their prison cells. 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. The obligation to the captives is that much greater if they were taken prisoner while on active duty. The state has a courageous pact, written in blood, with its soldiers. This includes its duty to bring home anyone prepared to risk his life and his freedom for the homeland.⁶⁹

Still, further factors aggravate Israeli preoccupation with the plight of its captured soldiers. Israel’s wars since the 1980s, unlike earlier ones, have been fought against non-state actors.⁷⁰ Though it has varied in intensity, Israel has been in a state of conflict with its enemies almost continuously during this period. These conflicts have mainly occurred on Israeli territory, in the territories Israel conquered in 1967, and in Lebanon.⁷¹ In response to escalating Palestinian attacks from Lebanon, Israel began ever-broader cross-border military incursions there during the 1970s, culminating in the First Lebanese War of 1982.⁷² This war officially ended in 1985 when Israel retreated to a self-proclaimed “security zone” in the southern part of the country.⁷³ Yet the fighting continued even after Israel abandoned that last terrain in 2000.⁷⁴ During this prolonged conflict, Israel’s Palestinian enemies,⁷⁵ as well as Hezbollah,⁷⁶ developed the

69. Sagi & Stern, *supra* note 45. See also CrimFH 7048/97 John Does v. Ministry of Defense, ¶ 24. (2000) (Isr.).

70. Jasjit Singh, *Interpreting the Lebanon War of 2006*, 1 AIR POWER 33, 44–45 (2006).

71. See ANTHONY H. CORDESMAN, ARAB-ISRAELI MILITARY FORCES IN AN ERA OF ASYMMETRIC WARS 5 (2006) (describing the main military conflicts Israel has experienced in recent years); William W. Haddad, *Israeli Occupation Policy in Lebanon, the West Bank and Gaza*, in THE REGIONALIZATION OF WARFARE 96, 96 (James Brown & William P. Snyder eds., 1985) (discussing the connection between the conflict in Lebanon and the Israeli-Palestinian conflict).

72. BLUM, *supra* note 48, at 192–95.

73. *Id.* at 197.

74. *Id.* at 200–04.

75. Bergman, *supra* note 1, at 4. Hijacking attempts were common still earlier. See J. PAUL DE B. TAILLON, HIJACKING AND HOSTAGES: GOVERNMENT RESPONSES TO TERRORISM 109–10 (2002).

76. See SHAUL SHAY, ISLAMIC TERROR ABDUCTIONS IN THE MIDDLE EAST 89–90 (2007); Bergman, *supra* note 1, at 4. Hezbollah is a local Lebanese, not Palestinian, organization. Gideon Gera,

practice of capturing Israeli soldiers, holding them in undisclosed locations—a violation of international law⁷⁷—while pressuring Israel for prisoner exchanges.

Non-state actors have incentives that are very different from nation-states with respect to detained enemy combatants. According to international law, each side is permitted to detain prisoners of war (“POWs”) until termination of active hostilities.⁷⁸ International law also allows a state, when in armed conflict with a non-state belligerent, to detain enemy fighters until active hostilities come to an end.⁷⁹ When states fight other states, they find the end of active hostilities a congenial moment for release of each other’s detainees, for at that point neither side has strong reasons to fear immediate threat from enemy soldiers.⁸⁰ International law appears to assume that non-state belligerents will find this same temporal benchmark consistent with their aims and interests. Many times that is not the case, however, because non-state belligerents often regard active hostilities with their state adversary as ongoing, with no clear future endpoint.⁸¹ Hence, in a conflict between a state and a non-state antagonist,

The Middle East in 1992: A Year of Transition and Uncertainty, in MIDDLE EAST CONTEMP. SURV. 5, 9 (Ami Ayalon ed., 1992).

77. See *supra* text accompanying note 67; S.C. RES. 1701, U.N. DOC. S/RES/1701 (Aug. 11, 2006) (“Emphasizing the need for an end of violence, but at the same time emphasizing the need to address urgently the causes that have given rise to the current crisis, including by the unconditional release of the abducted Israeli soldiers”).

78. Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).

79. Some would dispute this account of current law, though it is consistent with how several major states interpret the applicable sources. Furthermore, until 2000, Israeli domestic law allowed indefinite detention of captured terrorists, even if no longer thought to constitute a security threat, if such detention would provide bargaining chips in future prisoner exchanges. In that year, the Israeli Supreme Court ruled that the state lacks such authority. *CrimFH 7048/97 John Does v. Ministry of Defence*, ¶ 26. (2000) (Isr.). Soon thereafter, Israel enacted legislation establishing a legal presumption that a person should be assumed to represent a security threat if she is a member of a terrorist organization, until the end of hostilities with that organization. *Imprisonment of Unlawful Combatants Law, 5762–2002*, SH No. 192 art. 7 (Isr.). See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 518–19 (2004); National Defense Authorization Act for the Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298, 1562, 1564, §§ 1021(c)(1), 1023(b)(1).

80. JEAN-MARIE HENCKAERTS ET AL., CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME 1: RULES 455 (2005), available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> (“Practice indicates that release often occurs under an agreement at the end of a conflict based on bilateral exchange.”).

81. Chief Justice Beinisch thus observes:

[I]ssuing an internment order that does not include a specific time limit for its termination does indeed raise a significant difficulty, especially in the circumstances that we are addressing,

there is usually no obvious focal point or temporal benchmark to make prisoner release mutually beneficial. This helps explain both why captured members of non-state belligerents often find themselves indefinitely detained by state adversaries and why captured members of a state's armed forces might experience similar treatment from their non-state foe.⁸² Because of this, Israel's non-state enemies have learned that capturing Israeli soldiers is the best method for pressuring Israel to release their own captured members.⁸³

This has made capturing and detaining Israeli soldiers a very effective method for securing the release of disproportionate numbers of fighters. Israel's enemies have learned not only to play upon the acute public apprehensions after a successful capture, but also to seek further capturing efforts, with an explicit aim to demoralize the Israeli public.⁸⁴ This method has grown more effective in recent years. One reliable source reports:

I have covered Israeli hostage and M.I.A. cases for more than 15 years Over that time, the issue has come to dominate public discourse to a degree that no one could have predicted. Israeli society's inability to tolerate even a single soldier held in captivity results in popular movements that have tremendous impact on strategic decisions made by the government. The issue has become a generator of history rather than an outcome of it.⁸⁵

where the "hostile acts" of the various terrorist organizations, including the Hezbollah organization which is relevant to the appellants' cases, have continued for many years, and naturally it is impossible to know when they will cease. In this reality, prisoners under the Internment of Unlawful Combatants Law may remain in detention for prolonged periods of time.

CA 6659/06 A. & B. v. State of Israel ¶ 46 [2007] (Isr.) available at http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf.

82. Amos N. Guiora, *The Quest for Individual Adjudication and Accountability: Are International Tribunals the Right Response to Terrorism*, EMORY INT'L L. REV. 497, 500 (2010) ("Needless to say, unlike the prisoner of war ("POW") in the war paradigm, for detainees, *end of hostilities* in the terrorism paradigm is a euphemism for indefinite detention").

83. KRISTA E. WIEGAND, BOMBS AND BALLOTS: GOVERNANCE BY ISLAMIST TERRORIST AND GUERRILLA GROUPS 108 (2010) (stating that without such actions non-state actors will not be able to release their members).

84. Shmuel Bar, *Deterring Nonstate Terrorist Groups: The Case of Hizballah*, 26 COMP. STRATEGY 469, 476 (2007); Ron Schleifer, *Psychological Operations: A New Variation on an Age Old Art: Hezbollah Versus Israel*, 29 STUD. CONFLICT & TERRORISM 1, 5, 8 (2006).

85. Bergman, *supra* note 1, at 3 (omitting emphasis).

Even national leaders who previously opposed prisoner exchanges,⁸⁶ such as current Israeli Prime Minister Binyamin Netanyahu,⁸⁷ have bowed to public pressure and approved deals even more generous than those they once vehemently opposed.⁸⁸ In fact, with each such transaction, Israel has found itself agreeing to release ever more prisoners in return for each Israeli soldier. In the late 1970s, the ratio was tens of prisoners for each IDF soldier.⁸⁹ Since the mid-1980s, the ratio has become several hundred prisoners for every IDF soldier.⁹⁰ The recent Shalit exchange set a new record, with the release of more than a thousand prisoners for a single IDF soldier.⁹¹

86. Two prior, unsuccessful efforts to secure the return of captured soldiers greatly contributed to Israel's increasing readiness to strike numerically lopsided deals with its enemies. The first, in 1986, involved the Israeli pilot Ron Arad, captured in Lebanon. When an opportunity arose to strike a deal, Israel drove a hard bargain, rejecting offers of asymmetrical prisoner exchanges. Arad was passed between different groups of captors whose identities became decreasingly clear. The chance for a deal passed. Today, Arad is presumed dead. See AMI PEDAHZUR, *THE ISRAELI SECRET SERVICES AND THE STRUGGLE AGAINST TERRORISM* 84 (2010); Peter Wilkinson, *Why Israelis Believe One Soldier Is Worth 1,000 Palestinian Prisoners*, CNN (Oct. 17, 2011), http://articles.cnn.com/2011-10-17/middleeast/world_meast_israel-prisoner-swap-explainer_1_israeli-army-outpost-israel-s-prisons-authority-palestinian-prisoners. Then, in 1994, a soldier, Nachshon Wachsmann, was captured by Hamas and held in the West Bank. A military attempt to rescue him failed, resulting in his death and that of another IDF soldier. The failure persuaded military commanders and civilian leaders that military rescue would be impracticable under most circumstances. Ronen Bergman, *The Failure Still Resonates*, YEDIOT AHARONOT—THE HOLIDAY SECTION, Sept. 9, 2009, at 8 [hereinafter Bergman, Failure] (“The failed rescue trauma has remained as a scar in the collective memory. In the IDF and the intelligence community there are those who claim that because of it Israel did not do enough efforts to locate Gilad Shalit and rescue him in a military operation.”).

87. BENJAMIN NETANYAHU, *A PLACE UNDER THE SUN* 209 (1996) [Hebrew] (describing the Jibril Exchange, which was the first large scale prisoners exchange, as a “shameful surrender” by the State of Israel, and arguing that the individuals released substantially contributed to the terror surge of the late 1980s); Gideon Rafael, *Ambassador & Chairman, Opening Remarks at the Jerusalem Conference on International Terrorism (July 2–5, 1979)*, in *INTERNATIONAL TERRORISM: CHALLENGE AND RESPONSE* 111, 113 (Benjamin Netanyahu ed., 1981). See also Bergman, *supra* note 1, at 2 (citing an academic article Netanyahu wrote in 1986).

88. Bergman, *supra* note 1, at 2.

89. In the first exchange deal made with a terrorist organization, in 1979, one Israeli soldier was released in exchange for seventy-six convicted terrorists. *Id.* at 4.

90. In the Jibril Exchange, made in 1985, three captured Israeli soldiers were released in exchange for 1150 prisoners. This deal is considered the one that set the “exchange rate” for subsequent exchanges. Bergman, *supra* note 1, at 4; see also Niv Soffer, *The Next Kidnaping*, 439 *MAARCHOT* 40, 42 (Oct. 2011) (in Hebrew). Soffer lists the different prisoner exchanges made with Lebanese organizations, and concluding that, between 1983 and 2008, Israel released 6495 living terrorists and turned over 423 bodies of deceased terrorists, in return for ten living Israeli soldiers and the bodies of ten dead Israeli soldiers. *Id.* These numbers, of course, do not include those terrorists released in the recent Shalit Exchange. *Id.*

91. Bergman, *supra* note 1, at 2, 10.

Although most Israelis accept the deteriorating ratio, and the corresponding potential increased risk of future terrorist attacks that accompanies it,⁹² some Israelis complain that the costs of seeking to protect soldiers in this way and to this extent are now excessive in relation to any attendant benefits.⁹³ Considerable research reveals that many of the released prisoners will return to terrorism, causing further Israeli deaths.⁹⁴ This dispute concerns the relative weight to be accorded to opposing types of risk. On one side is the immediate risk to a captured soldier, an identifiable individual. On the other is the less proximate risk to a much larger number of Israeli civilians who are unidentifiable abstractions, and thus the risk to their lives is “merely” a statistical probability.

This risk trade-off implicates a raging scholarly debate at the intersection of philosophy and economics.⁹⁵ Some argue that actual lives

92. See Survey, *supra* note 3 (showing 79 percent support for the Shalit Exchange).

93. Some terrorist victims and their families have sought to persuade the Israeli Supreme Court to block lopsided prisoner exchanges on these grounds. Though the Court has uniformly rejected such petitions, concerns with the terrorist recidivism argument have deeply troubled the justices. *E.g.*, H CJ 7523/11 Almagor-Association of Victims of Terrorism v. Prime Minister, ¶ 9 (Oct. 17, 2011) (unpublished) (Isr.), <http://elyon1.court.gov.il/files/11/230/075/n05/11075230.n05.pdf> (stating that this argument is the most serious one raised by the petitioners); H CJ 10578/08 M.SH.L.T. v. Government of Israel, ¶¶ 12–14, 17 (Nov. 3, 2009) (unpublished) (Isr.), <http://elyon2.court.gov.il/files/08/780/105/B12/08105780.B12.htm> (declining to void a prisoner exchange agreement, but ruling that in any future ones the government must consider both general statistics regarding recidivism of formerly released terrorists and the likelihood for recidivism by each individual considered for release). See also WINOGRAD REPORT, *supra* note 40, at 503, 508. In public debate, there are many who further charge that the country’s “obsession” with captivity-avoidance leads it down an irrationally self-destructive path. See Shelah, *supra* note 13; Sagi & Stern, *supra* note 45 (arguing that “submitting to secure their release ‘at any cost’ may undermine the supreme objective for which they were sent to the front in the first place, and in whose name their comrades fell: bolstering the country’s security.”). See also Kupperwasser, *supra* note 47, at 24 (making a similar irrationality argument in the context of the value attributed by the Israeli society to the general force protection aim; that is, the aim of avoiding military casualties).

94. According to statistics from AL-MAGOR, the organization for Israeli terror victims, 80 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 exchanges, have returned to terrorist activities. News in Brief II, HAARETZ (Dec. 4, 2007, 12:00 AM), <http://www.haaretz.com/print-edition/news/news-in-brief-ii-1.234506>. See also Bergman, *supra* note 1, at 6. Bergman cites statistics from Israel’s intelligence agencies to the effect that 45 percent of those released in previous prisoner exchanges returned to terrorist activity; he further cites the former head of the MOSAD (the Israeli equivalent of the Central Intelligence Agency) as stating that “[t]wo hundred thirty-one Israelis were slaughtered by those freed in the Tannenbaum exchange.” *Id.*

95. Fania Oz-Salzberger, *Debate on Shalit Deal Honors the Israeli Public*, HAARETZ (Oct. 23, 2011), <http://www.haaretz.com/print-edition/opinion/debate-on-shalit-deal-honors-the-israeli-public-1.391449> (“Philosophers . . . are debating the issue of the weight of the risk of a specific individual’s

and statistical lives should be treated identically.⁹⁶ Others assert that public policy may subject only statistical lives, not actual lives, to cost-benefit analysis.⁹⁷ Before deciding how to resolve the Shalit predicament, Israeli policymakers discussed the situation in precisely these terms.⁹⁸ Moreover, for much of Shalit's five-year captivity, Israel's security agencies opposed releasing those prisoners demanded by his capturers.⁹⁹ These agencies withdrew their opposition only after Shalit's captors abandoned demands for release of those Israel deemed particularly dangerous.¹⁰⁰ Israeli policymakers thus adopted a more moderate, intermediate position than urged by either of the two theoretical extremes.¹⁰¹

immediate death as relative to the risk of the future death of many whose identities are unknown. Here this issue is a reality and an entire nation is grappling with it.”).

96. Mnookin stated:

So what may explain Israel's bargain? Gilad Shalit is a known individual: what psychologists would call an “identifiable being.” . . . By contrast, the Israelis who are endangered by this deal are mere statistics—an unidentifiable group of people who may die in the future. Psychologists call these “statistical lives.” There is a long line of psychological research showing that, in making decisions, human beings will incur far greater costs to save one identifiable being from immediate peril than to enact safety measures that might save many more statistical lives. . . . Such a response is entirely human, but it is not rational.

Mnookin, *supra* note 4. See also JONATHAN ALDRED, *THE SKEPTICAL ECONOMIST: REVEALING THE ETHICS INSIDE ECONOMICS* 151–52 (2009) (discussing the general philosophical dispute).

97. FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 68–71 (2005). See also Ralph L. Keeney, *Understanding Life-Threatening Risks*, 15 *RISK ANALYSIS* 627, 630 (1995) (“[I]t may be appropriate to assign a different economic value (most people suggest a smaller one) to saving statistical lives than to saving identifiable lives.”).

98. That is the claim made in Oz-Salzberger, *supra* note 95. See also Keeney, *supra* note 97, at 636. Keeney discusses the general philosophical dispute and argues that such problems cannot be solved through “a completely value-free or scientific analysis.” *Id.* He further argues that “communications about such risks that do not recognize the complexity [of the issue] are irresponsible” and that “[t]hose charged with communicating about a specific risk problem should understand the problem from the viewpoints of their audiences.” *Id.*

99. See Bergman, *supra* note 1, at 5–10.

100. See *id.* In fact, some believe that it is likely that, but for recent regional geopolitical shifts created by the “Arab Spring,” no deal for Shalit would have occurred. See also *id.* at 10. “ Hamas also had its reasons for moving ahead—the Arab spring was exerting considerable pressure on the organization’s leaders in Damascus, who feared for their future if President Bashar Assad of Syria fell.” *Id.*

101. Barak Ravid, *The Shalit Deal: The Critical Debate in the Government—Heads of the Security System Support the Deal*, HAARETZ (Oct. 12, 2012, 11:26 PM), <http://www.haaretz.co.il/news/shalit-deal/1.1522140> (in Hebrew). Though they initially opposed the generous terms of this exchange, the heads of Israel’s security agencies ultimately resolved to endorse it. See *id.* The IDF’s Chief of Staff has been quoted as stating: “This deal right now is the only way. It is inevitable that we will meet some of those released in future combat, but in our assessment we think that risks from release of these prisoners are containable, in security terms.” *Id.*

Certain critics, both foreign and Israeli, also objected that the lopsided terms of exchange encouraged further capture of IDF soldiers.¹⁰² For this reason, other states facing terrorist threats often refuse to engage in prisoner exchanges.¹⁰³ Notably, this has been the United States's policy in Iraq and Afghanistan.¹⁰⁴ Yet the American experience also suggests that refusal to negotiate encourages non-state captors to execute captured soldiers.¹⁰⁵ These competing considerations permit reasonable disagreement over which approach best protects a state's troops.¹⁰⁶

102. WINOGRAD REPORT, *supra* note 40, at 503. The Commission stated that "it is clear that the behavior of Israeli governments has encouraged kidnappings" and "that the greater our vulnerability is perceived to be, so the 'price' demanded—and received rises ever higher. By the same token, the incentive to engage in further, future kidnapping increases." *Id.* See also BYMAN, *supra* note 57, at 185 (discussing the motivations of Hamas); Soffer, *supra* note 90, at 46 ("Israel's readiness to pay a 'painful price' in return for the release of kidnapped soldiers—dead or alive—encourages additional kidnappings in the future").

103. *E.g.*, G7 Ottawa Ministerial Declaration on Countering Terrorism, art. 7 (Dec. 12, 1995), <http://www.g8.utoronto.ca/terrorism/terror96.htm> ("We noted the sinister increase in the taking of hostages by terrorists We call on all States . . . to refuse to make substantive concessions to hostage-takers . . . to deny to hostage takers any benefits from their criminal acts . . . and to bring to justice those responsible.").

104. The United States' refusal to engage in lopsided prisoner exchanges did, in fact, decrease attempts to capture its soldiers. The Winograd Commission, for example, stated:

A partial proof, at the least, for the effectiveness of strategies that are consistently pursued is the fact that after relatively few threats were followed through to harm the kidnaped after the refusal of states such as the U.S. to negotiate or to release detainees or to act in any other way demanded by the kidnappers—the number of terror attacks of kidnapping and negotiation directed at American soldiers has declined.

WINOGRAD REPORT, *supra* note 40, at 505; see also Vigoda, *supra* note 61, at 16.

105. For example, U.S. Army PFC Keith Maupin was captured in 2004; the U.S. refused to negotiate his release, and he was later executed by his captors. Dreazen, *supra* note 5. Also, U.S. Staff Sergeant Ahmed al-Taie was captured in 2006; his captors demanded ransom for his release; the United States refused to negotiate; his captors announced that they executed him in 2010; and in 2012, his death was confirmed. Guttman, *supra* note 5; Peter Graff, *Michigan Burial for Last U.S. Soldier Missing in Iraq*, REUTERS-CANADA (Feb. 12, 2012, 7:18 AM), available at <http://ca.reuters.com/article/topNews/idCATRE81Q11N20120227>. However, it is doubtful whether, currently, the United States still holds this position so adamantly. According to newspaper reports, the United States has been ready recently to strike deals with its non-state enemies in which detained terrorists are released in exchange for the return of American soldiers as well as other gains. See AP, *Taliban Offer to Return US Soldier in Exchange for Guantánamo Prisoners*, GUARDIAN.CO.UK (20 June 2013) <http://www.guardian.co.uk/world/2013/jun/20/taliban-us-soldier-guantanamo-exchange>; Elisabeth Bumiller & Matthew Rosenberg, *Parents of P.O.W. Reveal U.S. Talks on Taliban Swap*, N.Y. TIMES, May 10, 2012, at A1, available at <http://www.nytimes.com/2012/05/10/world/asia/pow-is-focus-of-talks-on-taliban-prisoner-swap.html?pagewanted=all> (reporting that recently the United States has attempted to negotiate, at this point unsuccessfully, the release of Sgt. Bowe Bergdahl, who is the only American soldier currently held by the Taliban, in return for the release of several Taliban prisoners held at Guantánamo); Kevin Sieff, *Secret U.S. Program Releases High-Level Insurgents in*

Some contend that a state's resort to force in response to the capturing of its soldiers, either to deter that practice prospectively or even to regain custody of current captives, is inconsistent with the international law of *jus ad bellum* necessity and proportionality. The law of *jus ad bellum* necessity prohibits recourse to force, even in response to armed attack, if the security threat thereby posed could clearly be satisfactorily addressed through nonviolent means.¹⁰⁷ A state's violent response to armed attack is also disproportionate if it exceeds the measure of force needed to counter the threat that victim state faces.¹⁰⁸ Israel's critics allege that its substantial military engagements of recent years, in Lebanon and Gaza, violated *jus ad bellum* because the country could simply have negotiated a prisoner exchange, involving no exercise of force at all.¹⁰⁹ Alternatively, Israel could have allowed its soldiers to die in captivity.¹¹⁰

Exchange for Pledges of Peace, WASH. POST (May 7, 2012), http://www.washingtonpost.com/world/asia_pacific/secret-us-program-releases-high-level-insurgents-in-exchange-for-pledges-of-peace/2012/05/06/gIQAFfJn6T_story_1.html (reporting deals in which Taliban members were released in return for other gains). See also A. HUNSICKER, UNDERSTANDING INTERNATIONAL COUNTER TERRORISM: A PROFESSIONAL'S GUIDE TO THE OPERATIONAL ART 209 (2006); GARY NOESNER, STALLING FOR TIME: MY LIFE AS AN FBI HOSTAGE NEGOTIATOR 219 (2010) (questioning the efficacy of the American policy of non-negotiation, and whether the United States has in fact consistently applied it).

106. The present analysis does not suggest that any and all such numerically asymmetrical exchanges are ultimately justified. In fact, two official inquiries (the Winograd Commission and Shamgar Commission) recently concluded that any future exchanges should adhere to some limit on the inequality of their terms, in light of the perverse incentives and enhanced risks of future terror attacks such lopsided exchanges create. The commissions thus implied that Israel had exceeded such defensible limit in some of its past exchanges. See WINOGRAD REPORT, *supra* note 40, at 501–09; Schweitzer, *supra* note 41, at 33, 35; Bergman, *supra* note 1, at 11 (reporting on the recommendations of the classified Shamgar Report).

107. E.g., Michael N. Schmitt, *Law-Enforcement, Self-Defense and Armed Conflict*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 525, 534–35 (Roberta Arnold ed., 2008).

108. The exact meaning of this test will be discussed *infra* Section III(B).

109. See, e.g., HASAN AFIF EL-HASAN, ISRAEL OR PALESTINE? IS THE TWO-STATE SOLUTION ALREADY DEAD? 200 (2010). See also Yaroslav Shiryayev, *The Right of Armed Self-Defense in International Law and Self-Defense Arguments Used in the Second Lebanon War*, 3 ACTA SOCIETATIS MARTENSIS 80, 80–82 (2008) (making a similar argument in relation to the Second Lebanon War).

110. There were no explicit contentions that *jus ad bellum* necessity or proportionality had been violated by Israel's decision not to allow its soldiers to die in captivity. *But see* Sagi & Stern, *supra* note 45 (arguing that if its soldiers had been killed and not taken captive, Israel most likely would not have entered the Second Lebanon War); Shelah, *supra* note 13 (criticizing IDF decisions regarding the design of Operation Cast Lead and the Second Lebanon War on the grounds that such decisions were too heavily influenced by the "everyone's children" ethos). For a similar criticism of the American decision to continue the fighting in Vietnam as long as the POW issue remained unsolved, see John Mueller, *Vietnam and Iraq: Strategy, Exit and Syndrome*, in VIETNAM IN IRAQ: TACTICS, LESSONS, LEGACIES AND GHOSTS 179, 182 (John Dumbrell & David Ryan eds., 2006).

However, allowing its captured soldiers to die in captivity would gravely demoralize Israeli society, further jeopardizing its security; and it is also likely to lead its enemies to adopt a policy of executing any Israeli soldier who does happen to fall into their hands during combat. At the same time, experience amply suggests that prisoner exchanges only encourage further efforts to capture Israeli soldiers as bargaining chips for later such deals. The best policy, then, may be to neither categorically make such deals nor refuse to make such deals. Moreover, in light of the severe disadvantages of both non-violent alternatives, an armed response aimed to prevent and deter enemy capture attacks may, sometimes, be necessary; as it may be the only course of action that can significantly reduce the enduring, overall threat presented by recurrent capture attacks against soldiers.¹¹¹

III. PROTECTING SOLDIERS FROM CAPTIVITY AND THE PROPORTIONALITY OF ISRAEL'S CONDUCT

A. THE SPIDER WEB DOCTRINE AND EVENTS LEADING TO OPERATION CAST LEAD

It is not only Israel's heightened sensitivity to capture attacks against its soldiers that has exacerbated the threat to its national security. In addition to that "subjective" consideration, as detailed in the current Section, there is also the "objective" fact that Israel's enemies increasingly rely on capturing soldiers, not merely as an isolated tactic, but as central to their broader, long-term strategy. Such captures are viewed as key to the overarching goal of demoralizing the Israeli public, sapping its moral resilience and collective readiness to defend itself. This shift in the strategy of Israel's enemies significantly influenced its decisions on both the breadth of its 2008 Gaza operation and the weight accorded to force protection, especially captivity avoidance, within the operation.

A brief historical review is necessary at this point to put Israel's sensitivity to capture attacks into context. During the 1990s, peace negotiations conducted between Israel and its northern neighbors led nowhere. Since Syria controlled much of Lebanon, the collapse of peace

111. Cf. Thomas Hurka, *Proportionality and the Laws of War*, 33 PHIL. & PUB. AFF. 34, 43 (2005). Hurka examines the *jus ad bellum* legality of the Gulf War, in light of the alternative of negotiating an Iraqi retreat from Kuwait in return for some territorial concession. Hurka states: "One can resist the aggression, which will deter future aggression, or not resist, which will encourage it, and the benefits of the first choice must include avoiding the harms of the second." *Id.*

talks with Syria in January 2000¹¹² precluded a negotiated Israeli withdrawal from Southern Lebanon.¹¹³ Recognition of this, combined with public desperation over military casualties, induced Israel to retreat unilaterally from Lebanon in May of that year.¹¹⁴ Yet the withdrawal appears to have only encouraged Hezbollah, who has become Israel's main enemy in Lebanon.¹¹⁵ Hezbollah's declared aim was not merely Israel's expulsion from Lebanon, but also the annihilation of the State of Israel.¹¹⁶ The IDF's withdrawal led Hezbollah leaders to conclude that they had discovered methods that were well suited to advancing their largest goal.¹¹⁷

Hezbollah's Secretary General stressed this conclusion in a famous speech soon after the withdrawal.¹¹⁸ He argued that although Israel's military was well equipped, the society from which its members are drawn and on whom they rely had proven itself surprisingly and tellingly weak.¹¹⁹ Israeli society is, in his words, as tenuous and precarious as a "spider's web" in that the IDF withdrawal revealed that Israelis are no longer prepared to bear the human cost of continued conflict.¹²⁰ By pressing in

112. ISRAEL IN THE MIDDLE EAST: DOCUMENTS AND READINGS ON SOCIETY, POLITICS, AND FOREIGN RELATIONS, PRE-1948 TO THE PRESENT 1, 6 (Itamar Rabinovich & Jehuda Reinharz eds., 2007).

113. BLUM, *supra* note 48, at 200–01.

114. *See id.* (discussing the influence of the failure of peace talks on Israel's decision to retreat); Yagil Levy, *An Unbearable Price: War Casualties and Warring Democracies* 22 INT'L J. OF POL. CULTURE & SOC'Y 69, 69–70 (2009) (discussing the influence of public exhaustion over the country's military casualties on Israel's decision to retreat); *supra* note 49 and accompanying text.

115. *See* NICHOLAS BLANFORD, WARRIORS OF GOD: INSIDE HEZBOLLAH'S THIRTY-YEAR STRUGGLE AGAINST ISRAEL 304–06 (2011) (contending that Hezbollah's new priority on capturing Israeli soldiers showed that Israeli retreat from Lebanon would not lead the organizations to disarm).

116. *See* EITAN AZANI, HEZBOLLAH: THE STORY OF THE PARTY OF GOD: FROM REVOLUTION TO INSTITUTIONALIZATION 77, 88 (2011); AUGUSTUS RICHARD NORTON, HEZBOLLAH: A SHORT HISTORY 38–39 (2009) (quoting statements by Hezbollah leaders). For further support, see the 1985 Open Letter that was published by Hezbollah upon its formation and translated into English in *The Hezbollah Program: An Open Letter (February 16, 1985)*, in RABINOVICH & REINHARZ, *supra* note 112, at 427 ("Our primary assumption in our fight against Israel states that the Zionist entity is aggressive from its inception, and built on lands wrested from their owners, at the expense of the rights of the Muslim people. Therefore our struggle will end only when this entity is obliterated."). The annihilation of Israel according to Hezbollah must further include the expulsion of all Jews who immigrated into Israel in the last century. Hezbollah's Secretary General Hassan Nasrallah expresses this idea in his "Spider Web" speech. Sec. Gen. of Hizbullah Sayyed Hassan Nasrallah, Address at the Festival of Victory in Bint Jbeil City (May 26, 2000), *translation available at* <http://breakingthespidersweb.blogspot.com/2011/05/nasrallahs-spider-web-speech.html>.

117. *See* BLANFORD, *supra* note 115, at 457–68 (quoting recent statements by Hezbollah leaders and other members indicating they believe they will attain their strategic objectives with this strategy).

118. *See* Nasrallah, *supra* note 116.

119. *Id.*

120. Hezbollah's Secretary General Hassan Nasrallah has stated:

this way on Israel's "soft spots," Hezbollah and its Palestinian comrades could force that state's dissolution.¹²¹

Hezbollah concluded from the Lebanese experience that Israel's very softest spot lay in its extraordinary aversion to casualties, both military and civilian, and especially in its abhorrence of soldier captivity.¹²² Accordingly, Hezbollah chose to concentrate on these weaknesses,¹²³ and

Hence, we offer this noble Lebanese model to our people in Palestine. To free your land, you don't need tanks, a strategic balance, rockets, and cannons; you need to follow the way of the past self-sacrifice martyrs who disrupted and horrified the coercive Zionist entity. You, the oppressed, unarmed, and restricted Palestinians, can force the Zionist invaders to return to the places they came from. . . . The choice is yours, and the model lies right in front of your eyes. An honest and serious resistance can make the freedom dawn arise. Our brothers and beloved Palestinians, I tell you: Israel, which owns nuclear weapons and the strongest war aircraft in the region, is feeble than a spider's web—I swear to God.

Id.

121. See *id.*; JALIL RAWSHANDIL & SHARON CHADHA, *JIHAD AND INTERNATIONAL SECURITY* 83 (2006); Laura Khoury & Seif Da'na, *Hezbollah's War of Position: The Arab-Islamic Revolutionary Praxis*, 12 *ARAB WORLD GEOGRAPHER* 136, 136–49 (2009).

122. Narsallah has stated more about exploiting Israel's casualty aversion, saying that Israelis are "described by Allah as 'the people who guard their lives most,'" and that their "strong adherence to this world with all its vanities and pleasures constitutes a weakness." ANTHONY H. CORDESMAN, GEORGE SULLIVAN & WILLIAM D. SULLIVAN, *LESSONS OF THE 2006 ISRAELI-HEZBOLLAH WAR* 34 (2007), (quoting a speech made by Narsallah on Hazbollah's Manar TV station three weeks before fighting erupted in 2006) available at http://csis.org/files/publication/120720_Cordesman_LessonsIsraeliHezbollah.pdf. See also RAWSHANDIL & CHADHA, *supra* note 121, at 83 (discussing Hezbollah's conclusion that casualty aversion is an Israeli soft spot in the context of the "Spider Web" doctrine). Narsallah contrasted that with the Lebanese's "willingness to sacrifice their blood, souls, children, fathers and families for the sake of the nation's honor, life and happiness," calling this "one of [their] nation's strength." CORDESMAN, SULLIVAN & SULLIVAN, *supra*, at 34.

In public speeches made in 2006, Nasrallah emphasized the practical benefit of capturing Israeli soldiers for later prisoner exchange. Yet many experts believe, on the basis of considerable evidence, that Hezbollah pursued both aims through such attacks; i.e. both to induce large-scale prisoner releases and to implement the "Spider Web" doctrine. See WINOGRAD REPORT, *supra* note 40, at 502–03; CORDESMAN, SULLIVAN & SULLIVAN, *supra*, at 34; Soffer, *supra* note 90, at 41. Support for this conclusion is substantial. First, Hezbollah has long been aware of Israeli sensitivity to the capture of soldiers and long exploited this acute sensitivity for purposes of public demoralization. See, e.g., RUNE FRIBERG LYME, DANISH INST. FOR INT'L STUD., *HIZB'ALLAH'S COMMUNICATION STRATEGY: MAKING FRIENDS AND INTIMIDATING ENEMIES* 35 (2009) (observing that Hezbollah TV broadcasts in Hebrew since the late 1980s "continuously sought to erode the authority of the IDF by questioning the Israeli claim never to leave anyone behind, strongly focusing on Ron Arad, a missing bomber"); SHAY, *supra* note 76, at 89; Bar, *supra* note 84, at 476; Schleifer, *supra* note 84, at 5, 8. Second, this is the way in which these capture attacks are viewed in public perception within the Arab world. See Khoury & Da'na, *supra* note 121, at 137, 141 (discussing the perception within the Arab world of the prisoner exchanges as a proof of the "Spider Web" theory); Wiegand, *supra* note 83, at 42, 108.

123. See also RONEN BERGMAN, *THE SECRET WAR WITH IRAN: THE 30-YEAR CLANDESTINE STRUGGLE AGAINST THE WORLD'S MOST DANGEROUS TERRORIST POWER* 260 (2008) (discussing Hezbollah efforts to maintain a state of conflict with Israel through capture attempts after Israel's

has made several attempts between 2000 and 2006 to capture Israeli soldiers—succeeding in two cases.¹²⁴ Israel first reacted moderately, by way of brief, localized attempts to regain custody of the captured soldiers and, failing that, small-scale bombing of Hezbollah targets.¹²⁵

Israel's efforts to placate its northern enemies were not confined to territorial withdrawal. Israel has adopted a policy of ignoring most cross-border Hezbollah provocations—only the most severe of such incidents, involving the firing of weapons into Israeli territory, have elicited even minimal armed response.¹²⁶ In order to diminish friction with Hezbollah, Israel has also substantially decreased its military presence near the Lebanese border.¹²⁷ Israel later concluded, however, that this lenience toward willfully provocative misconduct near its border enabled Hezbollah to construct the infrastructure, including watch-posts and installations for attack preparation, which it would later use to capture Israeli soldiers.¹²⁸

Like those with Syria, peace negotiations between Israel and the Palestine Liberation Organization (“P.L.O.”) also failed soon thereafter (in September 2000).¹²⁹ This led to renewed violence between the Palestinians and Israel in a conflict commonly known as the Second Intifada.¹³⁰ The same considerations that prompted Israel to withdraw from Lebanon in 2000—growing despair over a negotiated peace and growing aversion to taking casualties—later induced Israel to withdraw from Gaza in 2005 as

withdrawal from Lebanon); BLANFORD, *supra* note 115, at 304–06 (discussing the strategic significance of capturing attacks for Hezbollah after the IDF's retreat from Lebanon).

124. On October 7, 2000, Hezbollah executed its first successful capture, taking two Israeli soldiers (both of whom died during capture). Israel reacted with a small-scale armed response. On October 16, Hezbollah kidnapped a civilian, Elhanan Tannenbaum, because he was a retired IDF colonel. Both Tannenbaum and the bodies of the two dead soldiers were returned in January 2004 in exchange for 435 prisoners. There followed, in November 2005, a failed capture-attack that injured twelve Israelis. Israel responded with very limited counterforce. See AMOS HAREL & AVI ISSACHAROFF, 34 DAYS: ISRAEL, HEZBOLLAH, AND THE WAR IN LEBANON 5–7 (2008); Bergman, *supra* note 1, at 4; Michael N. Schmitt, “Change Direction” 2006: Israeli Operations in Lebanon and the International Law of Self-Defense, 29 MICH. J. INT’L L. 127, 131–34, 151–52 (2008); Soffer, *supra* note 90, at 41.

125. SHAY, *supra* note 76, at 95–96.

126. THE COMMISSION TO INVESTIGATE THE LEBANON CAMPAIGN IN 2006, THE SECOND LEBANON WAR, PARTIAL REPORT 41–47 (2007) (discussing this policy, enumerating Hezbollah provocations, and describing Israel's serial responses to them).

127. *Id.* at 47.

128. Soffer, *supra* note 90, at 41.

129. RABINOVICH & REINHARZ, *supra* note 112, at 6.

130. *Id.*

well.¹³¹ To reduce tensions, the Israeli government again instructed the IDF to ignore most border provocations.¹³²

Nevertheless, in 2006, elections of the Palestinian Authority yielded a government headed by Hamas, which, like Hezbollah, is expressly dedicated to Israel's dissolution.¹³³ Hamas then sought to follow Hezbollah's "spider web" strategy of civilian demoralization.¹³⁴ Just as Hezbollah had done earlier, Hamas began bombing Israeli border towns.¹³⁵ At first, Israel reacted with economic sanctions and small counter-attacks on Hamas targets.¹³⁶ But like its northern ally, Hamas also began seeking to capture Israeli soldiers.¹³⁷ It was eventually successful in seizing Gilad Shalit on June 25, 2006.¹³⁸

131. TAMAR S. HERMANN, *THE ISRAELI PEACE MOVEMENT: A SHATTERED DREAM* 226 (2009); Levy, *supra* note 114, at 76 (discussing the influence Israeli actress Osnat Vishinsky, whose son was killed in 2004 while serving as a soldier in Gaza, had on legitimizing the withdrawal from Gaza in 2005, and stating: "Vishinsky echoed the Four Mothers' tone, . . . a theme that PM Ariel Sharon himself had already addressed with his plan of unilateral withdrawal from Gaza. Against this background, Vishinsky's support was instrumental in legitimizing the existing agenda . . ."). Levy, however, further claims (p. 74) that "the tone of the bereavement discourse [is becoming increasingly] tolerant of the loss of Israeli lives" due to "a clear drop in the proportion of casualties from the secular middle class groups".

132. Soffer, *supra* note 90, at 41 (discussing Lebanon); Zaki Shalom & Yoaz Hendel, *After the Winograd Report*, 10 STRATEGIC UPDATE 19, 24 (2007) (in Hebrew) (stating that such a policy also was adopted in the border with Gaza).

133. Amichai Cohen, *The Principle of Proportionality in the Context of Operation Cast Lead: Institutional Perspectives*, 35 RUTGERS L. REC. 23, 24 (2009).

134. See THANASSIS CAMBANIS, *A PRIVILEGE TO DIE: INSIDE HEZBOLLAH'S LEGIONS AND THEIR ENDLESS WAR AGAINST ISRAEL* 17 (2010) (stating that Hamas has adopted Hezbollah's approach); Khoury & Da'na, *supra* note 121, at 137 (attributing increasing support for Hamas in the Arab world to the successes of the "Spider Web" theory); Soffer, *supra* note 90, at 41 ("Israel's sensitivity to the lives of its civilians and soldiers, and its readiness to release terrorists in return for kidnapped soldiers have led Hezbollah to the conclusion that kidnapping is an efficient strategy. . . . Hezbollah's modes of action have been a model for imitation for the Palestinians"); Bergman, *supra* note 1, at 5.

135. See OPERATION IN GAZA, *supra* note 15, at 14–26; Uzi Rubin, *The Missile Threat from Gaza—from Nuisance to Strategic Threat* 9–10, 13 (B.S.C.S.S. Mideast Security and Policy Studies No. 91, 2011), available at <http://www.biu.ac.il/Besa/MSPS91.pdf>.

136. OPERATION IN GAZA, *supra* note 15, at 19–22; Cohen, *supra* note 133, at 24.

137. SHAY, *supra* note 76, at 21, 149; Soffer, *supra* note 90, at 41. See also Khoury & Da'na, *supra* note 121, at 137.

138. HAREL & ISSACHAROFF, *supra* note 124, at 8–12 (noting that two other Israeli soldiers were killed, and one injured, in that Hamas operation). During the late 1980s and the 1990s, Hamas committed several capture attacks against Israeli soldiers. However, most likely due to the lack of control over a territory in which it could hide the soldiers, the Israeli soldiers it captured were usually executed a short while after being captured, and Israel, unlike in many of the Lebanese cases, refused to negotiate prisoner exchanges. See SHAY, *supra* note 76, at 30, 33, 54, 149.

In response to the capture of Shalit, Israel reacted more forcefully than before, unleashing “Operation Summer Rains.”¹³⁹ Ground forces entered the Gaza Strip to destroy rocket-launching sights, and the Israeli air force bombed Hamas training camps and arms caches.¹⁴⁰ However, later events in Lebanon soon limited the scale of the Gaza operation. Not long after Shalit’s capturing, Hezbollah captured two more Israeli soldiers.¹⁴¹ Israel considered Hezbollah a greater threat than Hamas, and did not wish to fight a two-front war.¹⁴² It therefore focused most of its attention to the north, which became the Second Lebanon War.¹⁴³ Both international opinion and the Israeli public consider Israeli’s war effort in Lebanon unsuccessful.¹⁴⁴ Yet, strong evidence suggests that Israel actually induced Hezbollah to discontinue rocket attacks and soldier capture attempts.¹⁴⁵ Though causation is difficult to infer from correlation in such circumstances, it is noteworthy that no further capture attacks and very few rocket attacks occurred after the 2006 war.¹⁴⁶ Hezbollah’s top leader even expressly acknowledged that he would not have initiated such capture efforts had he anticipated the intensity of Israel’s 2006 response to them.¹⁴⁷

Both Operation Summer Rains and the Second Lebanon War ended in unofficial cease fires.¹⁴⁸ However, hostilities with Hamas continued to grow. Israel ignored minor provocations, but continued to apply economic sanctions and, when attacked by rockets, counterattacked in small measure

139. See CAROL MIGDALOVITZ, CONG. RESEARCH SERV., RL33530, ISRAELI-ARAB NEGOTIATIONS: BACKGROUND, CONFLICTS AND U.S. POLICY 17 (2009).

140. Daniel Kuthy, *Gaza War (2006)*, in CONFLICT AND CONQUEST IN THE ISLAMIC WORLD 330 (Alexander Mikaberidze ed., 2011).

141. HAREL & ISSACHAROFF, *supra* note 124, at 8–12. In this attack, other soldiers were killed, while civilian towns along the northern border of Israel were bombarded.

142. *Id.* at 80–81.

143. *Id.*

144. Gabriel Siboni, *War and Victory*, 1 MIL. & STRATEGIC AFF., no. 3, 2009, at 39, 44.

145. Lazar Berman, *The Lessons of the Second Lebanon War*, THE WEEKLY STANDARD (Aug. 12, 2011, 12:15 PM), http://www.weeklystandard.com/blogs/lessons-second-lebanon-war_588240.html. See also Gabriel Siboni, *supra* note 144, at 39, 44.

146. See BENJAMIN S. LAMBETH, AIR OPERATIONS IN ISRAEL’S WAR AGAINST HEZBOLLAH: LEARNING FROM LEBANON AND GETTING IT RIGHT IN GAZA 158–59 (2011) (discussing strong indications that the Second Lebanon War effectively deterred Hezbollah’s rocket attacks).

147. BILAL Y. SAAB & NICHOLAS BLANFORD, SABAN CTR FOR MIDDLE EAST POL’Y, THE NEXT WAR: HOW ANOTHER CONFLICT BETWEEN HIZBALLAH AND ISRAEL COULD LOOK AND HOW BOTH SIDES ARE PREPARING FOR IT 4 (2011) (citing Nasrallah’s admission), available at http://www.brookings.edu/~media/research/files/papers/2011/8/hizballah%20israel/08_hizballah_israel.pdf.

148. Kuthy, *supra* note 140, at 330 (discussing operation Summer Rains); HAREL & ISSACHAROFF, *supra* note 124, at 216–19 (discussing the Second Lebanon War).

against particular Hamas installations.¹⁴⁹ There were also strong indications that Hamas continued its efforts to capture soldiers.¹⁵⁰

In 2007, Hamas staged a coup d'état, seizing complete control over Gaza, which it had shared with the P.L.O. since the year before.¹⁵¹ Rocket attacks by Hamas on Israeli civilian centers intensified after the coup.¹⁵² Israel's first responses were again limited to discrete, small-scale counterattacks and the tightening of sanctions.¹⁵³ Hostilities intensified in December 2008 when Hamas began to fire more rockets and mortars into Israel.¹⁵⁴ Israel first issued several warnings by way of press releases, as well as through both Egyptian emissaries and official notice to the United Nations.¹⁵⁵ In its communication with the United Nations, Israel stated that it would not indefinitely tolerate Hamas's attacks, and that if the attacks did not stop, it would exercise its right of self-defense.¹⁵⁶ Israel's warnings had no effect, as some 3,000 rockets and mortars were launched at towns in southern Israel during the year preceding Operation Cast Lead,¹⁵⁷ including over 300 rockets and mortar shells that fell in the two weeks before that Israeli operation.¹⁵⁸

149. PUBLIC COMMISSION APPOINTED TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010, ¶ 18 (2011) available at <http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf> [hereinafter "Turkel Committee-1st Report"]. See also, OPERATION IN GAZA, *supra* note 10, at 14–15; Shalom & Hendel, *supra* note 132, at 24; Cohen, *supra* note 133, at 24.

150. See *IDF Uncovers Gaza Strip Tunnel Intended for Terror Attack*, ISR. MINISTRY FOREIGN AFF., (Nov. 5, 2008), http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/IDF_uncovers_Gaza_Strip_tunnel_intended_for_terror_attack_5-Nov-2008.htm (reporting the discovery of a "tunnel meant for the immediate abduction of IDF soldiers a distance of 250 meters from the security fence of the Gaza Strip").

151. Cohen, *supra* note 133, at 24 ("Subsequent to the elections held by the Palestinian Authority in 2006, a government headed by Hamas took administrative control over the Gaza Strip. Thereafter, in June 2007, members of Hamas perpetrated a military coup, forcibly taking military control over the Strip and replacing many supporters of the more moderate El-Fatah faction in the Palestinian Authority.").

152. See OPERATION IN GAZA, *supra* note 15, at 15.

153. Turkel Committee-1st Report, *supra* note 149, at ¶¶ 1, 18–19, 26 (stating further that after Operation Cast Lead the economic sanctions escalated into a full-scale blockade). See also OPERATION IN GAZA, *supra* note 15, at 19–22; Cohen, *supra* note 133, at 24.

154. Operation in Gaza, *supra* note 15, at 15–19.

155. *Id.* at 19–21.

156. *Id.* at 21.

157. See *id.* at 15.

158. See Ambassador Gabriela Shalev, Permanent Representative of Isr., Statement to Emergency Meeting of the U.N. Security Council (Dec. 31, 2008), available at http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Speeches+-+statements/Statement_Amb_Shalev_UN_Security_Council_31-Dec-2008.htm.

B. THE BODY-BAG EFFECT AND CAPTIVITY CONCERN WITHIN THE LAW OF *JUS AD BELLUM* PROPORTIONALITY

The chief strategic aim of Operation Cast Lead was to discourage Hamas from continuing its rocket attacks against the Israeli population.¹⁵⁹ The repatriation of Gilad Shalit was not considered necessary to that campaign's success.¹⁶⁰ Given the onerous tactical obstacles, it would have been highly unrealistic to use Shalit's return as a benchmark for success. It would also have precluded Israel from claiming victory, despite its obvious success in other respects, notably in forcing a substantial reduction of rocket attacks against its civilians.¹⁶¹

However, high among Israel's priorities in operation Cast Lead was deterring Hamas from capturing and holding Israeli soldiers for long periods.¹⁶² Critics of Israel's decision to initiate armed engagement against

159. See *id.*; OPERATION IN GAZA, *supra* note 15, at 32. But see Ambassador Gabriela Shalev, Permanent Representative of Isr., Statement to the U.N. Security Council (Jan. 6, 2009), available at http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Speeches+-+statements/Statement_Amb_Shalev_UN_Security_Council_6-Jan-2009.htm. In this later statement to the Security Council, Shalev describes the operation's aim as "ensuring the end of terrorism from Gaza, and the end of smuggling weapons into Gaza; so that there is no longer a need for Israeli defensive operations." One should note that the goals of the operation are defined more broadly than simply deterring rocket attacks. She also explicitly referred to Shalit, in the general context of delineating that operation's broader purposes:

There is no equivalence between a State which equips civilian homes with bomb shelters and a terrorist regime that fills them with missiles. There is no equivalence between military commanders who struggle daily to ensure that their operations are conducted in accordance with the requirements of international humanitarian law, and the terrorists who flout this law by keeping Corporal Gilad Shalit captive, without even allowing the International Red Cross access to see him for 930 days. There is no equivalence between a State using force in exercise of its right of self-defense and a terrorist organization for which the very resort to violence is unlawful.

Id.

160. Giora Eiland, *Civil-Military Processes and Results of the Campaign*, 11 STRATEGIC ASSESSMENT 7, 11 (2009).

161. It is likely that Israel initially did not declare Shalit's recapture as an explicit objective of Operation Cast Lead because the Winograd Commission had recently reprimanded the government for proclaiming the return of IDF soldiers in Hezbollah custody the criterion for success in the Second Lebanon War. WINOGRAD REPORT, *supra* note 40, at 560–61.

162. Soffer, *supra* note 90, at 45 (stating that both the Second Lebanon War and Operation Cast Lead were initiated to deter Israel's enemies from future attempts to capture soldiers, and arguing that that goal had been achieved). Moreover, Giora Eiland, Head of the Israel's National Security Council from 2003 to 2006, described the goals of the operation as to "create a long term period of calm, prevent Hamas from rearming itself, and bring Gilad Shalit home." Eiland, *supra* note 160, at 9. One should note that here, Eiland defines the first goal not exclusively in terms of deterring Hamas from rocket attacks.

Hamas paid virtually no attention to this central operational aim.¹⁶³ Ignoring Israel's concern with captivity avoidance influenced their conclusion that Israel violated *jus ad bellum* proportionality.¹⁶⁴ Even those who noted this concern did not appreciate the full significance of captivity-avoidance to Israel's overall security.¹⁶⁵ Yet it is impossible to assess the proportionality of a state's response to force without appreciating the full range and gravity of the threat to which it is responding. This Section establishes that the risk and reality of soldier capture was integral to the threat faced by Israel.

International law bars states from using force¹⁶⁶ except in self-defense against an armed attack.¹⁶⁷ Resort to force must be as *immediate* as circumstances permit; and it must also be *necessary*, in the sense that nonviolent forms of response would be inadequate.¹⁶⁸ Military response, furthermore, must be limited—in form, intensity, and duration—to the aim of eliminating the threat to national security posed by the attack; this last condition is what proportionality demands at war-making's strategic, *jus ad bellum* level.¹⁶⁹

In legal commentary, there has been no careful assessment of captivity-avoidance as a factor in the evaluation of *jus ad bellum* proportionality. No general jurisprudential discussion exists upon which one might draw in assessing the particulars of Israel's military deliberations

163. Those who argued that Israel's actions were legal also gave equally little attention to the issue. *But see* Asa Kasher, *Operation Cast Lead and the Just War Theory*, 37 *AZURE* 43, 53, 69 (2009). Kasher briefly expresses support for the view that preventing soldier abductions has been and should be a major goal of IDF policy.

164. *See* George E. Bisharat et al., *Israel's Invasion of Gaza in International Law*, 38 *DENV. J. INT'L L. & POL'Y* 41, 67 (2009) ("Operation Cast Lead seemed calculated to achieve objectives considerably beyond stopping rocket fire from Gaza—a fact reflected both in statements by Israeli officials, and in Israel's choice of targets during the fighting."); Milena Sterio, *The Gaza Strip: Israel, Its Foreign Policy, and the Goldstone Report*, 43 *CASE W. RES. J. INT'L L.* 229, 239–40 (2010).

165. *E.g.*, EL-HASAN, *supra* note 109, at 182–83, 185, 198, 200; AZZAM TAMIMI, *HAMAS: A HISTORY FROM WITHIN* 245 (2007) (suggesting that Israel's concerns with capture of its soldiers was confined to the immediate aim of freeing Shalit); *see also* GOLDSTONE REPORT, *supra* note 14, ¶ 1344 (criticizing Israel's intentions in its blockade of Gaza); Shiryaev, *supra* note 109, at 92–93 (criticizing Israel's intentions in the Second Lebanon War).

166. U.N. Charter art. 2, para. 3–4.

167. *Id.* at art. 51.

168. *See* *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 *I.C.J.* 14, ¶¶ 187–201 (June 27); David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 *EURO. J. INT'L L.* 236, 237 (2013); Schmitt, *supra* note 124, at 151–52.

169. *Id.*

and combat conduct in this regard. The broader discussion of how far a state's concern with force protection may influence proportionality calculations, chiefly focused on casualty avoidance, takes us only so far in answering our more specific question about captivity-aversion. This latter aspect of force protection is no less pressing and morally vexing for Israeli policymakers.

In order to assess Israel's actions, the discussion hereinafter examines the strategic significance of force protection and the extent it is permitted to influence the evaluation of *jus ad bellum* proportionality. The discussion will rely on the existing jurisprudential discourse, currently focused on casualty-aversion; at the same time, unique considerations, only relevant to the captivity-aversion form of the force protection aim, will be pointed out and examined.

To withstand major threats to its security, a country must show that it is able to marshal public support for its armed response to these threats. Preserving that support relies upon maintaining a considerable measure of social solidarity among citizens—a variable that, though crucial, is also nearly ineffable.¹⁷⁰ Maintaining public resilience is particularly important when military operations become difficult, costly, or threatened with outright failure.¹⁷¹ In democratic societies, rising military casualties regularly undermine public support for continuing operations.¹⁷² This is commonly known as the “body-bag effect.”¹⁷³ It encourages state leaders to attend carefully to this aspect of force protection.¹⁷⁴

The intensity of a state's concern with safeguarding its troops does not by itself determine the permissible scope of the state's response to an illegal use of force. First, to reply with force of its own, the state must have

170. See JOHN M. COLLINS, *MILITARY STRATEGY: PRINCIPLES, PRACTICES, AND HISTORICAL PERSPECTIVES* 13 (2002) (arguing that democratic societies must reach general consensus over what national security requires if such policy is to be pursued effectively over time).

171. See Gerhart Husserl, *Interpersonal and International Reality: Some Facts to Remember for the Remaking of International Law*, 52 *ETHICS* 127, 127–28 (1942) (stating that to “undermine and break the national spirit of the enemy” and “actual combat” are “two equally important avenues to the desired goal of victory”).

172. Neil MacFarlane, *Politics and Humanitarian Action* 75 (Thomas J. Watson Jr. Inst. for Int'l Studies & the United Nations Univ, Occasional Paper No. 41, 2000).

173. *Id.*

174. See Michael Horowitz & Dan Reiter, *When Does Aerial Bombing Work?: Quantitative Empirical Tests 1917–1999*, 45 *J. CONFLICT RESOL.* 147, 150 (2001); Leonard Wong, *Maintaining Public Support for Military Operations*, in *DEFEATING TERRORISM: STRATEGIC ISSUE ANALYSES* 65, 67–68 (John R. Martin ed., 2002).

suffered “armed attack” within the meaning of United Nations Charter Article 51,¹⁷⁵ which requires a violent attack of sufficient gravity, duration, and intensity.¹⁷⁶ This threshold requirement sits uneasily with modern states’ acute concern with force protection, especially when their adversary, normally a non-state terrorist group, adopts the “pinprick policy,” sometimes also described in terms of an “accumulation of events.”¹⁷⁷ Because a non-state terrorist group typically lacks the resources for a large-scale, comprehensive campaign, involving simultaneous initiatives on several fronts, such a belligerent instead will perpetrate short, recurrent bursts of small-scale violence. This occurs with a measure of regularity that some would describe as continuous, others as merely intermittent.¹⁷⁸ In each incident, the non-state belligerent will usually succeed in injuring only a few enemy soldiers.¹⁷⁹ The non-state belligerent seeks the long-term result of cumulative demoralization to the opposing side, so that the public loses its willingness to fight and simply abandons the field.¹⁸⁰ Based only on the quantum of force proximately employed, these incidents could not in isolation be classified as “armed attacks.” If they could not be viewed in combination, there would be no unlawful attack to which the victim state could lawfully respond in kind.¹⁸¹

In light of this predicament, some argue that international law should not insist upon such a quantitative benchmark for “armed attack.”¹⁸² Instead, it should adopt a more qualitative test that permits the victim state to defend its security interests against the overall threat posed by a series of

175. U.N. Charter art. 51.

176. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 195 (June 27); Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715, 719–20 (2008).

177. See, e.g., KINGA TIBORI SZABÓ, *ANTICIPATORY ACTION IN SELF-DEFENCE: ESSENCE AND LIMITS UNDER INTERNATIONAL LAW* 303 (2011); CHRISTOPHER C. HARMON, *TERRORISM TODAY* 55 (2000).

178. See, JAN KITTRICH, *THE RIGHT OF INDIVIDUAL SELF-DEFENSE IN PUBLIC INTERNATIONAL LAW* 76 (2008) (examining the “accumulation of events” doctrine while using Israel as a case study example; Kittrich points out that uninvolved states tend to judge Israeli actions based on the most recent attack to which it responds, while Israel’s reference point is usually a series of attacks).

179. See *id.* at 73–74 (citing Yehuda Blum’s explanation for the “pin-prick attacks” strategy).

180. See HARMON, *supra* note 177, at 55 (“[B]oth terrorist and guerrilla tend to favor the pinprick attack They work to refine the strategy of exhaustion, by which stealth, intelligence, and swiftness make them ineradicable and a continuous drain on the strengths of the government.”).

181. See, e.g., Victor Kattan, *The Use and Abuse of Self-Defence in International Law: The Israel-Hezbollah Conflict as a Case Study*, 12 Y.B. ISLAMIC & MIDDLE EASTERN L. 31, 43 (2005).

182. See KITTRICH, *supra* note 178, at 175–76 (citing jurists who support this position).

similar small-scale incidents.¹⁸³ Under this view, international law must allow the state to assemble the discrete episodes of violence against it, allowing the possibility that they might, in conjunction, add up to armed attack. For example, when Belligerent A seeks the total destruction of Belligerent B, whether materially or as a legal entity, A often poses a more severe security threat to B than when A seeks other, more modest goals, irrespective of the measure of force it chooses to exert at any moment. Thus, for proportionality purposes, it would often matter little whether A seeks B's annihilation through instant thermonuclear holocaust or more gradually, through "death by a thousand cuts."¹⁸⁴

Others respond that a qualitative assessment is inappropriate because a belligerent's true motives are often murky, unclear even to "itself," in that its leadership may be divided on the issue.¹⁸⁵ Its motives will be even more opaque to its enemies. The workings of collective attitudes, across lines of nation and culture, are deeply inscrutable. Given this inescapable ignorance of each other's intentions, adversaries will be sorely tempted to assume the worst.¹⁸⁶ International law should help nations resist the impulse to exaggerate the motives of their adversaries. To this end, the law should not allow the victim state to tally up every perceived wrong and slight against it

183. See JAMES A. GREEN, *THE INTERNATIONAL COURT OF JUSTICE AND SELF-DEFENSE IN INTERNATIONAL LAW* 155 (2009); Oscar Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 *HOUS. J. INT'L L.* 309, 315 (1988–89). See also Enzo Cannizzaro, *Contextualizing Proportionality: jus ad bellum and jus in bello in the Lebanese War*, 88 *INT'L REV. RED CROSS* 779, 779, 783, 785 (2006) (defining these two tests in the context of *jus ad bellum* proportionality; Cannizzaro does not support the accumulation of events doctrine).

184. Antoine Lemay, José M. Fernandez & Scott Knight, *Pinprick Attacks: A Lesser Included Case?*, in *CONFERENCE ON CYBER CONFLICT PROCEEDINGS* 183, 183, 190 (Christian Czosseck & Karlis Podins eds., 2010). See also YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 220 (4th ed. 2005); TOM RUYLS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 174–77 (2010).

185. MICHIEL WEGER, FRANS OSINGA & HARRY KIRKELS, *COMPLEX OPERATIONS: STUDIES ON LEBANON (2006) AND AFGHANISTAN (2006–PRESENT)* 10 (2009) ("[D]efinitions blur when the enemy is an organisation rather than a state and it is not easy to define political objectives and to translate them into military missions. Indeed, the attempt to define strategic purpose or the army's missions may be like trying to hold jelly in one's hand.").

186. Isobel Roele, *Evaluating Self-Defence Claims in the United Nations Collective Security System: Between Esotericism and Exploitability* 246 (Aug. 2009) (unpublished Ph.D. thesis, University of Nottingham), available at <http://etheses.nottingham.ac.uk/1526> ("[A]n enemy is aggressive *per se*. This imposes a role-identity on a state that presupposes the very question that a discourse evaluating a self-defence claim would wish to answer. . . . Thus, another feature of the self's decision-making is that it will tend to assume the worst. . . ."). See also, Michael Bothe, *Terrorism and the Legality of Pre-Emptive Force*, 14 *EURO. J. INT'L L.* 227, 237 (2003) ("An essential argument for maintaining the restrictive concept is the problem of vagueness and the possibility of abuse. . . . All too easily, a standard of reasonableness boils down to subjectivity and speculation").

by a given adversary in characterizing what that adversary currently has in mind and for determining a proportionate response to its attack.¹⁸⁷

There are merits in both of these competing views and international law, rightly understood, seeks a compromise between them. To prevent abuse, a state must suffer a minimum measure of illegal force, by the enemy action it wishes her response to follow, in order for that state to be considered the victim of armed attack; i.e., in order for the state's forceful response to be legal.¹⁸⁸ Accordingly, the law has been wary about embracing the "accumulation of events" approach to understanding that key term of art.¹⁸⁹ Yet, the gravity of carnage demanded to be suffered by a victim state from a single enemy action, in order for that illegal enemy action to constitute an "armed attack" under international law is relatively low.¹⁹⁰ The fact that a relatively low quantitative threshold has been adopted, indirectly, reduces the constraints placed on states' ability to address cumulative attacks: since it is impossible to fully control the scale of forceful actions, under a low threshold, it is likely that one of the enemy's actions will exceed that threshold, giving the victim state a permission to respond. Moreover, while the "armed attack" threshold demand mainly focuses on the quantitative dimensions of the enemy's action, qualitative considerations may be taken in "close cases"; i.e., a state may treat a "close case," as an armed attack if the aggressor's intentions are clear and capacious.¹⁹¹

Some claim that Hamas's attacks on Israeli population centers, prior to operation Cast Lead, did not amount to an "armed attack" because they

187. See Cannizzaro, *supra* note 183, at 783–84; RUYS, *supra* note 184, at 174. Mere vengeance for past grievances, of course, is unlawful under any interpretation of *jus ad bellum*. See RUYS, *supra* note 184, at 174.

188. See Sonja Cenic, *State Responsibility and Self-Defence in International Law Post 9/11: Has the Scope of Article 51 of the United Nations Charter Been Widened as a Result of the US Response to 9/11?*, 14 *AUSTL. INT'L L.J.* 201, 201–02, 204 (2004).

189. See RUYS, *supra* note 184, at 174–77. Ruys supports the accumulation of events doctrine, but acknowledges that there are doubts as to whether it has become part of customary international law. *Id.* He further discusses the implication that its rejection has on the demand for an objective threshold. *Id.* See also Christian J. Tams, *The Use of Force Against Terrorists*, 20 *EUR. J. INT'L L.* 359, 388 (2009) ("When applying the threshold requirement, states seem to have shown a new willingness to accept the 'accumulation of events' doctrine which previously had received little support.").

190. See MICHAEL N. SCHMITT, *COUNTER-TERRORISM AND THE USE OF FORCE IN INTERNATIONAL LAW* 17–19 (2002).

191. RUYS, *supra* note 184, at 177. See also C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *RCADI* 455, 493 (1952).

were intermittent in character and caused a limited number of casualties.¹⁹² The escalation of such attacks in the year preceding Operation Cast Lead could indeed be described as gradual.¹⁹³ However, this does not consider that in the year preceding Cast Lead Israel was attacked by over 3000 rockets and mortars, with over 300 of those rockets and mortars falling in the last two weeks; it is hard to view such quantum of force, when applied in such short period of time, as being anything other than an “armed attack.”¹⁹⁴ Moreover, even if one considers Hamas’s last forceful actions, prior to Israel’s initiation of operation Cast Lead as a “close case” (though it is difficult to conceive 300 rockets and mortars in two weeks as such), Israel was still permitted to treat these actions as an armed attack—in light of Hamas’s ambitions regarding Israel. These attacks, plus other attacks and capture attempts against Israeli soldiers along the border, all sought the same strategic aim: to demoralize the Israeli public through harm to both its soldiers and civilians.¹⁹⁵

However, even if a state has genuinely suffered an armed attack, it is not entitled to eradicate any and all imaginable threats, imminent or distant, from its attacker. The law of *ad bellum* proportionality has been set as an additional limit on the actions of the attacked state: demanding that the

192. See, e.g., Victor Kattan, *Operation Cast Lead: Use of Force Discourse and jus ad bellum Controversies*, 15 PALESTINE Y.B. INT’L L. 95, 101–02 (2009). Some have argued that a state’s right of self-defense does not arise when the attack is by a non-state actor, rather than a state. Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136, ¶ 139 (July 2004); see also Alexander Orakhelashvili, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction*, 2 J. CONFLICT & SECURITY L. 119, 125–28 (2006); Kretzmer, *supra* note 168, at 246. In a later decision, however, the ICJ left open the question of “whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.” *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 147 (Dec. 2005).

193. Compare S.C. Res. 1860, U.N. Doc. S/RES/1860 (Jan. 8, 2009) (“[e]xpressing grave concern at the escalation of violence and the deterioration of the situation” in Gaza), with S.C. Res. U.N. Doc. 1701 S/RES/1701 (Aug. 11, 2006) (“[e]xpressing its utmost concern at the continuing escalation of hostilities in Lebanon and in Israel since Hizbollah’s attack on Israel on 12 July 2006”).

194. See *supra* notes 158–159 and accompanying text. The issue of whether Hamas’s actions over the preceding decade, especially its rocket attacks, can be considered as “armed attacks” was examined by a Panel of Inquiry (appointed by the U.N. Secretary General and headed by former New-Zealand prime minister, and legal scholar, Sir Geoffrey Palmer) as part of its examination of the legality of Israel’s Gaza blockade. This examination was necessary because a blockade constitutes an “armed attack” and therefore is legal only if made in self-defense to a prior armed attack. The Panel concluded that Hamas’s actions amounted to “armed attacks” and had become more extensive and intensive over time. See U.N. Secretary-General, *Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident*, ¶¶ 71–72, 78 (Sept. 2011), available at http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf.

195. See *supra* notes 133–138 and accompanying text.

scale and form of that state's response will be limited to the aim of eliminating the threat posed by the enemy attack.¹⁹⁶ If response did not have to be suitably tailored to the security threat actually confronted, violence would almost certainly escalate in ways that the law of *ad bellum* proportionality, in particular, strives to prevent.¹⁹⁷

A state's actions may become disproportionate when it is preoccupied, even obsessed, with force protection as we shall now demonstrate. To illustrate this concern, consider a prototypical scenario contemplated by much legal discussion: a state, having sustained an armed attack, selects a mode of response that is likely to minimize its military casualties, but is not maximally effective from an operational standpoint. If its enemy has seized a portion of the state's territory, the victim state would likely find a land operation to be most effective in retrieving its territory. Nevertheless, it might adopt an extensive aerial campaign, bombing military infrastructure within the enemy's lands to induce its withdrawal. The victim state prefers this second option because it poses fewer risks to its soldiers.¹⁹⁸ Its leaders also fear that ensuing casualties, if numerous enough, would erode the domestic support necessary to sustain the campaign over the period necessary for it to succeed. This is a *jus ad bellum* issue, because the scale of an aerial attack suitable to strategic aims is much greater than if those aims were pursued through a land campaign.¹⁹⁹ *Jus ad bellum* proportionality requires that states, before resorting to force, tailor their response so that it will be consistent, in intensity and form, with the threat posed by the enemy's illegal action.²⁰⁰ Given these facts, concern with the body-bag effect has induced the victim state to employ greater force against its attacker than the lawful goal of inducing territorial withdrawal, strictly considered, would require. The victim state has therefore violated *jus ad bellum* proportionality.²⁰¹

196. Kretzmer, *supra* note 168, at 237 (stating that this position is held by the majority of jurists).

197. *See id.* at 264 (discussing concern with the possibility that "[s]tates may use a fairly low level attack as an excuse to pursue aims that are unconnected with that attack").

198. Richard A. Lacquement, *The Casualty-Aversion Myth*, 57 NAVAL WAR C. REV. 39, 43–49 (2004).

199. *See* BG John S. Brown, *Historically Speaking: The Not So New "New Way of War,"* ARMY 69, 69–70 (Jan. 2012) (discussing the effectiveness of aerial campaigns); Martin Van Creveld, *The Rise and Fall of Air Power*, 156 ROYAL UNITED SERVICE INST. J. 48, 53–54 (2011).

200. *See* MANUAL OF THE LAW OF ARMED CONFLICT 26 (U.K. 2004) [hereinafter MANUAL OF THE LAW].

201. *See, e.g.,* Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 404–05 (1993).

Yet this scenario eludes considerations of great moral import. States sometimes face enemies less concerned with immediate tactical advantage than with the long-term effects on public morale. Such adversaries adopt strategies directed specifically to this end, partly through the perennial pinprick, but also through violent incidents independently sufficient to constitute armed attack.²⁰² Terrorist groups, in particular, often rely on the ethical scruples and non-reciprocation policies of democratic states by targeting civilians on the other side.²⁰³ Their strategic objective is to debilitate public support for a seemingly interminable conflict, tolerable enough from one month to the next, yet utterly unendurable over time.²⁰⁴ The means to this strategic end is the body-bag effect; achieved by inflicting far greater harm to soldiers than any short-term tactical or operational aim would warrant. Mistreating captured soldiers, no less than killing as many as possible in battle, can contribute greatly to this goal.

In the security threat posed to a state, there is a major difference between a belligerent who strives to harm the state's soldiers via discrete battlefield victories and one who seeks to maximize these soldiers' deaths and suffering, by both indefinite captivity and battlefield attacks, in order to demoralize the state's populace over a much longer period of time.²⁰⁵ The

202. For an example of how some groups have exploited the United State's aversion to casualties, see MARK T. DAMIANO, EMPLOYING AERIAL COERCION TO COMBAT TERRORISM: RECOMMENDATIONS FOR THE THEATER, CINC 11-12 (2002).

203. *Id.* 11-14. See also, Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 J. MIL. ETHICS 3, 5-7 (2005) (implicit in the way they distinguish between the aims of armed forces under the war paradigm and the aims of terrorist groups).

204. See Horowitz & Reiter, *supra* note 174, at 150 (discussing the unique sensitivity of democratic states). Daniel Byman & Matthew Waxman, *Defeating US Coercion*, 41 SURVIVAL 107, 114-16 (1999) (giving examples of states that use this policy against Western states).

205. This strategic objective violates *jus ad bellum*. International law on military necessity authorizes only the "submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources" and forbids causing unnecessary suffering to soldiers. MANUAL OF THE LAW, *supra* note 200, at 21-22. The principle of military necessity has strong *jus ad bellum* implications. Acceptable means are those tailored exclusively to the strategic threats posed by the enemy in the specific conflict. See Elizabeth Samson, *Necessity, Proportionality and Distinction in Nontraditional Conflicts: The Unfortunate Case Study of the Goldstone Report*, in RETHINKING THE LAW OF ARMED CONFLICT IN AN AGE OF TERRORISM 195, 202 (Christopher Ford & Amichai Cohen eds., 2012); Hilary McCoubrey, *The Nature of the Modern Doctrine of Military Necessity*, 30 MIL. L. & L. WAR REV. 215, 217 (1991). This legal principle does not only forbid vengeful, irrational killing or the abuse of enemy soldiers, but it also prohibits killing as many soldiers as possible when it is practicable to make them *hors de combat*. It further outlaws the refusal to take prisoners, mistreating prisoners, and the use of weapons that cause unnecessary suffering. All these methods, legally foreclosed, can prove quite effective in weakening both enemy forces and the civil society on whose support they depend. "Military necessity" is legally defined to exclude such methods, no matter how "necessary" they may genuinely be to strategic success. See JAN RÖMER, KILLING IN A GRAY AREA

first often poses a considerably lesser threat than the second. Thus, the question arises of whether A's intent to maximize harm to B's soldiers, both on the battlefield and through their indefinite captivity, may legally guide B's *jus ad bellum* thinking about what would constitute a proportionate response to A's attacks.

This second scenario better reflects the current Israeli predicament. In their emphasis on capturing and holding IDF soldiers for long periods (sometimes under harsh and appalling conditions), while simultaneously trying to inflict maximum military and civilian casualties, Israel's enemies seek to undermine the societal support for recourse to force in national self-defense.²⁰⁶ In other words, demoralizing Israeli society is the broader strategic goal of every discrete operational and tactical engagement.²⁰⁷ This is the essential logic of the "Spider Web" theory: to weaken the political will to preserve the State of Israel itself.

Once a state has sustained an armed attack, it may permissibly consider both quantitative and qualitative issues in gauging the *jus ad bellum* proportionality of its response²⁰⁸ (this is unlike the determination of whether enemy action is an "armed attack", which mainly relies on quantitative factors).²⁰⁹ This is why the *jus ad bellum* consideration allows the victim state to assess the proportionality of its response in relation to

BETWEEN HUMANITARIAN LAW AND HUMAN RIGHTS 70–72 (2010); Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law*, 28 B.U. INT'L L.J. 39, 46–47 (2010); Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 105, 168 (Dieter Fleck ed., 1999) ("The mere intimidation or terrorization of the adversary with no other purpose, however, is not permitted under international law."). However, some contend that "military necessity" does not pertain to *jus ad bellum* issues, and a belligerent may kill as many enemy soldiers as it wishes as long as it does not perpetrate any acts specifically prohibited by *jus in bello* duties. See Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 69, 71–72 (2010); Yoram Dinstein, *The System of Status Groups in International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 145, 148 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007). Even if that view were correct, there remains a major difference between the security threat posed by belligerents who seek to maximize enemy soldiers' death and suffering (to demoralize the opposing side's populace over time) and by those who strive to harm enemy soldiers only to the extent required for particular battlefield victories.

206. See *supra* notes 133–138 and accompanying text; WIEGAND, *supra* note 83, at 42 (discussing Hamas's intentional targeting of Israeli civilians to undermine public support for continued use of force).

207. See *supra* notes 133–138 and accompanying text.

208. Paul Ducheine & Eric Pouw, *Operation Change of Direction: A Short Survey of the Legal Basis and the Applicable Legal Regimes*, NL ARMS 2009, at 51, 57 ("The parity between form and scale of the attack and the defence can be assessed through a combination of quantitative and qualitative aspects.").

209. See *supra* notes 188–191 and accompanying text.

the full extent of the threat posed by the enemy attack.²¹⁰ The law does not, as some wrongly interpret, confine the scope of this response to halt and repel the enemy's immediate activity.²¹¹ Instead, the law allows a broader, qualitative assessment despite the danger that, in considering non-quantitative factors, certain states will exaggerate the gravity of the threat they face and may therefore react with disproportional force.²¹² The threat to a victim state's national security often closely corresponds to the scope of the attack it has most recently suffered. Sometimes, however, the scope of an immediate attack does not fully reflect the scope of the broader threat facing the state. If the aggressor's strategic objectives are very ambitious, its inclination to escalate the conflict whenever practicable will likely increase.²¹³ Accordingly, when evidence strongly suggests that the aggressor will imminently repeat its unlawful conduct, the victim state may act decisively to deter and prevent such misconduct.²¹⁴ Thus, the broader the aggressor state's near-term strategic objectives, the more comprehensive the legitimate scale of the victim state's reaction.²¹⁵ These observations suggest why strictly numerical considerations—the quantum of force an enemy has recently employed against it—offer insufficient guidance to the victim state in determining a suitably proportionate response to an attack.²¹⁶

210. Kretzmer, *supra* note 168, at 237 (surveying the legal literature on the subject and finding this to be the majority view).

211. For a discussion of these various interpretations of proportionality, see ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* 165–66 (1993). *See also* Cannizzaro, *supra* note 183, at 781–84.

212. *E.g.*, Cannizzaro, *supra* note 183, at 783–85.

213. Ducheine & Pouw, *supra* note 208, at 65 (“[p]arity between attack and defense must be viewed at the macro level. . . . Sometimes a large-scale reaction to a relatively limited attack is unavoidable. This may be related to the purpose of the attacker. This is, for instance, relevant in case of a danger of continuation or repetition of those attacks. In such a case the ability of the attacker must sometimes be countered in order to undo the consequences of the attack and avoid a repetition”). *See also*, SZABÓ, *supra* note 177, at 303–10; RUYS, *supra* note 184, at 184; Kretzmer, *supra* note 168, at 269.

214. Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS*, *supra* note 205, at 1, 31–32; Kretzmer, *supra* note 168, at 261–62; Schmitt, *supra* note 124, at 151. *See also* Thomas Hurka, *Proportionality and Necessity*, in *WAR: ESSAYS IN POLITICAL PHILOSOPHY* 127, 131–32 (Larry May & Emily Crookston eds., 2008).

215. *E.g.*, Ducheine & Pouw, *supra* note 208, at 65.

216. *See* OLAOLUWA OLUSANYA, *IDENTIFYING THE AGGRESSOR UNDER INTERNATIONAL LAW: A PRINCIPLES APPROACH* 60–61 (2006); SEAN D. MURPHY, *UNITED STATES PRACTICE IN INTERNATIONAL LAW: 2002-2004*, at 327 (2005) (discussing the American position); Schachter, *supra* note 183, at 315. *See also* LINDSAY MOIR, *REAPPRAISING THE RESORT TO FORCE: INTERNATIONAL LAW, JUS AD BELLUM AND THE WAR ON TERROR* 68–71 (2010) (discussing whether the United States's response to attacks by al-Qaeda was proportionate); Kretzmer, *supra* note 168, at 237; Schmitt, *supra*

Because qualitative issues may be considered when assessing *jus ad bellum* proportionality, a state that has sustained an armed attack may take legal cognizance of the enemy's recent aggressive acts against it. As such, once a state has suffered an "armed attack," different rules apply than when it has suffered only a series of small pin-prick incidents that fall short of that crucial legal threshold.²¹⁷ Once an attack against the state has reached the legal threshold of an armed attack, international law does not require this most immediate enemy act of violence to be assessed in isolation from that broader context,²¹⁸ which is partly defined by the attacker's demonstrated strategic aims. When a series of aggressive acts gives a reliable indication of the aggressor's intended near-future acts, the victim state may then determine the nature of its preventive or deterrent actions accordingly.²¹⁹ This process of analytical aggregation may encompass security threats posed to the victim state by recent enemy attacks of different sorts, such as the seizure of its territory and the sinking of its ships on the high seas.

No one doubts that there are dangers to a legal test encompassing diffuse qualitative considerations, just as there are converse dangers with a standard that, though stricter in its restraint of force, prevents the victim state from adequately defending itself. In the former case, leaders of a victim state may be tempted to fancifully "connect the dots" when such connection exists only in their own minds—as when prior attacks provide little genuine basis for expecting imminent future ones. There must be a clear, demonstrable connection between the attacks thus far endured and indications that other are soon to follow. Otherwise, wild speculation about

note 124, at 153–54; Robert Ago, *Addendum to Eighth Report on State Responsibility*, [1980] 2 Y.B. Int'l L. Comm'n 13, 69, U.N. Doc. A/CN.4/318/ADD.5-7 (1980).

217. Cf. *supra* note 189 and accompanying text.

218. See sources cited *supra* note 216; Ducheine & Pouw, *supra* note 208, at 65.

219. As Robert Ago stated:

[A] State suffers a series of successive and different acts of armed attack from another State, the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks.

Ago, *supra* note 216, at 69–70. See also Terry D. Gill, *Legal Basis of the Right of Self-Defense Under the UN Charter and Under Customary International Law*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 187, 196 (Terry D. Gill & Dieter Fleck eds., 2010); NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 53–54 (2010); RUYS, *supra* note 184, at 174–80; STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 167 (1996); Hilly Moodrick-Even Khen, *Having It Both Ways: The Question of Legal Regimes in Gaza and the West Bank*, 16 ISR. STUD. 55, 62 (2011); Yael Ronen, *Israel, Hizbollah and the Second Lebanon War*, 9 Y.B. INT'L HUMANITARIAN L. 362, 373–74 (2006).

the intrinsic evil of an inscrutable foe will induce national leaders to indulge their worst instincts.²²⁰

Israel's proportionality assessments were not made, however, on the basis of viral speculation about Hamas's long-term or proximate intentions. That allegation was nonetheless common among Israel's critics in the aftermath of Operation Cast Lead.²²¹ Even those who acknowledged captivity concern as a powerful influence on Israeli conduct expressly refused to accord it any legal relevance.²²²

It is true that the immediate aim of Operation Cast Lead was not to regain custody of a soldier, but rather to deter rocket attacks against Israel's civilian population. Even so, it was legitimately prominent in the minds of Israeli decision-makers that Gilad Shalit had been in Hamas captivity for more than a year.²²³ During that period, Hamas continued its efforts to capture Israeli soldiers, notwithstanding the aim and efforts of Operation Summer Rain; as demonstrated by the fact that only weeks before Operation Cast Lead, the IDF uncovered Hamas tunnels recently constructed on the border between Gaza and Israel, in preparation for a new

220. *E.g.*, ALEXANDROV, *supra* note 219, at 167; LUBELL, *supra* note 219, at 53–54.

221. *E.g.*, Noura Erakat, *Operation Cast Lead: The Elusive Quest for Self-Defense in International Law*, 36 RUTGERS L. REC. 164, 173–74 (2009) (claiming that Israel viewed the mere existence of Hamas as a strategic threat that can be taken into account when making its *ad bellum* assessment; and therefore it acted in Operation Cast Lead in a manner intended to annihilate Hamas and its followers).

222. *See, e.g.*, NAT'L LAWYERS GUILD DELEGATION TO GAZA, *ONSLAUGHT: ISRAEL'S ATTACK ON GAZA AND THE RULE OF LAW* 33 (2009). Some critics claim that Israel was entitled to defend itself only against the particular rocket attacks and to employ only such force as tailored to that end. These critics contend that Israel exceeded that measure of force in seeking to *punish* Hamas (or even the Palestinian population as such) for Shalit's capture. That purpose would be unlawful because it is not directly responsive to a genuine and immediate threat to national security. *See, e.g.*, EL-HASAN, *supra* note 109, at 182–83, 185, 198, 200; TAMIMI, *supra* note 165, at 245; Noam Chomsky, "Exterminate All the Brutes": Gaza 2009, CHOMSKY.INFO, <http://www.chomsky.info/articles/20090119.htm> (last visited Apr. 7 2013). *See also* GOLDSTONE REPORT, *supra* note 14, ¶¶ 1213–16, 1344 (criticizing Israel's alleged intentions for blockading Gaza).

223. When the enemy's armed attack has been directed at capturing soldiers, that attack should be legally viewed as continuing until the captured soldier is released from enemy hands. Otherwise, even if a state discovers the whereabouts of its captured soldier, it could not lawfully launch even a small rescue operation. That result would be absurd, and international law must therefore not be interpreted as such. *See also* Tom Ruys, *Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-Defense Against Hezbollah*, 43 STAN. J. INT'L L. 265, 273 (2007) (arguing, in connection with the Second Lebanon War, that "[g]iven . . . the premeditated and well-organized character of the Hezbollah ambush, the ongoing nature of the abduction, combined with diversionary rocket attacks suggest that this was a deliberate 'armed attack' rather than a mere 'incident.'"; emphasis added).

attempt at soldier capture.²²⁴ Consistent with the law of *ad bellum* proportionality, while attempting to deter rocket attacks, Israel could therefore lawfully select the operational design best suited to reducing risks of soldier capture, treating that danger as an aspect of the security threat it confronted.

There is no doubt that states frequently abuse their legal right to self-defense, interpreting that right too broadly and affording themselves unwarranted decision-making leeway.²²⁵ Despite this concern, the law of armed conflict wisely refrains from imposing strict uniformity in how states must understand their own national security. How societies conceive this elusive, incorporeal notion inevitably varies with their culture, especially with what political scientists describe as “strategic culture.”²²⁶ Only if a state’s decision to resort to force or to continue fighting is taken in bad faith,²²⁷ or clearly unreasonable,²²⁸ does that state’s conduct violate international law. This approach ensures that states possess a fair “margin of appreciation” in their assessments of *jus ad bellum* proportionality,²²⁹ while not embracing an entirely subjective test²³⁰ according to which their

224. See *supra* note 150 and accompanying text.

225. See Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?* 59 STAN. L. REV. 415, 427–29 (2006). See also *supra* note 197 and accompanying text.

226. See Daniel H. Joyner, *Jus ad Bellum in the Age of WMD Proliferation*, 40 GEO. WASH. INT’L L. REV. 233, 248, 254 (2008); Peter J. Katzenstein, *Introduction: Alternative Perspectives to National Security*, in *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* 1, 2 (Peter J. Katzenstein ed., 1996). For a discussion about national variation with regard to the “body-bag effect,” see Bernard Boëne, *The Military as a Tribe Among Tribes: Postmodern Armed Forces and Civil-Military Relations?*, in *HANDBOOK OF THE SOCIOLOGY OF THE MILITARY* 167, 178 (Giuseppe Caforio ed., 2006).

227. E.g., Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT’L L. 259, 269 (1989). See also Vienna Convention on the Law of Treaties art. 26, May 23 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

228. Schmitt, *supra* note 124, at 158 (“The law does not mandate selection of the best option; it requires that the choice made be reasonable in the circumstances as reasonably perceived by the actor at the time.”); Schachter, *supra* note 183, at 315 (referring to “grossly disproportionate” responses). See also *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 224, 282 (June 27) (dissenting opinion of Judge Schwebel); Franck, *supra* note 176, at 732–34.

229. Franck, *supra* note 176, at 733; Gardam, *supra* note 201, at 412 (stating that broad and abstract considerations are allowed to be taken into account in *jus ad bellum* proportionality assessments and “consequently, opinions will legitimately differ.”); Schachter, *supra* note 227, at 266–67 (“Some indeterminacy results from the key standards of necessity and proportionality, concepts that leave ample room for diverse opinions in particular cases.”).

230. The ICJ, in the *Nicaragua Case*, stated that the examination of the issue is not *purely* subjective, which indicates that still extensive discretion should be afforded to the victim state. *Nicaragua*, 1986 I.C.J. at ¶ 282. In that Case, as well as in that involving the Congo, the ICJ has also avoided reviewing how the relevant states exercised their lawful discretion regarding this issue. See

discretion would be effectively uncabined.²³¹ Under this balanced standard, a state has some discretion in determining the gravity of the threat it faces, including threats posed by adversaries seeking specifically to debilitate the moral resilience and social solidarity of its population. Unlike some of its critics,²³² Israel's enemies do not doubt that capturing soldiers demoralizes Israeli society, which is precisely the strategic goal they now acknowledge and consistently employ. Moreover, when assessing the *ad bellum* proportionality of Israel's actions, additional considerations must not be forgotten, such as the prior failure of economic sanctions and more limited military responses to halt continuing rocket attacks and capture attempts. In weighing all these facts and developments, Israel was within its rights in initiating its Gaza operation and in calculating that the force it employed would fall well within the *jus ad bellum* proportionality limits; the reasonableness and good faith of these decisions cannot convincingly be impugned.

Critics often use the number of civilian casualties to claim that a belligerent has breached the requirements of *jus ad bellum* proportionality.²³³ This common accusation often arises when a state's response to an attack has been strongly influenced by concerns with protecting its forces from capture or casualties.²³⁴ Such accusations were rampant among critics of Operation Cast Lead.²³⁵ This criticism confuses *jus ad bellum* with *jus in bello* proportionality; the *jus ad bellum* analysis

Franck, *supra* note 176, at 721. It is true, however, that in the *Oil Platforms Case*, the ICJ, implicitly departed from that previous interpretation by reading the proportionality test as strict and objective, allowing virtually no discretion. *Oil Platforms (Islamic Republic of Iran v. U.S.)*, 2003 I.C.J. 161, ¶ 73 (Nov. 6). Yet in paragraph 43, the Court nonetheless reiterated its support for the somewhat looser standard of a not *purely* subjective test. Moreover, two judges in the majority criticized the rest of the tribunal for exceeding its jurisdictional authority by venturing into an evaluation of the defendant's discretionary decisions. *See id.* ¶¶ 30–39 (separate opinion of Judge Higgins); *id.* ¶ 37 (separate opinion of Judge Buergenthal).

231. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* 1984 ICJ Reports 392, ¶ 98 (Nov. 26). *See also* Schachter, *supra* note 227, at 259, 262–63.

232. *E.g.*, EL-HASAN, *supra* note 109, at 183 (claiming that the Israeli “posture views any threat as an existential threat to the country's very survival. . . . [T]he pretext to invade Gaza was the Palestinian's abduction of an Israeli soldier. Israel was using the soldier's capture as an excuse to try to topple the government led by the Hamas”).

233. *See* Laurie R. Blank, *A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities*, 43 CASE W. RES. J. INT'L L. 707, 712 (2011) (criticizing this common tendency).

234. *See e.g.*, Gardam, *supra* note 201, at 404–05.

235. Criticism of Israel for prioritizing force protection is implied, for example, by Chomsky, *supra* note 222. *See also* GOLDSTONE REPORT, *supra* note 14, § XVII (discussing the Gaza Blockade and the harm it has caused the civilian population).

does not involve any assessment of potential casualties on the other side, it only considers the question of whether the response to attack comports with the threat such attack represents to genuine security interests.²³⁶ *Jus in bello* proportionality is the proportionality norm that demands a state not inflict incidental civilian harm clearly excessive in relation to the military advantage anticipated from a military attack.²³⁷ The reference point for *jus in bello* proportionality is much narrower than that of *jus ad bellum* proportionality—it regulates tactical and operational conduct once the armed conflict has begun and does not deal with strategic issues.²³⁸

The negation of the civilian-casualties consideration from *ad bellum* proportionality assessments makes sense, as no victim state can accurately predict the extent of incidental civilian casualties likely to ensue from the use of force. Any such estimate would be highly speculative at best,²³⁹ and states are likely to underestimate such future harm.²⁴⁰ The extent of casualties on the enemy side will greatly depend not only on the victim state's actions, but also on the enemy's own combative actions and conduct in response to the victim state's actions over the duration of conflict. It will further depend on whether the enemy does or does not make serious effort to protect its civilian population from predictable incidental harm at victim state's hands. War is inherently dynamic.²⁴¹ As with any social process, it has powerful elements of reciprocity ensuring that each antagonist seeks to respond, intelligently and intelligibly, to the other's acts.²⁴² This makes it impossible to anticipate, at the outset of an armed conflict, the measure of harm each side will ultimately suffer or inflict: each can only see a few steps ahead of where it stands at a given moment.²⁴³ This is why even *jus in*

236. See Blank, *supra* note 233, at 712 (“[*Jus ad bellum* proportionality is unconcerned with the extent of civilian casualties, unlike *jus in bello* proportionality, in which civilian casualties play a central role.”); Eitan Diamond, *Before the Abyss: Reshaping International Humanitarian Law to Suit the Ends of Power*, 43 ISR. L. REV. 414, 428 (2010). See also Press Release, Int’l Criminal Court, Letter from Chief Prosecutor Luis Moreno-Ocampo to Senders of Communications re: Iraq (Feb. 9, 2006) (referring to *in bello* proportionality, and stating: “[T]he death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime.”).

237. For further discussion of this issue see *infra* note 247 and accompanying text.

238. See *supra* note 10 and accompanying text.

239. See Kretzmer, *supra* note 168, at 267; Moodrick-Even Khen, *supra* note 219, at 62.

240. See, e.g., JOHN GEORGE STOESSINGER, *WHY NATIONS GO TO WAR* 403 (9th ed. 2005).

241. DAVID RODIN, *WAR AND SELF-DEFENSE* 114–15 (2002).

242. See MARK OSIEL, *THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR* 31–48 (2009); Daniel L. Byman & Matthew C. Waxman, *Kosovo and the Great Air Power Debate*, 24 INT’L SEC. 5, 9–10 (2000).

243. See Avi Kober, *The Israel Defense Forces in the Second Lebanon War: Why the Poor Performance?*, 31, J. STRATEGIC STUD. 3, 9 (2008) (“Even when one opts for violence out of a rational

belo proportionality—governing a shorter timespan than *jus ad bellum*—demands that belligerents attend only to military advantages expected to be “concrete and direct.”²⁴⁴ An advantage that would be indirect and unspecific is simply too uncertain. Again, this strongly suggests that the conduct of Israel’s Gaza operation was fully consistent with *jus ad bellum* proportionality.

C. CASUALTY AVERSION, THE CONCERN WITH CAPTURE, AND *JUS IN BELLO* PROPORTIONALITY

Once armed conflict begins, aggressors and victims have the same rights and duties regarding the means and methods of combat they may employ.²⁴⁵ Each side may use deadly force against soldiers but not against civilians.²⁴⁶ According to *jus in bello* proportionality, harming civilians is permissible only if incidental to an attack on a military target and not excessive in relation to the concrete and direct military advantage anticipated.²⁴⁷ Force protection also plays an important role in assessing *jus in bello* proportionality, no less than *jus ad bellum*, even though, as the discussion in the current Section will show, it is very different in nature. Here, the question is whether, and to what extent, soldiers are duty-bound to risk their lives to protect civilians on the other side of an armed conflict.

Even though states must put soldiers at risk to conduct combat missions,²⁴⁸ states also gain from preserving soldiers’ lives—even if only to enable these people to fight another day.²⁴⁹ How much discretion should

choice, believing it could be tamed, controlled and directed to one’s purposes, once violence starts it gains its own momentum and dynamic.”).

244. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977, *supra* note 10, ¶¶ 1828, 1854-60.

245. For discussions on the equal applicability of *jus in bello* on all sides to an armed conflict see, e.g., YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 4–5 (2004); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 406–08 (1963); Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of jus ad bellum and jus in bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47, 51–53 (2009).

246. Art. 51, Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter Additional Protocol I]; HENCKAERTS, *supra* note 80, at 3–8.

247. See Additional Protocol I, *id.* art. 51; HENCKAERTS, *supra* note 80, at 46–50.

248. See Blum, *supra* note 21, at 40 (“soldiers are used precisely as that: means for winning the war, defending the country, etc.”); David Luban, *Risk Taking and Force Protection*, 36–37 (Geo. Pub. L. Research Paper No. 11-72, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1855263 (discussing the value of soldiers as assets).

249. See GOLDSTONE REPORT, *supra* note 14, at ¶¶ 696(a), 698; Laurie R. Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*, 12 Y.B. INT’L HUMANITARIAN L. 347, 370 (2009) (“Stopping mortar fire endangering one’s own troops offers a clear military advantage. After all,

the commander enjoy to treat his or her soldiers as “military assets”? Questions about discretion pose perennial dilemmas. On one hand, the commander must simultaneously assess a number of relevant variables specific to the situation before him or her on both sides of the proportionality equation.²⁵⁰ Military assets (i.e., the “military advantage” side of the proportionality equation) differ from one mission to another in their kind, amount and significance, as well as in the probability each of them will be attained/defended if the relevant military mission is performed. Protecting soldiers’ lives is only one such military advantage that needs to be taken into account along with all the rest by the commander making the relevant *in bello* proportionality assessment. The significance of this military advantage varies depending on factors such as the importance of the mission, the mission’s risk level, the amount of soldiers involved, the skills of each soldier involved and more. Similarly, regarding harm to civilian lives and property (i.e., the other side of the proportionality equation), the probability, gravity, magnitude, and form of such harms also vary from one military mission to another, depending mainly on the location in which the specific military mission has to be conducted. This suggests a need for considerable latitude. On the other hand, if the law here accords this generously, as dangers increase, commanders will be increasingly tempted to discount likely civilian losses while overvaluing their own soldier-assets.²⁵¹

A *jus in bello* proportionality analysis must also identify and respect some minimum level of acceptable protection to the civilian population owed by soldiers on the other side of the conflict.²⁵² However there are varying approaches regarding how to accomplish this. Some believe “[t]he proportionality principle does not itself require the attacker to accept increased risk” in order to decrease risk to civilians.²⁵³ Others hold that civilian safety may never be significantly compromised in the interest of

no military force can engage in any military operations if the law does not permit it to take defensive action.”).

250. E.g., Dale Stephens & Michael W. Lewis, *The Law of Armed Conflict—A Contemporary Critique*, 6 MELB. J. INT’L L. 55, 74 (2005).

251. See SOLIS, *supra* note 21, at 285.

252. See Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 82 (2006) (“But what is the meaning of ‘excessive’ damage? More concretely, is the army required to expose its combatants to life-threatening risks in order to spare enemy civilians?”).

253. MANUAL OF THE LAW, *supra* note 200, at 26.

reducing soldiers' risk level.²⁵⁴ Resolving this dispute requires consideration of whether soldiers do not only have value as military assets, but also like civilians, enjoy a human right to life.²⁵⁵

The law of armed conflict, to a significant degree, treats soldiers according to a crudely consequentialist calculus, as it considers them to be the means to the end of victory.²⁵⁶ This view of the soldier sits rather

254. UNIV. CTR. INT'L HUMANITARIAN LAW GENEVA, EXPERT MEETING "TARGETING MILITARY OBJECTIVES" 17 (2005).

255. International Covenant on Civil and Political Rights arts. 4, 6, 8, Mar. 23, 1976, 999 U.N.T.S. 171 (securing certain human rights to all people). Different international tribunals, notably the ICJ, ruled that human rights law, including the right not to be arbitrarily deprived of one's life, continue to apply even during armed conflicts. These tribunals further ruled that what should count as an arbitrary deprivation of life must be determined on the basis of the relevant *lex specialis*—here the law of armed conflict. *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); *see also* Isayeva v. Russia, App. No. 57950/00, 41 Eur. H.R. Rep. 791, 832–38 (Eur. Ct. H.R.) (2005) (finding that the military was still bound to respect the right to life of the applicant during the armed conflict by minimizing the risk to life posed by the military's actions). While the ICJ and other tribunals (such as the European Court of Human Rights) most likely had in mind the right of civilians, not combatants, these courts nevertheless did not expressly limit this right to the former category. Some have interpreted the right to life, in light of the relevant *lex specialis*, so as to derogate this right with regard to combatants. *See, e.g.*, Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT'L REV. RED CROSS 737, 745, 748 (2005). Others contend that, because the right to life pertains even in war, soldiers too retain this right, to some extent. *E.g.*, Stephens & Lewis, *supra* note 250, at 72–74. Recent rulings by domestic courts seem to be showing increasing support for the latter position. *See, e.g.*, HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov.'t of Isr. [2006] (2) IsrLR 459, ¶ 46 (Isr.), translated at http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf (examining the *in bello* proportionality of targeted-killing military operations and stating: "A balance should be struck between the duty of the state to protect the lives of its soldiers and civilians and its duty to protect the lives of innocent civilians who are harmed when targeting terrorists."). *See also* Smith v. The Ministry of Defence, [2013] UKSC 41 (U.K.). In that case the majority opinion, in the British Supreme Court, ruled that the right to life, as enshrined in the European Convention of Human Rights, applies to British soldiers extraterritorially and even during an armed conflict. As to the specific issue of *in bello* proportionality and soldiers' right to life: Lord Hope (¶ 76), of the majority, ruled that commanders have a wide margin of appreciation that allows them to take this consideration into account. The Lord further implied that commanders might even have a duty to give some weight to that consideration, when making *in bello* proportionality assessments; as he stated that an opposite position would "depriv[e] the article [protecting the right to life] of content." This ruling overturned a previous ruling of the British Supreme Court in R. (Smith) v. Sec. of State for Defence, [2010] UKSC 29 (U.K.). The Court's majority there chose to resolve the case, entirely on a jurisdictional issue. This has led to the odd result that British soldiers retain a right to life only in the unlikely event that war occurs within Europe, where the European Convention on Human Rights has territorial jurisdiction, but not when the conflict occurs elsewhere, where British troop engagement is more probable. The European Court of Human Rights is going to consider the issue of soldiers' right to life during combat situations in a pending application called Pritchard v. U.K. (App. No. 1573/11).

256. Blum, *supra* note 21, at 40.

uneasily with core deontological notions of how people may be treated.²⁵⁷ Still, most agree that treating soldiers' lives as dispensable instruments to collective ends is inescapable in war.²⁵⁸ To what extent do the lives of soldiers retain any nontrivial deontological value that is pertinent to their duty to risk their lives for others? Some contend that, in taking up the role of soldier, people necessarily agree to forfeit their right for life, in any conventional sense of the term.²⁵⁹ Avishai Margalit and Michael Walzer, thus argue

By wearing a uniform, you take on yourself a risk that is borne only by those who have been trained to injure others (and to protect themselves). You should not shift this risk onto those who haven't been trained, who lack the capacity to injure; whether they are brothers or others. The moral justification for this requirement lies in the idea that violence is evil, and that we should limit the scope of violence as much as is realistically possible. As a soldier, you are asked to take an extra risk for the sake of limiting the scope of the war.²⁶⁰

Others are un-persuaded. First, the claim that people necessarily agree to forfeit their right for life when they become soldiers is unconvincing where (as in Israel) the soldier is conscripted and generally does not voluntarily seek a military career.²⁶¹ More importantly, international law

257. See JENS TIMMERMAN, *KANT'S GROUNDWORK OF THE METAPHYSICS OF MORALS: A COMMENTARY* 103 (2007) (arguing the moral necessity never to treat individuals merely as means, always as ends in themselves).

258. See Blum, *supra* note 205, at 118, 132–36 (acknowledging consensus among jurists and philosophers for this position, while herself rejecting it).

259. DAVID RODIN & HENRY SHUE, *JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS* 250 (2008) (interpreting the law to completely forfeit soldiers' right to life); Colm McKeogh, *Civilian Immunity in War: From Augustine to Vattel*, in *CIVILIAN IMMUNITY IN WAR* 62 (Igor Primoraz ed., 2007); MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 145 (4th ed. 2006) (ruling that during armed conflict soldiers' right to life should not be recognized because that would inevitably weaken civilian protection); Luban, *supra* note 248, at 26–29 (arguing that soldiers have a professional duty to risk their lives in order to reduce risks to civilians).

260. Avishai Margalit & Michael Walzer, *Israel: Civilians and Combatants*, N.Y. REV. BOOKS, May 14, 2009, available at <http://www.nybooks.com/articles/archives/2009/may/14/israel-civilians-combatants>.

261. Kasher stated:

Even if one becomes a conscript, one does not forfeit any of one's rights. One's service as a member of an armed force means that the extent to which one may entertain certain liberties has been changed. Restrictions imposed on one's liberties are not results of any step of forfeiture. From a conscript's point of view, the fewer restrictions imposed on conscripts, the better, and each of them has to be warranted on grounds of some constitutional principles and major features of the circumstances.

does not seem to forbid a state to afford some weight to the soldier's right to life, whether conscripts or volunteers.²⁶² Before the recent "civilianization" of military law in Western democracies, a person was generally deemed to lose most of her constitutional rights upon becoming a soldier.²⁶³ Today, however, the law of many democracies understands the soldier to be a "civilian in uniform," retaining many such rights.²⁶⁴ These rights may be interpreted more narrowly than those of civilians, when public policy so requires, as during armed conflicts.²⁶⁵ Even so, to some, international law allows states to acknowledge and respect their soldiers' right to life to the extent consistent with the nature of war.²⁶⁶ Notably, whatever international law permits, the individual constitutions of many democratic states require as well.²⁶⁷ Therefore, supporter of this position argue that we should not take international law to require that soldiers assume greater risk than necessary to their mission, so that they may maximally protect their adversary's civilians. Instead, we must interpret international law as obligating us not to ignore the soldiers' right to life. Otherwise, the law would become unworthy of respect and adherence.²⁶⁸

Asa Kasher, *The Principle of Distinction*, 6 J. MIL. ETHICS 152, 164 (2007). See also Avery Plaw, *Upholding the Principle of Distinction in Counter-Terrorist Operations: A Dialogue*, 9 J. MIL. ETHICS 3, 12 (2010).

262. See Stephens & Lewis, *supra* note 250, at 72:

The law of armed conflict does not require that a nation needlessly sacrifice its own military members in order to minimise incidental civilian injury. Indeed, while the ICJ has expressly asserted the precedence of the law of armed conflict as the *lex specialis* over human rights norms during a war, this still allows for the application of human rights norms where the *jus in bello* is silent. One obvious area of intersection concerns the rights of a nation's own military members and the risks to which they must be exposed to preserve the lives of civilians of the enemy nation.

See also *supra* note 255.

263. G.R. Rubin, *United Kingdom Military Law: Autonomy, Civilianisation, Juridification*, 65 MOD. L. REV. 36, 36–42 (2002).

264. Chappell v. Wallace, 462 U.S. 296, 304-05 (1983); HCJ 6055/95 Zemach v. Minister of Def. 53(5) P.D. 241, ¶¶ 19, 22 [1999] (Isr.); Engel v. Netherlands (No. 1) Eur. Ct. H.R. 647 (1976); Eur. Consult. Ass., *Recommendation 1742 Human Rights of Members of the Armed Forces*, Doc. No. 10861 (2006); U.S. DEP'T OF THE ARMY, ARMY LEADERSHIP FM 6-22, at 2-2 (2006) ("[S]erving as a Soldier of the United States does not mean giving up being an American citizen with its inherent rights and responsibilities"); ORG. FOR SEC. & CO-OPERATION IN EUR., HANDBOOK ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF ARMED FORCES PERSONNEL 32 (2008).

265. See, e.g., Scott C. v. R [2004] C.M.A.R. 2, ¶ 11 (Can.) (holding that the constitutional rights of soldiers must be construed narrowly when on the battlefield); Peter Rowe, *The Soldier as a Citizen in Uniform: A Reappraisal*, 7 N. Z. ARMED FORCES L. REV. 1, 7, 10, 16 (2007).

266. E.g., Stephens & Lewis, *supra* note 250, at 72. See also *supra* note 255.

267. Kasher, *supra* note 261, at 164.

268. See *id.*

To date, international law has not embraced either side of the preceding debate. With some uncertainty, it steers a middle course, allowing states considerable but not unlimited discretion on the role of force protection within *in bello* proportionality assessment.²⁶⁹ The current state of customary international law on the subject can be described as follows:

In taking care to protect civilians, soldiers must accept some element of risk to themselves. The rule [of proportionality] is unclear as to what degree of care is required of a soldier and what degree of risk he must take. Everything depends on the target, the urgency of the moment, the available technology and so on.²⁷⁰

This approach strikes a compromise: soldiers are required to accept some nontrivial risk in order to protect civilians, but the amount of additional risk that soldiers must accept depends on the particular circumstances. The upshot of this analysis is that when a commander clearly exaggerates the value of protecting his or her troops and thereby causes excessive civilian casualties, his or her conduct warrants sanction.²⁷¹ In reaching that conclusion, the commander's judges must enforce a mandatory minimum of civilian protection, which is invariant and does not change from one case to another. Therefore, a commander who systematically prioritizes her soldiers' lives over those of foreign civilians has violated international law.²⁷²

269. See, e.g., FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, INT'L CRIM. TRIBUNAL FORMER YUGOSLAVIA, ¶¶ 49–50, http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf (last visited June 14, 2013) [hereinafter NATO Bombing Report]; Stephens & Lewis, *supra* note 250, at 74; Aaron Xavier Fellmeth, *Questioning Civilian Immunity*, 43 TEX. INT'L L.J. 453, 487 (2008). See also COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977, *supra* note 10, ¶ 1835 (“it seemed necessary to leave some margin of appreciation to those who have to apply the rules.”); Diamond, *supra* note 236, at 428–29.

270. A.P.V. Rogers, *Conduct of Combat and Risks Run by the Civilian Population*, 21 MIL. L. & L. WAR REV. 293, 310 (1982) (emphasis added). See also IAN HENDERSON, CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY, AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I 204–06 (2009); ALEXANDRA BOIVIN, UNIV. CTR. FOR INT'L HUMANITARIAN LAW, THE LEGAL REGIME APPLICABLE TO TARGETING MILITARY OBJECTIVES IN THE CONTEXT OF CONTEMPORARY WARFARE, 45 (2006); William J. Fenrick, *The Law Applicable to Targeting and Proportionality After Operation Allied Force: A View from the Outside*, 3 Y.B. INT'L HUMANITARIAN L. 53, 78 (2001); A.P.V. Rogers, *Zero-Casualty Warfare*, 837 INT'L REV. RED CROSS 165, 180 (2000).

271. See NATO Bombing Report, *supra* note 269, ¶ 49–50.

272. See Yves Sandoz, *Commentary*, 78 INT'L L. STUD. 273, 277 (2002). Despite the illegality of such a policy, some advocate in support of it. See, e.g., Kasher, *supra* note 163, at 66.

Israel's declared policy on these matters is that military considerations "may legitimately include not only the need to neutrali[z]e the adversary's weapons and ammunition and dismantle military or terrorist infrastructure, but also—as a relevant but not overriding consideration—to protect the security of the commander's own forces."²⁷³ Israel claims to have applied this legal standard during Operation Cast Lead.²⁷⁴ Insofar as it did so, the country complied with *jus in bello* proportionality.

Israel's tactical and operational actions during the operation (i.e., its actions that are subject to the law *of in bello* proportionality) were also strongly influenced by a concern that Hamas would take advantage of any ground fighting to capture more soldiers.²⁷⁵ The tunnel on the border between Israel and Gaza, uncovered by the IDF a few weeks before operation Cast Lead, was not the only hidden tunnel dug by Hamas. In preparation for conflict with Israel, Hamas dug tunnels beneath buildings in Gaza for use as an aid in capturing soldiers.²⁷⁶ These tunnels enabled Hamas fighters to approach Israeli forces undetected underground, and then attack Israeli forces by surprise. Hamas fighters then attempted, in particular, to seize Israeli soldiers and drag them into such tunnels, spiriting them away to captivity. Tunnels further enabled Hamas fighters to escape quickly without fear of Israeli response, rather than having to carry away the captured soldier in plain sight. To be clear, this plan, prepared for prior to the operation, was actually executed during the fighting in Gaza, and in three separate instances, Hamas fighters were nearly successful in capturing an Israeli soldier.²⁷⁷

273. OPERATION IN GAZA, *supra* note 15, at 46. See also H CJ 769/02 Pub. Comm. Against Torture in Isr., v. Gov't of Isr., ¶¶ 40, 46 [2005] (unreported decision) (Isr.), available at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf.

274. See OPERATION IN GAZA, *supra* note 15, at 1–4, 32, 46; Shalev, *supra* note 159 ("In responding to terrorist attacks that show no respect for human life—either Israeli or Palestinian—Israel takes steps to protect both. It takes every possible measure to limit civilian casualties—even where these measures endanger the lives of our soldiers or the effectiveness of their operations.").

275. See Daniel Byman & Gad Goldstein, *The Challenge of Gaza: Policy Options and Broader Implications*, SABAN CTR. FOR MIDDLE EAST POL'Y 7 (July 2011), available at http://www.brookings.edu/~media/research/files/papers/2011/7/gaza%20borders%20byman/07_gaza_borders_byman.pdf.

276. YORAM COHEN & JEFFREY WHITE, WASH. INST. FOR NEAR EAST POL'Y, HAMAS IN COMBAT: THE MILITARY PERFORMANCE OF THE PALESTINIAN ISLAMIC RESISTANCE MOVEMENT 10 (Oct. 2009), available at <http://www.washingtoninstitute.org/policy-analysis/view/hamas-in-combat-the-military-performance-of-the-palestinian-islamic-resista>.

277. See GOLDSTONE REPORT, *supra* note 14, ¶ 458 (mentioning one case); Arnon Ben-Dror, *Exposed to the Legacy of the Combat in Gaza*, IDF.IL (Jan. 29, 2009), http://dover.idf.il/IDF/News_Channels/today/09/01/2900.htm (observing that capture attempts are the

In legal discourse, those who chastise Israel for violating *jus in bello* proportionality focus on the value ascribed to avoiding military casualties.²⁷⁸ Yet this is only one aspect of force protection. Averting the capture of soldiers is also an aspect of force protection, and this aspect is no less important to Israelis. In either case, the protective concern leads to adopting combat methods designed to avoid close-range contact with the enemy.²⁷⁹ Commanders in Cast Lead often sought aerial support as an alternative to close-range combat.²⁸⁰

The aim of protecting soldiers from enemy captivity warrants separate attention, for it is a further advantage to skirting close range fights.²⁸¹ Captured soldiers are “*hors de combat*” and since they are no longer involved in fighting, international law affords them extensive protection.²⁸² When the enemy will not respect such duties toward captured soldiers, the national interest in preventing their capture acquires great ethical salience.²⁸³ In such situations, the state whose soldiers are certain to be

most severe threat to the Israeli forces, that there were three serious such attempts during the operation, and that in one incident a soldier had been successfully dragged into a tunnel before being rescued) (in Hebrew).

278. See SOLIS, *supra* note 21, at 284 (briefly discussing the force protection dispute that has arisen following Operation Cast Lead and defining “force protection” in this context as casualty aversion). *But see* GOLDSTONE REPORT, *supra* note 14, ¶¶ 458–460, 802–823 (containing a brief and implicit referral to the captivity issue if the cited paragraphs are read jointly).

279. Compare Byman & Goldstein, *supra* note 275, at 7 (discussing how the concern with avoiding capture of soldiers affects military decision-making), with SOLIS, *supra* note 21, at 284 (discussing how the concern with avoiding military casualties affects military decision-making).

280. For a survey of the force protection tactics used by Israel see Abe F. Marrero, *The Tactics of Operation CAST LEAD*, in BACK TO BASICS: A STUDY OF THE SECOND LEBANON WAR AND OPERATION CAST LEAD 83, 94–95, 98–99 (Scott C. Farquhar ed., 2009).

281. Cf. Blank, *supra* note 249, at 370 (criticizing the Goldstone Report for ignoring anticipated military advantage when assessing the proportionality of an Israeli action, examining only the trade-off between civilian casualties and force protection).

282. Blum, *supra* note 205, at 72 (“The only general limitation on the killing of enemy combatants is once the latter are rendered *hors de combat*, through capture, surrender, or incapacitating injury.”).

283. See WINOGRAD REPORT, *supra* note 40, at 502; GOLDSTONE REPORT, *supra* note 14, ¶¶ 77, 1340, 1343. Non-state actors desire that their fighters be accorded POW status and privileges, but are many times unwilling to accord these to enemy soldiers. Non-states actors often highly prize the political and military leverage they gain from holding soldiers captive for long periods of time. They likely do not accord standard IHL rights, particularly the requirement to disclose the location of prisoners, for fear that this will facilitate their rescue. See, e.g., *Hamas Rejects Red Cross Demand to Prove Shalit is Alive*, HAARETZ.COM (June 23, 2011, 4:19 PM), <http://www.haaretz.com/news/diplomacy-defense/hamas-rejects-red-cross-demand-to-prove-shalit-is-alive-1.369250>. These reasons do not justify such mistreatment of captured soldiers, nor do they authorize the state thereby wronged to mistreat its enemy detainees. See OSIEL, *supra* note 242, at 197–98, 204, 264, 271–83, 322. However, the illegal mistreatment of its soldiers would provide the state with

mistreated in captivity owes them special moral duties, for example, to take reasonable measures to minimize the likelihood that they will suffer this execrable fate.²⁸⁴ Israelis certainly charge their military leaders with such duties.²⁸⁵ International law does not preclude such considerations from governing how military actions will be designed and conducted at the operational and tactical levels.²⁸⁶

It is nonetheless easy to exaggerate the risk of mistreatment by turning some oft-repeated anecdotes into sweeping generalizations regarding an adversary's treatment of prisoners of war.²⁸⁷ Such exaggeration could readily lead soldiers to overvalue the military advantage gained by protecting themselves and comrades from captivity.²⁸⁸ This need not stem from bad faith. The underlying mental process yielding such misestimations may be entirely unconscious.²⁸⁹ It is therefore wise that

lawful grounds to accord greater weight (than it otherwise might) to concerns with force protection when assessing *in bello* proportionality. It should be noted that, sometimes, non-state actors do not accord the proper threatment to captured soldiers, simply because they do not have the facilities to detain such soldiers in accordance with international law. See HENCKAERTS *supra* note 68, at 454 (acknowledging that non-state actors are often unable to "to detain prisoners in safety", but claiming that this fact leads them to wish to conduct prisoner exchanges).

284. The same reasoning can be demonstrated in the following policy applied by the U.S. in the armed conflicts it was involved in during the last half century: P.O.W. rescue operations are not illegal according to international law. See Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 *CHI. J. INT'L L.* 511, 539-40 (2004-2005). Yet, the U.S., in general, does not conduct such operations unless there is concern the captured American soldiers are abused. Major John W. Bulmentritt, *Playing Defense and Offense: Employing Rescue Resources as Offensive Weapons* 22 (Thesis, School of Advanced Airpower Studies—Air University Maxwell Air Force Base, 1999).

285. See Schweitzer, *supra* note 64, at 32-33; Schweitzer, *supra* note 41, at 37; Michaels, *supra* note 5 (quoting Israel's U.S. Ambassador: "Our soldiers have to know that when we send them out to the field of battle to risk their lives for us, . . . if, God forbid, they fall captive, that the state of Israel is going to do everything in its power to try to get them back"); WINOGRAD REPORT, *supra* note 40, at 503, 507.

286. See *supra* notes 269-270 and accompanying text. The rationale for this stance was first offered by JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT OR THE PRINCIPLES OF POLITICAL RIGHTS* 13-15 (Rose M. Harrington trans., 1893) (1761-62). After all, war is a conflict between states, not individual persons. The soldier's right to kill an enemy combatant during armed conflict, as well as the corresponding permission given to enemy soldiers to kill her, derives from the rights of the state. Because the soldier acts as an agent of that state, she is no longer in a position—once captured—to exercise those rights or to advance the state's interests in this way. Since she can no longer act as a state agent once captured, she further regains full protection for her right to life. On how this theory has influenced the modern law of war, see generally Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 *INT'L REV. RED CROSS* 149 (2005).

287. See OSIEL, *supra* note 242, at 257.

288. See SOLIS, *supra* note 21, at 284.

289. See OSIEL, *supra* note 242, at 257, 262.

international law requires soldiers to accept genuine personal risk, which is necessary to limit civilian casualties. Otherwise, their inclination to hyperbolize dangers of captivity could well induce them to inflict greater civilian casualties than ethically acceptable.²⁹⁰

After properly analyzing the international law of *in bello* proportionality, it is clear that Israeli policy in operation Cast Lead was consistent with such law. Israeli policy rejects the view that force protection may ever categorically override the aim of protecting civilians from combat harm.²⁹¹ This does not imply that every commander and soldier adhered to official IDF policy on every occasion and that disproportionate force was therefore never applied. In fact, there is indication from various news reports that some soldiers may have received orders suggesting their individual and group well-being should be given complete priority over the well-being of Palestinian civilians, in the event of a conflict between the goals of protecting each of these two categories of individuals.²⁹² Where sufficient evidence of such abusive conduct is evident, Israel must punish those responsible for it.²⁹³ In the future, Israel must further strive to prevent such misconduct more effectively.

290. See Blum, *supra* note 21, at 57–58 (discussing the role of IHL in counteracting tendencies to overvalue military advantages in relation to risks thereby imposed on the enemy’s civilian population).

291. See *supra* note 274 and accompanying text.

292. See *supra* note 13. See also Kasher & Yadlin, *supra* note 203, at 17–21 (defending military prioritization of force protection). Some contend that such thinking led IDF forces to accord undue weight to force protection during Operation Cast Lead. See, e.g., Plaw, *supra* note 261, at 5.

293. Israel conducted a number of administrative and criminal investigations, concluding that disproportional attacks did not occur in this campaign due to the overvaluation of force protection. See, e.g., STATE OF ISR., GAZA OPERATION INVESTIGATION: SECOND UPDATE 3 (2010) (describing forty-seven criminal investigations, some of which resulted in criminal trials); OPERATION IN GAZA, *supra* note 15, at 1–4, 32, 46 (describing the force protection policy implemented by Israeli forces during the operation and its compatibility with *jus in bello* proportionality). Israel’s efforts were acknowledged even by some of its critics. See *Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law Established Pursuant to Council Resolution 13/9*, UN Doc A/HRC/16/24, 21 (Mar. 18, 2011). This report is of the second commission appointed as follow-up to the Goldstone Commission (A.K.A. “the Davies Commission”). While that report still criticizes Israel to a certain degree, it also acknowledges that “Israel has dedicated significant resources to investigate over 400 allegations of operational misconduct in Gaza.” See also Richard Goldstone, *Reconsidering the Goldstone Report and Israel and War Crimes*, THE WASHINGTON POST (Apr. 2, 2011), http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html. But see Hina Jilani, Christine Chinkin & Desmond Travers, *Goldstone Report: Statement Issued by Members of UN Mission on Gaza War*, GUARDIAN.CO.UK (Apr. 14, 2011), <http://www.guardian.co.uk/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza>.

IV. CONCLUSION

Outsiders consistently fail to understand Israel's decision to prioritize captivity avoidance, an emphasis reflected both in the generous terms of its recent prisoner exchanges and its recent military practices. International reaction to the Shalit exchange amply reflects this disparity between Israeli opinion and that of even the country's most sympathetic foreign observers. That disagreement stems, as this Article has shown, from changes in the social distribution of military hardship within Israeli society and the repercussions of that change for the country's self-understanding and the psychodynamics of its citizens. This cultural chasm between Israel and its observers explains why so few were prepared to acknowledge that the design of Operation Cast Lead reflected a legitimate national concern with capture-avoidance. That misunderstanding accounts for the judgment by many of Israel's critics that its military conduct is inconsistent with the international law of proportionality. This misunderstanding insufficiently appreciates how the capture of Israel's soldiers seriously threatens the country's security.

The present Article corrects these mistaken views of fact and interpretations of law. Although Israel faces the problem of soldier protection with particular intensity, other modern states confront it with increasing urgency as well. The Israeli experience, therefore, points the way for an initial approach to this international moral and legal predicament. That experience especially discloses the ways in which societal concerns with troop protection in general—no less than capture avoidance in particular—may legitimately influence legal judgments regarding the proportionality (both *jus ad bellum* and *jus in bello*) of particular uses of force.

Our examination of Israel's policies and overall conduct during Operation Cast Lead concludes that these were reasonable and taken in good faith. We argue that Israel's declared enemies do not doubt the sincerity of its belief that its national security is gravely compromised by the capture of its soldiers. Israel's critics are demonstrably misguided in alleging that Israel invoked the capture of its soldiers as mere pretext for launching a war of aggression, thereby causing excessive civilian harm. This does not deny that a few field units may have prioritized force protection to unacceptable degree. International law requires that such

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abuses be investigated and sanctioned. The Israel military justice system has taken significant steps to that end.²⁹⁴

294. See *supra* note 293 and accompanying text.