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THE ELOR AZARIA CASE: A HALAKHIC FRAMEWORK

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Last spring, IDF soldier Elor Azaria deliberately shot and killed a wounded man lying on the ground. Several minutes before, that man had deliberately knifed one of Elor's comrades.

Last week, a military tribunal found Azaria guilty of "harigab". Generals and philosophers and rabbis weighed in to support or denounce the verdict, while accusing each other of ignoring or distorting Torah and ethics. Some voices supported the verdict but called for either a pardon or for very lenient sentencing.

The verdict depended on both a determination of fact – that Azaria had no reasonable basis to believe that the man posed a threat - and a determination of law.

Given the determination of fact, was the determination of law compatible with the letter and spirit of Halakhah?

One halakhic framework many opiners cited is Maimonides' ruling (Laws of Murder and Life-Preservation 1:13) that one must use the minimum force necessary to stop a *rodef* (person attempting to kill another). One who kills a *rodef* unnecessarily is called a *shofekh damim* (bloodshedder), but is not executed by Torah courts.

Why is he not executed? Maimonides distinguishes between *retzichah* (murder), which is automatically punished by execution, and *shofekh damim* (bloodshedding), which is not. As in many legal systems, a variety of mitigating factors can lower a crime from first to second degree homicide, or from murder to manslaughter.

The Israeli military system apparently makes a similar distinction between "retzichah" and "harigab", with *harigab* parallel to *shofekh damim*. (The analogy some have made to the halakhic category *retzichah beshogeg* (accidental homicide), which is punished by internal exile, is incorrect.)

While halakhah does not **mandate** executing a *shofekh damim*, Maimonides makes clear that the state has the authority to punish the sinner in accordance with social need and communal ethics.

Therefore, if *rodef* is the proper framework, Halakhah leaves Azaria's punishment to the judgement of the secular authorities. It is within the letter and spirit of halakhah to argue for leniency or stringency on moral or policy grounds.

However, *rodef* is not the proper framework, for several reasons.

- 1) Maimonides discusses situations where the *rodef* is still dangerous; he never considers permitting the extrajudicial killing of an incapacitated *rodef*. If a terrorist no longer poses a threat, only formally constituted authorities may execute him. (The related halakhic framework of *ba bamachteret* (furtive trespass) yields the same result.)
- 2) *Rodef* does not apply in the context of war. Soldiers engaged in battle have no halakhic obligation to wound rather than kill enemies, even when wounding would accomplish the same military objective. (I discuss captured or surrendering soldiers below.)

With *rodef* eliminated, what is the proper framework? Should the man Elor Azaria killed be treated as a civilian who attempted murder, or rather as a soldier in an enemy army?

Professor Asa Kasher¹, an author of the IDF code of ethics, contends that terrorists must be treated as civilian criminals. I suggest that from a halakhic perspective, the issue may depend on the status of non-Jews living under Jewish rule in the Land of Israel today.

¹see [here](#) for a Torah in Motion panel on military ethics featuring Dr. Kasher and myself

Popular halakhah often uses the term *geri toshav* (resident aliens) to refer to non-Jews who observe the Seven Noachide Commandments, including the prohibition against bloodshedding. However, this halakhic category formally applies only when the Jubilee is in force, and only in territory under Jewish rule. The Jubilee is not in force today, and throughout the Diaspora Jews live and have lived under non-Jewish sovereignty. Clearly the non-Jews of those societies are not formal *geri toshav*. There must be a category that covers at least non-Jews living under their own sovereignty outside the Land of Israel.

My tradition from my teachers is to distinguish between de jure and de facto *geri toshav*. De jure *geri toshav* undergo a formal naturalization process which includes acceptance of Jewish rule and of the binding force of the Seven Noachide Commandments, including the prohibition against bloodshedding. De facto *geri toshav* simply live in accordance with the Seven Noachide Commandments. The conditions of the Jubilee et al apply only to de jure *geri toshav*, whereas our obligations of sustaining (including the law of pursuit) apply to both categories of *geri toshav*.

Three relevant questions remain open:

- 1) What is the status of a de facto *ger toshav* who lives in an area under legitimate Jewish rule but actively resists that rule?
- 2) Can the status of de facto *ger toshav* result from membership in a community or group, or must it be acquired individually on the basis of behavior?
- 3) If a de facto *ger toshav* deliberately violates one of the Seven Noachide Commandments, is he or she now considered a sinning *ger toshav*, or rather an *ex-ger toshav*?

I suggest that along these three axes it is possible to distinguish between citizens of Israel and non-citizens living in the Territories. Perhaps Israeli citizenship automatically grants a person the status of de facto *ger toshav*, and so long as the person retains citizenship, regardless of their crimes, they remain *geri toshav*. However, residents of the territories living under military administration have no such collective grant. Their status depends on their individual actions, and so an attempted murderer from the territories loses the status of *ger toshav*.

Furthermore, perhaps attempted murderers with political motivations, having lost the status of *ger toshav*, may be treated halakhically as enemy combatants. (But there really is very little halakhic discussion of irregular warfare.)

Terrorists who are not Israeli citizens are therefore not *geri toshav*, and likely should be regarded as enemy combatants. (We must still consider whether soldiers should presume that terrorists are citizens.) Elor Azaria's case should accordingly be treated as equivalent to shooting an incapacitated prisoner of war.

The halakhah regarding prisoners of war is undeveloped. But there is universal agreement that the IDF can hold its soldiers accountable to its own code of conduct in this regard. The IDF has the right to punish Elor Azaria as it sees fit for violating its halakhically legitimate ethical norms.

I celebrate the continued vitality of those norms, and support their robust enforcement.

Some of those who demonstrated against the Azaria verdict did so with reprehensible motivations, such as racism, or actions, such as threats of violence. There is no room for threats against a legitimate system of justice. The defendant seems to show no remorse. There is grave danger of a slippery slope, and of emboldening dangerous elements of Israeli society. For all these reasons, I oppose showing Azaria extraordinary leniency.

But I do not think it is fair to tar all those who call for leniency as denying obvious principles of halakhah or Jewish ethics. There is no developed body of halakhah dealing with the ethics of ethically asymmetrical warfare. Having never been a soldier, I prefer not to make absolute judgments about what it is fair to expect of human beings in the fog of battle, although in this case my instincts are with the prosecution.

It is rarely good for justice when individual cases become symbols. For example, symbolic defendants often cannot be acquitted when there is strong evidence of guilt, even if reasonable doubt remains. Such cases are a good time for scholars to heed the Rabbinic injunction "Sages, be cautious with your words", lest you mislead your students and they suffer the consequences. I hope my words here meet that standard.

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