

## Prisoner Exchanges, Redeeming Captives and Halacha

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Jewish law, as explained in the Talmud, *Rishonim* and *Shulchan Aruch*, has a well established set of rules with regard to redeeming captives taken prisoner for ransom by bandits. They are:

1. The redeeming of prisoners is the most important mitzvah in the laws of charity and is to be done expeditiously.<sup>1</sup>
2. Notwithstanding the above exhortation, captives ought to not be redeemed by the community for more than the customary value of prisoners, so as to make sure that Jews are not made targets of kidnapping and ransom.<sup>2</sup>
3. Even though a community may not redeem captives for more than their fair worth, an individual person may pay his own ransom as he deems fit, and the same might be true for other members of his family.<sup>3</sup>
4. There is a dispute in Jewish law as to whether rule (2) applies when prisoners are being killed if their ransom is not paid<sup>4</sup>, although the consensus seems to be that such remains the rule even if captives are usually murdered if no ransom is paid.<sup>5</sup>

**“A government, by dint of serving the vast national interest of many people and even future generations, is permitted to consider long-term factors and reach results predicated on a vast national interest, even if it risks many lives for seemingly little real short-term gain.”**

In the United States, Canada and most Western nations, it is against public policy for the family of a kidnap victim to pay a ransom to release the one kidnapped, since the government wishes to make it clear that kidnapping for ransom is a pointless crime since no ransom will ever be paid. It has, in halachic terms, set the market value for kidnap victims at zero.<sup>6</sup> Indeed, kidnapping for ransom is thus extremely rare in America, and almost never successful.

Furthermore, it is generally accepted that the rules governing *pidyon shevuyim* do not apply to people who are in prison for a crime that they committed and are being justly punished for. As Rabbi Yehuda Goldreicht recounted:

*I asked Rabbi Shlomo Zalman Auerbach about a particular Jew who stole a large sum of money and was caught by the police in America. He was sentenced to a number of years in prison in America. Was it proper to assist in the collection of money for him [we were speaking about a large sum of \$200,000] in order to fulfill the mitzvah of redeeming captives to have him released from prison? When Rabbi Auerbach heard this he stated “Redeeming captives?! What is the mitzvah of redeeming captives*

*here? The mitzvah of redeeming captives is only when the gentiles are grabbing Jews, irrationally, for no proper reason, and placing them in prison. According to what I [Rabbi Auerbach] know, in America they do not irrationally grab Jews in order to squeeze money from them. The Torah says ‘do not steal’ and he stole money — on the contrary, it is good that he serve a prison sentence, so that he learns not to steal!”<sup>7</sup>*

Thus, it is relatively rare that we are actually confronted with a proper application of the mitzvah of *pidyon shivuyim* in America. The same is true for Israel, where kidnapping for ransom is extremely unusual.

However, sadly enough, Israeli soldiers are sometimes kidnapped by terrorist organizations that do not conduct them in accordance with the Geneva Convention with regard to prisoners of war. They seek to ransom back these soldiers (or their bodies) to the Israeli government. How should Halacha view such requests?

It seems clear that the obligation of *pidyon shivuyim* in its classical formulation in *Shulchan Aruch* simply does not apply to governmental conduct or to wartime; rather, these rules are limited to private or communal conduct. The conceptual reason behind this is pointed out by Rabbi Eliezer Yehudah Waldenberg in his responsa *Tzitz Eliezer* 12:57 and 13:100 when he addresses the question of governmental policy concerning the obligation of rescuing prisoners taken in wartime.<sup>8</sup>

Rabbi Waldenberg was asked about a government’s decision to send troops to rescue other captured soldiers, even when more soldiers will be killed during the rescue mission than had been captured in the first place — which would seem to violate the Talmudic rules explained above. Rabbi Waldenberg responds by positing two conceptual points that this writer thinks are correct.

The first is that war is different from individual or even communal Halacha and has a different set of rules. By this, Rabbi Waldenberg means that the basic halachot of war allow the killing of human beings in circumstances that are otherwise prohibited.

This construct can be supported by many other sources in many different contexts related to war. A list of *poskim* who agree with this approach begins with the thoughtful article by Rabbi Shaul Israeli in *Amud ha-Yemini* 16, which has produced a wealth of intellectual progeny on parade in nearly every subsequent issue of *Tehumin* by such luminary authors as Rabbi Ya’akov Ariel, Rabbi Shlomo Goren, Rabbi Ovadya Yosef and many others, all of whom





accept the starting point of R. Shaul Yisraeli — and R. Waldenberg — that the general methodology of Halacha is suspended in wartime.

Rabbi Waldenberg's second point is that governmental decisions are different from individual decisions and also follow a separate set of rules. (In this case, return of soldiers or even soldiers' bodies is a valid governmental goal and can be the basis for risking lives to accomplish, something that is certainly not generally permitted otherwise.)

A government — by dint of serving the vast national interest of many people and even future generations — is permitted (at the very least, in situations of war) to consider long-term factors and reach results predicated on a vast national interest, even if it risks many lives for seemingly little real short-term gain. Thus, a government could conclude, he states, that it is proper to lose the lives of three soldiers to rescue one, because it is important to the morale of the army for every individual soldier to know that all efforts will be expended to return him home, whether he is alive or not.

These observations by Rabbis Waldenberg and Yisraeli cause one to realize that Jewish law's view of combat conduct and battlefield ethics is, in fact, much simpler than one might think. A government at war may certainly choose to wage a lethal strike against enemy soldiers (and even civilians) since it even has the right to engage in military action that risks the lives of its own soldiers and civilians during wartime.

Recognition of the responsibility of the government for such difficult wartime decisions leads one to conclude — to take but one difficult example — that even the controversial "Hannibal procedure" seems to be a valid option from the perspective of Jewish law. (The term refers to instructions in the case in which a soldier has been kidnapped and the government realizes that it cannot rescue him. The government then sets out to kill the captured soldier, so as to avoid the long, drawn out

demoralizing situation of a soldier in enemy hands, when it concludes that such a policy best serves the nation.)<sup>9</sup>

Consider how to analyze such an order *al pe din*. Absent wartime, it is obvious that such conduct is prohibited. However, in wartime, a different result might be reached.

First and foremost, it is now clear that most of the Israeli soldiers who have been kidnapped during the intifada (as opposed to Israel's prior wars) are killed by their captors. Given that reality, any attempt to rescue a soldier who is being kidnapped is in the best interest of that soldier, as without rescue the soldier will most likely die, perhaps hideously. Like medical intervention that sometimes kills, the motives of the intervener are determinative of the presence or absence of sin. When one attempts to rescue a person from the threat of death and kills him in that rescue process, that is a bad outcome, but not murder at all. Indeed, such rescue attempts are prudent. Consent by the soldier to such attempts is implied, and is in his best interest.<sup>10</sup>

Second, soldiers are different from others. In a military context, the army has the right to direct soldiers into difficult situations, where their lives will be in danger and some will certainly die. Such is frequently the very nature of military action. Although generally one may avoid any halachic obligation due to danger to one's life, such is not the case with the obligation to serve in the army or to fight once drafted. The risk is part of the mitzvah, and cannot exempt one from the obligation. Thus, even if the soldier does not want to be saved in this manner, the army can compel soldiers to take certain risks against their wishes. That is why Halacha permits a military draft.

Third, even in the very sad case where the government has decided that it must stop the kidnapping even at the price of a soldier's life, and thus no real rescue attempt is made (such as shooting at the vehicle or building that the soldier is in with a missile from a tank), that conduct is not murder either.

In wartime, Halacha permits even the killing of innocent civilians as a side consequence of war. In this circumstance, the government has decided that it must kill the terrorists who engage in the kidnapping of Israeli soldiers at any cost, and that cost might entail the death of the soldiers who are taken prisoner. These soldiers who are hostages are like innocent civilians, and their death by friendly fire is not an act of murder by those who have shot them. This would not be the case outside of the army setting, where killing hostages is an act of murder.

Thus, it is quite clear that the framework for redeeming captives kidnapped for ransom found in *Shulchan Aruch, Yoreh Deah 252* is not applicable to decisions of the government of Israel to ransom or rescue Israeli soldiers (or even their bodies) kidnapped by terrorists in wartime.

May we live in a time where these discussions are purely theoretical, and the purely theoretical discussions I recall so well from my days at RIETS in *kodshim* and *taharot* become practical. ■

#### Footnotes

1. *Shulchan Aruch, Yoreh Deah 252:1 and 2.*
2. *Shulchan Aruch, Yoreh Deah 252:4.*
3. *Shulchan Aruch, Yoreh Deah 252:4, and Shach ad loc.; see also Bach commenting on Yoreh Deah 252:2.*
4. See Pitchai Teshuvah, *Yoreh Deah 252:4 for the contours of this dispute.*
5. *The logic is obvious: if one is compelled to make larger than normal payments to prevent the murder of kidnap victims, the basic rationale of this halachic framework becomes ineffective, as kidnappers will learn that all they need to do to get a better price is murder a captive.*
6. See, for example, Meadow Clendenin, "No Concessions," *Emory Law Journal* 56:741 (2006). For more on this, see *Model Penal Code § 2.06 and notes thereon.*
7. *Ve'aleyhu lo Yivul, volume 2: 113–114.*
8. I have addressed this global issue generally in Michael Broyde, "Just Wars, Just Battles and Just Conduct in Jewish Law: Jewish Law Is Not a Suicide Pact!" in Lawrence Schiffman and Joel B. Wolowelsky, eds., *War and Peace in the Jewish Tradition: Proceedings of the 16th Orthodox Forum* (2004) (New York: Michael Scharf Publication Trust of the Yeshiva University Press, 2007), 1–43 and Michael Broyde, "Only the Good Die Young?" *Meorot* 6(1):1–6 (2006), and *Meorot* 6(2):21–31 (2007).
9. *These Hannibal procedures have become a source of some controversy in Israel, where for nearly 20 years they had been standing orders in the case of a kidnapping. See Sara Leibovich-Dar, "Rescue by Death," Ha'aretz, May 22, 2003 (article number 996968). (The article states that the three Israeli soldiers whose remains were returned two years ago were killed in such a fashion.)*
10. For more on this approach, see Chazon Ish, *Sanhedrin 47b.*