The Shalit Case: The Responsibilities of the Jewish State

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The release deal in which the Israeli soldier Gilad Shalit was returned to his home entailed a very serious decision. In this article, I argue that the price for surrendering to terrorism—as the State of Israel did in this release deal—is a heavy price; however, it was necessary and right. This might not be readily understandable. Accepted governmental and military logic cannot agree to a deal of this nature. American soldiers, British citizens, and others are currently being held by kidnappers, captors, and different organizations for longer periods of time—and no negotiation for their release takes place. A deal such as the one made for Gilad Shalit has a specific Israeli component. One Israeli soldier has the value of a thousand enemies. Is there any logic to it? Is it permitted?

This halakhic question has great importance. It must deal with the practical means of implementing classic halakhic sources into complicated and changeable situations. It could be said that this question relates to the essence of the methods of halakhic ruling.

Some claim that the major responsibility of the adjudicator is to know the earlier sources as well as to have an extensive proficiency in the halakhic literature relating to the specific topic at hand. Yet, in addition to knowing these sources, it is necessary to have the ability of proceeding with cautious and just analysis and implementation.

Although the various halakhic answers repeat and quote one main source, the contemporary adjudicator must analyze the actual situation today, and clarify the similarities and the differences with past halakhic rulings; only then can one derive proper conclusions. That is the challenge of halakhic decision-making. Otherwise, it seems that whoever is able to read and has obtained an adequate mastery of “Google Search” can be an adjudicator par excellence. The challenge then is to rule as best as we can by careful study of the sources, as well as careful study of new and changing realities.

Here is a famous halakha dealing with capital offenses: “If a group of [Jewish] men are traveling on a journey and Gentiles encountered them and said to them: Give us one of your men and we will kill him, and if you refuse, we will kill you all, all should be killed and not one soul of Israel should be delivered to them”(*Yerushalmi*, *Trumot*, 8).

Where is the rationality here? Where is the evaluation? A death of one in comparison with the death of many!? The moral-halakhic answer is: There is no evaluation of number of people as opposed to high values. Each life is of infinite value, and we have no ethical right to turn over anyone to be murdered.

The supreme principle is that it is better to pay a grave price of lives rather than to violate a high ethical value that is higher and more valuable than life itself. The high value is not giving a person away to murderers. The Torah commands that we be killed rather than to transgress this principle.

The Shalit Deal resembles the well-known talmudic dilemma: “If two are travelling on a journey [far from civilization], and one has a pitcher of water; if both drink, they will [both] die, but if one only drinks, he can reach civilization,—Ben Patura taught: It is better that both should drink and die, rather than that one should behold his companion's death. Until R. Akiva came and taught: ‘that thy brother may live with thee:’ thy life takes precedence over his life” (*Baba Metzia*, 62a).

Theoretically, there is no logic to the opinion of Ben Patura: “Better that both should drink and die”? Nevertheless it has a high ethical value: One should not behold his companion's death. But what is the ruling in a case such as this? In general the halakha is in agreement with Rabbi Akiva. A person has the right to save his own life.

The Israel Defense Forces (IDF), however, in each and every combat, rules according to Ben Patura! In the course of every military operation soldiers risk their lives to rescue an injured IDF combatant, to cover for others, to allow a better position for the front or the back lines. A soldier who will put forth the opinion of Rabbi Akiva and will declare: My life takes precedence over the life of my friend, will find himself removed from the unit. We learn thus that in the actual laws of war, we rule according to Ben Patura. This is a high ethical value, an existential value for both the short and the long terms. The rescue forces and the fire brigade operate likewise in incidents of fire and every other calamity.

In private matters, the halakha is according to Rabbi Akiva. One who sees someone drowning or entrapped in a burning house is indeed morally obligated to try to save the victim, even by putting himself at a minor risk, as it is written: “You shall not stand idly by the blood of your brother.” But if the rescue involves a risk of death, then one is exempt. One is not bound to an act of self-sacrifice. This is the difference between the public sphere and the private sphere, and in this way the argument is settled. The halakha is according to Rabbi Akiva in matters involving individuals and according to Ben Patura in matters involving the public.

Israeli society cannot allow the giving up on any of its soldiers who were injured or captured. This is the secret strength of its power and the secret of the unity among all its troops. Soldiers and citizens sacrifice their lives for the life of the public; but they are never to be sacrificed by the public.

Every time this issue arises, people are quick to cite immediately the famous Mishna: “Captives should not be redeemed for more than their value, to prevent abuses” (Mishna *Gittin*, 45a). And they offer the simple commentary: Terrorists must not be released to save a captured Israeli soldier. Yet, the people who cite this Mishna do not bother to quote the following sentence in the same Mishna and said in the same breath: “Captives should not be helped to escape, to prevent abuses. Rabban Simeon Ben Gamaliel says [that the reason is] to prevent the ill-treatment of fellow captives.” That is to say: No one is to execute a mission for the purpose of rescuing the captives, since the captors will come to act with increased violence against other captives.

According to Rabban Simeon Ben Gamaliel’s opinion, Operation Entebbe was wrong, and the attempt to release Nachshon Vaksman was forbidden according to the halakha. But do we follow this ruling? Absolutely not! The operation to rescue Nachshon Vaxman was highly important and positive as is every action or operation which is a part of Israel's military activity to rescue fellow Israelis.

This Mishna was not ruling about an individual who fell captive as a part of a general war or a soldier who was sent by the state. Rather, this Mishna deals with thieves and pirate merchants who made a living by capturing people and selling them for the highest price. These captives had a specific price. In this context the Maharam of Rotenburg did not permit his own release from captivity, and he remained in captivity where his disciples could come to visit him, learn the Torah from him, and provide him with food and clothing.

This is a very different scenario from captives of war or the capturing of soldiers or civilians for the purpose of political and terrorist violence aimed at weakening the State of Israel. The Mishna simply is not addressing the responsibilities of a Jewish State toward its soldiers and citizens.

This is an example of the manner in which we must handle halakhic questions in the State of Israel. How to apply halakha in a modern democratic State is of utmost importance.

The examination of the relation between halakha and democracy can yield three possible conclusions:

1. Everything is under the halakhic order. Consequently, there is no right to conduct and consider democratic options that are not within the halakhic framework.
2. There is no correlation between the halakha as a private way of living, and general governmental considerations, that is, there is a separation of synagogue and State.
3. The halakha refers to all fields of life and has a say in every aspect of both the private and the public spheres. Nevertheless, even according to the halakha, there are matters in which there is substantial room for moral and social thought to go hand-in-hand with contemporary realities.

In this article, I am pointing out that the traditional halakhic sources relating to redemption of captives (*pidyon shevuyim*) simply do not relate to the public dimension of a modern Jewish State. The State has overall defense responsibility for the society and the individual citizens of Israel. The traditional sources on *pidyon shevuyim* do not apply here. The term “all Jews are responsible for one another” receives a new meaning and applies to the obligation of taking responsibility and actual risk for each of our fellow citizens.

Already in the context of the Mishna, the Tosafists and other Rishonim ruled that there are situations that are exceptional, and hence that we are allowed to rescue a captive even for an enormous price:

1. A distinguished person, one who excels in wisdom and importance (and for this reason the Maharam's refusal to allow his release for the high price his captors demanded, was an act of piety not demanded by halakha)
2. A situation in which the life of the captive is at risk (Tosafot, *Gittin* 58, “*Kol Mamon*”)
3. A wife, as the husband is obliged to free her. Likewise, a person has the obligation to ransom himself, if his able to do so.
4. In times of war

The topic of the Shalit Deal relates to the ongoing war between Israel and its enemies. All negotiations must be executed according to evaluations and agreements whose main concern is the defense and security of Israel. One who asks for halakhic proof will find that all the rules of *pidyon shevuyim* were not mentioned by the Rambam (Maimonides) in Laws of Kings and their Wars, but rather in Chapter 8, the Laws of *Matanot Aniyim*. This latter chapter presents rules of charity and the priorities for using money that was collected by the community for various charity purposes. This is where Rambam discusses the laws of redeeming captives—as a matter relating to individuals and communities. He does not discuss this topic in relation to the responsibilities of a Jewish State.

Rabbi Shlomo Goren, late Ashkenazic Chief Rabbi of Israel, wrote a Responsum in 5785 (1985) regarding the Jibril Agreement in which Israel released more than 1,000 terrorists. He cites the halakhic and defense arguments against an agreement of this kind. The main source for this prohibition is the Mishna quoted above.

The late Rabbi Haim David Halevy, Sephardic Chief Rabbi of Tel Aviv during those years, referred to Rabbi Goren's opinion, and rejected it. (Rabbi Halevy's Responsum was published in his book *Ase Lekha Rav*, Vol. 8, no. 53). He wrote: “Where, in all the halakhic discussion of this subject matter, is there a situation equivalent to the one we are facing today? Therefore, we need halakhic innovation at this point in time, in the spirit of the ancient sources and in accordance with them, that

is—a new halakhic ruling."

Rabbi Halevy analyzes the ruling of the Tosafists, cited above, and finds in their words innovation and daring. From the power of the Tosafists' words, he argued that even in our times we must rework the halakha in accordance with our national lives and not be satisfied with the simple reading of classic halakhic sources. Rabbi Halevy noted that when the Israeli government agreed to trade a large number of terrorists, this was not contrary to halakha, but rather a proper application of halakhic principles to an entirely new situation. Since we do not have a Sanhedrin to make these important national decisions, we must take responsibility for applying halakha to the ever-changing situations that confront us.

A year after Rabbi Goren had passed away in 5756 (1996), his book *Torat haMedina* was published, and in it is included his Responsum from the year 5745. However, this volume also includes a completely opposite conclusion:

Nonetheless, despite all that [I have written], in the case of prisoners of war, soldiers who fall captive while on duty in the name of the State that sent them to war, there is an obligation to do everything for their release.… Possibly the State bears the undisputed obligation to release them out of any danger, and there are no constrains of *Pidyon Shevuyim* … And there should not be any consideration of security risk that their release might cause to the public and the State, as each and every one of us is responsible for their captivity … It is not right to use the criterion of "their value" due to the responsibility that the State and the army have, of protecting its soldiers at any price.

Clearly, after he wrote the answer in the year 5745, Rabbi Goren arrived at an opposite conclusion! Why did Rabbi Goren make such dramatic change in his answer? He was convinced that each IDF soldier is an integral part of IDF as a body. In this matter, there are other rules, Laws of War rather than Laws of Charity. In a sense, all the citizens of Israel are soldiers who are taking part in a rescue operation for the release of one soldier from the family. This is our obligation as well as our uniqueness.

A similar approach was expressed by the late Rabbi Shaul Israeli:

Since our soldiers went out to war for the State and in its name to protect the people living in Zion, thus an unwritten but self-understood obligation exists that the State must use all its options, without jeopardizing its overall security, for their release in the case of their fall. And just as the obligation stands in the case of their injury, heaven forbid, in war, so too the demand to act in every possible way for their release from captivity is of no less in importance, "because it includes the suffering of public."

It is essential to emphasize that in war there is no proper calculation of casualties. Let us remember that The Second Lebanon War broke out due to concern for the fate of two captured Israeli soldiers. In our attempt to teach Hezbollah a lesson and hopefully release our captives, many soldiers fell, and many citizens—approximately 150—were killed. Is there a demand to avoid a military activity when its price is a hundred times higher than the number of the captured? No. This is a governmental and security consideration.