

Rabbi Dr. Shlomo Brody

Halakhic Dilemmas of Treating Wounded Terrorists

Since the horrific 10/7 attacks and war with Hamas, Israeli medics and hospitals have dealt with terrorists taken to them for medical treatment. This creates moral distress for healthcare professionals, who have no desire to treat terrorists who minutes or hours beforehand might have been killing and raping Israelis. In several Israeli public hospitals, the staff protested treating such patients. Some respond that such selectivity opens a dangerous slippery slope. Once we start deciding who to treat and not to treat, we open a Pandora's box. No one wants to treat murderers, wife beaters, or rapists. Yet the job of healthcare professionals is to treat people, independent of their national origins or moral liability. Questions of moral and legal liability are addressed by other authorities at a later time.

Ultimately, Israel's health minister ordered that terrorists should be treated at the IDF's Sde Teiman medical facility unless they had an injury which was life-threatening or could lead to irreversible

damage or disability. In such a case, a senior doctor may transfer them to a civilian hospital for necessary treatment.³⁶

The cases raised two fundamental questions: 1) Should wounded terrorists be treated at all? 2) Who should get priority of treatment in triage circumstances?

A few outspoken rabbis, including Rabbi Shmuel Eliyahu,³⁷ the Chief Rabbi of Tzfat, asserted that Israel should not be providing any medical care for these terrorists. They might be seen as clear and present threats to the state – in halachic terms, a “rodef” (pursuer) – and do not deserve any help toward their recovery. This claim is difficult to maintain once the terrorist has been physically neutralized. One might retort that since they are fighters who would return to action once they are healed, they do not lose their status as “pursuers.” This approach might further deter Hamas members from attacking in the first place. Yet fundamentalists don’t get so easily deterred, especially in cultures that promote become a *shaheed* (martyr). More fundamentally, to argue that neutralized Hamas terrorists still have the status of a pursuer would mean, conversely, that any Israeli citizen who could be called up for reserve service would be a legitimate military target. After all, if called up, they would

Rabbi Dr. Shlomo Brody is the executive director of Ematai and the author of *Ethics of Our Fighters: A Jewish View on War & Morality* (Maggid)

³⁶ <https://www.timesofisrael.com/health-ministry-issues-directives-for-medical-treatment-of-detained-gazan-terrorists/>

³⁷ <https://www.israelhayom.co.il/judaism/judaism-news/article/11089093>

become legitimate fighters. These are the reasons why we place moral limits on warfare. We don't exaggerate who represent a real threat so that we can minimize unnecessary bloodshed.

Another argument raised against treating terrorists was that with regard to evildoers, the Talmud states *eino ma'alim*, we don't do anything to save them.³⁸ In fact, during the height of lone-wolf attackers during the so-called "knife intifada" of 2015-2016, Rabbi Eliyahu argued that neutralized terrorists should be killed. This, he believed, is in line with the sentiment, found in *Masekhet Sofrim*, that "The best of gentiles may be killed [in war]," which was regularly interpreted to apply to enemy combatants during wartime.³⁹ Yet it's unclear why combatants retain that status once they've been captured or debilitated. As Rabbenu Behaya argues, the logic of the expression in *Masekhet Sofrim* is that during wartime when gentiles are coming to kill us, we should rise and kill them first. Yet once the threat has ended, peace, not violence, should be the goal.⁴⁰

During the knife-intifada, Rabbi Yaakov Ariel of Ramat Gan argued that the inevitable recording of such executions might further enrage our blood-thirsty and vengeful enemies and add to the threats

³⁸ Yoreh De'ah 158:1.

³⁹ *Masekhet Sofrim* 15:7. See also *Tosafot Avodah Zarah* 26b d.h. *ve-lo moridin*. For the history of this expression (including the inclusion of the term "in war") and its polemical use against Jews, see Rav Menachem Kasher, *Torah Sheleimah to Shemot* 9:20 and Excursus 19 in that volume. See also Jacob Katz, *Exclusiveness and Tolerance*, p. 107-108.

⁴⁰ Rabbenu Bachaya to *Shemot* 14:7

against us, as opposed to serving as a deterrent. He further added a more integral argument: even in the midst of war, one must still remember that we are fighting against human beings. Once the threat has been neutralized, we should not desire to kill anyone.⁴¹ Another factor, relevant to the case of medical treatment, is that not treating a terrorist, let alone killing them, would constitute a *chillul Hashem*, desecration of God's name, given the widespread international belief in the obligation to keep captured enemies alive.⁴² Israel has signed on various international conventions to provide medical care to captured enemy soldiers. Once the threat is neutralized, we treat them.

This change in international treatment of POWs might have real halachic consequences. Throughout the history of warfare, including during the 20th century, many prisoners were killed.⁴³ Yet military conventions of the twentieth century, in 1929 and especially the Third Geneva Convention of 1949, have attempted to end this

⁴¹ *Ye'erav Sichi: Sichot im HaRav Yaakov Ariel*, ed. Arale Harel, p. 135.

⁴² See, for example, Rabbi Yehuda Henkin, [Shu"t Bnei Banim Volume 3, Maamar #4](#), p. 193-194. See also responsa #40-41. On the general consideration of *hillul Hashem*, see Prof. Aviad Hacohen, "*Lamah Yomru Ha-goyim*," in *Am Levadad*, ed. R. Binyamin Lau, p. 88-123 and R' Yitzhak Henshke, "*Darkhei Ha-goyim Ke-basis Le-shikul Hilkhati*," *Tzohar* 34 (5769).

⁴³ For statistics during the two World Wars of the 20th century, see Niall Ferguson, "Prisoner Taking and Prisoner Killing in the Age of Total War: Towards a Political Economy of Military Defeat," *War in History* 11:2 (2004), p. 148-192.

vengeful phenomenon, and for good reason.⁴⁴ As Rabbi Eliezer Waldenberg wrote in the early 1950s in his *Hilkhot Medina*, halakha recognizes the wisdom of swapping prisoners of war at the end of hostilities.⁴⁵ This, in part, is because the Torah itself offers examples and reasons for being merciful to foreign prisoners who are no longer combatants.⁴⁶ Even prisoners of war were created in the image of God, as he noted. Yet treating POWs well also serves the practical goal of securing the release of one's own POWs. In this respect, he argues, following the lead of R' Meir Simcha Hacoen of Dvinsk,⁴⁷ that the entire dispensation to keep enemy prisoners, including an *eshet yefat to'ar*, is only when the Jews have no captives of their own in enemy hands, something which is exceedingly rare in warfare. Otherwise, we are required to follow conventions of prisoner swaps and redeem any Jewish captive.

⁴⁴ The sentiment is well-summarized by Geoffrey S. Corn, et al, "Belligerent Targeting and the Invalidity of a Least Harmful Means Rule," *International Law Studies* 89 (2013), p. 537, "There is virtually no disagreement in the contemporary international discourse on the law of armed conflict (LOAC) with the rule that once an enemy belligerent becomes *hors de combat*—what a soldier would recognize as "combat ineffective"—the authority to employ deadly force terminates."

⁴⁵ *Hilkhot Medinah*, Volume 2, *Sha'ar* 5, *Perek* 9, p. 192-194.

⁴⁶ He cites, as proof, I Melachim 20:31 (and the comments of the Abarbanel) and the Rambam's comments to the end of *Hilkhot Avadim* 9:8.

⁴⁷ *Meshekh Hókhma* on Devarim 21:10 (Jerusalem, 5757), ed. Yehuda Cooperman, vol. 3, p. 148. See also Rabbi Eliezer Melamed, *Peninei Halakha: Ha'm Ve-ha'retz - Likkutim*, p. 128-129, who argues that contemporary military mores have nullified the dispensations of *eshet yefat to'ar*. On the law of *eshet yefat to'ar*, see my "[Enemy Captives and Rape](#)," *The Jerusalem Post*, October 27, 2016.

Similarly quoting the opinion of the *Meshech Chochmah*, Rabbi Yitzchak Zilberstein has ruled that not treating a terrorist will endanger Jewish captives or Jews living in foreign lands.⁴⁸ As such, they must be treated. He too cites additional sources in Tanach that promote the proper treatment of prisoners of war as well as the strategic benefit of such behavior.⁴⁹ As he warns, we must act wisely and not “swayed by emotion” to make wrong decisions in these sensitive matters.

This conclusion was also reached during the current war by the rabbinic posek for Jerusalem’s Shaare Tzedek hospital, Rabbi Asher Weiss. He gave two major arguments.⁵⁰ Firstly, Hamas terrorists who are kept alive can be used as bargaining chips for hostage swaps.⁵¹ As such, treating these despicable patients might ultimately help save Israeli captives. Secondly, in the realm of public diplomacy, it helps Israel in the court of public opinion to take such humanitarian gestures. Preserving our reputation can help us maintain critical political support from foreign countries.

⁴⁸ *Shiurei Torah La-Rofim*, Vol 4., p. 582-583, translated in *Medical-Halachic Responsa*, ed. Fred Rosner, Vol. 8, p. 485-487.

⁴⁹ II Kings 6:22-23 and the comments of Malbim, who asserts that one may only kill in the midst of war. See also Yalkut Shimoni to II Melachim, Remez 231, which asserts that the meal provided by Elisha to prisoners accomplished more than twenty-two years of war of Yoram and Achav.

⁵⁰ <https://rotter.net/forum/scoops1/818127.shtml>

⁵¹ Regarding the halakhic propriety of swapping enemy prisoners to release captives (dead or alive), see my book, *A Guide to the Complex: Contemporary Halakhic Debates* (Maggid Books, 2014), p. 262-265.

That said, it is fully reasonable for Israel to establish that when medically feasible, terrorists should be treated at designated medical centers for prisoners. The staff and patients of public hospitals do not need to be unnecessarily subjugated to the presence of such despicable killers.

Should Terrorist Victims Receive Medical Priority over their Attackers?⁵²

For the reasons mentioned above, it becomes an imperative to keep enemy combatants alive once the threat has been neutralized. Yet this raises a separate but related question: should medics or hospitals prioritize treating severely wounded terrorists over more moderately wounded victims? In the midst of the above-mentioned “knife intifada,” the heads of the Israeli Medical Association (IMA) and the Magen David Adom (MDA) ambulance service announced that professional protocol mandates treating the wounded exclusively on the basis of their medical condition, independent of their national origins or moral liability. Medical professionals should treat patients without judgment, leaving questions of moral and legal liability for other authorities at a later time. Just as we treat car accident victims equally without asking who caused the accident, so too we should act neutrally at the site of a terrorist attack.

⁵² This section draws from my “Halakhic Dilemmas of the “Knife Intifada” in *Sefer Hayovel of Yeshivat Har Etzion* (Kodesh Press, 2019).

This sentiment, in fact, seems to have basis in international law, as stated in the First Geneva Convention: “Members of the armed forces who are wounded or sick shall be treated humanely and cared for without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria... Only urgent medical reasons will authorize priority in the order of treatment to be administered.” In the commentary to this law, further clarity is provided: “Each belligerent must treat his fallen adversaries as he would the wounded of his own army.”⁵³

Yet as sophisticated ethicists have noted, matters are not so simple, both in theory and certainly in practice, as military doctors (or for that matter, civilian health care providers assisting the army) have dual loyalties as both physicians and soldiers. The latter identity compels them to do what is best for military and security readiness, thereby dictating favoritism for one’s own brothers-in-arms. Indeed, many studies and anecdotal evidence indicate that medical soldiers give precedence to their own comrades during times of conflict.⁵⁴ Indeed, during the Knife Intifada, the pronouncements of the IMA and MDA drew sharp rebuke from the heads of the Hatzolah ambulance service and the Zaka rescue organization, who announced that they would give priority to victims when they were sufficiently wounded to

⁵³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 41, June 8, 1977, 1125 U.N.T.S. 3.

⁵⁴ Michael L. Gross, “Teaching Military Medical Ethics: Another Look at Dual Loyalty and Triage,” *Cambridge Quarterly of Healthcare Ethics* 19 (2010), p. 458–464.

require immediate care, even if the terrorist was more severely wounded.

This passionate debate rests, in part, on questions of triage in which societies must prioritize how to allocate scarce medical resources, in this case, utilizing emergency medical personnel for a third-party rescue by a public servant.⁵⁵ Who should get priority in this situation? Some decisors, including the Hazon Ish, Rabbi Abraham Karelitz, point to a Talmudic passage as a potential resource for this dilemma.⁵⁶ The Mishna states that a man receives preference over a woman when it comes to sustenance and restoring lost objects, but a woman takes precedence when it comes to provisions of clothing and being redeemed from captivity. It similarly asserts that a *kohen* (priest) takes precedence over a Levite, and that a scholar (even if born a bastard) gets precedent over an ignoramus, even if he is a *kohen gadol* (high priest). We thus have a series of criteria that prioritizes based on a variety of factors including genealogical sanctity, social utility, merit, and the level of threat.

Does this Mishna serve as a source for life-saving triage in the contemporary era? Perhaps, as seen in the 16th century ruling of

⁵⁵ Triage dilemmas, of course, can also emerge when those in need are in possession of the life-saving resource itself. The Talmud addresses one such case in a well-known debate regarding two thirsty desert travelers of which only one possesses a bottle of water sufficient to save himself alone (*Bava Metzia* 62a). For a good overview of various Jewish positions on triage, including those that apply to contemporary medical systems, see Alan Jotkowitz, "A Man Takes Precedence Over a Woman When it Comes to Saving a Life": The Modern Dilemma of Triage from a Halakhic and Ethical Perspective," *Tradition* 47:1 (2014), p. 48-68.

⁵⁶ *Horayot* 13a

Rabbi Moshe Isserles that one should save a drowning man before a woman, seemingly because men are obligated in more *mitzvot* than women.⁵⁷ Yet as Prof. Avraham Steinberg has noted, many 20th century scholars have questioned this ruling's feasibility or relevance in the contemporary era.⁵⁸ First, already in the 18th century, some scholars claimed that we cannot give priority to priests or Levites since we are no longer sure of accurate genealogical lineage. More fundamentally, contemporary decisors including Rabbi Eliezer Waldenberg have noted that some medieval commentators, including Meiri, asserted that the Mishna was only establishing priorities in food handouts, as indicated in the parallel passage in the *Talmud Yerushalmi*.⁵⁹ Rabbi Waldenberg further argues that even if this Mishna was referring to priorities in saving life, the rule giving preference to men over women was not codified in the major codes – *Mishneh Torah*, *Abra'ah Turin*, and *Shulhan Arukh* - because the Mishna ultimately cares more about the merit earned by the piety of the men and women (i.e., how many good deeds they perform), not the number of commandments they could theoretically perform. Such determinations, of course, cannot be easily made, particularly in the context of emergency care.

⁵⁷ See YD 252:8 and *Taz* *ibid.*, 252:6.

⁵⁸ Rabbi Dr. Avraham Steinberg, "*Peilut Ba-chazit Ha-oref*," *Assia* 21:1-2 (2008), p. 5-39.

⁵⁹ *Shu"t Tzitz Eliezer* 18:1, based on Meiri to Horayot 13a and *Yerushalmi Horayot* 3:4.

Other decisors have marginalized the Mishna by asserting that these priorities would only apply when all other factors are equal. Yet if one patient begins treatment earlier, he should not be abandoned for someone else. Alternatively, if one patient's health situation is significantly worse than another's, that patient gains preference, irrespective of social position. Accordingly, Rabbi Moshe Feinstein and Rabbi Shlomo Zalman Auerbach contend that the Mishna is of limited relevance in contemporary triage circumstances, in which we correctly tend to treat people equally based on medical criterion.⁶⁰

That said, it remains problematic to apply such egalitarian notions when one patient is a citizen and another is an enemy or a terrorist. It's precisely in times of national emergency when giving priority based on social worth may be more easily justified. Support for such social distinctions may be seen within the Talmudic ruling that a high priest sent to lead the troops in war (*kohen mashuach milchamah*) received priority over a vice *kohen gadol*, even though the latter may be seen as of a higher spiritual level. Nonetheless, since the former was necessary for public needs, his treatment is given priority.⁶¹ Indeed, many ethicists have wrangled with questions of the

⁶⁰ *Shu"t Igrot Moshe* 2:73-74 and *Shu"t Minchat Shlomo* 2:82:2

⁶¹ See *Nazir* 47b, Rashi *Horayot* 13a d.h. *le-hahayato*, and the discussion of R. Yitzchak Zylberstein in his *Nes Le-hitnoses*, *Siman* 67, p. 207-215.

justness of giving priority to certain soldiers over others in different contexts based on their utility in warfare.⁶²

In the case in which we are deciding between treating a wounded civilian victim and an enemy terrorist, the claim to prioritize the former is particularly strong since the gap between the social merits of the two patients (one an innocent civilian victim, the other a ruthless terrorist) is so wide. This is particularly true given the demoralizing effect that civilian deaths can have on the nation's fortitude to fight. It would thus appear that we should save the lives of neutralized terrorists, but we must first prioritize our national interests and fulfill our ethical duties to our own brethren.⁶³ At the end of the day, it remains difficult during wartime to justify prioritizing

⁶² Some discuss the ethics of "reverse triage," in which lightly-wounded soldiers may be treated first so that they can return quickly to the battlefield and replenish troops. Another interesting question involves treating members of one's own army as opposed to allied soldiers from a different country.

⁶³ On the role of "associative obligations" in wartime medicine, see Michael L. Gross, "Saving Life, Limb, and Eyesight: Assessing the Medical Rules of Eligibility During Armed Conflict," *The American Journal of Bioethics*, 17:10 (2017), p. 40-52.

national medical resources for an enemy over the immediate health needs of a citizen.⁶⁴

May Israel Withhold Burying the Corpses of Terrorists?

In the past, in the wake of repeated terrorist attacks, the Israeli government has debated whether to withhold returning the corpses of killed terrorists to their Palestinian families. Some claim this would deter future terrorists from seeking to become martyrs, especially given the heroic funerals they regularly receive. Others retort that such measures only further inflame the tense situation, and instead suggest demanding agreements from the terrorist's family to hold a modest funeral before returning the corpse.

Many countries, including Israel, create cemeteries for enemy soldiers in times of warfare, with the understanding that there will be a reciprocal return of bodies with the signing of an armistice. When dealing with terrorists, however, no such understanding can be assumed. Some thus further argue that Israel must retain these corpses as bargaining chips in future deals for the return of our dead

⁶⁴ There is, however, one interesting counter-argument made by the medical association. They've argued terrorists attacks on Israeli streets are responded to by civilian (i.e., non-military) medics. Telling them to prioritize Jewish victims will introduce social distinctions into Israeli healthcare and lead to a dangerous slippery slope within hospitals which amazingly succeed in keeping politics out of health care decisions, with Jews and Arabs treated alike. This is a significant consideration, but should be combated with the following clarification: the distinction here is between terrorist and victims, not Jews and Arabs. Therefore, if there should be a case of a Jew who randomly attacks innocent Arab civilians (alas, there have been a few examples of such behavior, but they remain rare), then the Arab victims in this case would take priority.

soldiers, including Hadar Goldin and Oron Shaul, who were killed during Operation Protective Edge in 2014.

The Torah explicitly mandates burying executed criminals. "If a man is guilty of a capital offense and is put to death, and you impale him on a stake, you must not let his corpse remain on the stake overnight, but must bury him the same day. For an impaled body is an affront to God – you shall not defile the land that the Lord your God is giving you to possess" (*Devarim* 21:22-23). The rationale offered by the Torah is very telling. It is an affront to God to leave a body unburied since, as the Talmud explains, all humans were created in the image of God. No actions, however, horrific, can remove that fundamental element of a person's humanity.

This point was exemplified by Yehoshua, who at the beginning of Israel's military conquests - when symbolic actions of brutality might have instilled fear in enemies - punctiliously buried the kings of Canaan (*Yehoshua* 10:27). Josephus, in his *Antiquities*, attests that ancient Jewish practice was to "let our enemies that fall in battle also be buried." Even the enemies in the apocalyptic war of Gog and Magog will be buried, leading the nations of the world to proclaim the greatness of the Jewish nation for burying their enemies.⁶⁵

Yet the right to burial does not mean that every person is entitled to equal burial rites. The Talmud declares that an executed convict is not buried in his family's gravesite because "we do not bury a wicked

⁶⁵ See *Rashi* to *Yechezkel* 39:13

person next to a righteous one."⁶⁶ Instead, the community must create a separate cemetery to bury these executed criminals, with many scholars further asserting that these criminals should be denied any honorary mourning rites. These laws signify society's eternal condemnation of that criminal's actions. Apostates or excommunicated community members were given similar treatments, and at times buried outside the cemetery walls.

While Jewish law mandates that Jews actively help to bury deceased gentile neighbors – in accordance with the divine image found in all humans – it also maintains that only Jews be buried within Jewish cemeteries. (Indeed, in many societies, burial grounds convey cultural affinities, including familial, professional, religious, and national ties). This has [caused tensions](#) in Israel where, after years of debate, intermarried Jewish Israelis may now be legally buried with their gentile spouses in state's cemeteries reserved for non-Jews. It has caused particularly acrimonious debates over separate military cemeteries since many Israelis, including a few poskim, believe that comrades-in-arms should be buried together, no matter what their religious affiliation.⁶⁷ In the current war, halachic arrangements have been made to allow soldiers that are not halachically Jewish to be buried alongside their fellow soldiers in IDF cemeteries. These controversies highlight the powerful symbolism created by burial rites.

⁶⁶ *Sanhedrin* 47a.

⁶⁷ See *Gittin* 61a, the commentaries of Rashba and Rabbenu Nissim, and my *A Guide to the Complex: Contemporary Halachic Debates* (Maggid, 2014), p. 330-332.

In the case of terrorists killed, there should be no debate: their corpses should ideally be interred in their own non-glorified area. To achieve this goal, could Israel even refuse to bury these terrorists entirely? Admittedly, some have contended that in extreme circumstances, we may suspend the mandate of burial for some broader societal purposes.⁶⁸ This might explain, for example, why David did not try to immediately bury the children of King Saul after they were executed by hanging (II *Shmuel* 21). Similarly, according to a few traditions, the Jewish people allowed the bodies of Haman and his sons to be left unburied for several days to instill fear in their enemies.

Such an extreme approach would be a grave mistake. First, while one might believe that such treatment will discourage future lone wolf attacks, it is more likely that radical fundamentalists will find a theological explanation to assure their holy war soldiers that they have a place in Heaven, whether they are buried or not. Second, one must weigh the consequences of how fundamentalists will react to such a symbolic action, especially when they have their hands on an Israeli corpse. Most fundamentally, while in the midst of a campaign against terror, one must never forget that every human being was created in God's image. Burying terrorists sends an important message to ourselves: even as we fight a just war against our

⁶⁸ See the discussion in R. Aharon Walkin, [Shu"t Zaken Aharon](#) 2:80. Yet ultimately, one is hard-pressed to find a notion that we would leave someone unburied, as emphasized by Aharon Kirschenbaum, *Bet Din Makin Ve-onshin*, p. 696-697 and note 184.

enemies, we should not lose sensitivity to the human tragedy of this wickedness.

Taking responsibility to bury these corpses, however, does not mean that Israel must return them to their families for burial.⁶⁹ The strategic calculation of whether such an action helps or harms Israeli interests remains a decision of the political and military echelon. Spiritual leaders must continue to urge that we prioritize our safety without ever forgetting that all humans were created in the image of God. This balance, of course, is not always easy to make, but it's my belief that the halakhic sources cited in this article provide us with a good framework of grappling with the significant ethical dilemmas faced in our time.

⁶⁹ This, in fact, was precisely the point of creating separate burial locations for criminals, as dictated by mSanhedrin 6:5-6. In 2013, when American officials couldn't find a burial spot for one of the Boston Marathon terrorists, I argued that he must be buried, but suggested that the following text be written on his gravestone: "Buried here is a terrorist who was born in the image of God with unlimited potential to do good but who desecrated that virtue with his violent actions. May his victims rest in peace, and may the society that buried him continue to emulate the ways of God and merit to live in a world of peace." See my "Even Criminals Rest in Peace," *Tablet Magazine*, May 9, 2013. (The title, alas, was not chosen by me and is somewhat misleading regarding its content).