

Of War, Hostages, Jewish Law and Philosophy

The Unique Status of War

War is different. It is undeniably evident that the reality of warfare changes everything, including the most basic principles of halakha and ethics. If war is to be accepted as legitimate—which Jewish tradition clearly does, at least under the proper circumstances and protocols—it must also be granted that there inheres within it the justification for radically changed norms.

Most fundamentally, this is true in two senses: War legitimates the taking of life in its prosecution, despite the severe prohibition of murder; and it mandates the risking of lives, which is otherwise subject to a prohibition as well.

It is actually the latter that is addressed most explicitly in the halakhic literature, albeit incompletely. Most frequently referenced is an observation of *Minhat Hinnukh*, who notes in two places that despite the general rule exempting one from a mitzva when its performance entails even a minor degree of danger, this exemption clearly does not apply to the Torah's mandates that require warfare. He does not endeavor to explain this, other than to suggest that it is simply a Scriptural decree (*gezerat ha-katuv*).¹

This point is made at far greater length by R. Yehoshua Menachem Ehrenberg in his *Devar Yehoshua*. In a responsum addressing the question of relinquishing land in Israel for promises of peace, he cites from the writings of Netziv, who wrote that the danger associated with warfare is “unlike other dangers and . . . is not prohibited at all.”² He proceeds to assert that if the dangers involved with inhabiting the Land of Israel were assessed on the same metric as the performance of other *mitzvot*, the

1 Mitzva #426 and #604.

2 *Responsa Devar Yehoshua* II, 48, and in greater detail in the *maftehot*; citing Netziv, *Meromei Sadeh* to *Eruvin* 45a. See also *Hiddushei Maran Riz ha-Levi al ha-Torah, Haftarat Parashat Beshalah*.

land would be desolate as life in Israel is evidently more dangerous than it is elsewhere.

As the “reason” for the irrelevance of the danger factor, R. Ehrenberg invokes divine providence, noting that as the “*Ish Milhama*,”³ God is directing the path of wars, and one is required to have faith in the ultimate benefit of their outcome (presumably those executed within the framework of Jewish law, including a *milhemet reshut*).

The even more dramatic deviation contained within war is the license to kill others, even beyond those who are presently posing a direct threat, who could be justifiably killed due to the “*rodef*” principle, permitting self-defense and the defense of others. That such aggression is legitimate is evident from its presence throughout the Bible and Rabbinic literature. Rav Abraham Isaac Kook tentatively suggested that warfare is regulated by the distinct *Mishpetei ha-Melukha*, statutes of the king, that contain a number of unique principles not shared by general halakha (for example, the permission to execute offenders against the public welfare based on his own assessment).⁴

Biblical narratives that less obviously involve this framework have also been explained in light of it. These include the killing of the male population of Shekhem by Simeon and Levi (Gen. 34). Maharal of Prague asserts that despite the fact that only the individual Shekhem had offended against their family, their aggressive action against the broader population was justified under the rubric of warfare.⁵

It is important to note that this is not to suggest universal approval for their actions. Ramban makes it clear that, as Jacob’s excoriation of the brothers indicates, their behavior was not legitimate.⁶ R. Samson Raphael Hirsch asserts likewise in his commentary that there was no justification for what Simeon and Levi did, despite the fact that there was a military motivation to instill fear in a population whose leader had attacked a member of their family, and to ensure no such aggression take place in the future. Nonetheless, this could not justify killing those who had not participated in harming them, especially at that post-circumcision moment when Shekhem posed no immediate threat.

Another example of the warfare designation involves Abraham, who, following his rescue of his nephew Lot from captivity, worried about his potential liability for the deaths he caused in the process,⁷ and

3 Exodus 15:3; see *Avoda Zara* 2b.

4 *Mishpat Kohan* #143.

5 *Gur Aryeh*, Genesis 34:13.

6 Commentary to Genesis 34:13, disagreeing with Rambam, *Hilkhot Melakhim* 9:4.

7 See Rashi, Genesis 15:1.

is apparently relieved of his distress. One suggestion is that he came to understand that his activity had not been simply the rescue of an individual, which would justify lethal action against the aggressors, but not any non-threatening individual who may be in the path. Rather, he had been waging a war, which allowed for a broader field of attack.⁸

Recognizing that this alternative framework exists does not automatically provide insight into its conceptual underpinnings. Even if we are to limit our focus to defensive wars, as noted, the rule of the pursuer and self-defense is insufficient to explain the departures from general morality allowed for in the context of war. Expanding the status of *rodef* to those playing an ancillary role in aggression is an avenue to explore, although such extension is both debatable,⁹ and, as R. Asher Weiss emphasizes, difficult to extend to those who literally have no part in supporting terrorist activity, particularly those too young to participate.¹⁰

R. Weiss further notes that an ideal to separate out uninvolved civilians, to protect them from harm, can be found in the Bible as well. When Saul prepares to wage war against Amalek, he warns the Kenites to separate from them, so that they not get killed in the process (I Samuel 15:6). However, should such efforts prove unsuccessful, this does not render necessary warfare illegitimate, despite the loss of innocent life.¹¹

Netziv advances a theory that limits the general prohibition of murder, as addressed to all of humanity, to times of peace. Highlighting the language of the verse “from the hand of man, from the hand of a person’s brother, will I require the life of man” (Genesis 9:5), he reads the phrasing to exclude a period when the relationship is not that of a man to his brother, that is to say, a state of war.¹² Even if this innovative interpretation is correct, an explanation of that reasoning would still be required.

To be sure, one relevant factor is that the activation of the war designation identifies the parties involved as national entities, rather than individuals, a notion invoked already in Maharal’s comments. As such, even those who may not be active threats, but are connected to the larger

8 See R. Mordechai Carlebach, *Havatzelet ha-Sharon*, Genesis, pp. 142–144, based on the commentary of *Taz*. He notes the spoils of war are also elements unique to that framework, and the offering of that to Abraham was relevant to his shifting perception.

9 For discussions of this possibility, see *Ohr Same’ah*, *Hil. Rotzeah* 1:8; *Responsa Ahiezer* 1:18 and *Divrei Yechezkel* 26.

10 R. Asher Weiss, *Minhat Asher al ha-Torah* (first edition), Deuteronomy 32. See also the very extensive discussion in R. Shaul Yisraeli, *Amud ha-Yemini*, 16, who considers the issue from several other angles as well.

11 Regarding this point, see also *Amud ha-Yemini*, 184.

12 *Ha’amek Davar*, Genesis 9:5.

group, become active parties to the conflict. It must be stressed, however, that this would not justify the wanton, unnecessary killing of civilians in that group. Even an actual *rodef* is only a legitimate target for lethal force if there is no other way to stop him; when there are non-fatal alternatives, killing him reverts to homicide. Presumably, when the concept is scaled up to a national level, it becomes legitimate to include civilians to the extent the aggression of their national entity cannot be combatted otherwise; beyond that, however, there would be no such license, at least not from the *rodef* principle.

The nationalization of the defense principle would mean, however, that it could be activated even if no human beings are threatened. If an adversarial nation sought to capture territory, even were it to be clear they could do so without killing anyone, military action would be justified in defense of the national territorial integrity.¹³

Similarly, the notion that one is obligated to endanger himself for war of this type can be illuminated by this idea as well. Just as an individual whose life is threatened will certainly be motivated to fight his pursuer, one who is part of a national entity under attack, even if he is personally not threatened, responds due to this group identification.

While the nationalization principle makes significant contributions in understanding the unusual rules of war, more can still be discerned with additional analysis. A starting point may be considering the philosophical underpinnings of the prohibition against murder.

Murder as a Formalist Principle

Familiar among the foundations of moral philosophy is the classical division of “Formalists,” who live by inviolable moral rules, and “Consequentialists,” who are willing to allow that desirable ends can justify otherwise questionable means. There are other terms for these concepts as well, but we will suffice with these for this extremely skeletal presentation.

It seems accurate to say that halakha is a mixture of these systems. To illustrate, the Talmud permits dishonesty (of at least some form) for a good cause, such as maintaining the peace.¹⁴ Presumably, this is a consequentialist rule, in which the ends justify the means. Meanwhile, formalist rules exist as well, a prominent example being murder, whose formalism is displayed by the rule of *yehareg ve-al ya'avur*, forbidding homicide even if one's own life is at stake, and even to save the lives of several others.

13 This is a point stressed by R. Ehrenberg as well as by R. Hershel Schachter, *Be-Ikvei ha-Tzon* 32:4.

14 See *Yevamot* 65b, *Bava Metzia* 23b.

It also seems reasonable to assert that the average person, independent of religious background, also maintains a morality that is a mixture of the systems. To parallel the above examples, while a pure Kantian formalist would not lie even to save a life, presumably most people would find that attitude extreme and in such a situation would decide, hopefully, that the ends do justify the means. But again, most people take a formalist attitude toward murder.

This can be displayed by noting the popularity of the “Trolley Problem.” In this morality thought exercise, a hypothetical is posed in which an individual realizes that a trolley is on a path to strike five people, who will not be able to escape in time. The bystander has the possibility of pulling a switch that will divert the trolley away from these people; however, in doing so, he will direct the trolley to one, previously unthreatened individual, who will be struck and killed. Is it morally acceptable to do so?¹⁵

Our interest here is not in the answer to the question, but in the nature of the question itself and to why it is considered challenging. From a consequentialist perspective, the answer seems readily apparent: five is more than one; it is obviously preferable to save them at the expense of one life, netting four saved lives. The difficulty lies in the fact that it is taken as a given that murder is prohibited in a formalistic fashion and cannot be allowed, even if it provides a beneficial result. The challenge of the question is, then, would pulling the switch and rerouting the trolley be considered murder, or something short of that offense? If one is to decide that it is not considered murder, variations on the problem exist to advance the discussion, for example a scenario in which a bystander is thrown in front of the trolley in order to stop it. If directing the train towards the unthreatened individual is not murder, throwing that individual in front of the train more likely is. Again, the entire question centers around what is defined as murder, under the assumption that once that definition is reached, a line is drawn that cannot be crossed.

If, then, it is acknowledged that murder is subject to a formalist prohibition both in the eyes of Jewish law and in the eyes of general moral thinking, it is worth considering what is the nature of this formalism, which in turn requires an investigation into the mechanics of formalism itself.

15 See, among myriad other studies, David Edmonds, *Would You Kill the Fat Man?: The Trolley Problem and What Your Answer Tells Us About Right and Wrong* (Princeton University Press, 2014); and J. David Bleich, “Autonomous Automobiles and the Trolley Problem,” *TRADITION* 51:3 (2019), 68–78. David Shatz has humorously observed that we could once and for all solve the trolley problem if we block the trolley’s path with a pile of all of the philosophical books and papers written on it, thus derailing the trolley and saving the lives of the many damsels in distress tied to the tracks.

Formalists can be divided into two categories. There are those who are, in essence, “Long-Term Consequentialists,” who agree, in theory, that it is worth focusing on bringing about favorable results. They merely maintain, understandably, that a well-intentioned breach in the rules for the moment will lead to a systemic breakdown, or an anarchic reality, which will wreak disaster eclipsing benefit. These may be more concisely termed “Policy Formalists.”

In contrast, there are “Values Formalists,” who do not focus on consequences at all; either because they are unknowable or beyond the responsibility and jurisdiction of the individual. Morality, to them, requires living a life that honors core values. Ideally, that will correlate with good results, but that goal cannot guide behavior, certainly not to breach those values that define an honorable life.

Accordingly, it must be asked what type of formalism drives the attitudes towards murder. There may be several answers to this question. From the perspective of general ethics, if we do assume that we often find a combination of consequentialism and formalism, some explanation is needed as to why some areas fall under one system and some under the other.

It is logical to assume that the higher the stakes, the less comfortable people will be allowing for a consequentialist society. To illustrate, society can tolerate allowing others to make their own decisions if the ends justify the means when, for example, they choose whether or not to answer honestly when asked for their opinion about someone’s cooking. However, few people would want to live in a society where it is considered morally acceptable for each individual to decide whether or not a cost-benefit analysis can justify killing his or her neighbor. Accordingly, the role of Policy Formalism seems clear in this case; a social contract exists to forbid all murdering, regardless of how beneficial it may seem.

At the same time, murder may also be the result of a ban from a values formalism perspective. Life is, arguably, the highest value that exists, and the most precious possession of any human being; to arrogate to oneself the right to take another’s life is the greatest possible offense against their personhood, and to negate the value of life is the greatest possible offense against God.

Which of the above characterizations is appropriate for the halakhic understanding of the prohibition against murder? The Talmud (*Sanhedrin* 74a) explains the *yehareg ve-al ya’avov* rule with the phrase, “Why do you presume your blood is redder than his” (the one who will be killed in order to save your life)? Upon initial reading, this phrasing yields a number of interpretations. It is possible to read this in a consequentialist fashion: if we could actually calculate which person had “redder blood,” perhaps

we would indeed prefer that individual's survival. However, as a practical matter, we cannot make such an assessment, and therefore are not in a position to choose.

More likely, it is an expression of formalism. It could be read in the vein of policy formalism: it is unhelpful to attempt the calculation of which life is more valuable, and therefore we do not even consider the question. Finally, it can be understood as an expression of values formalism: essentially it is a rhetorical question, stating that it is impossible to rank any life as more precious than any other, they are all equally cherished as a matter of principle.

The clearest indication of absolute formalism relating to murder is a scenario depicted in the *Yerushalmi* (*Terumot* 8:4) involving a group of Jews confronted by a gang of marauders, who demand they surrender one of their party to be killed, otherwise all of them will be executed. While there is an exception to the rule, and it is a topic of debate as to what it is, the default situation is that if no specific individual is identified, no one may be turned over, even though all will be killed.

In a typical *yehareg ve-al ya'avov* situation, it is sometimes theoretically possible to make a case for one individual's life over the other; this is especially true if multiple lives can be saved at the expense of one life. In this scenario, however, there is no other way to calculate the benefit: since the individual who would be turned over will die in either event, it is clearly consequentially preferable to turn him over and save the lives of everyone else. Nonetheless, this is forbidden, making the formalist nature of murder (in this case, even serving as an accessory to murder, by turning over someone to be killed) undeniable. (It should be noted, however, that in the *Tosefta* [*Terumot* 7:23] there is an additional opinion recorded that would limit this ruling only to handing over someone who is not included in the targeted group; according to that opinion, someone who would die in either event should indeed be turned over.¹⁶)

Commenting on Rambam's stance on this case, *Kesef Mishneh* questions why the *yehareg ve-al ya'avov* rule should apply even in a situation such as this, where the Talmud's "redder blood" logic seems to be irrelevant. He suggests that the logical formulation is not the actual reason for the rule, but rather an explanation offered alongside it; the source is instead a tradition that the Rabbis had and is applicable in all circumstances.¹⁷

16 See the extensive analysis of R. Yaakov Meshulem Ginsberg, *Mishpatim le-Yisrael* II, 618, based on *Responsa Bah* 43.

17 Note the objection of *Lehem Mishneh* and see the analysis of R. Avraham Teomim in *Responsa Hesed le-Avraham (Kamma)*, Y.D. 45, and see also *Hemdut Shlomo*, O.H. 38:22; and *Responsa Ahiezer* 2:16:5.

Taking the question further, R. Kook asserts that it is inaccurate to suggest that we never have any basis to distinguish between two lives; we do in fact make such distinctions when forced to triage situations of emergency rescue. As such, why would it be maintained that it is impossible in this case? His suggestion is that actively taking the life of someone, even to save the life of another, would be an act akin to judgment, and in that area of capital judgment, we do not accept rulings premised on the evaluation of the judge independent of evidence and witnesses (*umdena*). This is true even when the judge is extremely confident of his opinion; this is necessary in order to prevent situations in which such confidence may be misleading. So too, we cannot allow even what may seem like a very clear assessment to authorize the taking of one life to favor another. Essentially, in R. Kook's understanding, this is an expression of policy formalism.¹⁸

By contrast, R. Shaul Yisraeli, addressing the same questions, concludes that "whose blood is redder" is in essence a rhetorical question, conveying that all lives are conceptually equal, regardless of the details of the case. To extinguish a life is an offense against God of infinite magnitude regardless of whose life it is. This understanding would place the rule in the framework of values formalism.¹⁹ In a similar vein, R. Yitzhak Tzirkis understands "redder blood" in a purely formalist sense: "Since your blood is no redder than his, by what right do you allow yourself to commit the sin of murder to save your own life, even if your victim would die in any event?"²⁰

Upon initial impression, it would seem that taking a formalist attitude to murder means that in situations of conflict, one must always take the passive course (*shev ve-al ta'aseh*), and avoid a sin of commission in this area. While there is much truth to this, there are also challenges to working with this as a guideline in this area. Ironically, it is the extreme value placed upon human life that can pose a challenge to the formalist structure of the murder prohibition. This value, coupled with an explicit prohibition in the Torah of "Do not stand idly by the [shedding of] your fellow's blood" (Leviticus 19:16) forbidding even nonintervention when a life is threatened, means that even passivity can be seen as a form of commission and complicates the attitude brought to situations of conflict. Accordingly, there may be a need for a redefinition, prohibiting not simply an "action" but more specifically an act halakhically classified as murder.

18 *Mishpat Kohen* #143.

19 *Shevillin* (Kislev 5737).

20 *Ohr Yitzhak* 1, 15.

Conversely, there is the possibility that the *yehareg ve-al ya'avov* rule may be activated even without any direct action, but by enabling the consequence of homicide. Ritva maintains that to provide a weapon to a murderer is prohibited even at the cost of one's life,²¹ while R. Yaakov Emden (who cites the position from Radbaz) is inclined to disagree.²² R. Yeruchem Perlman explains this position as reflecting the logic of "whose blood is redder," even without a direct act of murder.²³

All told, the unique severity of murder may require the morally sensitive individual to address all of the possible considerations: Not to bring about the egregious negative consequences of committing murder, nor to perform an action that would constitute a murder act (as defined by halakha).

This combination of factors manifests itself in one of the most common dilemmas in contemporary medical ethics. Euthanasia is understood in halakhic literature as a form of murder and is prohibited, even when no empirical benefit can be assessed to the terminally ill individual or his family in extending his life. Nonetheless, Rema draws a crucial distinction: no action may be taken to hasten death; however, something which is preventing nature from taking its course may be removed to allow for death to occur on its own.²⁴

In this situation, the negative consequences usually associated with death have been deemed irrelevant, while an actual "act of murder" remains formalistically prohibited. An action that is not defined in such a fashion—even though, crucially, it brings about the exact same result—is permitted. This is because, as described above, all the elements of the murder prohibition have been independently accounted for. The devil is in the details, and the actual application of Rema's ruling is subject to enormous controversy, as there is much debate as to what is considered an action and what is considered the removal of a factor prolonging life, particularly with the state of contemporary technology and end-of-life care. The principle, though, is widely accepted.

This principle may also explain a tentative position of Hazon Ish.²⁵ In addressing a situation very similar to the trolley problem—in this case, a missile careening toward a populated area—he considers whether the missile can be diverted to a less populated area, thus killing fewer people, who would have otherwise been unharmed. He is unsure of this

21 *Pesahim* 25a, citing the Ra'ah and Ramban.

22 *Birat Migdal Oz, Even ha-Bohen, Pina* 1, Ot 81.

23 *Ohr Gadol*, 1. See also the analysis of *Ahavat Tzedaka, milu'im* to ch. 8, #3, who suggests a different explanation.

24 Y.D. 339:1.

25 *Hazon Ish, Hoshen Mishpat, Sanhedrin* 25.

conclusion, but advances the possibility that it may be permitted to do so, in that the action is not an act of cruelty, or aggression, but an act of rescue.

There is very significant controversy regarding the acceptability of Hazon Ish's position.²⁶ It may be, however, that the controversy actually attaches to whether the evaluation is correct, i.e., can the directing of a missile toward anyone fairly be classified as an act aiming to save life.²⁷ As a principle, though, the position appears to echo that which has been described above. The prohibition of murder must be addressed from all angles: consequentially, the loss of life is reduced, but the concern remains as to the formalist prohibition; that is addressed by ensuring no act halakhically defined as murder takes place.

The Murder Prohibition and the Ethic of War

What emerges is that the prohibition of homicide has unique aspects to it. There are strong reasons why it must be treated as a formalist prohibition: as a values formalist concept, it ranks supreme, impacting upon the most sacred of human and Divine values. From the perspective of policy formalism, the risks of allowing individuals to make independent decisions as to the taking of human lives are intolerable, and no area is more in need of formalistic policy.

However, there is strong role for consequentialism as well in both the preservation and the dignity accorded to human life. The threats that are assembled against these core treasures on a global level cannot always be removed peacefully, and to allow them to remain unchecked is to assault human life in its own way, particularly in light of the "Do not stand idly by" prohibition and the value system that it represents.

Nonetheless, as has been displayed, consequentialism in the area of life and death cannot be the domain of the individual. To a certain extent, the justice systems, both halakhic and civil, are empowered to fill this gap, but they can only address that which falls under their authority and jurisdiction, *de jure* and *de facto*. Threats on a national and global scale cannot be attended to in those settings.

It is here where warfare becomes a necessity. By its nature, to accomplish its goals, war must be able to function consequentially. Of course, this is not to eliminate the space for military ethics; thankfully, humanity

26 See *Minhat Asher*, *ibid.*, and R. J. David Bleich, writing elsewhere in this issue of *TRADITION*.

27 In assessing this question, and the parameters of a *ma'aseh hatzala* vs. a *ma'aseh akhziyut*, see at length, R. Uri Chaim Jungreis, *Uri vi-Yish'i, Parashat Vayishlah*, #45; and R. Shlomo Dichovsky, *Lev Shome'a le-Shlomo*, vol. II, 39:3.

has developed to the point where moral frameworks can be imposed even within the consequentialist reality of the battlefield.

This dynamic can be illustrated by some of the controversy surrounding the legacy of the recently deceased Henry Kissinger. Addressing this in a column in *The Wall Street Journal*, Walter Russell Mead wrote,

Kissinger understood . . . power and morality aren't opposites. Rather, power is the platform that makes moral action possible for a state. And morality isn't a set of rules and laws that states are expected to obey. Rather, in international relations, morality involves creating an order that prevents the anarchy and slaughter of great-power warfare. Such an order gains legitimacy not by its perfect adherence to a religious or secular moral code, but by its ability to preserve values and conditions that allow civilizations, and the human beings who inhabit them, to flourish.²⁸

Once again, the details of this application are subject to debate (to say the least); the point is the difference between these systems in which individuals are able to function and those in which states are sometimes required to.

Formalism and Consequentialism in War and Hostage Negotiation

The particular roles of these philosophical systems in the framework of war are illustrated more powerfully when combined with another, related area—one which at this writing is tragically relevant—in which these factors play a major role, namely, the dilemma of negotiating with terrorists to release hostages in their clutches.

To illustrate the distinction, let us first consider the question abstractly, without reference to any halakhic sources. In addressing this issue, the consequentialist may say that the priority is saving the lives of those in captivity, whatever compromises may be necessary to do so. The urgency of the moment dictates the behavior.

The formalist will likely refuse to negotiate. However, this refusal can be explained in two different ways. The “policy formalist” fears the result of such negotiations will be constant kidnappings, endangerment, and ever-increasing demands. Any gain, at least to society overall, from the release of the current captives will be outweighed by the disastrous results sure to follow.

The values formalist is focused more on the statement such negotiations make. Terrorism is the essence and embodiment of evil; to negotiate with its perpetrators is to validate their methods, in a perverted sense to

28 “Henry Kissinger on Power and Morality,” *Wall Street Journal* (December 4, 2023).

become an unwitting partner with them and reward them. No benefits, in the short or long term, can justify conferring such legitimacy to evil.

To continue the abstraction but to move more specifically to the current excruciating question of negotiating with Hamas for the remaining captives of October 7th, the formalist motivated by long-term consequentialism would certainly fear such deals, without much need to ponder the relationship of the current crisis to previous negotiated releases of prisoners, in which Yahya Sinwar, leader of Hamas in Gaza, was set free to wreak his satanic influence. The inclusion of violent criminals in this release only exacerbates the fear that accompanies the likelihood of continued abductions for additional gains.

To the values formalist, these deals seem even worse. The atrocities of October 7th were acts of unfathomable evil. To allow any profit whatsoever to accrue to the perpetrators would seem to reward this evil. The very notion of negotiating for the release of women and infants held in captivity for more than 70 days, as if they were items sold in the market by genuine owners of goods, is to legitimate the absolute essence of illegitimacy.

Thus, it would seem, it is consequentialism speaking here—the urgent call to relieve the unimaginably unbearable suffering of the hostages, their families, and the nation of Israel as a whole, so unforgivably tolerated by much of the world, and to rescue the hostages themselves from any further harm.

However, even consequentialism may fall short in providing a full explanation. The potential harm that can so easily materialize immediately, and the myriad ways in which these transfers can go wrong, call into question even the most limited cost-benefit analysis. A consideration in the context of the halakhic literature will prove illuminating.

Redeeming Hostages in Halakhic Literature

The topic of *pidyon shevuyim*, the redemption of captives, is itself one in which policy considerations of different types have had an impact, as it is the subject of the additional legislative measures described in the fourth chapter of the tractate *Gittin* as *tikkun olam*, geared toward addressing practical societal issues.

Despite the fact that *pidyon shevuyim* is considered a mitzva of highest priority,²⁹ the Mishna nonetheless imposes a limitation: “Captives are not redeemed for more than their value.”³⁰ This rule, apparently a rabbinic

29 *Bava Batra* 8a; *Mishneh Torah*, *Hilkhot Mattenot Aniyim* 8:10.

30 *Gittin* 45a.

enactment,³¹ is given two possible explanations in the following Talmudic discussion: we are concerned either with the potential financial burden on the community tasked with mustering phenomenal sums to redeem their co-religionists, or the fear that such payments will encourage the further kidnapping of Jews for ransom.

There may be a number of differences between the two reasons, depending on how they are understood. Rashi immediately offers one: if the concern is the communal burden, a wealthy relative may volunteer to shoulder the costs. If, however, we are concerned with encouraging future kidnappings, he should be prohibited from doing so.

That last point calls attention to what would seem to be another significant difference. The issue of encouraging kidnappings clearly points to a prohibition against such ransom payments. The concern about communal financial burden, however, may be read differently: it may be an exemption, rather than a prohibition.³²

Hatam Sofer notes that this is a surprising exemption, as an imperative of the level of *pidyon shevuyim* would require that no expense be spared in its performance. He asserts that this would be true for an individual, who can himself then turn to the community for assistance.³³ The community, by contrast, risks the lives of its members should it become collectively impoverished. Assuming over-priced redemption to constitute a mortal risk to the populace may therefore indicate that this policy should maintain even when the captives are themselves at risk of death. Others, however, assumed otherwise, taking it as given that the economic burden would only be a factor in situations in which the captives are assumed not to be at mortal risk.³⁴

The concern of incentivizing additional kidnapping is certainly an expression of policy formalism. Some have expressed astonishment at this consideration, noting that if this is to be a case of one *pikuah nefesh* (lifesaving) priority trumping another, it is surprising, as future risks are generally not credited by halakhic authorities as *pikuah nefesh* to override halakhic imperatives.³⁵ However, that would seem to be the point; as the focus of a particular *tikkun olam* enactment, it represents policy concerns that are beyond the standard protocols.

31 See *Yam Shel Shlomo*, *Gittin* 4:66.

32 See R. Yehudah Shaviv, "Birurim be-Hilkhot Pidyon Shevuyim," *Noam* 17 (1974), 96–115.

33 *Responsa Hatam Sofer*, H.M. 177.

34 See R. Shmuel Elimelech Turk, *Responsa Peri Malka* 58.

35 See, for example, *Ahavat Tzedaka*, 287–288. This is a principle established by *Responsa Noda bi-Yehuda* II, Y.D. 210, and *Responsa Hatam Sofer*, Y.D. 336, and reiterated by the *Hazon Ish* (*Ohalot* 22:32). See also R. Natan Tzvi Friedman, *Responsa Netzer Matta'ai* 31.

There is a significant range of opinion as to the final halakhic conclusion. Some maintain that the dominant rationale is the fear of encouragement, and thus no overpaying is allowed, even by family members.³⁶ Others take the opposite position, understanding that the burden on the community is the main concern, and thus private individuals are free to redeem their loved ones with their own money.³⁷

The notion of a definitive conclusion on this matter is itself interesting, and sheds light on the attitude toward policy considerations. The concern of encouraging future kidnappings seems undeniable; it does not disappear if the halakha rules against it. Rather, a ruling in that direction would indicate that the concern should not be factored in to override a mitzva of this supremacy.

Alternatively, a ruling in the other direction may possess a different kind of significance. It is worth considering what is the nature of the concern for incentivizing kidnapping: is it a pragmatic fear of the impact of further kidnappings, or does it carry with it also an indictment of guilt on the redeemer for whatever may happen as a result? Would he, or the community as whole, be considered halakhically responsible for any kidnappings that happen as a result of such encouragement? That would be an extreme formulation, but the question is useful for understanding the nature of the issue, and for applying it against other considerations.³⁸

Others understand that the Talmud is inconclusive on the matter, although this yields two divergent paths.³⁹ Some assume that the uncertainty indicates that a passive approach be taken.⁴⁰ Others draw the opposite conclusion from that same uncertainty: in the absence of conclusive evidence otherwise, we must redeem the captives if we are capable of doing so.

Here, again, the possibilities are illuminating. What should be the default position if no conclusion is definitively established? The issue of whether it is preferable to act on behalf of the presently distressed captives unless commanded otherwise, or to maintain a passive stance rather than run the risk of being responsible for actively inviting a future

36 *Rambam, Hilkhhot Mattenot Aniyim* 8:12; Rashba, cited in *Beit Yosef*, Y.D. 252.

37 See *Bah* and *Shakh*. R. Chaim Kanievsky, *Derekh Emuna, Mattenot Aniyim* 8:77, believes this to be the consensus contemporary view and the prevailing custom, allowing but not obligating individuals to use their own funds to redeem as possible.

38 See the analysis of *Ahavat Tzedaka, miluim* to ch. 8, #3.

39 See *Rosh, Gittin* 4:44, and *Ramah*, cited in *Beit Yosef*.

40 *Ran*; *Beit Yosef*; *Radbaz* to *Mishneh Torah* (but compare to *Responsa Radbaz* 1, 40).

danger into the community, is reflective of the varying approaches we have seen thus far.⁴¹

Other possible distinctions and exceptions emerge when commentaries grapple with a seemingly contradictory Talmudic passage (*Gittin* 58a), in which R. Yehoshua ben Hananya meets a young imprisoned boy who so impresses him with his spiritual potential, he pays an exorbitant amount to ransom him, seemingly in defiance of the enactment. Sensing the contradiction, *Tosafot* (s.v. *kol mammon*) offer two resolutions: the redemption was justified because of the risk posed to the boy's life in captivity; or, his potential as a great scholar and leader of the Jewish people allowed for an exception.

Both of these answers, when analyzed, yield further insights into policy considerations. The possibility that mortal risk to the captives is a reason to dismiss the enactment against overpayment was astounding to some, who assumed that every captive faces such risks, and it is difficult to imagine the Mishna would not have acknowledged such a common exception to its ruling.⁴² In fact, the Ramban explicitly denied this possibility. R. Yehezkel Katzenelbogen asserted that the reason the *Tosafot* provide multiple resolutions is because each one only accords with one of the reasons for the enactment.⁴³ In the case of mortal risk, this is applicable to concerns of economic burden. If, however, the issue is encouraging future terroristic behavior, danger to the captive is a greater reason *not* to redeem, as such a policy will encourage the kidnappers to further threaten the lives of the hostages, so as to increase their likelihood of significant payment.

Similar reasoning leads R. Aharon Perahia to suggest a perhaps paradoxical distinction: when the kidnappers are primarily murderous, but are susceptible to being bribed, the risk to the lives of the captives justifies an overpayment to save them. However, when the kidnappers are primarily interested in ransom, risk to the captives is a reason not to pay, so as not to incentivize greater risk.⁴⁴

This concern, not only directed at future possible kidnappings but at the wellbeing of the current captives, evokes another ruling in the same *mishna*, one that curiously is largely undiscussed, even though it bears

41 The stance of *shev ve-al ta'aseh adif*, leading toward a passive stance, seems to be the less intuitive one, as it could be assumed that in the absence of conclusive proof to the contrary, the important mitzva of *pidyon shevuyim* should dominate. R. Yehudah Herzl Henkin analyzes the position at length, citing three approaches in its interpretation; see his "Hatzalat Benei Aruba u-Feula Tzevait," *Noam* 21 (1979), 130–159.

42 See, for example, R. Moshe Feinstein, *Dibberot Moshe*, *Gittin*, ch. 4, n. 123.

43 *Responsa Keneset Yehezkel* 38.

44 *Responsa Parah Mateh Aharon* II, 8.

great relevance to hostage situations including the current crisis. We are also instructed not to aid the captives in efforts to escape. The Talmud gives two reasons for this policy: either this is also because of *tikkun olam*, out of a fear that the kidnappers will react by treating future prisoners more restrictively; or for the protection of current co-prisoners, who may suffer the vengeance of their captors should one of them escape. It is unclear how, if at all, this passage has historically impacted upon policy.⁴⁵

Notably, the possibility of an exception for a distinguished Torah scholar has been understood in fundamentally different ways, again impacting the approach to formalist attitudes to policy. Radbaz assumed that this exception can be allowed because it will not encourage future kidnappings; it is a rare situation, and in any event the kidnappers will not be able to easily identify targets in that category.⁴⁶ R. Katzenelbogen, though, following his approach noted above, maintains this position is only feasible according to the explanation that is concerned with encouragement of future kidnapping; if the issue is economic burden, no exception should be made.

However, Hakham Tzvi understood the point differently: in the case of a Torah scholar, the value to society is so great, the concern for possible encouragement is disregarded.⁴⁷ As R. Yehudah Herzl Henkin notes, there are two types of exceptions to the overpayment policy that are considered: those that don't trigger the relevant concerns, and those that may, but are nonetheless allowed because of competing values.

With the two factors in combination, the argument to allow for the redemption of a great Torah scholar has wide support. Despite this, one of the greatest *Rishonim*, R. Meir (Maharam) of Rothenberg, died in captivity in 1293, reportedly because he refused to allow himself to be redeemed, apparently assessing that the concerns were relevant to his situation. Maharshah found this astonishing; even if R. Meir was too humble to appreciate his stature, he should certainly have worried about the loss of Torah study that was engendered by his seven years of imprisonment. Maharshah suggests that R. Meir was concerned that had he allowed

45 *Peri Malka* suggests that perhaps this concern is only relevant when the captives are not already endangered. *Responsa Havvot Ya'ir* 213, asserts that whatever its weight, this ruling clearly does not apply to the prisoners themselves, who are entitled to make attempts on their own behalf; see also R. Nachum Rabinovitch, in his *Yad Peshuta to Mattenot Aniyim* 8:10. R. Henkin, *op. cit.*, 131, relates that there were rabbis who objected to the rescue mission in Entebbe on these grounds, although not in print; R. Shaul Yisraeli does address the issue in his treatment of that mission in *Shevilin (Kislev 5737)*, 93–102. See also R. Yom Tov Krispin, *Bigdei Yom Tov*, Y.D. 37.

46 *Responsa Radbaz* I, 498. See also R. Asher Foichtunger, *Asher le-Melekh to Mishneh Torah*.

47 *Responsa Hakham Tzvi* 70.

himself to be redeemed, and his captors would learn the price that could be obtained for Torah leaders, before long all of them would be snatched for ransoms that would be beyond the ability of the community to pay. Better his own learning be lost, he reasoned, than the generation completely lose all connection to Torah scholarship.⁴⁸

Another possible situation in which encouragement may not be relevant is implicitly considered, and then rejected, by Maharam Lublin.⁴⁹ He addresses the situation of a young man imprisoned because of an inappropriate relationship with an Arab girl. Perhaps redeeming this captive will not encourage future prisoners, as the pool is limited to those guilty of this offense? No, he argues; false accusations can be brought to elicit further ransoms.

Tosafot commenting on the original passage offers an additional resolution to the contradiction: perhaps the context of R. Yehoshua ben Hananya's expensive redemption was relevant, taking place in the aftermath of the destruction of the Temple, when the concern of encouraging other captors was inapplicable.⁵⁰ It is not explained why that is the case; Meiri adds words indicating that everyone at that time was already in a state of exile and confinement. R. Yosef Shalom Elyashiv understood the point to be that in that context, the enemy would have continued to kill and capture Jews regardless of what efforts were made on behalf of captives.⁵¹

The entire enactment is meaningless unless there is a metric for assessing "more than the value" of the captive, the threshold beyond which paying is inappropriate. The Talmud provides no guidance on this, leading to multiple opinions. Radbaz rejected the view that the standard is the price of a servant in the marketplace, arguing instead that the rate should be whatever is paid for non-Jewish prisoners, so that no additional payments are provided to encourage the kidnapping of Jews. Maharam Lublin, however, did accept the slave market standard,⁵² despite the fact that such markets were no longer in use; he argued that there is no basis

48 *Yam Shel Shlomo*, *Gittin* 4:66. This passage in *Yam Shel Shlomo* is actually one of the primary sources for the tale of R. Meir's refused redemption, which itself would have great significance for the development of this topic. However, some scholars have questioned the historicity of this account, noting among other evidence that R. Meir's great student, the Rosh, who had worked on securing R. Meir's release, does not mention this. One suggestion is that the story became conflated with that of another rabbi (related in Ramban's *Torat ha-Adam*) who had been kidnapped earlier and died in captivity, and for that reason the exorbitant ransom was not paid. See Simcha Emanuel, "Did Rabbi Meir of Rothenburg Refuse To Be Ransomed?," *JSQ* 24:1 (2017), 23–38.

49 *Responsa Maharam*, 15,

50 *Gittin* 45a, s.v. *de-lo*.

51 As cited by R. Yitzchak Zilberstein, *Shoshanat ha-Amakim*, p. 133.

52 As did *Yam Shel Shlomo*.

to deviate from that which was presumably the assumption of the Talmud. He rejected, though, the suggestion that the standard should be assessed in relation to communal wealth.⁵³ R. Nachum Rabinovitch asserted that “it is difficult to say that over the course of the generations this halakha has been upheld in its literal expression.”

In any event, the literal expression is certainly not applicable to the current situation in Israel and Gaza, in which it is not money of any amount that is being sought, but the release of prisoners from the enemy side. This raises issues of a completely different nature, so much so that it almost requires a restructuring of the entire analysis. In this phase, though, the elements of moral philosophy and public policy take on new forms of relevance.

Many contemporary authorities took up this question, most notably R. Ovadiah Yosef but many others as well.⁵⁴ In much of the literature, the issue is framed with the premise that freeing prisoners who have engaged in terrorist activity, and would likely do so in the future, poses a danger to society. Accordingly, the question is asked whether such future danger may be undertaken in order to alleviate the current danger to the hostages.

At first, the formalist rule of murder appears to present an unsurmountable obstacle; we are not permitted to sacrifice one life for another. The major factor challenging this premise is the unknown: the potential danger to lives posed by released terrorists is in the future, and may not materialize. In light of the Talmudic rule of “we do not allow the indefinite (*safek*) to override the definite (*vadai*),” it would be appropriate, perhaps, to prioritize the clear and present danger of the current captives.⁵⁵ Such an approach seems to fit within the realm of “policy formalism.” As a rule, we do not measure one life (or many) against others; however, when there is a significant basis to distinguish, the rule could change.

53 As R. Yehudah Shaviv notes, *op. cit.*, 100, this issue presumably also connects to the reasoning for the enactment: if the issue is economic burden, the level of communal wealth would be relevant; if the issue is encouragement, presumably less so.

54 *Responsa Yabbia Omer*, vol. 10, H.M. 6. Other treatments are referenced throughout this article. R. Yosef himself analyzed the issue in consultation with other leading rabbis, including R. Yosef Shalom Elyashiv, R. Shlomo Zalman Auerbach, R. Yaakov Betzalel Zolty, R. Abba Ben-Zion Shaul, and R. Eliezer Goldshmidt. Their conclusion, apparently in consensus, was to endorse the government’s negotiation for the hostages in the 1976 Entebbe crisis. In contrast, the Steipler Gaon, as related in *Orehot Rabbenu*, did not feel that terrorists should be released for this purpose. However, both opinions became moot when word came that Operation Thunderbolt had successfully freed the hostages. Upon hearing the news, both rabbis expressed gratitude that the situation was resolved in that fashion.

55 This logic has a source in the *Midrash Tanhuma*, cited in Rashi on Genesis 43:8.

Countering this is the passivist argument (*shev ve-al ta'aseh*): better to remain passive rather than to become responsible for a sin of commission of such magnitude. This approach reflects a more absolute formalism: there certainly is no basis to assume it will bring about a better result; it accomplishes instead a stronger commitment to the system itself.

A number of instructive points arise from within the literature. In one interesting example of the sources building on themselves, a discussion of whether one is obligated to enter a situation of possible risk to effect the definite rescue of another may make use of a responsum of R. Eliyahu of Lublin, who posed the question in the abstract.⁵⁶ In doing so, he drew upon the original source: the fact that we do not overpay to redeem captives, out of fear of encouragement, displays that we are not willing to allow even a future, uncertain risk for the community, as a price for resolving a current danger for others.

Conversely, R. Ovadia Yosef argues that we should prioritize the current hostages, asserting that the halakha does not factor in future eventualities in considerations of *pikuah nefesh*. However, one may counter that it is the very enactment against overpayment that validates just such a consideration. A further objection is noted by R. Shaul Yisraeli, who notes that not all future threats are equal; adducing Talmudic proof, he asserts that a future danger that is real and identifiable is considered as clear and present.⁵⁷

Another point of dispute, also relevant to the question of murder as a formalist precept, is whether causing the future danger should be considered equivalent to directly inflicting the harm. One contemporary author argued that it should, citing factors unique to the prohibition of homicide.⁵⁸ There are sources that seem to connect to the consequentialist aspect of the prohibition, therefore including within it any action that supports or leads to the death of another. Among these are the Targum Yonatan Ben Uziel that translates "*lo tirtzah*" (Exodus 20:13) as "do not be a partner with killers," and, significantly, Ibn Ezra, who includes in the prohibition even one who fails to disclose the location of a killer lying in wait. In contrast, R. Ovadia Yosef explicitly distinguishes between endangering and killing, a factor he incorporates into his conclusion.

Another point of difference is that this author argues that even if one would allow a later, uncertain danger to save lives currently at risk, that could only be done voluntarily, not imposed on others.⁵⁹

56 *Responsa Yad Eliyahu* 43.

57 See *Eruvin* 44a.

58 R. Pinchas Schapiro, *Responsa Berit Shalom* I, 13,

59 R. Natan Ortner, writing in *Tehumin* 13 (1992-93), 257-263, makes the point in the opposite direction: working with the assumption that the hostage, as the one in

R. Yosef anticipated this point as well, arguing that no distinction should be made, as the *safek/vadai* distinction that is determinant remains the same regardless.

Returning to our original subject of war and its unique attributes, the topic of hostage negotiation is complicated when integrated into the wartime context. Now, the ransom is not only dangerous in a possible future sense, but contributes immediately to the resources available to the enemy, in addition to bestowing other valuable assets. R. Hershel Schachter notes that when R. Yitzchak Hutner was on board an airplane hijacked by the Popular Front for the Liberation of Palestine as part of the Black September events of 1970, efforts to raise funds to ransom him at a high sum (in light of his esteemed rabbinic status) were rebuffed by R. Yaakov Kaminetsky, who invoked the undesirability of supporting the enemy.⁶⁰

At the same time, the wartime context provides arguments in the other direction, especially when the hostages are soldiers. R. Asher Weiss argues that the State of Israel must do everything possible to bring back its hostage soldiers, with whom they have an unwritten pact, the breaking of which would have a terrible effect on the morale of the army.⁶¹ Similarly, R. Shlomo Dichofsky argues strongly that the unique parameters of war that neutralize concerns of danger do the same to any hesitations about redeeming captives. He maintains that just as considerations of morale become legitimate factors in battlefield decisions, so too they rank as high as any other factor when it comes to questions of bringing back hostages.⁶²

Even as a point of technical halakha, R. Avraham Avidan wonders about the assumption that one need not enter into danger to save others: does that remain true if the other is in need of rescue because of a mission undertaken on your behalf? He remains inconclusive on this point, but it would bear enormous relevance to some of the contemporary situations.⁶³

The context of ongoing battle may also mitigate the concern of encouraging further kidnapping, through the premise that such mayhem is happening regardless. R. Yitzchak Shmuel Schechter, in a responsum

current, definite danger, is entitled to priority, no one else can impose upon him the removal of that right, even if he could waive it himself.

60 *Be-Ikvei ha-Tzon* 32:3.

61 In R. Weiss' understanding, the enactment of "not aiding captives to escape" is also made completely irrelevant by wartime concerns. R. Shaul Yisraeli makes a similar argument in *Responsa Havvat Binyamin* I, 16.

62 *Lev Shomea Le-Shlomo* II, 39:6:1.

63 *Ahavat Tzedaka*, 292, n. 61. R. Yehudah Shaviv offers a more unusual argument for a different wartime policy, suggesting that a potential monetary ransom may encourage the captors to keep the hostages alive and healthy.

regarding the Gilad Shalit trade, argues strongly to this effect. After marshalling evidence that the weight of opinion has sided with the view that hostages must be redeemed at any expense when their lives are in danger, he asserts that continued terrorism by the enemy is such a given that the fear of further encouraging it cannot be a factor against the lives of hostages.⁶⁴

It should be noted that throughout the history of the literature on this topic, variables have been allowed to mitigate the impact of the enactment against overpayment and to argue for the redemption of hostages even at great expense and effort. Radbaz already addressed the fact that such redemptions were taking place and endeavored to explain it: perhaps there is the fear of torture worse than death; perhaps the captives will be forced to violate the Torah; perhaps non-Jewish captives are being redeemed at similar rates; perhaps great scholars are involved; perhaps only all those elements together create a justification. *Kenesset Yehezkel* argues that when the assessment is that encouragement is not a risk, danger to the captives may take on greater importance.

Of great significance is Radbaz's closing explanation: since the matter contains unresolved points of halakha, allow the Jews to follow their conscience; since they do so voluntarily, and rejoice in fulfilling the mitzva of rescuing their fellow Jews, they are greatly rewarded, as they are upholding the attributes of their forefather Abraham. It is also noteworthy that even those who advocated against the redemption of captives in specific circumstances acknowledged one factor that may change the equation: the display of *Kiddush Hashem* that may be involved in the attitudes expressed.⁶⁵

Concluding Thoughts

This last point may be most relevant of all. It may indeed be that the case for Israel to negotiate with terrorists fails on formalist grounds of all types, and may even fail on consequentialist grounds, given the many uncertainties that surround the results, even in the immediate short term. And it may be the wrong decision; this paper certainly makes no pretense to being in a position to judge. No American, certainly not from within a

64 *Responsa Yashiv Yitzhak*, vol. 22, #20–21. Regarding people in danger, this is the assessment of *Sedei Hemed V, Divrei Hakhamim*, 77.

65 See the factors mentioned by Maharam Lublin and their formulation in *Kenesset Yehezkel*. Similarly, *Peri Malkah* asserts that *Kiddush Hashem* was the main element of the Entebbe rescue. R. Shaul Yisraeli, *Shevilin* (Kislev 5737), 93–102, also justified Operation Thunderbolt based on that factor, arguing that the *Kiddush Hashem* involved elevated the operation to a *milhemet mitzva*. R. Yehudah Shaviv argues that since soldiers represent the State of Israel, their remaining in captivity is itself a unique *Hillul Hashem* and justifies all measures in their rescue.

sheltered classroom, is in a position to judge the government of Israel as it makes excruciating choices weighing factors we are neither fully aware of nor capable of assessing (even if we were aware).

And yet, values formalism may still yield insight into the lasting benefit of such negotiations, as devastating and as fraught as they are. Wars, at least when waged by civilized nations, are necessarily guided by the cold calculation of numbers. Decisions are made to save the most lives at the cost of smaller numbers, to risk and endanger segments of the population on the hope that larger segments will survive. There is no other way to function in this context.

The brutal pragmatism of warfare is only defensible because it emanates from a values-based premise: human life is of infinite worth. Once that principle is established, it then becomes possible to act to maximize gains and minimize losses. It is worth going to war to save millions of lives because each single life is endlessly valuable.

Perhaps, then, Israel's consideration or acceptance of hostage deals is premised not on consequentialist ideas, but on formalist ones. It is a public declaration of the lengths to which Israeli society will go—despite the risks and counter-indications—to uphold and honor life as a value.

Such messaging is not merely symbolic. In conflict with an utterly nihilistic adversary acting in complete disregard for the significance of any human life, including the civilians it purports to lead, this affirmation draws a stark contrast between Israel and its enemy. The battle lines that represent the essence of the conflict are established. That Israel does so even at the risk of empowering that enemy is evidence of its sincerity.

In past decades, even Western democracies have utilized strategies that aimed to defeat their enemies through destroying their morale, even at great human cost. Israel is taking the opposite approach, investing in elevating its own morale (and morality) through instilling within its citizens awareness of an almost illogical willingness to see each one as a priceless treasure worthy of any sacrifice. As military strategies go, this one may have a power that defies all calculations.

R. Shaul Yisraeli, in struggling to understand our starting question—how the existence of war as a concept reshapes moral principles—ultimately suggests that it operates on a principle similar to *dina demalkhuta dina*, the notion recognizing the law of the land as binding.⁶⁶ Just as that rule, according to some interpretations, emerges from a social contract of mutual consent, the fact that the nations of the world have always conducted international affairs through warfare conveys its

legitimacy. As such, the evolution of laws of war have enhanced the morality of the conduct within that structure, through the same mechanism.

Further still, every gesture toward the sanctity and preciousness of life contributes to an evolving understanding, that we hope will slowly have an impact as well. For now, protecting life often means that aggressive and harsh measures must be taken against those who threaten it, and tragically, inevitably impacting those who are innocent as well. But the belief in a perfectible world means that we can continue to strive against all obstacles to model a humanity in the image of God, and that someday, it can be different.

Our forefather Jacob, when preparing for confrontation with his brother Esau, is described as “very scared” (Genesis 32:8). The Rabbis of the Talmud found this surprising; Jacob had already been promised that God would be with him. As such, what did he fear? Did he lack in faith? The Talmud suggests that perhaps he had proven himself unworthy of the promise; maybe, in his behavior or potential sin, he had fallen short of deserving God’s protection (*Berakhot* 4a). However, this too, seems inadequate; there is no indication that God’s promise was conditional, nor that Jacob had been delinquent. As the Midrash telegraphs, even in the sinful and idolatrous surrounding of Laban’s house, Jacob remained steadfast in his observance of all the *mitzvot* (the well-known play on *garti-taryag*; see Rashi to Genesis 32:5).

The founding Rosh Yeshiva of Kerem B’Yavneh, R. Chaim Ya’akov Goldvicht, noted that spiritual possessions, such as one’s relationship with God, are of two types. We are told that “three things are acquired with *yissurim*” (*Berakhot* 5a), usually translated as suffering, among these, Torah and one’s portion in the world to come. “*Yissurim*” in this context should not be understood purely as suffering, he asserted, but rather as personally enduring what is necessary to earn the relationship, to make an actual process of acquisition, a *kinyan*, rather than benefitting from a pure gift. One who has “paid his dues,” and only through that process earns a relationship with God, can feel confident that relationship is secure.⁶⁷

By contrast, when one is promised, in advance of personal accomplishment, a relationship, there is a constant anxiety: have I lived up to the expectations, explicit or implicit, genuine or assumed? Despite all that Jacob did throughout his time with Laban to overcome tremendous challenge and maintain his character, he remains plagued by self-doubt, pushed to a constant process of introspection and striving, declaring, “I am unworthy of all the kindness that You have so steadfastly shown Your

67 *Assufat Ma’arakhot*, Genesis, 85ff.

servant” (Genesis 32:11)—perhaps I have not yet filled the potential my gifts demand.

Of course, the third acquisition that comes only through *yissurim* is *Eretz Yisrael*. The birthright promised to our forefathers has nonetheless demanded of each generation its own *kinyan*, *yissurim* in every sense of the word, both the suffering and the personal toil, effort, and investment, to truly acquire the land, and not merely receive it.

Jacob’s anxiety was compounded by another emotion: “*va-yetzer lo*” (32:8). He felt distressed, anxious, constrained, because, as Rashi informs us, he feared not only for his own life; he was equally concerned he may have to kill someone else. Yes, as commentaries note, if so, it would have been justifiable self-defense; but perhaps he would misjudge the situation, and even if he were to be correct, what Jew wishes to kill another? As Golda Meir famously remarked, “We will perhaps in time be able to forgive the Arabs for killing our sons, but it will be harder for us to forgive them for having forced us to kill their sons.”

All of what Jacob does and experiences here—the preparing for war, the overtures for peace, the personal fear, the abhorrence at the thought of taking the life of another, and the agonizing over the possibility of doing so unnecessarily—are the components of the personal *kinyan* he makes on what God has promised to him and his children.

It is in the context of Jacob’s preparations that he is given his new name, Yisrael, indicating that he “struggled with God and men, and prevailed” (32:29). Yet, despite the implications of that verse, the new name does not completely supersede the old one, which continues to appear. Commentaries note that while Jacob has prevailed over some adversaries, the ordeal is not over, and there will be much struggle and conflict in the future. Nonetheless, Jacob can be secure in the knowledge that he has personally earned the right to the name Yisrael. This is no less true of the People, the Land, and the Nation, that share his legacy.