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The Elor Azaria Case and the Murderer or Hero Dilemma

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ELOR AZARIA----MURDERER OR HERO? AMOS N. GUIORA¹

I. Introduction

Preface

On Thursday morning, March 24, 2016, Israel Defense Forces Sergeant Elor Azaria killed a severely wounded Palestinian terrorist, Abdel Fattah al-Sharif who was incapacitated when mortally shot. For this act, Azaria was convicted of manslaughter by a military court and sentenced to 18 months imprisonment subsequently reduced by the IDF Chief of Staff, General Gadi Eizencot.

While much attention was focused on the trial, the examination in this chapter will expand beyond what occurred in the courtroom. In the subsequent chapter, Col (RET) Maya Heller----who presided over the trial---will discuss the implementation of the principle of judicial independence during the trial despite the public atmosphere surrounding the case. In that vein, our chapters are intended to provide the reader with different perspectives of the trial, addressing distinct issues. Heller will focus on the period during the trial while Guiora will address the broader societal implications of the case. We wrote our chapters independently of each other, without collaboration as we explored distinct themes. It is our hope that by reading the two chapters “back-to-back” the reader will gain broader insight into a matter that dominated the Israeli news cycle and became the focal point of extraordinary public attention. The intersection, or confluence, of the two chapters is intended to enable the reader to gain an understanding both the inside (the courtroom) and the outside (the public arena).

For this chapter, I interviewed a range of individuals including senior former Israel Defense Force commanders and individuals directly involved in the trial. While some of the interviews were “on the record”, I have decided to treat all the interviews as “off the record.”² The extent to which the Azaria matter made an indelible impression on all those interviewed was obvious in every conversation. That was true

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² Interview notes are in my records; I am grateful to those who chose to engage with me, their insights and honesty are deeply appreciated. In full disclosure, I served with the majority of those interviewed and was referred to others, some who agreed to discuss the matter with me, others begged off.

regardless of when they served in the IDF and what positions they held during their service.

Background

The decision to prosecute Azaria, his subsequent conviction and incarceration, rocked Israeli society reflecting deep fissures on powerful issues, including, but not limited to, what is the normative moral standard expected of soldiers in a non-traditional conflict. Azaria's actions were captured on film by a Palestinian;³ dissemination was immediate with powerful consequences for the IDF, the public, politicians, and Azaria.

Outrage focused on the decision to prosecute a soldier who had killed a Palestinian terrorist. For some Israelis, Azaria became a hero, referred to as "our soldier" and "king."⁴ For others, Azaria was a soldier who killed a helpless Palestinian and must be punished accordingly, regardless of the fact al-Sharif had stabbed an Israeli soldier prior to being killed by Azaria.

The title of this chapter-----murderer or hero-----is intended to reflect the wide chasm that defined the debate in Israel, which extended well beyond the specific action in the streets of Hebron in the West Bank where Azaria killed al-Sharif.

That is not to diminish the importance of Azaria's actions, but rather to highlight other aspects of the case that demand our attention. By broadening the scope of issues pertinent to the Azaria case, the intent is to provide a glimpse both into Israeli society and the IDF culture. Both are important when considering the broader consequences of a mis-begotten decision by one soldier, highlighting the impact of one military trial. The incitement by politicians, the cacophony from the public, the constant media attention became a story onto themselves, perhaps over-shadowing the actual trial. Covering the trial required addressing its implications and ramifications on Israeli society; there came to be two stories.

What was complex and challenging were the larger issues. It is those issues that will be this chapter's primary focus, without minimizing the trial's importance. In this chapter (distinct from Col. Heller's chapter) we shall focus on three issues distinct from the judicial proceedings: actions of Israeli politicians, questions regarding morality in armed conflict, and the public outcry. Nevertheless, there is a need to set the stage with respect to Azaria's actions and the question before the Court with

³ <https://www.youtube.com/watch?v=b4s2CrVvgpw>

⁴ https://www.youtube.com/watch?v=Lh_8Y4fwG1I

the understanding that Heller's chapter will focus on the trial itself. In that vein, this chapter will be divided into the following sections: I. Introduction; II. Murderer or Hero; III. March 24, 2016; IV. What Crime did Azaria Commit? V. Political Involvement; Section VI. Normative Behavior-Standards of IDF Morality; Section VII. The Costs; VIII. Final Word.

History and precedent are important, facts and circumstances notwithstanding. The question of whether---and where---to prosecute an IDF soldier was previously confronted by the public, the judiciary, and senior commanders. In short, the then Judge Advocate General, BG Amnon Strashnov decided not to prosecute (then) Col. Yehuda Meir for his actions in 1988 during the early stages of the Palestinian *intifada* but rather to bring Meir before a disciplinary hearing. In response to a petition filed by a human rights organization to the Supreme Court (sitting as the High Court of Justice), the Court ordered Meir's prosecution before a Military Court which subsequently convicted him and lowered his rank to Private.⁵

II. Murderer or Hero?

The phrase, "murderer or hero", applies not only to the legal questions facing the prosecutor, defense attorney, and court but also the IDF, the public, and politicians. Answering that question, as became quickly apparent, was directly related to the significant political divide in Israel, focusing on the IDF's presence in the West Bank, whose population is overwhelmingly Palestinian.

As a result of the 1967 Six Day War, Israel gained control of the West Bank (from Jordan) and the Gaza Strip (from Egypt). While the 1994 Oslo Peace Accords between Israel and the Palestinian Authority (the successor to the Palestine Liberation Organization) were intended to result in the establishment of a Palestinian State in the West Bank and the Gaza Strip, the conflict has yet to be resolved. While Israel disengaged from the Gaza Strip in 2005, the IDF still has a military presence in the West Bank as Israel has security (as compared to police) responsibility and power. Therefore, Azaria (and his unit) was stationed in Hebron, a major city in the West Bank. In broad strokes, Israelis of the political left oppose IDF presence in the West Bank, favoring establishment of a Palestinian state

⁵ 425/89, Tzopan vs. The Judge Advocate General, <https://www.latimes.com/archives/la-xpm-1990-06-23-mn-359-story.html> , <https://www.jta.org/1991/04/25/archive/idf-colonel-convicted-of-brutality-will-be-discharged-but-not-jailed>. For a similar case in the U.K. please see <https://www.gq-magazine.co.uk/politics/article/marine-a>

whereas Israelis of the political right oppose the establishment of a Palestinian state and favor the continued presence of the IDF in the West Bank.

Both sides of the spectrum have consistently sought to separate the actions of units and soldiers from the broader political question. Nevertheless, as quickly became apparent, the decision to prosecute Azaria dramatically brought to the surface the consequences of assigning blame to a soldier sent by the State to serve in the West Bank. For those on the right, Azaria was a hero who justifiably killed a Palestinian who had sought to murder a soldier. That position was rejected by those who focused solely on Azaria's actions, rejecting the defense offered by his supporters who sought to legitimize the killing of al-Sharif.

Public reaction literally, exploded in the streets where the Military Court is located. Demonstrations were so loud, sometimes so profane, the judicial process was hard pressed to hear itself. The trial became a critical part of the Israeli domestic dialogue; the decision to prosecute inflaming passions and emotions. Lost in the noise, perhaps deliberately, was that Azaria had killed al-Sharif long after the threat he posed had dissipated. We came to learn this because of the video of the event that went viral immediately.

The video depicts the following: al-Sharif lying prone on the ground, soldiers milling about in his presence in a manner clearly suggesting he is not perceived as posing a threat, Azaria exchanging words with a fellow soldier, taking a few steps toward al-Sharif, loading-cocking his rifle, taking aim and firing one shot directed at the head of the wounded terrorist. Careful viewing of the video does not suggest al-Sharif posed a danger to Azaria or the other soldiers, certainly not to Azaria when he approached al-Sharif from behind him while he was lying on his back.⁶

If not for the presence of Aymad Abu-Shsia, a photographer for the human rights organization, Bet'se'lem, the facts as captured in the video would not have been so accurately and graphically known. The video made clear the time gap between the stabbing of the soldier by al-Sharif and Azaria's criminal action that did not take place in the context of operational engagement, when the latter posed a direct threat to the latter, his fellow soldiers, or others. This was not a case of a soldier acting in self-defense.

While al-Sharif *had* posed such a threat, that had been neutralized when Azaria shot him as clearly depicted in the video. It is not an exaggeration to suggest that Mr. Abu-Shsia's video had the same impact Ms. Darnella Frazier's video had in the

⁶ <https://www.youtube.com/watch?v=w4O6eRssOjs>

conviction of Derek Chauvin for the murder of George Floyd.⁷ Arguably, if not for Ms. Frazier and Mr. Abu-Shasia, neither Chauvin nor Azaria would not have been convicted.

The response in Israel was immediate.

Blame for that must be blamed squarely at the feet of right-wing Israeli politicians, ranging from low-level Members of the Knesset (Parliament) to (then) Prime Minister Netanyahu. The rush to defend Azaria----facts notwithstanding---- was in accordance with the right-left debate referenced above, whereby Azaria was portrayed as a hero, defending his fellow soldiers, and others. The rush to weigh in on social media, radio, and TV reflected a determined effort to frame the issue in the broader political context and to proactively influence a possible decision to prosecute Azaria. The original “noise” did not abate over the course of time; the vilification of the IDF Chief-of-Staff Gadi Eizenkot was particularly heinous. Incitement best describes the chant repeated both electronically and, in the street, “Gadi, Gadi, be careful Rabin is looking for a friend”⁸ referencing assassinated Prime Minister Rabin. This is but an example of the tone and tenor in the aftermath of the decision to prosecute Azaria.⁹

III. March 24, 2016

In and itself, what happened in the streets of Hebron is not particularly unique in the context of IDF soldiers stationed in the West Bank. In the morning hours of Thursday March 24, 2016, a Palestinian, Abdel Fattah al-Sharif, stabbed an Israeli soldier; immediately thereafter, IDF soldiers shot and critically wounded al-Sharif. From an operational perspective, the decision to open-fire in immediate response to the stabbing fell well within IDF Rules of Engagement.¹⁰ Neither the stabbing nor the shooting were noteworthy, no different from innumerable similar attacks/responses inherent to interaction between IDF soldiers and Palestinians who live in the West Bank.

⁷ <https://apnews.com/article/video-dominates-derek-chauvin-trial-explained-f7608641d2fdbd6a8443691fd7ca1625>

⁸ <https://www.youtube.com/watch?v=AnyjyLugt8>

⁹ This was brilliantly captured on the Israeli TV show, Eretz Nehedert, <https://www.youtube.com/watch?v=F7gruBQX2QI>

¹⁰ <https://www.timesofisrael.com/revisiting-the-idfs-rules-of-engagement-in-light-of-hebron-shooting/>, https://www.washingtonpost.com/world/middle-east/israeli-veterans-say-permissive-rules-of-engagement-fueled-gaza-carnage/2015/05/04/ab698d16-f020-11e4-8050-839e9234b303_story.html, <https://www.jstor.org/stable/43946931>

It is what happened when Elor Azaria “swung” into action, firing the single shot that killed al-Shari whilst he lay on his back, critically wounded, that is our focus. That is when the situation, that until then had been under control, dramatically shifted. Were it not for Azaria’s unilateral decision, al-Shari would have been yet another Palestinian who stabbed an Israeli soldier.

Other soldiers who were in greater immediate proximity to al-Shari, displayed no indication of operational readiness, concern, or preparation to open fire. Quite the opposite. There is no indication any of the soldiers seen on the video sensed al-Sharif posed a danger. Nonchalant would aptly describe the body language and conduct of the soldiers in al-Sharif’s immediate vicinity. Some retired IDF commanders interviewed for this chapter were critical of the soldier’s demeanor, noting the lack of operational readiness and lack of military bearing.

Azaria did not have any operational role or command responsibility during the incident or in its immediate aftermath. Azaria was not engaged in the initial neutralizing of al-Sharif; more than that, he was not present when the stabbing occurred, arriving only after al-Shari had been wounded by soldiers in the immediate response who acted in accordance with IDF Rules of Engagement. That is distinct from Azaria’s actions which took place well after the stabbing, when no danger was posed and when the Rules of Engagement did *not (italics intended)* justify shooting al-Sharif.

Any effort to portray otherwise is not reflected in available evidence, whether in the video or in testimony before the Military Court. Azaria’s decision to open fire was his alone; there is no evidence an officer so commanded. Azaria’s action took place well after the incident had been contained.

These are two distinct events, albeit occurring in the same location. To view al-Shari’s death as a natural continuation of the initial stabbing is to misconstrue and misperceive the facts as Azaria’s defenders did. To do so reflects, whether in whole or in part, politicization of the event, adroit legal arguments by defense counsel, or “spin” by various interested parties. As we shall come to see, that was the primary effort of defense counsel and politicians alike.

Fortunately, the rule of law prevailed.

IV. What Crime Did Azaria Commit?

We begin with the following premise: Elor Azaria committed a crime whose resolution had to come before a Military Court.

Precedent and policy indicate no disciplinary action would have been taken had the killing occurred as a reasonable response to the stabbing by a soldier present in the immediate moment. Had al-Sharif died when initially shot, the matter would not have been brought before the Military Court for there would have been no justification to court martial the soldier who shot al-Sharif in the *immediate* (italics intended) aftermath of the stabbing.

That was not the case regarding Azaria. The distinction-separation between the initial shooting and the subsequent shooting-killing of al-Sharif is essential to understanding the title of this chapter. Elor Azaria was no hero; his action was unrelated to the attack-response. Therefore, the only question was whether he should be charged with murder or manslaughter. Any attempt to frame the question in a different light does not square with the facts. Had Elor Azaria been an integral component of the unit that responded to the stabbing and opened fire in accordance with IDF Rules of Engagement, his name would not have been in the public domain. IDF soldiers are trained to respond in such situations; that is the reasonable expectation commanders have of soldiers who serve in a combat unit. From all perspectives, the soldier/s who opened fire in the immediate aftermath of the stabbing, acted in accordance with IDF regulations. There was no consideration given to bringing them before commanders for disciplinary purposes; an operational “after action” review was deemed sufficient, given the event. That is, in all probability, the outcome that would have awaited Azaria had he acted in accordance with IDF Regulations. As the video depicts, Azaria acted well after the threat posed by al-Sharif had dissipated. It is for that reason, then, to equate Azaria’s actions to decision making in the context of operational decision making must be rejected. The only question, then, regarding Azaria was whether to indict on the charge of murder or manslaughter.

The former IDF commanders interviewed were in near unanimous agreement Azaria had to be prosecuted; with one exception, all believed the appropriate charge was manslaughter. Two commanders were of the opinion Azaria should not have been charged, arguing a disciplinary hearing before a senior commander was sufficient. The commander who believed Azaria should have been charged with murder was harsh in his criticism of the manslaughter decision. The commanders who agreed with the manslaughter decision were more concerned with the question from a military unit discipline perspective, rather than a legal dilemma. Their primary focus was how the case would impact the willingness of combat soldiers to open fire when operational circumstances are not black and white. This concern has been raised previously, in response to court martials or disciplinary actions taken against combat soldiers.

Those involved in the legal decision-making process emphasized the “close call” in assessing whether to indict on manslaughter or murder. The primary question was whether Azaria’s actions were premeditated; if so, that would justify indictment for murder.

This is not the “classic” murder scenario whereby an individual carefully plans in advance, purchasing necessary weapons, tracking the victim, lying in wait, and acting in a pre-mediated manner. However, it is also not the “classic” manslaughter vignette where a person comes home, only to find his/her partner romantically engaged with another person, killing them in an “act of passion”, devoid of forethought and planning. Azaria’s actions do not reflect that scenario; there is no evidence either from the video or from others that this was an instinctive act, reflecting a spontaneous decision and action. Actually, quite the opposite for there is a coolness, a sense of deliberateness to Azaria’s conduct as depicted in the video.

For that reason, both the decision makers and I define this as a “close call” and why commander opinions were not unanimous, albeit heavily tilting strongly in favor of manslaughter. However, from a narrow legal perspective, based on my understanding of criminal law, a decision of murder would have been jurisprudentially justifiable. The elements of murder were met with a slight tweak---- which perhaps is what ultimately led to the manslaughter decision---this was not pre-planned as murder is traditionally understood, but also not impulsive as manslaughter is defined in the criminal code.¹¹ Because there was time for Azaria to reflect as clearly depicted and given al-Shari did not pose a threat to Azaria or others, I would have voted to indict on murder. The fact this is not the classic pre-emptive model does not sufficiently dissuade me from viewing the killing of al-Sharif as an act of murder.

V. Political Involvement

Israeli politicians rushed into the arena. Their actions and words galvanized the Israeli political right; demonstrations, rallies, angry voices, incitement, cheap politicking, became the norm. Elor Azaria was turned into a hero, referred to in some quarters as, “our son.” It was as if he had been adopted by a segment of the population, seizing a moment to attack the left, the media, the judiciary, and the Chief of Staff. In other words, the right was attacking the usual suspects who have drawn their wrath for unrelated events over the years.

¹¹ For a further discussion of this, see Col (RET) Heller’s chapter; for additional reading see, <https://www.idf.il/en/minisites/military-advocate-generals-corps/the-idf-military-justice-system/>, <https://en.idi.org.il/articles/12244>, http://www.knesset.gov.il/review/data/eng/law/kns2_militaryjustice_1_eng.pd

For PM Netanyahu it was a golden opportunity to score points with the right wing, embracing Azaria in a widely publicized phone call.¹²

Other politicians----particularly Naftali Bennett, Yvet Liberman, and Sharon Gal----took every opportunity to criticize the IDF for “daring” to prosecute Azaria, the new national hero.¹³

While disagreement, loud and direct, is integral to the Israeli national psyche, there was something different in how leading politicians, and subsequently the public, attacked the IDF. There are very few sacred cows in Israel, political correctness is an anathema to the culture, but for decades attacking the IDF was considered off limits amongst much of the Israeli public. While the fawning, almost obsequious interaction between the public and IDF leadership that defined the relationship after the 1967 Six Day War had turned critical in the aftermath of the 1973 Yom Kippur War, this was different. Never had an IDF Chief of Staff been called a traitor, a word with dangerous connotations in contemporary Israeli society.

After all, that was the very word the far-right had called former Prime Minister Rabin prior to his assassination in November 1995.¹⁴

It is used by counterdemonstrations at weekly protests against PM Netanyahu;¹⁵ it is a word this writer has heard when participating in those rallies.

While words are casually bandied about in Israel, the failure of the political establishment to condemn those voices illuminates the extent to which politicians seized the moment. Azaria became code-word for Israelis seeking to castigate the judiciary and political left. The demonstrations were emboldened-incited by politicians who quickly reached conclusions regarding the events that transpired in Hebron.

Whether they watched the video is an open question; whether the facts as presented in Court mattered to them is a foregone conclusion. In the context of Israeli politics there is nothing particularly striking about this. What is important, for our purposes, is the willingness of politicians---including the Prime Minister---to cast aspersions on the Chief of Staff specifically and the IDF in general, casting doubt in the public’s mind regarding the legitimacy of the decision-making process regarding Azaria.

¹² <https://www.haaretz.com/israel-news/why-the-hebron-shooter-trial-is-dividing-israel-1.5481805>

¹³ <https://www.haaretz.com/israel-news/.premium-hebron-shooter-elor-azaria-released-from-prison-after-nine-months-1.6070371>, <https://www.timesofisrael.com/hebron-shooter-gets-heros-welcome-after-serving-term/>

¹⁴ <https://www.history.com/this-day-in-history/yitzhak-rabin-assassinated>

¹⁵ <https://www.ipost.com/israel-news/politics-and-diplomacy/anti-netanyahu-protesters-bring-boxes-to-balfour-to-help-bibi-pack-667615>

That is dangerous in a democracy predicated on the rule of law. More than that, as the former commanders emphasized, failure to prosecute Azaria could have negative consequences on unit discipline. While there is no doubt regarding the importance of discipline, there is also no doubt this was an issue politicians paid no heed to. Fortunately, at the end of the day, the loud, cacophonous external noise had no impact on the Chief of Staff, the prosecutor, or the Court. That is to their credit. The same cannot be said regarding those who deliberately sought to undermine the legal -judicial system.

With that, we turn our attention to the manner in which the IDF instructs soldiers regarding requirements to act both in accordance with the rule of law and accepted norms of morality. The discussion is particularly important both because of Azaria's actions and the efforts of his defenders to frame al-Sharif's killing as legitimate self-defense. The retired IDF commanders placed particular importance on the need to directly address this issue when meetings with combat soldiers. While there was disagreement amongst them regarding the murder-manslaughter debate, there was unanimity regarding the need to reinforce training imbuing normative standards.

VI. Normative Behavior-Standards of IDF Morality

On a personal note, relevant to this section: From 2001-2004 I served as Commander, IDF School of Military Law; officers under my command created a sophisticated, interactive video teaching an 11-point code of conduct.¹⁶ The purpose was to confront soldiers with legal-moral-operational dilemmas akin to what transpired in Hebron on March 24, 2016. The scenarios in the video were based on events that had occurred in the West Bank. The video included an international law test.

The impetus for creating the video was a culmination of events, including specific actions by soldiers, complaints filed by non-Governmental Organizations (NGO's), and an understanding that addressing these issues was essential to ensuring soldiers conduct themselves in accordance with recognized laws of armed conflict. While "why now" was a question some posed, its relevance was minimal. What was important was the decision to directly confront these critical issues. That was confirmed when then Deputy Chief of Staff, Major General Gabi Ashkenazi, mandated the video be incorporated in both training courses and operational units. Following Ashkenazi's decision, thousands of soldiers viewed the video.¹⁷

¹⁶ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=783985

¹⁷ *ibid*

While empirical data was not gathered regarding the video's effectiveness, anecdotal evidence strongly intimated its positive impact. More than that: combat unit commanders requested their soldiers view the video, after which discussions would be held when soldiers voiced complaints application of the code of conduct unnecessarily exposed them to danger. Commanders were uniformly adamant respecting the codes was essential to ensuring both unit discipline and operational effectiveness.

The IDF is closely monitored by domestic and international human rights organizations that report misconduct, whether minor or egregious.¹⁸ The reporting primarily focuses on interaction between soldiers and Palestinian residents (non-combatants) of the West Bank and Gaza Strip, rather than the manner in which the IDF conducts operational counterterrorism. The extent to which these organizations influence decision making is an open question. What is clear, however, is that sensitivity to respect for human rights is embedded into the IDF culture with the understanding that mistakes have occurred and, in all probability, will again. That is not to excuse misconduct but, rather, to state what is largely, the obvious.

Which brings us to Elor Azaria. Distinct from the soldiers who responded to the stabbing, Azaria's actions---in addition to their criminal nature---do not reflect the IDF's code of conduct, as captured in the video. Azaria's unilateral decision to open fire when al-Sharif did not pose a threat is in direct contradiction to the requirement to protect the wounded, their actions notwithstanding. While al-Sharif was a terrorist, when killed by Azaria he was lying prone on his back, critically wounded.

Distinguishing between a terrorist shot while committing an act of terrorism and a neutralized terrorist, posing no danger to those in the vicinity, is at the heart of the code of conduct. It is the difference between legitimate use of force and an act that fails on two different fronts: legal and moral. While the Military Court addressed the former, the second is, also, of great importance from both a strictly moralist perspective and a utilitarian approach to unit discipline and command influence. The commanders emphasized Azaria's unilateral decision, made without any operational justification, violated the IDF's principles regarding the use of force. For them, this was an issue of great importance because of their decades-long commitment to an IDF predicated on normative behavior. That is not to suggest they are naïve, viewing the world through rose-colored glasses; based on my professional experience with them, I know that not to be the case.

¹⁸ During the course of my career, I met with a number of these organizations

Similarly, I am aware that during their decades long careers they have been faced with complex challenges that formed their approaches to morality in armed conflict and the obligations it imposes. While nuances are inherent to operational dilemmas, and the decision to open fire must be viewed through that prism, normative standards articulated through a code of conduct must not brook Azaria's actions.

VII. The Costs

The incitement and politicization of the decision to prosecute Azaria was not cost-free. Those involved in the decision and its implementation paid a personal price that, unfortunately, did not impose a subsequent cost on those responsible.

We begin with the following: because of threats against them, the prosecutor and judge were provided 24-hour security protection. To define that as "outrageous" is to minimize its importance. While it is a direct result of the actions of several politicians, its importance goes beyond that.

To fully appreciate the positioning of the Azaria trial in contemporary Israeli society one must recognize the deep fissure emanating from the inability (unwillingness?) to resolve the Israeli-Palestinian conflict. At its deepest root, when the legal question regarding Azaria is relegated to the back seat, the case brought to the surface questions that deeply divide Israeli society today. While there are innumerable issues on the national "plate", the question that has been "front and center" is how, and whether, to resolve this decades long matter. Issues come, issues go but this matter is –depending on one's political perspective----stuck in the throat like a bone.

Regardless of one's political leanings, the Azaria matter forced Israelis to address this question. While terrorist attacks in the West Bank are frequent and violent, they are, largely, accepted as part of the national heartbeat. In some ways, that also applies to terrorist attacks in Israel caused by Palestinian terrorists coming from the West Bank. The same accepting of reality applies to instances when Israeli soldiers respond to terrorist attacks, whether killing or injuring the terrorist. Soldiers who serve in combat units understand terrorism/counterterrorism is part and parcel of the experience. That also holds for the broader public which understands the reality of the situation, regardless of their political leanings. It is not an exaggeration to suggest an attack such as the one addressed in this chapter would have barely registered a blip on the collective radar screen of an Israeli public saturated with news.

That changed once the video went viral.

From that moment, all bets were off regarding as the standard responses to terrorism/counterterrorism were swept by political incitement and public clamor. It was as if the lid blew off whatever restraints had been acceptable; the rush to judgment, the race to score points, the gallop to dictate the news cycle, the unquenchable need to be heard was so overwhelming. While the video was clear in its depiction, the extraordinarily irresponsible castigation of those involved in deciding to bring Azaria to trial in a Military Court was extraordinary.

Facts be damned.

Our “hero” had killed a Palestinian terrorist and the IDF wants to prosecute him? He should receive a medal. He should be lauded. He did exactly what we train and expect soldiers to do. How the hell can they prosecute “our son.” It was as if Elor Azaria now had hundreds of thousands of parents, ready to embrace him, warding off the evil IDF Chief of Staff, prosecutors, and Court. If they were not evil, there would be no need to protect them.

But they were evil, determined to prosecute a soldier who had protected his fellow soldiers while serving the state. It was, after all, the state that sent him, that endangered him, that demanded his military service and was now prosecuting him. And for what? For heroically killing a Palestinian terrorist who only a few minutes before had stabbed another soldier and was, any minute, going to detonate himself with the suicide bomb he surely had under his coat or would stab other soldiers with the knife lying on the ground within arm’s reach of him.

In a nutshell: The temerity to prosecute this brave soldier. Our son. Our hero.

The narrative, driven by Netanyahu and other politicians, was black-white, devoid of gray and ignoring the facts. While, perhaps, we can excuse the public from taking its lead from the politicians, that tolerance does not extend to the politicians. They were playing with fire, deliberately exacerbating a situation to suit their needs and agenda. While that is the essence of politics, in a tinderbox such as Israel with an assassination fomented by incitement in its history, that is the height of irresponsibility, if not dangerous. What demands attention was the failure of right-wing politicians, first and foremost Netanyahu, to condemn the incitement that marked the response to the decision to prosecute Azaria. That failure must be understood in the context of the assassination of Prime Minister Rabin in November 1995 that can be directly attributed to the unfettered incitement from the political right. The same words and phrases used against Rabin, particularly “traitor”, reared their ugly head again. In essence, same words, same voices, same political camp. It is in that context that the demonstrations outside the courthouse and

elsewhere must be understood. Elor Azaria was merely an impetus, perhaps “tool” is more correct phrase, that enabled politicians from the right to seize the moment.

The danger inherent to the incitement against Eizenkot must be understood in a broader context: not only was he under attack but the moral standards the IDF seeks to imbue its soldiers were assaulted. The consequences from the perspectives of IDF commanders were, potentially, dangerous. It is not by chance that the retired officers unanimously articulated their deep concern regarding the impact of the political clamoring on IDF units. Some of them were deeply angry at the politicians; while criticism is legitimate, calling the Chief of Staff a “traitor” crossed the Rubicon.

Lost in the shuffle was the following: While not indicted for murder, Elor Azaria was far more a murderer than a hero.

VIII. Final Word

Azaria, whose sentence was shortened by Eizenkot is today a private citizen, working as a baker. His moment in the sun has, perhaps, passed. The fleeting talk of him going into politics has, seemingly, passed. The star power that embraced his family has, also, moved on. There was a sense his family enjoyed the moment, or at least did not shy from it. Those involved in the trial have retired from the IDF and entered the civilian workplace. The demonstrations have moved onto other issues and causes; some, safe to assume, in the streets and social media clamoring against anti-Netanyahu demonstrators. The politicians who led the charge----Netanyahu, Lieberman, Bennett, and Gal----have gone on to other issues and endeavors: Gal left politics and is a media personality), Bennett is Prime Minister, Netanyahu is head of the opposition, and Lieberman is Finance Minister.

That is the nature of affairs that capture headlines and then recede into the dustbin of history. Israel is chock-full of such examples. There are too many to recount.

However, there are certain lessons that demand our attention from both an Israeli specific and broader military justice perspective. In the lines ahead, I shall seek to address both, at times separately, at times merging.

From an Israeli perspective, the fault lines we came to see in the street reflect the powerful divisions in society. The vociferousness with which they rose to the surface was both telling and disturbing. The threat of violence was visceral and cannot be easily dismissed; the decision to prosecute Azaria angered a sector of the public in a way few previous events had. The sustained embrace of the soldier was powerful and telling in how the Israeli-Palestinian conflict burns under the surface. The cynicism of the politicians was extraordinary. Fortunately, those entrusted with

decision making ignored threats and personal danger and were, at the end of day, loyal to two things: the rule of law and the moral code by which the IDF lives. The public owes them its gratitude.

However, more than anything, IDF commanders---past, present, and future---must ensure moral codes by which the IDF defines itself, be at the forefront of operational decision making.

We must recall the following: while al-Shari was lying wounded on the ground, awaiting medical attention, the soldiers who had been engaged in the response to the terrorist attack conducted themselves in accordance with IDF norms. The attack/response was over and therefore, from an operational perspective, there was nothing to do. The incident was over. The terrorist was critically injured, there was no need for operational engagement. That is exactly what combat soldiers are taught.

Azaria, and Azaria alone, did the exact opposite and for that he was appropriately court-martialed.

From the perspective of military justice, public and political clamor notwithstanding, the system worked. The three actors---prosecution, defense, and Court---fulfilled their obligation as demanded of Officers of the Court. All three conducted themselves in accordance with their duties and responsibilities. While critical voices were heard, whether on specific issues or on broader themes, it would be hard to criticize the way witnesses were heard, rulings rendered, arguments made. This author believes the Prosecution could have indicted for murder. However, the decision to indict for manslaughter falls well within the boundaries of reasonableness and can be, and has been, eloquently explained to this author.

The old saw, “reasonable minds can reasonably disagree” applies here. What is, however, not in dispute is that the prosecution of Azaria was the absolute correct decision and the way the judicial system conducted itself stands in stark contrast to the way the public and politicians conducted themselves.

The dignity of the former is only matched by the untethered cynicism, incitement, and dangerous anger of the latter. Fortunately, the rule of law ultimately won.

Full circle: as we know from the initial viewing of the video, Elor Azaria was no hero but rather a soldier who killed a mortally wounded terrorist when there was no justification for opening fire.

That is the crux of the matter of IDF vs. *Elor Azaria*.

