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Israel: Sentencing of Soldier Convicted of Killing Neutralized Palestinian Assailant

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SUMMARY On February 21, 2017, the Military Court Central District issued a sentence in the case of the Israel Defense Forces sergeant who had been previously convicted of manslaughter and of “unbecoming conduct” for shooting and killing an injured Palestinian assailant without justification and in violation of military rules of engagement.

In reaching its decision, the Court followed established sentencing rules, which require choosing the “appropriate range of punishment.” This range is selected taking into consideration the harm that was caused to social values as a result of the offense, the ongoing relevant sentencing policy for the offense, and the circumstances in which the offense was perpetrated, including the defendant’s level of guilt. Other circumstances related to the defendant himself and those unrelated to the perpetration of the offense may be taken into account to determine a punishment within the “appropriate range of punishment” or as a consideration to deviate from it.

The three judges disagreed as to the “appropriate range of punishment” that should apply to the defendant. Two of the three judges opined that the range that should apply is eighteen to forty-eight months of actual imprisonment. The third judge, however, was of the opinion that the range that should apply is thirty to sixty months’ imprisonment.

While all three judges agreed that the defendant’s act caused serious harm to the values of the sanctity of life and the “purity of arms” (military rules governing the use of weapons), the majority of judges stated that they could not disregard the unique circumstances of the case. The dissenting judge agreed that these unique circumstances should be considered, but opined that in determining the “appropriate range for punishment” more significant weight should be given to the protected values that were harmed by the defendant’s actions.

All three judges agreed that the overwhelming amount of evidence regarding circumstances unrelated to the offense justified a substantial reduction in the defendant’s sentence within the determined “appropriate range of punishment.” Given the severity of the offense, the Court rejected the claim that there were reasons to justify deviation from the “appropriate range of punishment” itself.

The Court sentenced the defendant to imprisonment for a period of eighteen months, plus an additional twelve months of imprisonment if he commits another manslaughter offense within three years and an additional six months’ imprisonment if he unlawfully uses a weapon within two years. The Court also ordered the demotion of the defendant from the rank of a sergeant to a private.

Appeals on the decision were filed by both the defendant and the prosecution and are pending at the time of writing of this report.

I. Introduction

On January 4, 2017, Israel's Military Court convicted a sergeant in the Israel Defense Forces (IDF) of manslaughter and of "unbecoming conduct" for shooting and killing an injured Palestinian assailant without justification and in violation of military rules of engagement. The Court ruled that the defendant shot the "terrorist," as the assailant is referred to throughout the decision, because the assailant had injured his friend. The Court said that taking a person's life after he has been subdued—even the life of a terrorist—is prohibited and violates military ethical rules, and as such, did not comport with the behavior expected from a soldier at the defendant's rank.¹

The Military Court issued its sentencing decision on February 21, 2017. The Court, in a two to one decision, sentenced the defendant to imprisonment for a period of eighteen months (minus nine days for time spent in close confinement). The Court unanimously sentenced the defendant to an additional twelve months' imprisonment if he commits another manslaughter offense within three years of the sentencing, and another six months if he unlawfully uses a weapon within two years of the sentencing. The Court also ordered the demotion of the defendant from the rank of a sergeant to a private.²

The defendant has reportedly appealed the conviction, alleging that the Court disregarded evidence submitted at the trial and that the military investigation against him was unfair.³

The prosecution has also filed an appeal against what it views as a significant deviation from the required "appropriate range of punishment,"⁴ based on the determinations made by the Military Court regarding the "severity of the [defendant's] act and the level of the defendant's guilt."⁵ In its appeal the prosecution requested that the Court impose a harsher imprisonment sentence on the defendant within a higher "appropriate range of punishment" of thirty-six to sixty months. A harsher sentence, according to the prosecution, would better reflect the principles of punishment established in other relevant cases and "send a clear and decisive message regarding the sanctity

¹ File 182/16 Military Prosecutor v. Sergeant Elor Azaria (Jan. 4, 2017), *available at* NEVO LEGAL DATABASE, <http://www.nevo.co.il> (in Hebrew, by subscription; last visited Jan. 11, 2017). For a summary of the decision see Ruth Levush, *Israel: Military Court Decision on Killing Neutralized Palestinian Assailant*, LAW LIBRARY OF CONGRESS (Jan. 2017), <http://www.loc.gov/law/help/military-court-decision/israel.php>, *archived at* <https://perma.cc/GY6W-B4HW>.

² File 182/16 Military Prosecutor v. Sergeant Elor Azaria (Feb. 21, 2017), *available at* NEVO LEGAL DATABASE, <http://www.nevo.co.il> (in Hebrew, by subscription; last visited Jan. 11, 2017). All translated text of the decision in this report provided by author.

³ Yoav Ziton, *Elor Azaria Appealed, Most of His Attorneys Resigned*, YNET (Mar. 1, 2017), <http://www.ynet.co.il/articles/0.7340.L-4929284.00.html>, *archived at* <https://perma.cc/6JFK-UVXB>; *The Trial of Elor Azaria: The Prosecution Appealed the Sentence*, YNET (Mar. 6, 2017), <http://www.ynet.co.il/articles/0.7340.L-4931933.00.html>, *archived at* <https://perma.cc/V37W-5YYZ>.

⁴ *See* discussion, *infra*, Part V, "Determination and Reasoning."

⁵ Appeal 17, Chief Military Prosecution v. Sergeant Elor Azaria (Mar. 7, 2017), *available at* YNET, <http://go.ynet.co.il/pic/news/2017-03-07.pdf>, *archived at* <https://perma.cc/X4G9-QJ59>.

of life and the rule of ‘purity of arms’,⁶ and emphasize that unnecessary deprivation of life, even of a terrorist, is unlawful, immoral, and contrary to IDF values.”⁷

The following is a summary of the Military Court’s sentencing decision.

II. Sentencing Policy

The Court opined that in imposing a sentence it must choose a clear policy that promotes social values while considering the special circumstances of the case and of the defendant.⁸

The defendant was convicted of manslaughter, an offense under section 298 of Penal Law, 5737-1977,⁹ which is punishable by up to twenty years’ imprisonment. The long term of imprisonment that may be imposed for manslaughter, the Court determined, reflects the seriousness with which the legislature regarded this offense, recognizing “the superior status of the value of the sanctity of life.”¹⁰ The Court noted, however, that under the Israeli legal system, “punishment is always individualized and derives from the circumstances of the specific case.”¹¹

III. Evidence Relevant to Sentencing

The defendant was drafted into the IDF in July 2014. He volunteered to serve in a combat unit, a fact that according to one of his commanders, deserved appreciation and consideration.¹² Commander testimony indicated that the defendant successfully completed medic courses and advanced training and that he did not have a disciplinary record.¹³

The defendant’s commanders testified that the defendant had exhibited a “spirit of voluntarism” and excelled in spite of considerable personal difficulties. He also assisted soldiers with economic problems, even after hours of active duty. Several commanders testified on his professionalism as a medic, his excellence in performing his tasks, his good nature, and his generosity towards other soldiers.¹⁴ Testimony was also heard regarding his good behavior and

⁶ The defendant was convicted of “unbecoming conduct” for violating the principle of “purity of arms.” See File 182/16 Military Prosecutor v. Sergeant Elor Azaria (Jan. 4, 2017), ¶ 306. Purity of Arms requires that “IDF servicemen and women . . . use their weapons and force only for the purpose of their mission, only to the necessary extent and maintain their humanity even during combat. IDF soldiers will not use their weapons and force to harm human beings who are not combatants or prisoners of war, and will do all in their power to avoid causing harm to their lives, bodies, dignity, and property.” *IDF Code of Ethics*, IDF, <https://www.idfblog.com/about-the-idf/idf-code-of-ethics/> (last visited Mar. 13, 2017), archived at <https://perma.cc/S2NU-GKDN>.

⁷ Appeal 17, Chief Military Prosecution v. Sergeant Elor Azaria (Mar. 7, 2017), ¶ 3.

⁸ File 182/16, Military Prosecutor v. Sergeant Elor Azaria (Feb. 21, 2017), ¶ 1.

⁹ Penal Law, 5737-1977, § 298, SH No. 864 p. 226.

¹⁰ File 182/16, Military Prosecutor v. Sergeant Elor Azaria (Feb. 21, 2017), ¶ 2.

¹¹ *Id.*

¹² *Id.* ¶ 12.

¹³ *Id.* ¶ 10.

¹⁴ *Id.* ¶¶ 13–17.

work ethic while awaiting trial under “open imprisonment” (incarceration with some freedom to move about the camp area, subject to specified conditions).¹⁵

Soldiers further testified that the defendant was good-natured and that he had exhibited motivation and exerted efforts to excel in his medic studies. A soldier who served with the defendant in the same unit since being drafted, including in the medic course, testified about the difficult and demanding conditions they experienced. He also testified that during his military service the defendant provided care to Palestinians to the best of his ability.¹⁶

A mental health officer testified that he provided care for the defendant after the defendant approached him two months after the shooting event. The officer testified that he was impressed with the defendant’s sensitivity towards others and the respect he had for authority. He also testified that the defendant was in a state of crisis as a result of being the subject of a criminal trial and due to events that happened in his family.¹⁷

According to the defendant’s father, the trial impacted his and his family’s health: during the course of the proceedings, the father suffered a stroke; his wife experienced drastic weight loss; and his brother, the defendant’s uncle, suffered two heart attacks. To support the family, the defendant’s sister was forced to stop her academic studies.¹⁸ The father also testified that the defendant and members of the family were subjected to death threats by hostile elements.¹⁹

The defendant’s father also testified that, shortly before the event, the defendant had been in a state of a crisis due to a heavy workload. Although the father contacted the battalion commander to help his son, the defendant did not receive any assistance. The father alleged that throughout the duration of the trial, for ten months, no military official approached the family to provide assistance.²⁰

Several other witnesses testified about their positive impression of the defendant and his family and the impact of the conviction on the defendant’s future employment chances.²¹

IV. Defense in the Interest of Justice

The defense alleged that after the defendant was convicted, senior IDF commanders, including the Chief of Staff, attempted to convince the defendant’s father to replace the privately-hired defense team with one that would be provided by the military. The defense also alleged that the

¹⁵ *Id.* ¶¶ 18–19. For conditions of open imprisonment, see General Staff Order 6.0211, Open Imprisonment (Oct. 1962), <https://m.www.idf.il/פתוח-מעצר/העליון-הפיקוד-הוראות-העליון-הפיקוד-הוראות/אתרים/> (in Hebrew), archived at <https://perma.cc/8CEK-XQ5W>.

¹⁶ File 182/16, Military Prosecutor v. Sergeant Elor Azaria (Feb. 21, 2017), ¶¶ 20–21.

¹⁷ *Id.* ¶ 22.

¹⁸ *Id.* ¶ 24.

¹⁹ *Id.* ¶ 25.

²⁰ *Id.* ¶ 23.

²¹ *Id.* ¶¶ 26–30.

father was encouraged to reach a plea bargain, which would have required the father to agree not to appeal the verdict in exchange for favorable testimony by senior commanders at the sentencing proceedings. The defense stated that these attempts were “scandalous” and justified a significant reduction in the sentencing of the defendant.²²

The defendant’s father then testified that he was approached by a former deputy commander who had previously served under the battalion’s commander to arrange a meeting between him and the battalion commander, in order to discuss the plea bargain. The father agreed and a meeting took place between him and the battalion commander in the presence of the former deputy commander. Having reviewed the transcript of the conversation that was secretly taped by the defendant’s father, the Court concluded that the battalion commander clarified that he was not authorized to offer a plea bargain. Instead, he encouraged the father to consult with the chief military defense attorney to learn of “other options that the military defense can offer.”²³ Referring to the content of the recorded meeting, an IDF spokesman commented that “there was no proposal for lightening the sentence or regarding an appeal or another intervention in the legal process.”²⁴

V. Determination and Reasoning

A. General Considerations of Sentencing

Based on established precedent for determining a suitable sentence, a court must first determine the “appropriate range for punishment.”²⁵ The principles of sentencing, accordingly, first require an evaluation of the general social values that were harmed by the offense. Only at a later stage, for the purpose of determining the punishment within the “appropriate range for punishment,” or as a consideration to deviate from it, sentencing guidelines require an evaluation of the circumstances of the defendant himself, along with additional circumstances that are not related to the offense.²⁶

B. Social Values Harmed by the Offense

The Court determined that the defendant’s acts harmed several social values that must be protected to strengthen the moral and ethical foundation of society in general and of the IDF especially. The main protected value harmed by the defendant’s acts, the Court opined, was that of the sanctity of life. While committing the act with the intention of taking the life of the assailant who the Court had determined did not pose a danger at the time, the defendant also harmed the principle of the purity of arms, as he utilized lethal force at a level that exceeded what was necessary for performing a military goal.²⁷

²² *Id.* ¶ 31.

²³ *Id.* ¶ 43(h).

²⁴ *Id.* ¶44.

²⁵ *Id.* ¶¶ 50–51.

²⁶ *Id.* ¶ 51.

²⁷ *Id.* ¶ 52.

Citing established precedent on the principle of purity of arms, the Court noted that

the lethal use of the weapon was carried out after the despicable and vile terrorist injured an IDF soldier in a stabbing attack, which took place merely several minutes prior to the said shooting . . . [I]n our view, even in such complicated situations, and maybe especially in them, IDF soldiers are under an obligation to be careful to prevent harm to human life beyond what is required.²⁸

Based on additional precedent, the Court further determined that the IDF is “the people’s army.” Every young person that serves in the IDF receives a personal weapon to perform his/her duties. Any deviation from the rules of engagement, therefore, might impact the moral compass of society as a whole, and might even harm the State of Israel and its reputation.²⁹

The Court concluded that severe harm was inflicted by the defendant’s actions on what it viewed as the superior social values of sanctity of life and the purity of arms.³⁰

C. Circumstances Related to Perpetrating the Offense

Having established the harm caused to social values by the defendant’s acts, the Court then evaluated the circumstances in which the offense was committed.

1. The Event Took Place in a Complicated and Hostile Arena

The Court listed various mitigating circumstances, including the fact that the event as a whole took place in a complicated and hostile arena, a few minutes after two assailants had attempted to kill IDF soldiers who were conducting “a mission of guarding and checking their position” at the time.³¹ The assailants succeeded in stabbing one soldier. The threat posed by the assailants at an earlier stage was therefore, in the view of the Court, not a vague threat but a real one, at a time when the military was facing “a wave of terror.”³² The Court recognized that there was also a concrete intelligence warning for a pending terrorist attack in the relevant location.³³

2. Decision to Shoot Adopted Shortly Before the Shooting and without Prior Planning

The Court stated that although it had previously held that the defendant committed the shooting when he was no longer subjected to any threat by the assailant,

the evidentiary framework that was submitted . . . did not indicate in a definitive way the exact moment in which the defendant decided to carry out the shooting that led to the death of the terrorist, and in this matter we accept the position of the military prosecution,

²⁸ *Id.* ¶ 53.

²⁹ *Id.* ¶¶ 53–56.

³⁰ *Id.* ¶ 57.

³¹ *Id.* ¶ 60.

³² *Id.*

³³ *Id.*

from which it appears that it should be assumed for the benefit of the defendant that [the decision to shoot] was adopted shortly before the shooting, and without the shooting being performed after prior planning.³⁴

3. Defendant's Inexperience Acting in a Complex and Tense Environment

The Court gave weight to the fact that the event in question was the first “true” military operation in which the defendant took part. It was also the first case in which the defendant was required to care for an injured soldier, a friend from the same unit, under operational circumstances. The Court recognized that the shooting took place in “an active scene and [at a time when] the operational event had not yet ended.”³⁵

Military and rescue personnel were still at the scene at the time of the shooting and there were calls heard regarding the danger posed by the assailant. These calls had previously been rejected by the Court as a ground substantiating a claim of error on the part of the defendant. Nevertheless, the Court opined, “it cannot be disregarded that the total atmosphere in the scene in which the defendant acted was complex and tense, [a fact] that should also be given weight in imposing the sentence.”³⁶

4. Judicial Review of Military Personnel Actions during Combat Situations

Israel's Supreme Court has previously determined that actions undertaken by security forces during combat situations where there is a real danger to their lives and well-being should not be evaluated under “laboratory conditions” removed from the special situation in which they acted.³⁷

The defendant's claim that he acted by mistake was rejected during the trial. At the sentencing stage, however, the Court was willing to consider the complexity of the situation in the scene, the defendant's lack of operational experience, and the undisputed fact that he did not get clear orders regarding the behavior expected of him at the scene.³⁸

5. The “Appropriate Range of Punishment” under the Circumstances

The Court reviewed examples of previously imposed sentences, offered by the prosecution and defense, as relevant to the circumstances of the current case.³⁹

The majority of judges concluded that, in determining the “appropriate range of punishment,” the Court cannot disregard the totality of the unique circumstances of the event. These include the

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* ¶ 61 (citing CA 5604/94 Osama Hamed v. State of Israel, 58(2) PD 498 (2004)).

³⁸ *Id.* ¶ 63.

³⁹ *Id.* ¶¶ 67–69.

event being the first military operation of this kind in which the defendant took part and that he was required, shortly before the shooting, to care for his friend who had been stabbed by the attackers attempting to kill IDF soldiers. This took place in a hostile, tense, and complex scene during which shouts regarding the danger posed by the attacker were heard. Given these circumstances, the majority of judges opined that the “appropriate range for punishment” should be eighteen to forty-eight months’ imprisonment.⁴⁰

In the view of the minority opinion, however, while the unique circumstances related to perpetration of the offense must be considered in determining the “appropriate range of punishment,” the Court must give more weight to the protected values that were harmed by the defendant’s actions. Since it had been determined that the defendant shot the assailant with intent to cause his death due to the assailant’s attack on another IDF soldier, the defendant’s punishment must reflect the value accorded to the sanctity of life in the State of Israel. The “appropriate range for punishment” in the current case, according to the minority opinion, should be imprisonment for a period of thirty to sixty months.⁴¹

D. Circumstances Unrelated to the Offense

The Court noted that in accordance with the Penal Law, 5737-1977,⁴² in determining the appropriate punishment the court may consider circumstances that are not related to the offense.⁴³ These include evidence regarding the defendant’s positive contributions to society, his volunteering for a combat unit, his professional and dedicated service as a medic, and other positive attributes.⁴⁴

The Court further considered the fact this was the defendant’s first entanglement with the law and that his actions stood in clear contradiction to his character and excellent military service before the event. It noted that the evidence indicated the defendant, who until the event lived a positive and rule-abiding life, had been in distress and his family’s health had deteriorated. Since the event and following his conviction, the defendant and his family were subjected to real threats by hostile elements. The Court also considered the harsh impact of a criminal conviction of a soldier on his future civilian life.⁴⁵

The Court agreed to also consider the potential, but unproven, impact of the Minister of Defense, the IDF Chief of Staff, and the IDF Spokesman’s public denunciations of the defendant’s acts shortly after the event and before the completion of the investigation.⁴⁶ However, the Court rejected the claim that efforts made by military authorities to influence the defendant’s father to

⁴⁰ *Id.* ¶¶ 70–72.

⁴¹ *Id.* ¶¶ 73–75.

⁴² Penal Law, 5737-1977, § 40 K.

⁴³ File 182/16, Military Prosecutor v. Sergeant Elor Azaria (Feb. 21, 2017), ¶ 76.

⁴⁴ *Id.* ¶¶ 77–78.

⁴⁵ *Id.* ¶¶ 80–82.

⁴⁶ *Id.* ¶¶ 83–86.

replace the defense team and reach a plea bargain had any relevance to the issue of determining the defendant's sentence.⁴⁷

While considering grounds for reducing the defendant's punishment within the "appropriate range of punishment," the Court also took into account the defendant's refusal to take responsibility for his actions even after his conviction.⁴⁸

Considering the totality of the circumstances, including the defendant's significant contributions to the military, his positive character, his detention, the harm incurred by him and his family, and the impact of his criminal conviction on his future, the Court determined that the punishment selected should be at the lower level of the "appropriate range for punishment."⁴⁹

As the case involves an extremely serious offense, the Court rejected any possibility for deviation from the "appropriate range for punishment." Such a deviation may sometimes be authorized under section 40D(b) of the Penal Law, for the purpose of potential rehabilitation in cases that do not involve "extreme severity of the offense or the defendant's guilt."⁵⁰

VI. Sentence

As noted above, the judges differed regarding the "appropriate range of punishment" that should apply to the defendant. Whereas two of the three judges on the panel opined that this range should be for eighteen to forty-eight months' imprisonment, the third judge was of the opinion that it should be at the range of thirty to sixty months' imprisonment. All judges were in agreement that the sentence that should be imposed on the defendant should be at the lower end of the "appropriate range of punishment."

Based on the majority opinion, the Court sentenced the defendant to imprisonment for a period of eighteen months (minus nine days in which he was placed in close confinement and not including the period in which he was under open imprisonment). In addition, the defendant was sentenced to a period of twelve months if he committed another manslaughter offense within three years of the sentencing and to an additional six months if he unlawfully used a weapon within two years of the sentencing. The Court also ordered the demotion of the defendant from the rank of a sergeant to a private.⁵¹

⁴⁷ *Id.* ¶ 87.

⁴⁸ *Id.* ¶ 88.

⁴⁹ *Id.* ¶ 90.

⁵⁰ Penal Law, 5737-1977, § 40 D(b).

⁵¹ File 182/16, Military Prosecutor v. Sergeant Elor Azaria (Feb. 21, 2017), ¶¶ 92-94.