

Communications

TO THE EDITOR:

In “Sacrificing the Few to Save the Many” (*Tradition*, 43:1, Spring 2010) R. Bleich discusses the 9/11 airplane hijackings, and analyzes the *halakhic* propriety of shooting down the planes to prevent them from reaching their intended targets. Were such an intervention possible it would save the lives of those in the buildings into which the planes would soon crash, yet would shorten the lives of the innocent passengers who would otherwise live for the remaining moments prior to impact. Addressed specifically is United Airlines Flight 93 which was hijacked after the successful terror attacks against the Twin Towers, and was understood by the Aerospace Defense Command to be headed for the Congress. Sufficient time may have been present to scramble fighter jets to down the airline had the plane not first crashed into an open field.

The article finds precedent for this case in the halakhic literature dealing with the conduct of inhabitants of a city who must choose between handing over a fugitive and between being put to death, as well as sources which discuss the rules of self preservation in the face of limited life saving resources. R. Bleich concludes that halakhic literature does not sanction downing the airline. The reasoning behind this conclusion is predicated upon the proposition that the relevant sources view every moment of life, even of a brief or limited period, known as *hayyei sha’ah*, as having infinite value. As such, no consideration, including preserving the normal longevity (referred to in halakhic literature as *hayyei olam*) of others, allows for shooting down the plane, thereby cutting short the *hayyei sha’ah* of the innocent passengers.

It would be interesting to consider whether United Airlines Flight 93, which targeted the Congress, raises issues beyond the preservation of individual or collective *hayyei olam*. Indeed, in responding to the events of 9/11, the Presidential Military Order of November 13, 2001 sec 1c stated “international terrorism may place at risk the continuity of the operations of the United States Government” suggesting that the functioning of the government was under attack.

Furthermore, the Office of Legal Council of the Justice Department advised the Administration that the laws of war applied to 9/11. Accordingly, the President, in his capacity as Commander in Chief, declared (Military Order sec 1a) that the attacks on the United States were “on a scale that has created a state of armed conflict that requires the use of the

United States Armed Forces.” While legal academics have debated whether the 9/11 attacks were in fact an act of war, I have no doubt that Al Qaeda and the Jihadists sent to perpetrate the attacks were absolutely certain that they were.

R. Bleich has noted elsewhere (*Contemporary Halakhic Problems*, vol. III (New York, 1989) pp. 275-278) that the laws of war are distinct from those governing personal or collective self defense. One wonders whether the laws of warfare, as they apply to the killing of innocents, would be applicable to the downing of a hijacked commercial airliner used as a weapon during an armed conflict and whether halakha grants further latitude to those authorized to defend against *lese majeste*; threats to the very functioning of a sovereign state.

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RABBI BLEICH RESPONDS:

Dr. Becker has indeed quoted me correctly as stating that “the laws of war are distinct from those governing personal or collective self-defense.” The “wonder” he expresses should probably be reformulated as a question with regard to whether license to inflict collateral damage in the course of warfare applies also to the sacrifice of the defending nation’s own nationals. One must be mindful of the fact that military personnel engaged in a defensive war are also innocent. It may well be argued that, according to the thesis developed by *Hatam Sofer* in a different context, a sovereign is authorized to sacrifice of the lives of a limited number of his subjects in order to safeguard the lives of a much larger number of compatriots. *Hatam Sofer*’s novel view is predicated upon his analysis of a talmudic application of the verse “You, O Solomon shall have the thousand, and two hundred to those that keep the fruit thereof” (Song of Songs 9:12). *Hatam Sofer*’s thesis is discussed in *Contemporary Halakhic Problems*, IV, 78ff.

Legal academics have certainly debated whether the 9/11 attacks were in fact an act of war. The “absolute certainty” of *Al Qaeda* does not serve to dispose of that question either as a matter of international law or of Halakhah. The salient factors that serve to distinguish between terrorism and war must be carefully elucidated. Nor is the advice of a governmental agency dispositive either in international law or in Halakhah. I am hardly an expert in international law but I have reason to believe that the skepticism expressed by legal academics is well-founded. A man’s house may be his castle but that does not mean that a highwayman may

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proclaim his patch of land a sovereign state and declare himself supreme ruler thereof. Nevertheless, it seems to me that, for various reasons, as a matter of Halakhah, *Al Queda* has a much stronger case for claiming war-making capacity and hence halakhic rules of warfare might be invoked in campaigns against their operatives.

Dr. Becker's identification of these considerations has not eluded me. Dr. Becker seems to be unaware of my discussion in *Contemporary Halakhic Problems*, III, 4-10, of whether war, as distinct from collective self-defense, is a recognized exception to the prohibition against homicide in the context of the Noahide Code. Beyond that which is permitted to persons engaged in self-defense, I am unaware of any "further latitude" granted to "those authorized to defend against *lèse majesté*."

Analysis of these highly significant issues was studiously omitted from my discussion of the events of 9/11 because the intentions, and probably the affiliation, of those engaged in the violent acts of 9/11 were entirely unknown until after the incident. The passengers certainly had no such information and, unless there is information to the contrary, it should be assumed that the Air Force was equally uninformed. *Ein le-dayyan ela mah she-einav ro'ot*. Hindsight is of scant value in assessing the legitimacy of a determination made at an earlier point in time. The propriety of such decisions must be analyzed solely within the context of contemporaneously available information.