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1

MILITARY ETHICS IN JEWISH LAW

by

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Rabbi Jose the Galilean states: "How meritorious is peace? Even in time of war Jewish law requires that one initiate discussions of peace.\*\*"

I. Foreword

In the mid-1950's, President Dwight Eisenhower conducted a lengthy strategic review of the defensive options available to the United States during the Cold War. During the course of the review, it became clear that undertaking a conventional arms defense of Europe against the massive array of Warsaw Pact troops was a task that America (and Europe) was economically unprepared to do. It would require a tripling of the defense budget, the reinstatement of a near universal draft and the significant raising of taxes, all steps the American people would have been unprepared to take. Yet the defense of Europe was vital.

Eisenhower formulated the United States response with three defensive axioms. First, the U.S. would never start a war with the Warsaw Pact; second, the U.S. reserved the right to first use of nuclear weapons; and finally, such weapons would be targeted against civilian centers should war be initiated by the Soviets.<sup>1</sup> These policies prevented another world war from breaking out, as the Soviets were genuinely afraid of the massive destruction of their civilian populations.

We now know that President Eisenhower understood that these strategies were unethical if implemented in a war, but furthermore recognized that absent these policies, another world war would break out, and Europe might be overrun. Thus,

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\*\* *Leviticus Rabbah*, Tzav §9.

<sup>1</sup> See "Statement of Policy by the National Security Council on Basic National Security Policy, October 30, 1953," in *The Pentagon Papers* (Gravel ed.), vol. 1, doc. 18, 412-429.

he authorized these exact policies, notwithstanding his deep reservations about them (and perhaps even unwillingness to actually implement them in wartime).<sup>2</sup> Furthermore, to give these unethical policies 'teeth,' he promoted officers to be in command who provided a demeanor and mindset of being ready, willing and able to order a nuclear response without ethical reservations.<sup>3</sup> Such was needed to insure that the policy — at its core, a bluff — would be effective.

And it was. *The Cold war was won on a bluff, with not a single shot fired between the superpowers.*

The articulation of the *halakhot* of war has an element of this type of public policy in it. I do not write about Jewish law for my own pleasure, but rather in the belief that people read what I write, and (hopefully) listen. War law is thus not an area where it is wise to actually articulate your own ethical limits, as one must assume that both friend and foe read the literature. One should not expect candid statements of the limits of *halakhah* (Jewish law), as such might be like Eisenhower announcing that the nuclear option is merely a bluff. Bluffs only work if others are uncertain that one is bluffing.<sup>4</sup>

<sup>2</sup> There is a great deal of debate among scholars and historians as to Eisenhower's true private feelings on the actual use of nuclear weapons in "massive retaliation." See e.g., Richard H. Immerman, "Confessions of an Eisenhower Revisionist: An Agonizing Reappraisal," *Diplomatic History* 14:3 (Summer 1990), 319-342, who writes at 326: "'The only thing worse than losing a global war was winning one,' [Eisenhower] remarked to the National Security Council in July 1953." And again (ibid.): "Even though Eisenhower would later contradict himself on this point, I believe that he basically meant what he said. Consequently, he never considered the nuclear option viable, except in the sense one considers suicide viable." But see also Frederick W. Marks III, *Power and Peace: The Diplomacy of John Foster Dulles* (Praeger, 1993), at 108-09, who, though acknowledging Immerman's view as plausible, "because from time to time, Ike did seem to imply that the initiation of nuclear warfare by the United States was unthinkable," goes on to represent the consensus view of military and nuclear experts as holding that Eisenhower was clearly willing to "go nuclear"; see sources cited there in notes 46-50. See also George H. Quester, "Was Eisenhower a Genius?" *International Security* 4 (Fall 1979):159-79. Ultimately, Eisenhower's true beliefs may never be known; his memoirs were published while the Cold War was ongoing, and he died before it ended. Perhaps at best we can conclude that, rhetoric aside, he played his cards very close to the chest — a policy not unwarranted for a bluff (admittedly, unprovable) of such magnitude.

<sup>3</sup> Think of the legendary General Curtis LeMay as an example, and watch Stanley Kubrick's *Dr. Strangelove, or: How I Learned to Stop Worrying and Love the Bomb* (Columbia, 1964) to better understand the ethical mindset demanded. Indeed, one of the contentions of Immerman's "Confessions" is that Eisenhower shrewdly used Secretary of State John Foster Dulles in a similar civilian role as a spokesperson and ambassador of these ends.

<sup>4</sup> For an example of bluffing in Jewish law (whose truth ultimately cannot be determined), see the comments of Rabbi Yehiel Mikhel Epstein regarding informing (*mesira*), *Arukh ha-Shulhan* 388:7; See also, Michael Broyde, "Informing on Others for Violating American Law: A Jewish Law View," *Journal of Halacha and Contemporary Society* 41 (2002):5-49; Justice Menachem Elon, "Extradition in Jewish Law," *Teḥumin* 8 (1988):263-86, 304-09; Rabbi J. David Bleich, "Extradition," *Teḥumin* 8 (1988):297-303; and Rabbi Shaul Israeli, "Extradition," *Teḥumin* 8 (1988):287-96. See also R. Yehudah Herzl Henkin, *Responsa Bnei Banim* III, p.146.

## II. The Limits of Jewish Law in Regulating War

About ten years ago I wrote a rather conceptual article on the halakhic issues raised by starting wars, fighting wars, and ending wars. It was, I think, a fine article which undertook an extensive theoretical review of these issues.<sup>5</sup> Over the past five years, as I have spoken about the topic on various occasions, the article has been updated, modified, and expanded, including a version presented at the Orthodox Forum of Yeshiva University.<sup>6</sup> It forms the basis of some sections of this article.

Also over the last five years, I have been privileged to serve as the *rosh kollel* (academic head) of the Atlanta Torah MiTzion Kollel, where I give a daily *shiur* (lecture) to its members. I have had numerous opportunities to speak with the Atlanta Torah MiTzion members about many different halakhic issues, and *halakhot* related to war is a regular topic of interest and discussion, as they are in Atlanta having only recently completed five years of combined army service and serious Torah study in the course of their *hesder yeshiva* experience.<sup>7</sup>

Yet year after year, presentations of my article never interested any of these young men very much — they would listen politely (as such is *kavod ha-Torah*), but displayed no real enthusiasm for the theoretical topics put forward. What was of interest to these recent Israeli soldiers in *halakhot* of war? The answer is simple. As soldiers, they felt that they were not given enough real guidance to deal with the practical issues of battlefield ethics — actually fighting a war as a private, sergeant, or captain, with all of the moral ambiguities of the combat encounter. In fact, upon examination, I found that many of these halakhic issues are poorly addressed. The standard works that deal with Jewish law in the army omit these matters and provide no guidance at all as to basic issues related to fighting a war!<sup>8</sup>

The conceptual reason behind this absence of discussion is pointed out by Rabbi

<sup>5</sup> Michael Broyde, "Fighting for Peace: Battlefield Ethics, Peace Talks, Treaties and Pacifism in the Jewish Tradition," in Patout Burns, ed., *War and its Discontents: Pacifism and Quietism in the Abrahamic Traditions*, 1-30 (Georgetown University Press, 1996).

<sup>6</sup> See e.g., Michael Broyde, "Battlefield Ethics in the Jewish Tradition," *95th Annual Proceedings of the American Society for International Law*, 92-98 (2001) (published in 2002).

<sup>7</sup> It is worth noting that the *hesder* program is unique in the world (as far as I can determine) in that it combines religious training leading to ordination with combat service in the army (as opposed to, for example, Italy's sponsorship of ordination programs to encourage army chaplains). While much has been written on the ideology of *hesder yeshivot* (See e.g., R. Aharon Lichtenstein, "The Ideology of Hesder," *Tradition*, 19:3 (1981), 199-217), I suspect that its unique military component derives directly from the Jewish law sources found in this paper — that it is a religious duty to serve in the armed forces in a time of *milḥemet mitzvah*.

<sup>8</sup> Thus both *ha-Tzava ke-Hilkhatah* and the more standard *Hilkhot Tzava* leave them out completely and focus exclusively on questions of ritual observance of Jewish law in the army setting. For an excellent review of one of these works, and a placing of it in a social context, see Rabbi Dr. Michael [S.] Berger, Book Review, *Tradition* 25:3 98-100 (1991).

Eliezer Yehudah Waldenberg in his responsa,<sup>9</sup> when he addresses the question of governmental policy concerning the obligation of rescuing captives (*pidyon shevuyim*). The basic rule, well known in Jewish law, is that one may not ransom captives for more than they are worth.<sup>10</sup> Rabbi Waldenberg was asked about a government's decision to send troops to rescue other captured soldiers, even when more soldiers might or will be killed during the mission than had been captured in the first place — which would seem to violate the Talmudic rule. Rabbi Waldenberg responds by positing two conceptual points. The first is that war is different from individual ethics and has a different set of rules. The second is that governmental decisions are different from individual decisions and also follow a separate set of rules.<sup>11</sup> By this, Rabbi Waldenberg means that the basic *halakhot* of war allow the killing of human beings in circumstances that are otherwise prohibited. Furthermore, a government, by dint of serving the vast national interest of many people, is permitted — in situations of war — to consider diverse factors and reach results predicated on a vast national interest or consensus, even if it risks many lives for seemingly little real short-term gain. Thus, a government could conclude, he states, that it is proper to lose the lives of three soldiers to rescue one.<sup>12</sup>

These two startling observations, which I believe to be correct and supported by many other sources in many different contexts related to war,<sup>13</sup> cause one to realize

<sup>9</sup> *Tzitz Eliezer* 12:57 and 13:100.

<sup>10</sup> *Shulhan Arukh, Yoreh De'ah* 252.

<sup>11</sup> *Tzitz Eliezer* 13:100: יוצא לנו מדבריהם של הגאונים האמורים, כי לפנינו שתי הגדרות וסברות. על הדינים המיוחדים שישנם בזה בכל חמה, והמה (א) מפני שכך ועל יסוד זה נוסד העולם. (ב) מפני דהלכות צבור והנהגת המדינה שאני, זאת אומרת שזהו משום תקנת והבטחת העם והמדינה.

<sup>12</sup> Of course, the reverse conclusion is also possible, although he does not dwell on that prospect.

<sup>13</sup> The starting point for such a list is the thoughtful article by Rabbi Shaul Israeli in *'Amud ha-Yemini* 16, which has produced a wealth of intellectual progeny on parade in nearly every issue of *Tehumin* by such luminary authors as Rabbi Ya'akov Ariel, Rabbi Shlomo Goren, Rabbi Ovadya Yosef, and many others. There are no less than 64 articles dealing with war related issues in the 23 volumes of *Tehumin*, the overwhelming number of which agree with the starting point of Rabbi Israeli. See also *infra*, note 100.

In addition to the view of R. Israeli, there are, in grand outline, four other views about the substance of the Jewish law of war as articulated by the halakhic authorities of the last generation. The first is the view of R. Elazar Menahem Shakh, the great leader of the Ponovezh Yeshiva for decades. In his view, there are no unique rules of how to fight a war, and war is simply the general rules of self-defense writ large. (See R. Elazar Menahem Shakh, *Be-Zot Ani Boteah* [Bnei Brak, 1969], pp. 10-35.) The second is the view of R. Shlomo Goren, that *halakhah* has indigenous rules for waging war which, although covered by layers of dust from generations of disuse, are present and need to be fleshed out. (See R. Shlomo Goren, *She'elot u-Teshuvot Meshiv Milhamah* [4 volumes, Jerusalem, 1983-2004].) The third is the view of R. Ovadia Yosef, who acknowledges that there are indigenous rules of war within *halakhah*, but thinks that they are not related to the State of Israel, but govern the conduct of Jewish soldiers in any army (See e.g., R. Ovadia Yosef, *Yehaveh Da'at* 2:11 and 2:14 as well as many other cases. In truth, I had not grasped the extent to which Rav Ovadia adopts this view, even as I had sensed it, until I read an excellent article by Shlomo Fischer in the *Cardozo Law Review*. See Shlomo Fischer, "Excursus: Concerning the Rulings of R. Ovadia Yosef Pertaining to the Thanksgiving Prayer, The

that Jewish law's view of combat conduct and battlefield ethics is, in fact, much simpler than one might think. If a government can choose as a matter of policy to engage in retaliatory military action that risks the lives of its own soldiers and civilians in a time of war, is it not obvious that it may do so with enemy soldiers and civilians as well? Likewise, recognition of the responsibility of the government for such difficult wartime decisions leads one to conclude that the so-called Hannibal procedure,<sup>14</sup> while controversial as a matter of policy, seems to be a valid option from the perspective of Jewish law.<sup>15</sup>

Settlement of the Land of Israel, and Middle East Peace," *Cardozo Law Review* 28 [October 2006]: 229-244.) The fourth view is that of the Satmar Rabbi, R. Joel Teitelbaum, that fighting of Jewish wars is prohibited by rabbinic decree after the three Talmudic oaths until the coming of the Messiah. (See R. Yoel Teitelbaum, *Kuntres al ha-Geulah ve-al ha-Temurah* [Brooklyn, 1967], throughout, but particularly pp. 80-85.) This article, however, assumes that all of these views are incorrect, and posits that R. Israeli's approach that secular law norms govern is correct; such is the view of R. Waldenberg as well.

As this article repeatedly notes, I find R. Shaul Israeli's approach to be both logical and deeply consistent with the sources. It also, in my view, works in the real world. It is quite clear to me that the vast majority of contemporary *poskim* agree with Rav Israeli, and for that reason, even as there are numerous *sefarim* that deal with religious life in the army, not a single one of them discusses battlefield ethics *halakhah le-ma'aseh*. Why? Because the Israeli army obeys international law, and that is all *halakhah* requires in war.

<sup>14</sup> Hannibal Procedure refers to instructions in the case where a soldier has been kidnapped and the government realizes that it cannot rescue him. It then sets out to kill the soldier, so as to avoid the long, drawn out demoralizing situation of a soldier in enemy hands, when it concludes that such a policy best serves the nation. These Hannibal procedures have become a source of some controversy in Israel, where for nearly twenty years they have been standing orders in the case of a kidnapping. See Sara Leibovich-Dar, "Rescue by Death," *ha'Aretz*, May 22, 2003 (article number 996968). (The article states that the three Israeli soldiers whose remains were recently returned were killed in such a fashion.)

<sup>15</sup> Consider how to analyze such an order. Absent wartime, it is obvious that such conduct is prohibited. However, in wartime, a different result might be reached. First and foremost, it is now clear that most of the Israeli soldiers who have been kidnapped during the intifada (as opposed to Israel's prior wars) are killed by their captors. Given that reality, any attempt to rescue a soldier who is being kidnapped is in the best interest of that soldier, as without rescue the soldier will most likely die, perhaps hideously. Like medical intervention that sometimes kills, the motives of the intervener are determinative of the presence or absence of sin. When one attempts to rescue a person from the threat of death and accidentally kills them in that process, that is a bad outcome, but not murder at all. Indeed, such rescue attempts are prudent. Consent by the soldier to such attempts is implied, and is in his best interest. For more on this approach, see Abraham Isaiah Karelitz, *Ikazon Ish, Sanhedrin* 47b.

Second, soldiers are different from others. In a military situation, the army has the right to direct soldiers into difficult situations, where their lives will be in danger and some will certainly die. Such is the very nature of military action, frequently. Although generally one may avoid any halakhic obligation due to danger to one's life, such is not the case with the obligation to serve in the army. The risk is part of the mitzvah, and cannot exempt one from the obligation. Thus, even if the soldier does not want to be saved in this manner, the Army can compel soldiers to take certain risks against their wishes. That is why *halakhah* permits a military draft.

Third, even in the very sad case where the government has decided that it must stop the kidnapping even at the price of a soldier's life, and thus no real rescue attempt is made (such as shooting at the vehicle that the soldier is in with a missile from a tank), that conduct is not murder either. In wartime, *halakhah* permits even the killing of innocent civilians as a side consequence of war. (See note 105.) In this circumstance the government has decided that it must kill the terrorists who

Let us consider a yet more troubling problem. Intelligence has revealed, say, that the second to the minister of defense of the enemy is a practicing homosexual. The army devises a covert operation to exploit this perceived weakness by sending in an operative to seduce the official, with all the activity such entails, gain access to the enemy's strategies, and transmit them back to headquarters. Would such conduct be permissible according to Jewish law, assuming that it would be effective in providing access to critical battle plans of the enemy, and assuming it is ordered by the army (or an equally responsible branch of government) through a duly authorized military order following the "chain of command"? I suspect that the answer to that question is yes.<sup>16</sup>

Allow me to elaborate: how does Jewish law know that one may not have a sexual relationship with one man to save another, generally? The answer stems from the well-known Talmudic doctrine requiring one to give up his or her life rather than violate the three cardinal prohibitions of murder, sexual immorality, and idolatry. The rationale behind this is found in a fundamental Talmudic passage that analogizes sexual immorality (*ervah*)<sup>17</sup> to prohibitions against murder, in that in both cases Jewish law requires that one die rather than violate that specific provision of Jewish law.<sup>18</sup> (This imperative runs contrary to the general rule that permits one to violate any prohibition to save one's life.) How does one know in the first place that one may not kill an innocent person to save one's life? The

engage in the kidnapping of Israeli soldiers at any cost, and that cost might entail the death of the soldiers who are taken prisoner. These soldiers who are hostages are like innocent civilians, and their death by friendly fire is not an act of murder by those who have shot them. This would not be case outside of the army setting.

<sup>16</sup> For an example of this that is even harder to justify, see Matthew Gutman, "Dirani Interrogator Denies Torture Allegation," *Jerusalem Post*, January 28, 2004, p. 3.

<sup>17</sup> But not *avodah zarah*, which has its own rationale.

<sup>18</sup> See *Sanhedrin* 74a which states:  
How do we know that one cannot engage in prohibited sexual activity or murder to save one's life? As Rebbi states: "...for like when a person arises and murders another person, such shall be [the rule in] this matter [of the rape of a betrothed woman]" (Deuteronomy 22:26). And what law had we, in fact, [already] learned from murder? Rather, it is learned from here; [the verse] comes to teach and it actually learns [a new law]: we analogize murderer to the rape of a betrothed woman. Just as the betrothed woman can be saved at the expense of the life of the rapist, so too the murderer: [his victim] can be saved at the expense of the murderer's life. In addition, we analogize the [case of the] betrothed woman to the [case of the] murderer. Just as murder is a prohibition that one must allow oneself to be killed rather than violate, so too, the betrothed woman must allow herself to be killed rather than violate. How do we know that one may not kill another [innocent] person to save one's life? It is logical. [As was adduced in the instance] of that person who came in front of Rava and said, "This bandit instructed me to kill someone, and if not, he will kill me." [Rava] replied to him: "You should be killed and not kill; who says that your blood is sweeter [alt., redder] than his blood; maybe his blood is sweeter [alt., redder]?"

It is obvious to this writer that the 'sweetness of blood' rationale is not applicable in wartime, and thus one may kill in such a case. There is no reason to assume that were there a case where an *ervah* violation would accomplish the same goal, the same conclusion could not be reached.

Talmud states that such can be logically deduced, and develops the principle that one person's blood is no sweeter (alternatively, redder) than another's. The inference to be drawn, of course, is that in situations where the murder of such an innocent person is permitted (such as in time of war) an illicit sexual relationship with that person – in the course of a properly authorized military order design to achieve lawful goals – is also permitted according to Jewish law.<sup>19</sup> This view – that all conduct in war that is needed to win (other than breaching treaties) is permitted by *halakhah*, since the greater includes the lesser – was adopted by the late Rabbi Shaul Israeli, judge of Supreme Rabbinical Court in Jerusalem, in a famous essay.<sup>20</sup> Indeed, such conduct might even be a fulfillment of the essential obligation to fight.<sup>21</sup> Certainly there is a deep consensus that every violation of Jewish law other than *ervah* and idolatry would be categorically permitted in the course of fulfilling valid military orders.<sup>22</sup>

Let me take it to the next step. If the government can only rescue a soldier by killing a dozen innocent infants in the enemy camp, may it do that? Are enemy civilians more or less sacred than one's own soldiers, and if they are not less sacred as a matter of technical *halakhah*, might they be by dint of a presumptive *hora'at sha'ah* (temporary edict/suspension of law) which would permit such? Indeed, the basic thrust of this introductory section of the paper is that war has, by its very nature an element of *hora'at sha'ah*, in which basic elements of "regular" Jewish law are suspended. Thus, once 'killing' in war becomes permitted as a matter of Jewish law, many of the hierarchical values of Jewish law seem to be suspended in war as well, at least to the extent that the ones who are hurt are people who also may be killed.<sup>23</sup> Rabbi Joseph Karo in his commentary to Maimonides' Code

<sup>19</sup> Consider, for example, that the Jewish blonde bombshell sent in to kill the enemy general – which we all agree is permitted in wartime – may determine as a matter of strategy that it is more effective as a matter of tactics to seduce the general and steal the war plans than to kill him. This approach, however, is not sufficient to explain the conduct of the heroine Yael in Judges 4:17-19, as she was not a combatant at all (as the text points out); thus, the Talmudic rabbis resorted to a different rationale of *averah lishmah* to defend her *ma'aseh ervah*. See *Yalkut Shim'oni*, *Shoftim* 247 and the comments of R. Moses Isserles, *Responsa of Rama* 11 and Rabbi Jacob Reischer, *Shevut Ya'akov* 2:117.

<sup>20</sup> R. Shaul Israeli, "Military activities of national defense (Ileb.)," first published in *Ha-Torah ve-ha-Medinah* 5/6 (1953-54): 71-113, reprinted in his *Anud ha-Yemini* (rev ed., Jerusalem, 1991) as Ch. 16, 168-205.

<sup>21</sup> See e.g., Greg Myre, "Coerced or Not, Palestinians Who Assist Israel Face Death," *New York Times*, Nov. 29, 2003.

<sup>22</sup> See e.g., Rabbi Ya'akov Ariel, "*Gezel ha-goy be-milhamah*," *Te'umin* 23:11-17 (5763). Although *yefat to'ar* requires discussion, this matter is different in that such conduct is not directly engaged in as part the pursuit of a valid military goal, but rather the law represents an attempt to address an issue that relates to troop morale and other such issues. See also *infra* note 110.

<sup>23</sup> See for example, Rabbi Abraham Isaac Kook, *Mishpat Kohen* 143, which permits the sacrifice of oneself as a form of *hora'at sha'ah* that is allowed by Jewish law to save the community. Is there any doubt that the same hypothetical rabbinical court that would permit a Jewish soldier to kill himself to save the community, would permit the killing of "less innocent" enemy soldiers or even civilians in such situations as well? In grave times of national war, every battle and every encounter rises to such a level,

explicitly notes that the power of a *beit din* (rabbinical court) includes the authority (not only to kill people who are guilty of some violation of Jewish law, but whose conviction otherwise lacks in technical proof, but also) to kill people who are completely innocent, if in the judgment of the rabbinical court the exigencies of the times require such.<sup>24</sup>

Indeed, the Talmud (*Yevamot* 79a), seems to recognize that in wartime the concept of *hillul ha-Shem* (avoiding the desecration of God's name) permits even the killing of otherwise innocent civilians. The discussion concerns why King David spared the life of Mephibosheth, son of Jonathan and grandson of Saul,<sup>25</sup> when the Gibeonites sought to have the remnants of King Saul's family killed. In this particular case, these killings were a naked act of retaliation, which the Talmud

I suspect.

So too, consider torture. Of course, the gratuitous torture of individuals for the sadistic pleasure of another never ought to be allowed. However, torture frequently serves a valuable purpose, both of extracting information from enemy combatants and for brutally punishing those who have engaged in warfare against the community, so as to persuade others to cease their actions. Once again, even as the restrictions found in international law seem clear and without exception, Jewish law speaks with a different voice. Torture, it would appear to me, is no more problematic than death itself, and there is no logical reason that the Jewish legal tradition would rule it categorically out of place as a method which, if employed, could obtain information that would save lives in the future. Indeed a claim can be made that even as a method of reprisal, torturing captured enemy soldiers simply because they are doing the same to your own soldiers has a strong and real foundation in Jewish law.

<sup>24</sup> R. Joseph Karo, *Kesef Mishneh* on Maimonides, *Hilkhot Mamrim* (Laws of Rebels) 2:4-5 (see also notes of Radvaz on this) as well as *Hilkhot Sanhedrin* (Laws of Courts) 24:4.

The authority for a *beit din* to make such a determination stems from its leadership role over the nation (*manhigei ha-kehillah*); see *Dvar Avraham* 1:1. The same ability thus applies to duly authorized governments (secular and Jewish), and can be relegated to their structures of military command. Indeed, the Israeli army assumes such a responsibility. Consider the following text from the Israel Defense Forces Code:

*Purity of Arms.* The IDF serviceman will use force of arms only for the purpose of subduing the enemy to the *necessary* extent and will limit his use of force so as to prevent *unnecessary* harm to human life and limb, dignity and property. The IDF servicemen's purity of arms is their self control in use of armed force. They will use their arms only for the purpose of achieving their mission, without inflicting *unnecessary* injury to human life or limb; dignity or property, of both soldiers and civilians, with special consideration for the defenseless, whether in wartime, or during routine security operations, or in the absence of combat, or times of peace. (emphasis added)

The Spirit of The IDF: The Ethical Code of the Israel Defense Forces (1995 version). It is worth noting that when the code was rewritten in concise, bullet-point form in 2001, the language of the Purity of Arms clause was updated:

*Purity of Arms* - The IDF servicemen and women will use their weapons and force only for the purpose of their mission, only to the necessary extent and will 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.

The Spirit of the IDF (2001) (available online at [www1.idf.il/DOVER/site/mainpage.asp?sl=EN&id=32](http://www1.idf.il/DOVER/site/mainpage.asp?sl=EN&id=32)). Among other revisions (including decreased emphasis of the term 'unnecessary'), the newer version actually seems to maintain that the Israeli military reserves greater latitude to determine the extent that force — and collateral harm — is necessary and appropriate.

<sup>25</sup> But see Tosafot ad loc., s.v. *Armoni u-Mefiboshet*.

only criticizes as lacking in the proper morality for the Jewish people. The Talmud makes no mention of the fact that the underlying act — the murder of seven absolutely innocent people as an act of retaliation — violates the Jewish law rules of murder. The reason that is so is clear. This retaliatory conduct in wartime does not violate any such prohibition.<sup>26</sup> Indeed, this seems logical, as retaliation when done to teach a lesson is not a general violation of Jewish law,<sup>27</sup> and killing for a purpose is not prohibited in wartime: thus, retaliatory killing in war is permitted.

The same can be said for collective punishment of vast segments of society for the active misconduct of the few. The final obligation in the Noahide code — basic frameworks of commandments forming the universal law code that Jewish law believes to be binding on all humans — is *dinim*, commonly translated as "laws" or "justice." Two vastly different interpretations of this commandment are found among the early authorities, but they both share the basic approach of permitting collective punishment. Maimonides rules that the obligations of *dinim* require only that the enumerated Noahide laws be enforced within the system of justice to be established — but that absent such enforcement, all members of society may be punished. He states:

How are all obligated by *dinim*? They must create courts and appoint judges in every province to enforce these six commandments and to warn the people about the need to obey the law. A person who violates any of these seven obligations (may be) (is)<sup>28</sup> killed with a sword. For this reason the inhabitants of Shechem [the city] were liable to be killed<sup>29</sup> since Shechem [the person] stole<sup>30</sup> [Dina], and the inhabitants saw and knew this and did nothing.<sup>31</sup>

Consequently, If one is in a situation where innocent people are being killed by terrorist acts that cannot be stopped by catching the perpetrators themselves, and those terrorists are supported by a civilian population that passively protects them and does not condemn them, collective punishment would be permitted by Jewish

<sup>26</sup> See e.g. the comments of Rashi, ad loc., s.v. *ve-al yithallel shem shamayim*. Indeed consider the often discussed problem in the Vietnam war of convincing captured Vietnamese officers to share information with American intelligence. This was a difficult task, but American officers found that the single most effective way to get such captives to share information was to take five prisoners up in a helicopter and ask one of them a question. If he refused to answer, without any further discussion he was pushed out of the helicopter and the next prisoner was questioned. This method seemed to work.

<sup>27</sup> For a recent, excellent work on this topic, see Zvi H. Weinberger and Boruch Heifetz, *Sefer limud le-hilkhot Ben adam la-havero* (vol. 2): *Lo tikom ve-lo titor* (T'sefat, 2003) which notes this point many times.

<sup>28</sup> See Rabbi Aharon Soloveichik, "On Noachides," *Bet Yitzhak* 19:335-338 (5747), and See also R. Joab Joshua Weingarten, *Helkat Yo'av*, Tanyana 14 for the uncertainty of the translation.

<sup>29</sup> See Genesis 34.

<sup>30</sup> As to why Maimonides uses the word "stole" (*gaza*) to describe abduction, see *Sanhedrin* 55a and R. Moses Schreiber, *Hatam Sofer*, *Yoreh De'ah* 19.

<sup>31</sup> Maimonides, *Hilkhot Melakhim* (Laws of Kings), 9:14.

law.<sup>32</sup> Nahmanides has a much more expansive conception of *dinim*, and would certainly permit regulations that include collective punishment.<sup>33</sup>

Admittedly, this lengthy preamble is terribly disquieting, and it heads in a direction that is deeply uncomfortable to me: Jewish law has no 'real' restrictions on the conduct of the Jewish army during wartime, so long as the actions being performed are all authorized by the command structure of the military in order to fulfill a valid and authorized goal. Sadly enough, it might turn out that most of these unpleasant activities we have considered will all have to become tools in this quite gruesome *danse macabre* in which the long term consequences of defeat are too great to ponder. This is true both in the Jewish homeland and our beloved America.

Of course, this does not mean that there are no limits to the law of war. Rather, it means that the Jewish tradition does not impose upon its adherents any intrinsic limitations on the *halakhah* of war except those that are derived from mutually agreed upon treaties or conventions agreed to by the combatants. Those limitations — external to Jewish law, but fully binding on all Jewish adherents — have the status either of treaties (which as explained below in section VI are fully binding) or international law accepted by the parties (which I explain elsewhere<sup>34</sup> is binding). Absent these mutually agreed upon limitations, Jewish law has few if any rules of battle.

### III. *The Aspects of War that Jewish Law Does Regulate: An Overview*

The remainder of this article reviews that the aspects of war that Judaism seeks to regulate even though "law" as an institution has shied away from doing so, and that

<sup>32</sup> And this is without any notion of *hora'at sha'ah*; See opinion of Kesef Mishneh *supra*, text accompanying note 24.

The classical doctrine of "purity of arms" simply disappears in such cases. Indeed, even the killing of prisoners becomes something Jewish law can consider. During World War II when the French Forces of the Interior continued to fight German occupation forces in France, Germany refused to treat members of the French Resistance as combatants — even though they wore insignia, carried their arms openly, and were in touch with both the Allies and the French provisional government in Algeria — and subjected them to summary execution despite formal protests by the provisional government. The French Forces of the Interior threatened reprisals, and when the executions did not stop, they shot eighty German prisoners under their control, which they had 'borrowed' from the British. The killings then stopped. The only other alternative would seem to have been the wholesale death of many French soldiers.

<sup>33</sup> Commentary of Nahmanides, Geneses 34:14. For more on this dispute see Michael Broyde, "Jewish Law and the Obligation to Enforce Secular Law," in D. Shatz & C. Waxman eds., *The Orthodox Forum Proceedings VI: Jewish Responsibilities to Society* (1997), 103-143. (This article discusses the duties of citizenship from a Jewish law view.) For more on Nahmanides' position, see Rabbi Shlomo Goren, "Combat Morality and the Halacha," *Crossroads* 1:211-231 (1987).

<sup>34</sup> Michael J. Broyde "A Jewish Law View of World Law: *Halakhah* and International Law," *Emory Law Journal* 54 (spec. ed., 2005):79-93.

"ethics" as a discipline has failed to successfully regulate. In this area, as in many others, the legal and the ethical are freely combined in the Jewish tradition, and the tradition uses both in attempting to delineate what may and what may not be done in war.

The discussion will begin with a review of the legal or ethical issues raised that can justify the *starting* of war (*jus ad bellum*). This issue is crucial for any discussion of the ethics of the battlefield itself in the Jewish tradition. As developed below, there are numerous different theories as to why and when it is morally permissible to start a war that will kill people. What theory one adopts to justify a war, and what category of "war" any particular military activity is placed in, significantly affects what type of conduct is legally or morally permissible on the battlefield (*jus in bello*). The article continues by addressing various ethical issues raised by military activities in the order they would be encountered as hostilities advanced and then receded, including a discussion of the issues raised by peace treaties in the Jewish tradition.

This article demonstrates that the Jewish tradition has within it a moral license that permits war (and killing) that differs from the usual rules of self-defense for individuals. However, the permissibility to "wage war" is quite limited in the Jewish tradition, and the requirement that one always seek a just peace is part and parcel of the process that one must exercise to initiate a legitimate war. The love of peace and the pursuit of peace, as well as the responsibility to eradicate evil, all co-exist in the Jewish tradition, each in its place and to be used in its proper time.

#### A. Jewish Law's View of Non-Jewish Nations at War

Historically, Jews have been (and to a great extent, still are) a people living in a Diaspora, foreigners in and, later, citizens of countries where Jewish law was not the ethical or legal touchstone of moral conduct by the government. As with many areas of practical import, it is necessary for adherents to the Jewish legal tradition to develop a method for determining whether such a nation's military activity is indeed permissible according to Jewish law.<sup>35</sup>

Two distinctly different rationales are extant to justify the use of military force. The first is the general principle of self-defense, whose rules are as applicable to the defense of a group of people as they are to the defense of a single person. The Talmud<sup>36</sup> rules that a person is permitted to kill a pursuer to save his or her own

<sup>35</sup> Should the host country's military activities be deemed a violation of Jewish law, Jewish law would prohibit one from assisting that nation in its unlawful military activity and certainly would prohibit serving in its armed forces and killing soldiers who are members of the opposing army. For precisely such a determination in the context of the Vietnam war, see David Novak, "A Jewish View of War," in his *Law and Theology in Judaism* vol. 1 (New York, 1974), 125-135.

<sup>36</sup> *Sanhedrin* 74a-b.

life regardless of whether the person being pursued is a Jew or a non-Jew. While there is some dispute among modern Jewish law authorities as to whether Jewish law *mandates* or merely *permits* a non-Jew or bystander to take the life of one who is trying to kill another, nearly all authorities posit that such conduct is at the least permissible.<sup>37</sup>

It is obvious that the laws of pursuit are equally applicable to a group of individuals or a nation as they are to a single person. Military action thus becomes permissible, or more likely obligatory, when it is defensive in nature, or undertaken to aid the victim of aggression. However, using the pursuer paradigm to analyze "war" leads one to conclude that all of the restrictions related to this rationale apply as well.<sup>38</sup> War, if it is to exist legally as a morally sanctioned event, must permit some forms of killing other than those that are allowed through the self-defense rationale; the permissibility of the modern institution of "war" as a separate legal category by Jewish law standards cannot exist solely as a derivative of these self-defense rules.

There are a number of recent authorities who explicitly state that the institution of "war" is legally recognized as a distinct moral license (independent of the laws of pursuer and self-defense) to terminate life according to Jewish law, even for secular nations. Rabbi Naftali Zvi Yehudah Berlin,<sup>39</sup> argues that the very verse that

<sup>37</sup> Jewish law compels a Jew to take the life of a pursuer (Jewish or otherwise) who is trying to take the life of a Jew; *Shulhan Arukh* 425. *Minhat Hinnukh* says that this is permissible but not mandatory for a non-Jew; see Rabbi Joseph Babad, *Minhat Hinnukh*, positive commandment 296. The source quoted for this statement is the Talmud in *Sanhedrin* (72b) which derives from the verse in Genesis 9:6 ("One who sheds man's blood by man shall his blood be shed.") one of the dispensations to kill the pursuer. All commandments derived from this verse apply both to Jews and non-Jews since it was stated (at least) twice in the Torah, once before and once after the giving of the Law to the Jews. Tosafot (*Sanhedrin* 72b) posits that this verse only makes the non-Jew's killing of a pursuer permissible but not obligatory. Tosafot claims that it is Deuteronomy 22:27 ("The betrothed damsel cried and there was none to save her.") that makes this action obligatory rather than optional, and this verse has legal effect only on Jews.

Rabbi Shelomoh Zevin argues with this position; See Rabbi Shelomoh Yosef Zevin, *Le-'Or Ha-Halakhah: Be'ayot U-Verurim* (2nd ed., Tel Aviv: Tsiyoni 1957), pages 150-57. Rabbi Zevin notes that the verses in Obadiah 1:11-13 chastise the kingdom of Edom for standing by silently while Israel was destroyed. Hence, he claims, it appears that all have an obligation to help. He also argues that the Talmud in *Sanhedrin* 72b was only referring to a home invader (literally, *ba ba-mahteret*; according to Jewish law, one who enters a house to rob it when its owner is home presumably will kill the owner if interrupted. Thus the owner of the home may kill the invader during the burglary.) and not a pursuer. Other modern commentaries also disagree with the *Minhat Hinnukh*; for a summary of the discourse on this point, see R. Yehuda Shaviv, *Betzur Eviezer*, (Tzomet, 1990) pages 96-99, who appears to conclude that most authorities are in agreement with Rabbi Zevin's ruling; see also R. Yitzhak Schmelks, *Bet Yitzhak, Yoreh De'ah* II, 162 and *Novellae of R. Hayyim Soloveitchik on Maimonides, Hilkhot Rotzeah* 1:9.

For an excellent article on this topic, and on the general status of preemptive war in Jewish law, see Rabbi J. David Bleich, "Preemptive War in Jewish Law," *Contemporary Halakhic Problems* III (Ktav, 1989), 251.

<sup>38</sup> What precisely these restrictions are will be explained *infra* section III:A.

<sup>39</sup> Rabbi Naftali Zvi Yehudah Berlin, *Ha'amek Davar*, Genesis 9:5.

prohibits murder permits war. He claims that the term "At the hand of man, his brother"<sup>40</sup> prohibits killing only when it is proper to behave in a brotherly manner, but *at times of war, killing that would otherwise be prohibited is permitted*. Indeed, such an opinion can also be found in the medieval Talmudic commentary of Tosafot.<sup>41</sup> Rabbi Judah Loew (Maharal of Prague) in his commentary on Genesis 32 also states that war is permitted under Noahide Law. He claims that this is the justification for the actions of Simeon and Levi in the massacre of the inhabitants of Shechem. Furthermore, by this analysis even preemptive action, like the kind taken by Simeon and Levi, would be permitted. Also, Maharal at least implies that the killing of civilians who are not liable under the pursuer rationale is nonetheless permissible.<sup>42</sup>

Other authorities disagree. Rabbi Moses Schreiber<sup>43</sup> seemingly adopts a middle position and accepts that wars of aggression are never permitted to secular nations; however, he does appear to recognize the institution of "war" distinct from the pursuer rationale in the context of defensive wars. A number of other rabbinic authorities seem to accept this position as well.<sup>44</sup>

Indeed, The approach of Rabbi Israel Meir Kagan to halakhic matters pertaining to Jewish soldiers in secular armies can only be explained if there is a basic halakhic legitimacy to war by secular (Noahide) nations, as Rabbi Berlin claims. In his *Mishnah Berurah* he permits conscription into a secular nation's draft.<sup>45</sup> Although the central issues raised there regarding Sabbath violations (*hillul Shabbat*) of a soldier are beyond the scope of this article, Rabbi Kagan's underlying view permits [and in some circumstances mandates] military service, and when called upon, killing people in the course of that duty: such can only be validated in a model of lawful war by secular nations.<sup>46</sup>

<sup>40</sup> Genesis 9:5; In Hebrew, "*Mi-yad ish ahiv.*"

<sup>41</sup> Tosafot *Shevu'ot* 35b, s.v. *katla had.*

<sup>42</sup> See also R. Goren, "Combat Morality and the Halacha." *Crossroads* 1 (1987): 211-231. It is worth noting that the dispute between Jacob on one side and Simeon and Levi on the other side as to the propriety of their conduct in Shechem is one of the few (maybe the only) incidents in the Torah where it is unclear who is ultimately correct. Rabbi Goren posits that Jacob was correct, and thus Maharal of Prague is wrong.

<sup>43</sup> Rabbi Moses Schreiber, *Hatam Sofer, Yoreh De'ah* 1:19.

<sup>44</sup> See e.g., Rabbi Abraham Kahana-Shapiro, *Dvar Avraham*, 1:11; Rabbi Menahem Zemba, *Zera' Avraham* #24. The issue of selling weapons to non-Jewish nations is addressed in an essay of Rabbi J. David Bleich, "Sale of Arms," in his *Contemporary Halakhic Problems* III, 10-13. In this essay it is demonstrated that the consensus opinion within Jewish law permits the sale of arms to governments that typically use these weapons to protect themselves from bandits.

<sup>45</sup> R. Israel Meir Kagan, *Mishnah Berurah* 329:17.

<sup>46</sup> Similar sentiments can be found in Rabbi Samson Raphael Hirsch, who clearly and enthusiastically endorses military service for one's own country; see *Horeb* at pp. 461-463. A related but murkier view can be found in Rabbi David Zvi Hoffman, *Responsa Melamed le-Ho'il* 42-43. Rabbi Yehudah Herzl Henkin recently sent me a copy of a letter by his grandfather that reaches similar conclusions. Rabbi Joseph Elijah Henkin states in a letter written on December 23, 1941:

One basic point needs to be made. It seems to this writer that the military conduct of the state of Israel may be categorized under the rubric of "war" established by the above sources. Although there is a known tendency to seek to justify the conduct of the state of Israel in the context of "Jewish" wars (whose parameters are explained below), there is an equally clear trend among modern decisors of Jewish law to seek to fit the conduct of the state of Israel into the general (universal) idea of war, and not the uniquely Jewish law model.<sup>47</sup> Among the halakhic authorities who advance arguments that can only stand if predicated on the correctness of the approach of Rabbi Berlin and others are Rabbis Shaul Israeli, Ya'akov Ariel, Dov Lior and others.<sup>48</sup> The crux of this argument, often unstated, is that the government of Israel is not bound to uphold the obligations of war imposed on a "Jewish Kingdom" but merely must conduct itself in accordance with the international legal norms that Rabbi Berlin mentions. In this model, the rules discussed in the next section apply strictly to a Davidic dynasty, and the real rules of war simply follow international legal norms as codified by treaties.

Of course, the approach of Rabbi Berlin recognizes that treaties restrict the rights of combatants, but that exercise in self-restraint stems from a voluntary decision to agree to such rules, and thus it is beyond the scope of this paper and of limited applicability to the modern wars against terrorism fought by both America

On the matter to enlist to volunteer for the Army: In my opinion, there is a difference between the rules of the army which existed before now in America and England, and the obligation of the army now. Before, when the entire army consisted only of volunteers, and during wartime they called upon volunteers by appealing to sacrifice for one's own people and country, then certainly everyone was required to take on the burden; but now that there is obligatory service, and the obligations are changed and reorganized according to need and function, I see no reason why one should volunteer to go, so that someone else will be exempted, for there are boundaries to this — there needs to be a space, uniforms, and weapons for them .... So now the correct way is a middle position: everyone should fulfill the obligation placed on him by the government and intend to improve his nation in every area and function he performs, not to show indifference nor get riled up against the Allies.

(Email from Rabbi Yehudah Henkin, on file with the author; footnotes omitted. Reprinted in *Responsa Bnei Banim* IV, pp. 93-94).

So too, Rabbi Joseph B. Soloveitchik's lengthy letter to Dr. Samuel Belkin about the voluntary draft of Orthodox rabbis and rabbinical students to be chaplains in the US service branches during the Korean War is predicated on the basic propriety of American military activity; See Rabbi Joseph B. Soloveitchik, "On Drafting Rabbis and Rabbinical Students for the U.S. Armed Forces Chaplaincy," in his *Community, Covenant and Commitment*, ed. Rabbi Nathaniel Helfgot (Ktav, 2005), 23-60.

On a personal note, I can attest to the prevalence of this practice in the Orthodox community of Germany during World War I, as my great uncle Jacob Buehler *ob"m* was killed in the battle of Verdun in 1916 fighting as a member of Kaiser Wilhelm's army.

<sup>47</sup> See for example, a fine article (whose conclusion I do not agree with) by Ya'acov (Gerald) Blidstein, "The Treatment of Hostile Civilian Populations: The Contemporary Halakhic Discussion In Israel," *Israel Studies* 1:2 (1996): 27-44.

<sup>48</sup> For Rabbi Lior, see "Gishat ha-halakhah le-sijot ha-shalom bi-zmanenu," *Shvilitin* 33:35 (5745): 146-150. The others are referenced above, and yet others are cited in Blidstein's fine article, *supra* note 47. Many other contemporary Israeli poskim could be added to this list.

and Israel. As Captain Seltzer, formerly of the Judge Advocate General's Corps, notes in a forthcoming paper on the conduct of U.S. forces:

Members of the armed forces of a party to a conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as POWs whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy and engaging in combat are examples of concealment of the status of a member of the armed forces and qualify as a war crime. *Unprivileged belligerents — or unlawful combatants — may include spies, saboteurs or civilians who are participating in the hostilities or who otherwise engage in unauthorized attacks or other combatant acts. They are not entitled to POW status, but merely "humane treatment," are prosecutable by the captor and may be executed or imprisoned. They are subject to the extreme penalty of death because of the danger inherent in their conduct.*<sup>49</sup>

Thus, conventions do not govern many of the unconventional techniques increasingly employed even by national entities, let alone terrorist armies (such as Hezbollah or the Iraqi resistance).

#### B. A Jewish Nation Starting a War

The discussion among commentators and decisors concerning the issues involved in a Jewish nation starting a war is far more detailed and subject to much more extensive discussion than Jewish law's view of non-Jewish nations going to war.

The Talmud<sup>50</sup> understands that a special category of permitted killing called "war" exists that is analytically different from other permitted forms of killing, like the killing of a pursuer or a home invader. The Talmud delimits two categories of permissible war: 1) Obligatory; and 2) Authorized.<sup>51</sup> It is crucial to determine which category of "war" any particular type of conflict is. As explained below, many of the restrictions placed by Jewish law on the type of conduct permitted by

<sup>49</sup> Captain Yosefi M. Seltzer, "How the Laws of Armed Conflict Have Changed," forthcoming in the proceedings of the 16th annual Orthodox Forum of Yeshiva University (emphasis added).

<sup>50</sup> *Sotah* 44b.

<sup>51</sup> The word *reshut* is sometimes translated as "permitted"; this is not correct, for reasons to be explained *infra*. Rabbi Joseph Karo, in *Kesef Mishneh (Hilkhos Melakhim 6:1)* further divides the category of "Obligatory" into two categories, "Compulsory" and "Commanded." Thus some modern commentaries divide the types of war into three. While this division is not incorrect, the legal differences between "Commanded" and "Compulsory" wars are not very significant, and it is for this reason the Mishnah, Maimonides, and this article will continue to use the common bifurcation rather than any other type of division.

*Betzur Eveizer*, *supra* note 37, at 84, notes that the Talmud implicitly creates one other category of war, an illegal war; see *supra* note 35 and *infra* note 74 for a discussion of the ramifications of concluding that a war is an illegal war.



war are frequently limited to Authorized rather than Obligatory wars.<sup>52</sup> Logic would dictate, and Jewish law accepts, that a specifically divinely mandated conflict has certain ethical rules not found in any other type of military engagement (and thus will not really be dealt with in this article).<sup>53</sup>

Before examining the exact line drawn by the commentators to differentiate between Obligatory and Authorized wars, a more basic question must be addressed: by what license can the Jewish tradition permit wars that are not obligatory, with all of the resulting carnage and destruction? Michael Waltzer, in his analysis of the Jewish tradition, comes to the conclusion that optional or authorized wars are fundamentally improper and merely tolerated by the Jewish tradition as an evil that cannot be abolished.<sup>54</sup> Noam Zohar rightly notes that such an answer is contrary to the basic thrust of the Jewish commandments, and proposes that optional or authorized wars are those wars whose moral license is

<sup>52</sup> Or perhaps on "Compulsory" wars according to those who accept a trifurcation of the categories; see note 51.

<sup>53</sup> As explained above, Jewish ethics clearly distinguishes between the different categories of war. An Obligatory war requires a different mode of ethical conduct than all other types of war. Particularly when discussing the obligation in the time of Joshua to conquer the land of Israel for the first time and the generic biblical obligation to destroy Amalek, Jewish law mandates a different set of ethical norms for these historical obligations. Thus, Maimonides states:

It is a positive commandment to vanquish the seven nations [that used to occupy Israel] since it says "you shall vanquish them." Anyone who has one of the members of that nation subservient to him and does not kill him violates the negative commandment, since it says "no life shall survive [from the seven nations]." *Their identity has since disappeared.*

(*Hilkhot Melakhim* 5:4, emphasis added; Amalek is discussed in *Melakhim* 5:5.) So too, Maimonides, based on a Talmudic source, states that in the wars against the nations of Ammon and Moab, Jewish law forbids the Jewish people from initiating peace discussions with them, although if they initiate such discussions Jewish law allows one to reciprocate (*Hilkhot Melakhim* 6:6; similar sentiments can be found in R. Eliezer of Metz, *Yerayim*, Mitzvah 250). Rabbi Joseph Karo, writing in the *Kesef Mishneh*, disagrees and states that it is inappropriate to accept overtures of peace even when they are initiated by Ammon and Moab.

Unlike Jewish law's rules concerning "regular" war, these regulations are not based on normative ethical values, but were designed to be used solely in the initial period of Jewish conquest of the land of Israel or solely in circumstances where God's direct divine commandment to the Jewish nation was clear. Thus, for example, Rabbi David Kimhi (*Radak*) notes that the primary sin of the Jewish people in the incident of the Gibeonites recounted in Joshua (see *infra*, Section VI) was that they had clear methods of seeking God's counsel on what to do, but they chose not to seek his assistance; see generally, Rabbi Eliezer Berkovits, *Not in Heaven: The Nature and Function of Halakhah* (New York, 1983) for a discussion of the role of the Divine in Jewish law.

Thus, "Jewish law" as used in this article refers to that time period when direct visible Divine direction in, and interaction with, the world has ceased: it is methodologically improper to discuss Jewish ethics in the presence of the active Divine with any other system of ethics, since the active (acknowledged) presence of the Divine changes the ground rules for ethical norms. Normative Jewish law confines itself to a discussion of what to do when the active Divine presence is no longer in the world, and thus normative rules are in effect. This distinction, and the distinction between Old Testament Judaism and modern Jewish law, has been lost to some commentators; see e.g., Maj. Guy B. Roberts, "Note: Judaic Sources of and Views on the Laws of War," *Naval Law Review* 37 (1988): 221.

<sup>54</sup> Michael Waltzer, "War and Peace in the Jewish Tradition," in *The Ethics of War*, ed. T. Nardin (Princeton, 1997).

clearly just, but whose fundamental obligation is not present, such as when the military costs of the war (at least in terms of casualties) are high enough that it is morally permissible to decline to fight.<sup>55</sup> As will be explained further below, I think this explanation is itself deeply incomplete, as the essential characterization of war entails risk, and declining to fight due to the cost would label all wars, other than those where the soldiers' lives are directly and immediately at stake, to be optional. A third answer is suggested by Rabbi Eliezer Waldenberg, who posits that even authorized or optional wars are limited by the duty to insure that all

such wars have to be with the goal and intent to elevate true faith and to fill the world with righteousness, and break the strength of those who do evil, and to fight the battles of God.<sup>56</sup>

Rabbi Waldenberg's view, then, is that these wars are like all positive commandments that are not mandatory — but yet, good deeds. There is no obvious reason why all good deeds must be mandatory in the Jewish tradition — some good deeds, and some good wars, may be optional.<sup>57</sup>

### C. Obligatory vs. Authorized Wars

According to the Talmud,<sup>58</sup> Obligatory wars are those wars started in direct

<sup>55</sup> Noam Zohar, "Can a War be Morally Optional?" *Journal of Political Philosophy* 4:3 (1996): 229-241.

<sup>56</sup> *Tzitz Eliezer* 13:100.

<sup>57</sup> From this it is clear that the Jewish tradition does not favor pacifism as a value superior to all other values or incorporate it as a basic moral doctrine within Judaism. Judaism has long accepted a practical form of pacifism as appropriate in the "right" circumstances. For example, the Talmud recounts that in response to the persecutions of the second century (C.E.), the Jewish people agreed (literally: took an oath) to mandated pacifism in the process of seeking political independence or autonomy for the Jewish state (*Ketubot* 111a). This action is explained by noting that frequently pacifism is the best response to total political defeat; only through the complete abjuring of the right to use force can survival be insured. So too, the phenomenon of martyrdom, even with the extreme example of killing one's own children rather than allowing them to be converted out of the faith, represents a form of pacifism in the face of violence; see e.g., Haym Soloveitchik, "Religious Law and Change: The Medieval Ashkenazic Example," *AJS Review* 12:2 (1987): 205-223 and *Shulhan Arukh, Yoreh De'ah* 151 for a description of when such conduct is permissible.

However, it is impossible to assert that a pacifistic tradition is based on a deeply rooted Jewish tradition to abstain from violence even in response to violence. It is true that there was a tradition rejecting the violent response to anti-Semitism and pogrom; yet it is clear that this tradition was based on the futility of such a response, rather than on its moral impropriety. Even a casual survey of Jewish legal material on the appropriateness of an aggressive response to violence leads one to conclude that neither Jewish law nor rabbinic ethics frowned on aggression in all circumstances as a response to violence; see e.g. *Shulhan Arukh, Hoshen Mishpat* 421:13 and 426:1 which mandate aggression as a response to violence. That is, of course, not to say that pacifism as a tactic is frowned on. Civil disobedience as a tactic to gain sympathy or as a military tactic of resort in a time of weakness is quite permissible.

<sup>58</sup> *Sotah* 44b.

fulfillment of a specific biblical commandment, such as the obligation to destroy the tribe of Amalek in biblical times. Authorized wars are wars undertaken to increase territory or “to diminish the heathens so that they shall not march,” which is, as explained below, a category of military action given different parameters by different authorities.<sup>59</sup> Maimonides, in his codification of the law, writes that:

The king must first wage only Obligatory wars. What is an Obligatory war? It is a war against the seven nations, the war against Amalek, and a war to deliver Israel from an enemy who has attacked them. Then he may wage Authorized wars, which is a war against others in order to enlarge the borders of Israel and to increase his greatness and prestige.<sup>60</sup>

Surprisingly enough, the category of “to deliver Israel from an enemy...” is not found in the Talmud. In addition, the category of preemptive war<sup>61</sup> is not mentioned in Maimonides’ formulation of the law even though it is found in the Talmud.<sup>62</sup>

What was Maimonides’ understanding of the Talmud and how did he develop these categories? These questions are the key focus of a discussion on the laws of starting wars. The classic rabbinic commentaries, both medieval and modern, grapple with the dividing line between “a war to deliver Israel from an enemy who has attacked them” and a war “to enlarge the borders of Israel and to increase [the

<sup>59</sup> The Talmud additionally recounts that there are three ritual requirements for an Authorized war to commence. The first is the consent of the Sanhedrin (Parliament); see *Sanhedrin* 29b. The second is the presence of a king or ruler; see *Sanhedrin* 20a. The third is consultation with the *urim ve-tumim*, a mystical ornament worn by the High Priest (not in existence for more than 2500 years); see *Sanhedrin* 16b. (For an explanation of what this garment precisely is, see Maimonides, *Hilkhot Klei Mikdash* (Laws of Temple implements), 8:1-6.) A number of commentators significantly limit each of these three Talmudic requirements. Maimonides does not list the requirement of *urim ve-tumim* at all in his code. He does, however, state elsewhere (see *Book of Commandments*, chapter 14) that the *urim ve-tumim* are needed. So too, R. Yehiel Mikhel Epstein, *Arukh HaShulhan he-Atid, Melakhim* 74:7 states that the *urim ve-tumim* are not needed, and this is agreed to by R. Zevin, *Le-'Or Ha-Halakhah*, p. 12. Nahmanides states (see *Addendum to Maimonides' Sefer ha-Mitzvot*, positive commandment 4) that a king is not actually needed. Rather, war may be undertaken by “a king, judge, or whoever exercises jurisdiction over the people.” Rabbi Menahem Meiri argues that approval of the Sanhedrin is only needed if a significant minority of the nation does not approve of the war. However, he states that no approval is needed for popularly supported wars; see *Sanhedrin* 16a.

The details of the ritual requirements for such a war are beyond the scope of this paper; see generally, Bleich, *supra* note 37 and Zevin, “*Ha-milhamah*” in his *Le-'Or Ha-Halakhah*.

<sup>60</sup> Maimonides, *Hilkhot Melakhim* 5:1.

<sup>61</sup> “To diminish...,” *supra* text accompanying notes 58-59.

<sup>62</sup> It is worth noting that Christian ethics developed a similar dichotomy between types of war: Augustine and the other later Christian (Catholic and Protestant) writers recognized another type of war not recognized by Greek and Roman law. This was the concept of the Holy War. That is, a war in which God himself called His people to fight. In such a war, ruthlessness was the norm. . . . In just wars God’s express will could not be so clearly discerned, so restraint was required. . . .

“Note: Judaic Sources of the Laws of War,” *supra* note 53, at 224.

Jewish law never greatly expanded the category of Compulsory war; Christian ethics might have had no choice, since it had no doctrine of Authorized wars.

king’s] greatness and prestige.” Behind each of these approaches lies a different understanding of when a war is obligatory, authorized, or prohibited and the ethical duties associated with each category.

Jacob ben Moses ibn Abbasi of Huesca’s translation of Maimonides’ commentary on the Mishnah suggests that Maimonides was of the opinion that an Obligatory war does not start until one is actually attacked by an army; Authorized wars include all defensive non-obligatory wars and all military actions commenced for any reason other than self-defense.<sup>63</sup> According to this definition, military action prior to the initial use of force by one’s opponents can only be justified through the “pursuer” or self-defense rationale. All other military activity is prohibited.

Rabbi Joseph Kapach, in his translation of the same commentary of Maimonides, understands Maimonides to permit war against nations that have previously fought with Israel and that are still technically at war with the Jewish nation — even though no fighting is now going on. An offensive war cannot be justified even as an Authorized war unless a prior state of belligerency existed.<sup>64</sup>

Rabbi Abraham diBoton, in his commentary on Maimonides’ Code (*Lehem Mishneh*),<sup>65</sup> posits that the phrase “to enhance the king’s greatness and prestige” includes all of the categories of authorized war permitted in the Talmud. Once again, all wars other than purely defensive wars, where military activity is initiated solely by one’s opponents, are classified as Authorized wars or illegal wars. Obligatory wars are limited to purely defensive wars.

Rabbi Menahem ben Meir (*Meiri*), in his commentary on the Talmud,<sup>66</sup> states

<sup>63</sup> See Maimonides’ commentary to *Sotah* 8:7. Maimonides’ commentary to the Mishnah was originally written in Arabic. This version, printed in the commentary section appended to the Vilna edition of the Talmud, is the most common translation. Contrary to popular belief, most of the commentary was not translated in Maimonides’ own lifetime. For more on the various translators of Maimonides’ Commentary on the Mishnah (Kitab al-Siraj), see Jewish Encyclopedia, “Moses ben Maimon,” available online at [www.jewishencyclopedia.com/view.jsp?artid=905&letter=M#3070](http://www.jewishencyclopedia.com/view.jsp?artid=905&letter=M#3070).

<sup>64</sup> See Translation of R. Joseph Kapach, *Mishnah Sotah* 8:7. This is generally considered the better translation. For more on the distinction between the two translations of Maimonides’ *Commentary on the Mishnah*, see Rabbi J. David Bleich, “Preemptive War in Jewish Law,” *Tradition* 21:1 (Spring 1983): 3-41, at 9-11. Some scholars have noted that one should not even consider this a dispute, as ibn Abbasi’s translation is rather poor. (Louis Ginzburg, writing at a time when the Arabic original was not accessible, avers that “His Hebrew seems to be weak...”; See Jewish Encyclopedia, “Abbasi, Jacob ben Moses ibn,” available online at <http://www.jewishencyclopedia.com/view.jsp?artid=176&letter=A>.) Thus, not only is Kapach’s modern translation far superior, but any inconsistencies or inaccuracies should be decided in favor of the Kapach reading.

<sup>65</sup> Commenting on Maimonides, *id.* Rabbi David bar Naftali Hirsch, *Korban ha-'Edah* (in his addendum, *Shiurei Korban*, to the Palestinian Talmud, 8:10) has a slightly narrower definition, which is very similar to diBoton. An Authorized war may be undertaken “against neighbors in the fear that with the passage of time they will wage war. Thus, Israel may attack them in order to destroy them.” Thus, an Authorized war is permitted as a preemptive attack against *militaristic* neighbors. However, war cannot occur without evidence of bellicose activity.

<sup>66</sup> Rabbi Menahem ben Meir, *Commentary of Meiri to Sotah* 43b.

that an Authorized war is any attack that is commenced in order to prevent an attack in the future. Once hostilities begin, all military activity falls under the rubric of Obligatory. Similarly, Rabbi Abraham Isaiah Karelitz (*Hazon Ish*) claims that Maimonides' definition of an Authorized war is referring to a use of force in a war of attrition.<sup>67</sup> In any circumstance in which prior "battle" has occurred and that battle was initiated by the enemy, the war that is being fought is an Obligatory one. According to this approach, the use of military force prior to the start of a war of attrition is prohibited (unless justified by the general rules of self-defense, in which case a "war" is not being fought according to Jewish law.)

Rabbi Yehiel Mikhel Epstein, in his *Arukh ha-Shulhan he-Atid*, advances a unique explanation. He writes that the only difference between an Authorized and an Obligatory war is the status of those people exempt from being drafted – the categories mentioned in Deuteronomy 20.<sup>68</sup> In an Obligatory war, even those people must fight. However, he writes, the king is obligated to defend Israel "even when there is only suspicion that they may attack us." Thus the position he takes is that vis-à-vis the government there is only a slight difference between Authorized and Obligatory wars — the pool of draftable candidates.<sup>69</sup>

#### D. Summary

Jewish law regarding wars by non-Jewish governments thus can be divided into three categories:

- (1) War to save the nation that is now, or soon to be, under attack. This is not technically war but is permitted because of the law of "pursuer" and is subject to all of the restrictions related to the law of pursuer and the rules of self-defense.
- (2) War to aid an innocent third party who is under attack. This too, is not technically war, but most commentators mandate this, also under the "pursuer" rationale, while some rule this is merely permitted. In either case, it is subject to all of the restrictions related to the "pursuer" rationale.
- (3) What Jewish sources define as war — namely of self defense and perhaps territorial expansion. A number of commentators permit "war" as an institution even in situations where non-combatants might be killed; most authorities limit this license to defensive wars.

<sup>67</sup> See Rabbi Abraham Isaiah Karelitz, *Hazon Ish*, *Mo'ed* 114:2. He writes, "they kill Israel intermittently, but do not engage in battle."

<sup>68</sup> See *infra*, Section V.

<sup>69</sup> See Rabbi Yehiel Mikhel Epstein, *Arukh ha-Shulhan he-Atid*, *Melakhim* 74:3-4. The thesis of the Noam Zohar (cited above) is buttressed by the approach of the *Arukh ha-Shulhan*.

So too, Jewish law regarding wars by the Jewish government can be divided into three (different) categories:

- (1) Defending the people of Israel from attack by an aggressive neighbor. This is an obligatory war.
- (2) Fighting offensive wars against belligerent neighbors.
- (3) Protecting individuals through the use of the laws of "pursuer" and self defense from aggressive neighbors. This is not a "war" according to the Jewish tradition.<sup>70</sup>

Finally it is crucial to realize that there are situations where war is — in the Jewish tradition — simply not permitted. The killing that takes place in such wars, if not directly based on immediate self-defense needs,<sup>71</sup> is simply murder, and participation in those wars is prohibited according to Jewish law.<sup>72</sup> This statement,

<sup>70</sup> In addition, the varying types of wars are flexible, not rigid. Armed aggression can begin as being permissible because of "pursuer" and then, due to a massive unwarranted counter-attack by the enemy, can turn into an Obligatory war; after the battlefield has stabilized, the war can become an Authorized war.

<sup>71</sup> See Rabbi Joseph Karo, *Beit Yosef*, *Hoshen Mishpat* 525:6-7 (uncensored version).

<sup>72</sup> How one categorizes each individual conflict can sometimes be a judgment about which reasonable scholars of Jewish law might differ; that does not, however, mean that such decisions are purely a function of individual choice. As with all such matters in Jewish law, there is a manner and matter for resolving such disagreements. For further discussion of this issue, see *Shulhan Arukh*, *Yoreh De'ah* 242 and commentaries *ad locum*.

The question of societal, rather than individual pacifism, is a different topic in Jewish law. As demonstrated elsewhere in this paper, Judaism does not require that society go to war in every circumstance in which war is permissible. The decision as to whether or not to wage war is a societal burden, one made by those who are part of the society who will suffer the consequences of waging the war. In response to a belligerent action, in situations where war is Authorized rather than Obligatory, *society has the right to adopt a pacifistic stance and decline to wage war (or to wage some kind of limited war)*. In that sense a society could adopt a generally pacifistic response to aggression and decline to exercise its right to respond to every aggression. That form of societal pacifism is permitted according to Jewish law. Even in that situation, these considerations are limited to cases of Authorized war; Of course, there are circumstances in which even Obligatory wars need not be fought; however these circumstances all relate to the inability to triumph, rather than a theological opposition to war.

Rabbi Maurice Lamm in his excellent seminal essay on pacifism and selective conscientious objection in the Jewish tradition concludes by stating:

It must be affirmed that Judaism rejected total pacifism, but that it believed strongly in pragmatic pacifism as a higher, morally more noteworthy, religious position. Nonetheless, this selective pacifism is only a public, national decision, and not a personal one.

Maurice Lamm, "After the War — Another look at Pacifism and Selective Conscientious Objection," in *Contemporary Jewish Ethics*, M. Kellner, ed. (New York, 1978), 221-238. Rabbi Lamm's essay demonstrates what is obvious to all students of Jewish law and ethics: *theological pacifism has no place in the Jewish tradition*. (Two small criticisms could be voiced of his essay. First, an individual's "selective conscientious objection" can be justified in the Jewish tradition as a response to an *unjust* war. Frequently societies will embrace a military policy directly contrary to the Jewish tradition as to when a war is permissible. Jewish citizens in that society are faced with a dilemma as to their own conduct: should they fight in an unjust war? Should they publicly oppose the war (and risk societal scorn and perhaps a rise in anti-Semitism) or should they simply find a way to avoid fighting? A number of solutions have been addressed to this question, which forces an individual to weigh the consequences to Jews in one's host country with the biblical commandment not to kill and not to stand

of course, is incomplete. If Noahide law permits a war in situations that Jewish law does not, and Jewish law recognizes the use of Noahide law as a justification for such a war, then such wars cannot be a categorical violation of Jewish law (in the sense of being prohibited for Jews to engage in this conduct). I will leave that topic for another discussion, although the proper resolution of that matter has been hinted at elsewhere.<sup>73</sup>

#### IV. Battlefield Ethics

##### A. Type of War

The initial question that needs to be addressed when discussing battlefield ethics is whether the rules for these situations differ from all other applications of Jewish ethics, or if "battlefield ethics" is merely an application of the general rules of Jewish ethics to the combat situation. This question is essentially a rephrasing of the question, What is the moral license according to the Jewish tradition that permits war to be waged? As explained above, the Jewish tradition divides "armed conflict" into three different categories: obligatory war, authorized war, and societal applications of the "pursuer" rationale.<sup>74</sup> Each of these situations comes with different licenses. The easiest one to address is the final one, the pursuer rationale: Battlefield ethics based on the pursuer model are simply a generic application of the [general] field of Jewish ethics relating to stopping one who is an evildoer from harming (killing) an innocent person. While it is beyond the scope of this essay completely to explain that detailed area of Jewish ethics, the touchstone rules of self-defense according to Jewish law are fourfold: Even when self defense

by when others are killed. A number of solutions have been advanced to this dilemma in Jewish law and there is no reason why selective conscientious objection should not be acceptable in a society that allows one to declare such a status and avoid military service in that manner. Second, pragmatic pacifism is a moral value in the Jewish tradition, but in this author's opinion, it is only a value of significance in situations where active (physical) removal of the impropriety is not possible.

<sup>73</sup> See R. Shaul Israeli, 'Amud ha-Yemini 16. For an example of this type of discussion, see Michael Broyde and Michael Hecht, "The Return of Lost Property According to Jewish & Common Law: A Comparison," *The Journal of Law and Religion* 13 (1996): 225-254 (This article compares lost property law in Jewish, Common and New York law.) and compare it with Michael Broyde and Michael Hecht, "The Gentile and Returning Lost Property According to Jewish Law: A Theory of Reciprocity," *Jewish Law Annual XIII* (2000): 31-45. This article contains a novel analysis of when and why Jewish law advances distinctions between Jews and non-Jews in commercial law.

<sup>74</sup> And prohibited wars. Perhaps the most pressing ethical dilemma is what to do in a situation where society is waging a prohibited war and severely penalizes (perhaps even executes) citizens who do not cooperate with the war effort. This question is beyond the scope of this essay, as the primary focus of such a paper would be the ethical liberalities one may take to protect one's own life, limb or property in times of great duress; see e.g., R. Mordecai Winkler, *Levushet Mordekhai* 2:174 (permitting Sabbath violation to avoid fighting in unjust wars); but see R. Meir Eisenstadt, *Imrei Eish, Yoreh De'ah* 52.

is mandatory or permissible and one may kill a person or group of people who are seeking to kill one who is innocent, one may not:

- (1) Kill an innocent<sup>75</sup> third party to save a life;
- (2) Compel a person to risk his or her life to save the life of another;
- (3) Kill the pursuer after his or her evil act is over as a form of punishment.
- (4) Use more force than minimally needed.<sup>76</sup>

These are generic rules of Jewish law derived from different Talmudic sources and methodologically unrelated to "war" as an institution.<sup>77</sup> Thus, the application of the rules of this type of "armed conflict" would resemble an activity by a police force rather than an activity by an army. Only the most genteel of modern armies can function in accordance with these rules.

On the other hand, both the situation of Obligatory war and Authorized war are not merely a further extrapolation of the principles of "self-defense" or "pursuer." There are ethical liberalities (and strictures) associated with the battlefield setting that have unique ethical and legal rules unrelated to other fields of Jewish law or ethics.<sup>78</sup> They permit the killing of a fellow human being in situations where that action — but for the permissibility of war — would be murder. In order to understand what precisely is the "license to kill", it is necessary to explain the

<sup>75</sup> The question of who is "innocent" in this context is difficult to quantify precisely. One can be a pursuer in situations where the law does not label one a "murderer" in Jewish law; thus a minor (*Sanhedrin* 74b) and, according to most authorities, an unintentional murderer both may be killed to prevent the loss of life of another. So too, it would appear reasonable to derive from Maimonides' rule that one who directs the murder even though he does not directly participate in it as a murderer, may be killed. So too, it appears that one who assists in the murder, even if not actually participating in it directly, is not "innocent"; see comments of *Maharal of Prague* on Genesis 34. From this *Maharal* one could derive that any who encourage this activity fall within the rubric of one who is a combatant. Thus, typically all soldiers would be defined as "combatants." It would appear difficult, however, to define "combatant" as opposed to "innocent" in all combat situations with a general rule; each military activity requires its own assessment of what is needed to wage this war and what is not. (For example, sometimes the role of medical personnel is to repair injured troops so that they can return to the front as soon as possible, and sometimes medical personnel's role is to heal soldiers who are returning home so as to allow these soldiers a normal civilian life.) See also the discussion below, at notes 101-103.

<sup>76</sup> This last rule has been subject to a considerable amount of renewed examination in light of the analysis of Rabbi Yitzhak Ze'ev Soloveitchik that one may, as a matter of right, kill a *rodef* (pursuer) as he is a *gavra bar katila* (someone deserving to be put to death who has the status of "living dead"). While Ya'acov Blidstein notes in "The Treatment of Hostile Civilian Populations: The Contemporary Halakhic Discussion In Israel," *Israel Studies*, 1:2 (1996): 27-44, that it is surprising how quickly that theoretical analysis has moved into practical *halakhah*, I am not surprised at all, and this is part (I suspect) of the dramatic impact conceptual *lamdut* has had on normative *halakhah*, a topic worthy of an article in its own right.

<sup>77</sup> For a discussion of these rules generally, and various applications see Rabbi Joseph Karo, *Shulhan Arukh, Hoshen Mishpat* 425 (and commentaries). In addition, R. Jacob ben Asher, *Tur, Hoshen Mishpat* 425 contains many crucial insights into the law (however, the standard text of this section of the *Tur* has been heavily censored, and is not nearly as valuable a reference as the less widely available uncensored version).

<sup>78</sup> See Section II.

preliminary steps required by Jewish law to actually fight a battle after war has been properly declared. It is through an understanding of these prescriptions (and proscriptions) that one grasps the limits on the license to kill one's opponents in military action according to Jewish law. Indeed, nearly all of the preliminary requirements to an Authorized war are designed to remove non-combatants, civilians and others who do not wish to fight from the battlefield.

#### B. Seeking Peace Prior to Starting War

Two basic texts form Jewish law's understanding of the duties society must undertake before a battle may be fought. The Biblical text states:

When you approach a city to do battle with it, you shall call to it in peace. And if they respond in peace and they open the city to you, all the people in the city shall pay taxes to you and be subservient. And if they do not make peace with you, you shall wage war with them and you may besiege them.<sup>79</sup>

Thus the Bible clearly sets out the obligation to seek peace as a prelude to any offensive military activity; absent the seeking of peace, the use of force in a war violates Jewish law. Although unstated in the text, it is apparent that while one need not engage in negotiations over the legitimacy of one's goals, one must explain what one is seeking through this military action and what military goals are (and are not) sought.<sup>80</sup> Before this seeking of peace, battle is prohibited. The Tannaitic authority Rabbi Jose the Galilean is quoted as stating, "How meritorious is peace! Even in a time of war one must initiate all activities with a request for peace"<sup>81</sup> This procedural requirement is quite significant: it prevents the escalation of hostilities and allows both sides to rationally plan the cost of war and the virtues of peace.

Rabbi Shlomo Yitzhaki (*Rashi*), in his commentary on the Bible,<sup>82</sup> indicates that the obligation to seek peace prior to firing the first shot is limited to Authorized wars. However, in Obligatory or Compulsory wars there is no obligation to seek a peaceful solution. Indeed, such a position can be found in the Midrash Halakhah.<sup>83</sup> Maimonides, in his classic code of Jewish law disagrees. He states:

<sup>79</sup> Deuteronomy 20:10-12.

<sup>80</sup> See e.g., Numbers 21:21-24 where the Jewish people clearly promised to limit their goals in return for a peaceful passage through the lands belonging to Sihon and the Amorites.

<sup>81</sup> *Leviticus Rabbah*, *Tzav* §9.

<sup>82</sup> *Rashi*, commentary to Deuteronomy 20:10.

<sup>83</sup> *Sifri* 199, commenting on *id.* One could distinguish in this context between Obligatory wars and Commanded wars in this regard, and limit the license only to wars that are Obligatory, rather than merely Commanded. It would appear that such a position is also accepted by *Ravad*; see *Ravad* commenting on *Hilkhot Melakhim* 6:1 and Commentary of *Malbim* on Deuteronomy 20:10.

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It is clear, however, a wars one must initially see. (although, it is crucial to a compromise its claim so as to obligation is the need that the g. opponents. One must detail to one's ei. one seeks as a victory in this conflict.<sup>87</sup> the costs of fighting and to seek a rational p before war may begin.

A fundamental and very important dispute exists. obligation. Maimonides requires that the peaceful include an acknowledgment of and agreement to follow that (Jewish law asserts) govern all members of the world groundwork for moral behavior;<sup>88</sup> *part and parcel of the imposition of ethical values on the defeated society.* Nahmanides requirement as being necessary for the "peaceful" cessation of indicates that it is the military goals alone that determine whether peace acceptable. According to Nahmanides, Jewish law would compel the peaceful "victor" to accept peace terms that include all of the victors' initial demands for the imposition of ethical values in the defeated society; Maimonides would reject that rule and permit war in those circumstances purely to impose ethical

<sup>84</sup> Maimonides, *Hilkhot Melakhim* 6:1.

<sup>85</sup> See his commentary on *id.*

<sup>86</sup> I would, however, note that such is clearly permissible as a function of prudent planning. Thus, the Jewish nation offered to avoid an authorized war with the Amorites if that nation would agree to a lesser violation of its sovereignty; see Numbers 21:21.

<sup>87</sup> Of course, there is no obligation to do so with specificity as to detailed battle plans; however, a clear assertion of the goals of the war are needed.

<sup>88</sup> *Hilkhot Melakhim* 6:1. These seven commandments are: acknowledging God; prohibiting idol worship; prohibition of murder; prohibition of theft; prohibition of incest and adultery; prohibition of eating the flesh of still living animals; and the obligation to enforce these (and perhaps other) laws. For a discussion of these laws in context, see *Arukh ha-Shulhan he-Atid*, *Hilkhot Melakhim* 78-80.

<sup>89</sup> Commentary of Nahmanides on Deuteronomy 20:1; of course, if after the surrender, a Jewish government were to rule that society, such a government would enforce these seven laws; however, the vanquished's agreement to obey those laws is not a condition of surrender according to Nahmanides.

values in a non-ethical society.<sup>90</sup> To this writer this approach seems very logical and provides the basis for the comments of Rabbi Waldenberg that even authorized wars have to be with the goal and intent to elevate true faith and fill the world with righteousness and fight the battles of God.<sup>91</sup>

### C. The Civilian, the Siege,<sup>92</sup> and Standard of Conduct

The obligation to seek peace in the manner outlined above applies to battles between armies where no civilian population is involved. Jewish law requires an additional series of overtures for peace and surrender in situations where the military activity involves attacking cities populated by civilians. Maimonides states:

Joshua, before he entered the land of Israel, sent three letters to its inhabitants. The first one said that those who wish to flee [the oncoming army] should flee. The second one said that those who wish to make peace should make peace. The third letter said that those who want to fight a war should prepare to fight a war.<sup>93</sup>

Nor was the general obligation to warn the civilian population enough to fulfill the obligation: Maimonides codifies a number of specific rules of military ethics, all based on Talmudic sources:

When one surrounds a city to lay siege to it, it is prohibited to surround it from four sides; only three sides are permissible. One must leave a place for inhabitants to flee for all those who wish to abscond to save their lives.<sup>94</sup>

Nahmanides elaborates on this obligation in a way that clearly explains the moral rationale by stating:

God commanded us that when we lay siege to a city, we must leave one of the sides without a siege so as to give them a place to flee to. *It is from this commandment that we*

<sup>90</sup> This is just one facet in the debate between Maimonides and most other authorities as to whether Jewish law requires the imposition of the Noahide code on secular society. Elsewhere (*Hilkhot Melakhim* 8:10), Maimonides explains that in his opinion there is a general obligation on all (Jews and non-Jews) to compel enforcement of these basic ethical rules even through force in all circumstances; see also *Hilkhot Melakhim* 9:14 for a similar sentiment by Maimonides. Nahmanides disagrees with this conception of the obligation and seems to understand that the obligation to enforce the seven laws is limited to the non-Jewish rulers of the nation, and is of a totally different scope; for a general discussion of this, see R. Yehudah Gershuni, *Mishpetei Melukhah* 165-167. It is worth noting that a strong claim can be made that Tosafot agrees with Nahmanides in this area; See Tosafot, *Avodah Zarah* 26b. s.v. *velo moredim*.

<sup>91</sup> *Tzitz Eliezer* 13:100, *supra* at note 56.

<sup>92</sup> Or naval blockade.

<sup>93</sup> *Hilkhot Melakhim* 6:5. Maimonides understands the Jerusalem Talmud's discussion of this topic to require three different letters. If one examines *Shevi'it* 6:1 closely, one could conclude that one can send only one letter with all three texts; see *Arukh ha-Shulhan he-Atid*, *Hilkhot Melakhim* 75:6-7.

<sup>94</sup> *Hilkhot Melakhim* 6:7.

*learn to deal with compassion even with our enemies, even at time of war; in addition, by giving our enemies a place to which to flee, they will not charge at us with as much force.*<sup>95</sup>

Nahmanides believes that this obligation is so basic as to require that it be one of the 613 fundamental biblical commandments in Jewish law. However, Nahmanides clearly limits this ethical obligation to Authorized and not Obligatory wars, and this is agreed to by most other authorities.<sup>96</sup>

Essentially Jewish law completely rejects the notion of a "siege" as that term is understood by military tacticians and contemporary articulators of international law. Modern international law generally assumes that in a situation where "the commander of a besieged place expel[s] the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure to drive them [those expelled] back so as to hasten the surrender."<sup>97</sup> Secular law and morals allow the use of the civilians as pawns in the siege. *The Jewish tradition prohibited that and mandated that non-combatants who wished to flee must be allowed to flee the scene of the battle.* (I would add, however, that I do not understand Maimonides' words literally. It is not surrounding the city on all four sides that is prohibited — rather, it is the preventing of the *outflow of civilians or soldiers* who are seeking to flee. Of course, Jewish law would allow one to stop the *inflow of supplies* to a besieged city through this fourth side.<sup>98</sup>)

This approach solves another difficult problem according to Jewish law: the role of the "innocent" civilian in combat. Since the Jewish tradition accepts that civilians (and soldiers who are surrendering) are always entitled to flee from the scene of the battle, it would logically follow that all who remain voluntarily are classified as combatants, since the opportunity to leave is continuously present. Particularly in combination with Joshua's practice of sending letters of warning in advance of combat, this legal approach limits greatly the role of the doctrine of "innocent civilian" in the Jewish tradition. Essentially, the Jewish tradition maintains that innocent civilians should do their very best to remove themselves from the battlefield, and those who remain are not so innocent. If one voluntarily

<sup>95</sup> *Supplement of Nahmanides to Maimonides' Book of Commandments*, Positive Commandment #4.

<sup>96</sup> *Id.* See also *Minhat Hinnukh* 527. Rabbi Gershuni indicates that the commandment is limited to Compulsory wars, rather than Commanded wars. His insight would seem correct as asserted by *Mishpetei Melukhah* commenting on *id.* It is only in a situation where total victory is the aim that such conduct is not obligatory.

<sup>97</sup> Charles C. Hyde, *International Law* (Boston, 1922), §656; for an article on this topic from the Jewish perspective, see Bradley Artson, "The Siege and the Civilian," *Judaism* 36 no.1 (1987): 54-65.

A number of the points made by Rabbi Artson are incorporated into this essay, although the theme of the purpose of the Jewish tradition in the two articles differs somewhat.

<sup>98</sup> See R. Yehiel Epstein, *Arukh ha-Shulhan he-Atid*, *Hilkhot Melakhim* 76:12.

stays in a city that is under siege, one assumes the mantle of a combatant.<sup>99</sup>

Such an analysis that seeks to distinguish between combatants and civilians seems of value when one conceptualizes war in terms of a designated battlefield with confined corners, one from which people can intentionally flee if they wish to be civilians or which they can run towards if they wish to do battle. However, this paradigm of war seems ill-suited to the majority of hostilities in the last century, and even more so of the last decade. When one is fighting a war in a civilian area, these rules seem to be the subject of a considerable amount of debate.

Not surprisingly, the contours of that debate have played out with considerable force in the pages of *Teḥumin*, a contemporary periodical of the Religious Zionist community.<sup>100</sup> Indeed, the earliest modern discussion of this topic was presented by Rabbi Shaul Israeli in 1954, in response to the killing of civilians by Israel Defense Forces Unit 101 at Kibia (Qibya) in 1953.<sup>101</sup> Rabbi Israeli argues that civilians who conspire to assist in the undertaking of military operations can be killed through the pursuer rationale, as they are materially aiding the murderers. (He notes that this is a basic distinction in Jewish law between judicial punishment, which can only be meted out to principals, and the pursuer rationale, which allows one to kill someone who has joined a conspiracy to kill an innocent person, if killing that conspirator will cause the end of the murderous act.<sup>102</sup>) Indeed, Rabbi Israeli goes even further in that he seems to adopt the view that those who simply extend support to terror — by encouraging acts of violence with mere words — can be labeled combatants as well. This is not, Rabbi Israeli posits, any form of collective punishment, as only people who are guilty (whether of murder or conspiracy to commit murder) are actually being punished. However, as is obvious, this is a vast expansion of the simple understanding of the rules of *rodef*, or even the more complex statistical analysis of life-threatening activity put forward by some more modern *aḥaronim* (latter-day decisors).<sup>103</sup>

<sup>99</sup> Although I have seen no modern Jewish law authorities who state this, I would apply this rule in modern combat situations to all civilians who remain voluntarily in the locale of the war in a way that facilitates combat. This author doubts if (for example) anyone who voluntarily remained in Berlin in World War II would be classified as an innocent civilian according to Jewish law.

<sup>100</sup> Fair disclosure indicates that I share that I have published a number of articles in *Teḥumin*, but none on this topic.

<sup>101</sup> R. Shaul Israeli, "Military activities of national defense (Heb.)," first published in *Ha-Torah ve-ha-Medinah* 5/6 (1953-54): 71-113, reprinted in his *Amud ha-Yemini* (rev. ed., Jerusalem, 1991) as Ch. 16, 168-205.

<sup>102</sup> To the best of my knowledge, this principle is first cogently noted by R. Meir Simḥa of Dvinsk in *Or Sameah*, *Hilkhot Rotzeah* 1:8.

<sup>103</sup> For an example of this, see Rabbi Abraham Isaiah Karelitz, *Ḥazon Ish*, *Ohalot* 22:32 and Rabbi Isser Yehudah Unterman, *Torah she-Ba'al Peh* 11:14 (1970) and *Noam* 13:4 (1971), both of whom permit statistical analysis to create statuses. Perhaps, by analogy, one can compare this to any other obligation to examine whether one need be fearful of the presence of an item or activity through statistical sampling. Consider, for example, a very simple matter: In accordance with Jewish dietary

This stands in sharp contrast with the approach taken by the late Rabbi Chaim Dovid Halevi (author of the *Aseh Lekha Rav* series). He categorically denies that the concept of pursuer can be applied in situations other than when the person is actually threatening the life of another person. For him, the concept of pursuer certainly may not be applied to cases where the person under discussion is 'merely' a political supporter of those who engage in such activities.<sup>104</sup>

The unintentional and undesired slaying of innocent civilians who involuntarily remain behind seems to this author to be the one "killing" activity that is permissible in Jewish law in war situations that would not be permissible in the pursuer/self-defense situations. Just like Jewish law permits one to send one's own soldiers out to combat (without their consent) perhaps to be killed, Jewish law would allow the unintentional killing of innocent civilians as a necessary (but undesired) byproduct of the moral license of war.<sup>105</sup>

laws, when must one check vegetables for insects to ensure that the vegetables are free of them and permissible to eat? *Halakhah* divides the obligation to check into three categories: (1) Cases where most of the vegetables have insect infestation; (2) Cases where a statistically significant number (but less than 50%) of the vegetables have insect infestation (*mi'ut hamatzui*); (3) Cases where insect infestation is statistically very, very unlikely (*mi'ut she'eino matzui*). In cases 1 and 2, one must check for infestation: in case 3 one need not; See R. Joseph Karo, *Shulḥan Arukh*, *Yoreh De'ah* 39:1 and R. Elijah of Vilna, *Biur ha-Gra* 39:2. See also R. Jacob deKarlín, *Mishkenot Ya'akov*, *Yoreh De'ah* 16 for a discussion of what are the exact statistical ranges for each category. The exact reverse reasoning would apply to the rules of pursuit — one may kill a person as a pursuer only in a situation where the likelihood that such a person is not a pursuer is so statistically unlikely as to be considered a *mi'ut she'eino matzui*.

<sup>104</sup> See Rabbi Chaim Dovid Halevi, "Din ha-ba le-hargakha hashkem le-hargo be-ḥayyenu ha-tzeboryim," *Teḥumin* 1:343-348 (5740). This approach stands in sharp contrast with the insight of the *Maharatz Ḥayot*, who adopts the view that the King's ability to punish (kill) those who rebel is grounded in the rules of *rodef* and not the *dinei melekh*. See R. Zvi Hirsch Chajes, *Kol Kitvai Maharatz Ḥayot* 1:48. The most difficult and harsh example of this view, in this writer's opinion, is taken by Rabbi Itamar Warhaftig who writes (*halakhah lema'aseh*, to the Israeli police) that one may intentionally kill non-violent demonstrators in a violent demonstration as the public safety is threatened by their mere presence. See Dr. Itmar Warhaftig, "Haganah atzmit be-'averot retzah ve-ḥavalah," *Sinai* 81 (1977): 48-78.

<sup>105</sup> See Rabbi Shaul Israeli, *Amud ha-Yemini* 16:5 and R. Joseph Babad, *Minḥat Ḥinukh*, Commandment 425 who discusses "death" in war in a way that perhaps indicates that this approach is correct. See also Bleich, *supra* note 37, at 277 who states, "To this writer's knowledge, there exists no discussion in classical rabbinical sources that takes cognizance of the likelihood of causing civilian casualties in the course of hostilities..."

In many ways this provides guidance into the ethical issues associated with a modern airplane- (and long range artillery-) based war. Air warfare greatly expands the "kill zone" of combat and (at least in our current state of technology) tends inevitably to result in the death of civilians. The tactical aims of air warfare appear to be fourfold: to destroy specific enemy military targets; to destroy the economic base of the enemy's war-making capacity; to randomly terrorize civilian populations; and to retaliate for other atrocities by the enemy to one's own home base and thus deter such conduct in the future by the enemy.

The first of these goals is within the ambit of that which is permissible, since civilian deaths are unintentional. The same would appear to be true about the second, providing that the targets are genuine economic targets related to the economic base needed to wage the war and the death of civilians is not

Rabbi Ya'akov Ariel advances one possible explanation for this killing of 'innocent' civilians that places this exception in a different light. Rabbi Ariel posits that war is at its core societal in nature and thus different from pursuer rationales in its basic model. War is the collective battle of societies, Rabbi Ariel posits, and thus there are no innocent civilians; even babes in their mothers' arms are to be killed, harsh as that sounds.<sup>106</sup>

The Jewish tradition mandated a number of other rules so as to prevent certain types of tactics that violated the norms of ethical behavior even in war. Maimonides recounts that it is prohibited to remove fruit trees so as to induce suffering, famine, and unnecessary waste in the camp of the enemy, and this is accepted as normative in Jewish law.<sup>107</sup> In his enumeration of the commandments, Maimonides explicitly links this to the deliberate intention to expose the enemy to undue suffering.<sup>108</sup> Nahmanides adds that the removal of all trees is permissible if needed for the building of fortifications: it is only when done deliberately to induce unneeded suffering that it is prohibited. However, Nahmanides still understands the Jewish tradition as requiring one to have mercy on one's enemy as one would have mercy on one's own, and to not engage in unduly cruel activity.<sup>109</sup> Even one of the greatest of scourges — rape of the female civilian population of the enemy — was tightly regulated under Jewish law.<sup>110</sup>

directly desired. It would appear that the third goal is not legitimate absent the designation of "Compulsory" or "Obligatory" war. The final goal raises a whole series of issues beyond the scope of this article and could perhaps provide some sort of justification for certain types of conduct in combat that would otherwise be prohibited, although its detailed analysis in Jewish law is beyond the scope of this paper and relates to circumstances where retaliation or specific deterrence might permit that which is normally prohibited; *Rama, Yoreh De'ah* 334:6 and Rabbi David Halevi, *Turei Zahav (Taz) ad locum* and *Minḥat Ḥinukh*, Commandment 338.

<sup>106</sup> Rabbi Ya'akov Ariel, "Haganah atzmit (ha-intifada ba-halakhah)," *Tehumin* 10: 62-75 (1991). He bases his view on the famous comments of the *Maharal* on the biblical incident of Shechem, which defend the killing of the innocent civilians in that conflict along such a rationale. This, of course, draws one into a more famous biblical dispute, and one of the few morally ambiguous stories in the Torah that the Torah does not itself resolve — who was right: Jacob or Simeon and Levi? Rabbi Shlomo Goren, in his discussion of the exact same set of sources, posits that Jacob's view was correct; R. Shlomo Goren "Combat Morality and Halacha," *Crossroads* 1:211-231 (1987). See also the article of Rabbi Yo'ezer Ariel (brother of Ya'akov Ariel), who reaches a different conclusion; Rabbi Yo'ezer Ariel, "Ha'onashat nokhrim," *Tehumin* 5:350-363 (1979). In this writer's view, Rabbi Yo'ezer Ariel's paper correctly distinguishes between individual and national goals in these matters. (See also *supra*, note 42.)

<sup>107</sup> *Hilkhot Melakhim* 6:8; See *Betzur Eviezer*, *supra* note 37 at 120-121.

<sup>108</sup> *Sefer ha-Mitzvot (Book of Commandments)*, Negative Commandment #57.

<sup>109</sup> In his supplement to Maimonides, *Sefer ha-Mitzvot* (Positive Commandment 6).

<sup>110</sup> The rules related to sexuality in combat are unique in Jewish law because the Talmud (*Kiddushin* 21b) explicitly states that even that which is permissible was only allowed because of the moral weakness of men in combat. While the details of these regulations are beyond the scope of this paper (See *Zevin, supra* note 37, at 52-54 for a detailed description of these various laws), it is clear that the Bible chose to permit (but discourage) rape in very narrow situations in wartime so as to inject some realistic notion of morality into what could otherwise be a completely immoral situation. The rules

#### D. A Note on Nuclear War and Jewish Law

The use of nuclear technology as a weapon of mass destruction is very problematic in Jewish law. In a situation resulting in Mutually Assured Destruction if weapons are used, it is clear that the Jewish tradition would prohibit the actual use of such armaments if they were to cause the large scale destruction of human life on the earth as it currently exists. The Talmud<sup>111</sup> explicitly discourages the waging of war in a situation where the casualty rate exceeds a sixth of the population. Lord Jakobovits, in an article written more than forty years ago, summarized Jewish law on this topic in his eloquent manner:

In view of this vital limitation of the law of self-defense, it would appear that a defensive war likely to endanger the survival of the attacking and the defending nations alike, if not indeed the entire human race, can never be justified. On this assumption, then, that the choice posed by a threatened nuclear attack would be either complete destruction or surrender, only the second may be morally vindicated.<sup>112</sup>

However, one caveat is needed: It is permissible to threaten to adopt a military strategy that one is in fact prohibited to implement, in order to deter a war. While one injustice cannot ever justify another injustice, sometimes threatening to do a wrong can prevent the initial wrong from occurring. *Just because one may not pull the nuclear trigger does not mean one may not own a nuclear gun.*<sup>113</sup> It is important to understand the logical syllogism that permits this conduct. It is forbidden — because of the prohibition to lie — to threaten to use a weapon that one is prohibited from actually using. However, it can be clearly demonstrated that lying to save the life of an innocent person is permissible.<sup>114</sup> Thus, this lie becomes

explicitly prohibited multiple rapes, encouraged marrying such women, and limited the time period where such rape was permitted to the battlefield.

A number of liberalities in ritual law were also allowed, reflecting the unique aspects of war. Why these particular laws did not apply in wartime, but others did, is also a topic beyond the scope of this paper.

<sup>111</sup> *Shevu'ot* 35b. Tosafot notes that this applies even to a Jewish government fighting an authorized war; See generally, Rabbi J. David Bleich, "Nuclear Warfare," *Tradition* 21 (1984): 84-88; (reprinted in *Confronting Omnicide: Jewish Reflections on Weapons of Mass Destruction*, D. Landes, ed. [1991], p. 209).

<sup>112</sup> Immanuel Jakobovits, *Tradition* 4 (1962): 202; (reprinted in *Confronting Omnicide: Jewish Reflections on Weapons of Mass Destruction*, D. Landes, ed. [1991], p. 199). See also Walter Wurzbberger, "Nuclear Deterrence and Nuclear War," in *Confronting Omnicide*, p. 224 and Maj. Guy B. Roberts, "Note: Judaic Sources of and Views on the Laws of War," *Naval Law Review* 37 (1988): 221.

<sup>113</sup> Rabbi J. David Bleich, "Nuclear Warfare," *Tradition* 21:84-88 (1984). Although this author finds this logically persuasive, it is difficult to find a clear source in the Jewish tradition that permits one to threaten to do that which it is prohibited to do; see e.g. Rabbi Moses Isserles, *Hoshen Mishpat* 28:2.

<sup>114</sup> See e.g., Rabbi Aharon Zakai, *ha-Bayit ha-Yehudi* (Jerusalem, 1986) vol. 7 ch. 3.



legally justifiable to save one's own life too. An example proves this point: If a person sought to kill an innocent party and one may not prevent that act by killing the potential murderer, one could threaten this person by saying, "If you kill this innocent person, I will kill your children." While, of course, one could not carry out the threat in response to the murder, the threat itself would be a permissible deterrent because lying to avoid a murder is permitted. This demonstrates that threatening to do that which one may not actually do is generally permissible to save a life. The possession of nuclear weapons is simply an amplification of this logical analysis.

The overemphasis of the seriousness of the minor prohibition to tell an untruth at the expense of letting a person die is an example of an ethical valuation that is completely contrary to the Jewish ethical norm. In general, the underemphasis of the biblical ethical mandate of "not standing by while one's neighbor's blood is shed" is the hallmark of those who adopt a system of pacifistic ethics and explains why such an ethical direction is contrary to Jewish law. If one could save a life by telling a lie, such a lie would be mandatory in Jewish ethics.

The use of tactical (battlefield) nuclear weapons designed solely to be used on the field of battle,<sup>115</sup> in circumstances where the complete destruction of the combatants would be permissible (such as after the proper warning and peace seeking), would be acceptable as well in Jewish law.

#### E. Summary

In sum, there clearly is a license to wage particular kinds of war and kill certain people in the Jewish tradition. However, in order to exercise this license, one must first seek peace; this peace must be sought prior to declaring war, prior to waging a battle, and prior to laying a siege. While war permits killing, it only permits the intentional killings of combatants. Innocent people must be given every opportunity to remove themselves from the field of combat.

#### V. Fighting on the Same Team: Ethics within the Army

Judaism not only mandated a particular type of ethical behavior towards one's enemies, but compelled one to adopt certain rules of conduct towards one's own soldiers as well. The Torah explicitly addresses the question of who shall be compelled to fight in a war. It states:

And when you approach the time for battle, the priest shall approach and speak to the people. He should say to them, "Listen Israel, today you are approaching war with your

<sup>115</sup> Assuming that such weapons exist and have the stated limited effect.

enemies; do not be faint in heart; do not be fearful and do not be alarmed; do not be frightened of them. Because God, your God, is going with you to battle your enemies and to save you." And the officers shall say to the people "Who is the person who has built a house and not yet dedicated it? He should return to his house lest he die in battle and another dedicate it. Who is the person who has planted a vineyard and never used the fruit? He should leave and return lest he die in battle and another use the fruit. Who is the person who is engaged to a woman and has not married her? He should leave and return home lest he die in battle and another marry her." And the officers should add to this saying "Who is the person who is scared and frightened in his heart? He should leave and return lest his neighbor's heart grow weak as his has."<sup>116</sup>

Two distinctly different exemptions are present in the Torah. The first is that of a person who is in a situation where his death will cause a clear incompleteness in an impending life cycle event. The second is a person whose conduct is deleterious to the morale of the army as a whole. While the position of Maimonides is unclear, Rabbi Abraham ben David of Posquières (*Ravad*) immediately notes that these two categories of exemptions are different in purpose and application.<sup>117</sup> *Ravad* states that the exemptions which relate to impending life cycle events apply only to an Authorized war; in an Obligatory war all must fight. However, he states that it is possible that the exemption for one who is fearful would apply even to an Obligatory war.<sup>118</sup>

The Talmud<sup>119</sup> explains this second exemption in two different ways. Rabbi Akiva states that it refers to a person who is lacking the moral courage to do battle and to see people perish in combat. Rabbi Yossi asserts that the fearfulness describes a person whose personal actions have been sinful (and who is thus afraid that in wartime he will be punished for his sins).<sup>120</sup> Most authorities maintain that one who is fearful of the war to such a degree that he classifies for such an exemption is compelled to take this deferral — it is not optional;<sup>121</sup> Jewish law prohibits one who is of such character from fighting.<sup>122</sup>

<sup>116</sup> Deuteronomy 20:2-9.

<sup>117</sup> See *Hilkhot Melakhim* 7:1-4 and comments of *Kesef Mishneh*, *Radvaz* and *Lehem Mishneh ad locum*, all of whom interpret Maimonides as agreeing with *Ravad* on this issue. Maimonides in his *Sefer ha-Mitzvot* appears to adopt the position of *Ravad* in total; see *Sefer ha-Mitzvot*, Commandment 191.

<sup>118</sup> Compare *Lehem Mishneh* commenting on *id.* and *Arukh ha-Shulhan he-Atid*, *Hilkhot Melakhim* 76:3 for an analysis of Maimonides' position.

<sup>119</sup> *Sotah* 44a.

<sup>120</sup> There is some dispute over how a person would prove his acceptability for any one of these exemptions; See R. Yehudah Gershuni, *Mishpetei Melukhah* 7:15 for a detailed discussion of this issue and R. Zevin, *supra* note 37, at 31-32.

<sup>121</sup> See commentaries on Maimonides, *supra* note 117.

<sup>122</sup> Maimonides accepts the opinion of Rabbi Akiva as normative (*Hilkhot Melakhim* 7:3); while *H'inukh* accepts the opinion of Rabbi Yossi (*Sefer ha-Hinukh*, Commandment 526). Most authorities accept Rabbi Akiva's opinion as normative; see *Arukh ha-Shulhan he-Atid*, *Melakhim* 76:22; see also R. Aryeh Leib Gunzberg, *Sha'agat Aryeh ha-Hadashot* 14:2 for more on this dispute.

While one could claim that this type of an exemption is a form of selective conscientious objection, such an understanding of the law would be in error. A person who "objects" is not given an exemption; certainly a person who is physically and psychologically capable — but who merely opposes this particular war — may be compelled to fight. It is only a form of psychological unfitness that earns one this type of exemption.

However, the most important limitation on this exemption is that it is limited to Authorized wars. In Obligatory wars, all who can, must fight.<sup>123</sup> Although one modern commentator seeks to argue that this is a basic model of a voluntary army,<sup>124</sup> I do not think that this argument is cogent. Rather, given the nature of a threat posed by a mandatory war, all — even those who are basically unfit — need to serve.<sup>125</sup>

In addition to the question of who serves, Jewish law mandated certain ethical norms on the battlefield so as to insure certain moral behavior. For example, the Torah requires, and it is quoted in the Midrash Halakhah and codes, that basic sanitary rules be observed while in military encampment.<sup>126</sup>

## VI. *Peace Treaties*

The book of Joshua recounts the story of the first treaty the Jewish nation entered into as follows:

The people of Gibeon<sup>127</sup> heard what Joshua did to Jericho and to Ai.<sup>128</sup> And they worked with trickery and they made themselves to look like ambassadors . . . And they went to Joshua at Gilgal and said to him, and to all the people of Israel, "We have come from a far land; make a treaty with us" . . . And they said to Joshua, "We are your servants"; he said to them, "Who are you and where do you come from?" They replied, "From a very far away land . . ." And Joshua [and the Jews] made peace with them, and he signed a treaty with them that was sworn on [ratified by] the presidents of the tribes. And it was at the end of three days after the treaty was signed that [the Jewish nation] heard that [the Gibeonites] were neighbors and lived nearby. The people of Israel traveled and came to their cities on the third day . . . And the people of Israel did not attack them since the presidents of the tribes had ratified [the treaty] — in the name of God, the God of Israel.

<sup>123</sup> *Sifri* 198.

<sup>124</sup> Noam Zohar, "Can a War be Morally Optional?" *Journal of Political Philosophy* 4:3 (1996) at 239.

<sup>125</sup> Since the nation is in danger, the long term planning which allows those who have unfinished tasks, to be exempt from fighting obviously is less relevant.

<sup>126</sup> See Deuteronomy 23:10-15; *Sifri* 257; Maimonides, *Hilkhot Melakhim* 6:13-14; see also *Arukh ha-Shulhan he-Atid, Melakhim* 75:18.

<sup>127</sup> Non-Jewish Inhabitants of central Israel.

<sup>128</sup> These two cities were destroyed.

The nation [of Israel] complained to the presidents of the tribes. The presidents replied, "We swore [not to attack them] by the name of the God of Israel, and thus we cannot touch them."<sup>129</sup>

Even though the treaty was entered into under fraudulent pretexts, the Jewish people maintained that the treaty was morally binding on them. Indeed, Maimonides in his classic medieval code of Jewish law, basing himself almost exclusively on this Biblical incident, codifies the central rule of treaties as follows:

It is prohibited to lie [or breach] in treaties, and it is prohibited to make them [the defeated nation] suffer after they have settled and accepted the seven commandments.<sup>130</sup>

Rabbi David Ibn Avi Zimra (*Radvaz*) in his commentary on Maimonides explains that "this is learned from the incident of the Gibeonites since breaking one's treaties is a profanation of God's name."<sup>131</sup> According to this rationale, the reason why the Jewish nation felt compelled to honor its treaty with the Gibeonites — a treaty that in the very least was entered into under false pretenses — was that *others would not grasp the full circumstances under which the treaty was signed, and would have interpreted the breach of the treaty as a sign of moral laxity on the part of the Jewish people*. One could argue, based on this rationale, that in circumstances where the breach of a treaty would be considered reasonable by others, it would be permissible to breach.<sup>132</sup>

Rabbi Levi ben Gershon (*Ralbag*) understands the nature of the obligation to observe treaties differently; he claims that the reason the treaty with the Gibeonites had to be honored was that the Jewish nation "swore" to observe its obligation, and the nations of the world would have otherwise thought that the Jewish people do not believe in a God and thus do not take their promises seriously (collectively and individually).<sup>133</sup>

Rabbi David Kimhi (*Radak*) advances an even more radical understanding of the nature of this obligation. Among the possible reasons he suggests to explain why the treaty was honored — even though it was actually void because it was entered into based solely on the fraudulent assurances of the Gibeonites — was because others would not be aware that the treaty was really void and would (incorrectly)

<sup>129</sup> Joshua 9:3-19.

<sup>130</sup> Maimonides, *Hilkhot Melakhim* (Laws of Kings and Their Kingdoms) 6:3. As explained above, it seems intuitive that those who argue with Maimonides' requirement of acceptance of the Seven Noahide laws, as explained above, would disagree with its application here too; see e.g., Rabbi Yehudah Gershuni, *Mishpetei Melukhah*, p.173.

<sup>131</sup> Commentary of *Radvaz ad loc*. Such can also be implied from Maimonides' own comments of *Hilkhot Melakhim* 6:5.

<sup>132</sup> In Judaism, the term "*hillul ha-Shem*" (desecration of God's name) denotes a prohibition whose parameters are fixed not by objective legal determinations, but by the perceptions of observers in the moral sphere. This is a very atypical prohibition in the Jewish legal system.

<sup>133</sup> Commentary of *Ralbag* to Joshua 9:15.

identify the Jewish nation as the breaker of the treaty. This fear, that the Jewish nation would be wrongly identified as a treaty breaker, he states, is enough to require that the Jewish nation keep all treaties duly entered into.<sup>134</sup>

Each of these theories, whatever the basis for the precise boundaries of the obligation to keep treaties, presupposes that treaties are basically binding according to Jewish law.<sup>135</sup> It is only in the case of a visibly obvious breach of the treaty by one party that the second party may decline to honor it. Thus, Jewish law accepts that when a war is over, the peace that is agreed to is binding. Indeed, even in a situation where there is some unnoticed fraud in its enactment or ratification, such a treaty is still in force.

#### VII. Conclusion

When one reviews the rules found within Jewish law for waging war, one grasps a crucial reality of Jewish military ethics. The moral license that "war" grants a person or a country varies from situation to situation and event to event. The Jewish tradition treats different permissible wars differently. The battle for vital economic need carries with it much less of a moral license than the war waged to prevent an aggressive enemy from conquering an innocent nation. Jewish law recognized that some wars are completely immoral, some wars are morally permissible but grant a very limited license to kill, and some wars are a basic battle for good with an enemy that is evil. Each of these situations comes with a different moral response and a different right to wage war. In sum, it is crucially important to examine the justice of every cause. However, violence in the service of justice is not to be abhorred within the Jewish tradition.

We all pray for a time when the world will be different. Until that time, however, Jewish law directs the Jewish state and the American nation do what it takes (no more, but no less, either) to survive and prosper in the crazy world in which we live.

<sup>134</sup> Commentary of *Radak* to Joshua 9:7. This theory would have relevance to a duly entered into treaty that was breached by one side in a non-public manner and that the other side now wishes to abandon based on the private breach of the other side. *Radak* would state that this is not allowed because most people would think that the second breaker is actually the first one and is not taking the treaty seriously.

<sup>135</sup> This is also the unstated assumption of the Babylonian Talmud, *Gittin* 45b-46a, which seeks to explain why treaties made in error might still be binding.

## 2

### RETHINKING 'SEXUAL' OFFENCES IN BIBLICAL LAW: THE LITERARY STRUCTURE OF LEVITICUS 20

by

JONATHAN BURNSIDE\*

*Abstract: Lev. 20:2-27 is a highly sophisticated literary unit, chiasmically arranged according to who is responsible for meting out punishment. Within this overall structure there are three distinct sub-sections, each of which is further arranged in a distinct literary pattern (20:3-6; 9-16 and 17-21). The first and last of these are also arranged chiasmically and the mid-turn of both these smaller chiasms correspond to the fulcrum of the chiasmus of the chapter as a whole. The internal structure also alludes to key sources, including the Decalogue and the Covenant Code. The article argues that literary presentation is key to interpreting this notorious text.<sup>1</sup>*

#### Introduction

*Leviticus* has had a bad press. It is after all a page from this book, concerning homosexuality,<sup>2</sup> which Sir Ian McKellen, star of *The Lord of the Rings*, admits to tearing from hotel Bibles.<sup>3</sup> To a modern sensibility the laws of Lev. 20 seem harsh, not just regarding homosexuality, but also adultery, incest and bestiality. One participant at a staff seminar where this paper was presented expressed indignation at the execution of the animal in Lev. 20:15-16. The United Nations Development Programme defines cultural liberty as "allowing people the freedom to choose their identities – and to lead the lives they want – without being excluded from other choices important to them" (2004: 6). This includes sexual freedom because "recognition and respect for sexual minorities can make a society more culturally

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<sup>2</sup> And not, as it happens, wizards.

<sup>3</sup> <http://www.mckellen.com/epost/m021110.htm#1>, accessed 22 April 2005.