

Torah and War: A Chronological Compendium of Articles by Rabbi Aryeh Klapper

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Is War Ever Holy?

(Mayim Acharonim, The Torah Journal of Maimonides School, circa 1998; language but not content revised, 2023)

Devarim 20 mandates a pre-war speech that includes a list of people exempt from military service. Must this speech be delivered before all kinds of wars, or only some? Rav Yosef Dov Soloveitchik's answer reinterprets the halakhic category *milchemet mitzvah* (commanded war) in a way that allows the philosophic/moral contention that the Torah never sees war as an intrinsic good. Even when war fulfills a *mitzvah*, it is at best a negative means for achieving a noble end. Going to war is never *lekhatchilah*, a choice one should make freely; it is at best the correct choice under the pressure of circumstances.

This point may appear trivial to some: How could the mass killing of other human beings ever be regarded as *lekhatchilah*? To others it may appear blasphemous: How can we subject clear *mitzvot* to human moral evaluation?

To the first group, I present the second! The second group, however, requires a more extensive answer.

I cannot argue that it would be better for the Divine Will not to be fulfilled. Nonetheless, I think it well-settled that some *mitzvot* come into play only as the result of unfortunate circumstances. Divorce, for example, is a *mitzvah* according to Rashba and others, yet remaining happily married is not a religious failure.

Furthermore, there are better and worse ways of fulfilling any *mitzvah*; the standard meaning of *bediavad* is a choice that fulfills the *mitzvah* retrospectively but should not have been made prospectively. The question is whether we can properly apply the term *bediavad* to *mitzvah*-wars.

According to Sotah 44b, the only universally agreed case of *milchemet mitzvah* is the initial Jewish conquest of Canaan. The Torah seemingly offered us no choice of means in that conquest. We were explicitly commanded "*lo techayeh kol neshomoh*" ("*You must not leave any soul alive*"). However, we were required to offer the Canaanites the option of leaving their land peacefully, and in that sense we can say that war was forced upon us. It is also true that the genocide of the Canaanites is commanded as a result of their sins, and one might argue that Hashem would have preferred that they not sin, certainly not so extensively.

In the broadly agreed case of the war to destroy *Amalek* (to be fulfilled in the Messianic era), one might similarly argue that war will be forced upon us by their character or actions. But this seems a very stretched use of the term *bediavad*, nearly the equivalent of suggesting that all the *mitzvot* of Pesach are *bediavad* because we would rather the Egyptians had not enslaved us.

It is also true that some commentators suggest that the obligation to offer peace applies in principle to Amalek as well, although not in practice, as the obligation applies only once per war and the initial war with Amalek has never ended. Again, however, this does not make the category *bediavad* meaningful.

The meaning of *bediavad* that I seek to apply here assumes that we have a real choice in the present; it is "*prospective bediavad*", a statement that a particular action will retrospectively be viewed as fulfilling a *mitzvah* despite the fact that a better alternative existed when the choice was made. My

claim is that the Rav's understanding of *milchemet mitzvah* allows for that meaning of *bediavad* to characterize the war against Amalek.

I do not know whether the Rav intended or considered this implication of his argument, or whether it is merely a conclusion that can reasonably be derived from a *chiddush* that he published in the pure spirit of Torah *lishmoh*. For obvious reasons, I am happier believing the former.

Let's begin by quoting the prewar speech in its Torah context.

When you go out to war against your enemy, and you see that he has steeds and chariots, and outnumbers you, do not be frightened by them, for Hashem your God is with you, Who lifted you out of the Land of Mitzrayim.

When you actually near battle, the priest will approach and speak to the nation. He will say to them: "Listen, Israel: Today you are nearing battle with your enemies. Let your hearts not soften! Do not fear or panic, and don't be intimidated by them! For Hashem your God is the One who goes with you to battle for you and to provide victory for you."

The guardians will then speak to the nation, saying:

"Any man who has built a new house and not inaugurated it – let him go return to his house, lest he die in the war and another man inaugurate it.

Also, any man who has planted a vineyard and not yet eaten its produce - let him go return to his house, lest he die in the war and another man eat its produce.

Also, any man who betrothed a woman but did not marry her - let him go return to his house, lest he die in the war and another man marry her."

The guardians speak further to the nation, saying:

"Any man who is afraid and soft of heart, let him go return to his house, so that he not melt the hearts of his brothers to be like his heart."

When the guardians finish speaking to the people, they will appoint military officers to head the nation.

When you near a city to make war against it, first cry peace to it. If it responds with peace, and opens itself to you, all the people in it will be tributary and serve you. If it does not make peace with you, and you make war with it, and you lay siege to it, and Hashem your God gives it into your hand, you shall put all its males to the sword. However, all the women and children and cattle, everything in the city, all its booty you shall take as spoil, and consume the booty of your enemies which your God has given you.

This is what you shall do to all the distant cities, which are not of the cities of those nations. However, from the cities of those nations whom Hashem your God is giving you as your homestead, keep no soul alive. Rather, utterly destroy them, the Hittites and the Amorites and the Canaanites and the Perizites and the Hivites and the Jebusites, as Hashem your God commanded you, so that you will not learn to act in the manner of all their abominations, which they performed for their gods, which would cause you to sin to Hashem your God.

If you lay siege to a city, to make war against it and capture it - do not destroy its trees, waving the hatchet against it; you can eat from it, but not cut it down, for is the tree of a field a human being, that it can escape from you into the fortifications?

However, trees that you know are not food trees - that you may destroy, and you may build fortifications against the city which is making war with you until you bring it down.

In Laws of Kings Chapter 7, Rambam codifies these laws as follows:

Whether it be a *milchemet mitzvah* or a *milchemet reshut* (authorized but optional war), a priest is appointed to speak to the nation at the time of the battle. He is anointed with the anointing oil, and called "*mashuach milchomoh*".

The *mashuach milchomoh* speaks twice to the nation:

once on the border before they go out but prior to the formation of the battleline, he says to the nation “any man who has planted a vineyard and not yet eaten its produce etc.” so that any such man, upon hearing his words, will return from the line of battle; and once on the battleline he says “Do not fear or panic”.

When they are forming the lines and approaching battle, the *mashuach milchomoh* stands on a high place, with all the lines before him, and says to them in Hebrew:

“Listen, Israel: Today you are nearing battle with your enemies. Let your hearts not soften! Do not fear or panic, and don’t be intimidated by them! For Hashem your God is the One who goes with you to battle for you and to provide victory for you.”

He speaks to that point, and an underling priest shouts his words loudly to the whole nation.

The *mashuach milchomoh* then says:

“Any man who has built a new house . . . Also, any man who has planted a vineyard . . . Also, any man who betrothed . . .”

The *mashuach milchomoh* speaks to that point, and the guardian shouts his words loudly to the whole nation.

Afterward, the guardian speaks on his own and says

“Any man who is afraid and soft of heart”,

and another guardian shouts this to the whole people.

After the retreat of all those allowed to retreat from the battlelines, they form the lines, appoint military officers at the head of the nation, and establish behind every line strong and forceful guardians, with bronze staffs in their hands. If anyone seeks to retreat from the battle, they have permission to stab their calves, for the beginning of defeat is flight.

In what context was it said that these people may retreat from the battlelines? With regard to a מלחמת רשות but with regard to a *milchemet mitzvah* - all go out, even a groom from his bedchamber and a bride from her canopy.

Rambam’s formulation creates an ambiguity regarding the role of the *mashuach milchomoh*. At the outset, Rambam writes that he is discussing both commanded and optional wars; at the end, he writes that his words apply only to an optional war. If these statements are not contradictory, then at some point in the chapter his words must cease referring to both types of war and begin applying only to *reshut*-wars. But at which point?

Raavad comments on Rambam’s opening line as follows:

“Whether it be a *milchemet mitzvah* or a *milchemet reshut*, a priest is appointed to speak to the nation at the time of the battle. He is anointed with the anointing oil, and called “the *mashuach milchomoh*” – Said Abraham:

“This may apply to “Let your hearts not soften!”,

but with regard to all the rest of those who retreat from the battlelines, that was said only with regard to a *reshut*-war, but not with regard to a *mitzvah*-war, and so says the Talmud.”

Raavad makes a substantive distinction between *milchemet mitzvah* and *milchemet reshut*. He says that the *mashuach milchomoh* speaks before both types of war, but delivers the complete speech found in the Torah only before a *milchemet reshut*.

Some commentators think that Raavad’s distinction is obviously Rambam’s intent. See Migdal Oz, who even denounces Raavad for attacking Rambam unjustifiably! But in my humble opinion, Raavad was correct to assume that Rambam disagreed with his halakhic outcome.

We noted above that there should be a transition point in Rambam after which his words cease applying to all wars and apply only to *reshut*-wars. However, Rambam mentions the part of the speech that Raavad thinks could have been delivered before all wars, “*Let your hearts not soften!*”, only after mentioning parts that Raavad thinks could only have been delivered before *reshut*-wars, such as “any man who has planted a vineyard and not yet eaten its produce etc.” So Raavad’s distinction makes no sense in the structure of Rambam’s presentation.

Rav Soloveitchik begins by noting that Raavad writes that ‘it is possible’ that the *mashuach milchomoh* says “*Let your hearts not soften!*” before a *milchemet reshut*. This implies an at least equal probability that the *mashuach milchomoh* says nothing at all before a *milchemet reshut*. Indeed, Rambam himself in the Sefer HaMitzvot seems to take the latter position, saying:

“The reproof of the *mashuach milchomoh* and the proclamation to the battlelines is obligatory in a *reshut*-war, where the law regarding such reproof applies, but they said that in a *mitzvah*-war there is none of this, neither reproof nor proclamation, as is explained in Chapter 8 of Tractate Sotah.”

The Rav initially finds Rambam’s position problematic. Why wouldn’t the *mashuach milchomoh* speak the verses that are merely inspirational, and contain no references to retreating from the lines, before a *mitzvah*-war? He finds especially problematic the Book of Commandments’ claim that this is explained in Sotah, because Sotah establishes only that there are no retreaters from the line in *mitzvah*-wars: it says nothing one way or the other about the *mashuach milchomoh*’s speech¹.

The Rav’s first suggested answer is that the speech must in all particulars be given precisely as written in the Torah, or else not given at all. Rambam may have derived this rule from Mishnah Sotah 8:1’s ruling that the *mashuach milchomoh* must speak to the nation in Hebrew rather than in the vernacular. This insistence on a precise form suggests that this commandment is subject to a principle that applies to many other commandments involving reading Torah, for example Shema, namely that one must say the entire parshah rather than excerpt relevant portions. Giving the entire speech is not possible lest people mistakenly retreat from the lines; therefore the speech cannot be given at all.

To defend Raavad’s alternate possibility, says the Rav, we must redefine the “parshah” in this case as including only the relevant verses. This is plausible because the excerpt is consecutive. No skipping is necessary.

However, the Rav develops a third option via Sefer HaChinukh. Chinukh writes consistently that mitzvot associated with war apply to men and not women. Examples include the location of latrines, the obligation to offer peace before battle, and the obligation “*Do not fear or panic*”. Minchat Chinukh challenges the last example on the ground that women are obligated to participate in *milchamot mitzvah*, as the Mishnah says “and a bride from her canopy”!? As at least some of the mitzvot associated with war apply to *milchamot mitzvah*; women would be obligated in those; therefore Chinukh’s exclusion of them is unjustified.

¹This is true of Talmud Sotah, but the structure of Mishnah Sotah Chapter 8 supports Maimonides’ claim. Chapter 8, which discusses the speech and other laws of war, concludes by stating that everything previous applied only to *milchemet reshut*. Since nothing in the chapter speaks of *milchemet mitzvah*, it seems to say that the speech is relevant only to *milchemet reshut*. However, Maimonides himself adds an opening line referring to both *reshut* and *mitzvah* in Laws of Kings 7. This seems strong evidence that his position there is not the same as in his Book of Commandments.

The Rav resolves Minchat Chinukh's difficulty as follows. *Milchamot mitzvah* relate to specific mitzvot, such as the extermination of the 7 nations and the erasure of Amalek, but those mitzvot do not necessarily have an essential relationship to war. The proof is that they may apply even to individuals in a private non-war setting. See, for example, Sefer HaChinukh's reformulation of *lo techayeh kol neshomoh*:

Anyone who had a member of these (seven) nations in his power, and had the capacity to kill him without endangering himself, and did not, has violated *lo techayeh kol neshomoh*.

Sefer HaChinukh clearly believes that *lo techayeh kol neshomoh* applies even when no war is being fought². Accordingly, the fact that women can be obligated to participate in *milchamot mitzvah* may stem from their obligations as individuals in particular *mitzvot*. They are never directly obligated to fight a war, only to do whatever is necessary, including war, to accomplish those *mitzvot*.

By contrast, Rambam formulates the obligation for men to serve as a corollary of the king's right or obligation to engage in war, not as an adjunct of specific *mitzvot*. Men have an obligation to serve in the army whenever necessary. The necessity may arise either out of particular *mitzvot* or else simply out of a national policy decision, as in a *milchemet reshut*.

The Rav further contends that the army, or *machaneh*, of Israel is composed only of those soldiers directly obligated to serve. Women, whose obligation is indirect, are not formally considered soldiers, even in a *milchemet mitzvah*. The laws of war, such as *veyated tihyeh lekha (You must have a peg)*, apply only to the *machaneh*. Thus women are not obligated in those laws even when participating in a *milchemet mitzvah*.

The distinction between the direct obligation to serve in the army and the indirect obligation to fight wars when necessary to accomplish *mitzvot* may explain more than women's exemption from *machaneh*-based *mitzvot*. The Rav suggests that the list of exemptions in the *mashuach milchomoh's* speech may be relevant only to service in the *machaneh*. With regard to a *milchemet reshut*, accordingly, those exempted would be free literally to return to their homes. With regard to a *milchemet mitzvah*, however, exemption from *the machaneh* would not necessarily mean exemption from fighting, as the *mitzvah* might impose that obligation separately. Thus the mishnah illustrates the requirement that all go out to battle, meaning even those formally exempted, with the case of a woman, i.e. the bride. Those exempted from *the machaneh* of a *milchemet reshut* are similarly exempted from the *machaneh* of a *milchemet mitzvah*, but would still be compelled to fight, just as women must participate in a *milchemet mitzvah* without being part of the *machaneh*.

Accordingly, Rambam in Laws of Kings may hold that the *mashuach milchomoh* reads the entire speech before every war. The exemptions formally apply to *milchemet reshut* and *milchemet mitzvah* equally, although they have greater practical significance in the former case. Note that even in a *milchemet reshut* those exempted from the *machaneh* are still obligated to provide support services to the army, so that "*let him return to his house*" is never literally true.

It may furthermore be that the exemptions are not automatic, but rather depend on actually hearing the *mashuach milchomoh's* speech. In other words, all men are presumptively part of the

²(Note also, however, that according to both Rambam and Sefer HaChinukh the mitzvah of erasing Amalek seems not to obligate individuals outside the communal context of war.)

machaneh, even in a *milchemet reshut*. The *mashuach milchomoh's* speech is thus practically necessary in a *milchemet mitzvah* so as to exempt the relevant men from the laws applying to the *machaneh*.

To this point we have discussed only two cases of *milchemet mitzvah*, the wars against the 7 nations and against Amalek. Rambam mentions a third case, wars of self-defense. One can assimilate that case to the preceding analysis by saying that such wars fulfill various mitzvot associated with lifesaving, such as *vochai bahem* and *rodef*.

The Rav's analysis enables us to contend that war is never ipso facto obligatory. For non-exempt men, the obligation to fight stems from the king's right to draft soldiers generally, and is identical in *milchemet reshut* and *milchemet mitzvah*. For women and exempt men, the obligation to fight stems from the *mitzvah*, but is not itself the *mitzvah*. If the *mitzvah* could be accomplished by other means, fighting would certainly not be obligatory and perhaps would not be permitted.

We said above that with regard to the War of the 7 nations it is easily arguable that we would have preferred not having to fight. With regard to wars of self-defense it is similarly probable that war is not the first option, that peace is preferable to victory. However, we also noted above that the category *bediavad* seems less applicable to the campaign against Amalek.

I would like to suggest a line of analysis that might enable such an application. The Torah and Rambam are careful to formulate the mitzvah as "erasure" rather than as war or killing. Here may be more than one way to "erase" Amalek; we can encourage their assimilation, for example. In this regard, and in conclusion, note that Rambam (in apparent opposition to at least one midrashic tradition) believes that we accept converts from Amalek.

A Religious Perspective

(Harvard Crimson, September 20, 2001)

In the aftermath of catastrophe, no empathetic human being can offer a whole or holistic response. We can only, in T.S. Eliot's evocative phrase, shore fragments against ruins, and hope they will last until time and human resilience enable rebuilding.

What follows, then, are fragmentary thoughts about religion and community in the aftermath of the mass murder committed in New York, Washington, and Pennsylvania last September 11.

a) Enormous human evil should promote faith in G-d rather than dim it. There are only three options: the world is meaningless, human beings create meaning, or G-d provides meaning. No one truly believes that the world is meaningless. The human capacity for unmitigated evil makes us implausible creators of meaning. All that is left is G-d.

b) While human beings cannot create meaning, we control its presence in this world. It is our responsibility to continue our efforts to pour meaning into this world even – especially - as others do their best to remove it.

c) It is the proper role of religion to promote continual and intensive moral introspection, whether in suffering or pleasure, in poverty or prosperity. It is legitimate and appropriate for rabbis – for Jews - to ask ourselves and our communities to search our ways and reconsider our deeds in the face of tragedy, to ask each of us to search for the extent of our own culpability for the creation of a world society in which evil flourishes.

But it is not the proper role of religion to absolve human beings of responsibility for their own evil actions. It is not the proper role of religion to absolve human beings of their responsibility to prevent the evil actions of others. The reality of ultimate Divine justice does not prevent human beings from being commanded to establish justice, as best they can, on their own.

d) It is an important and proper role of religion to provide comfort in the face of tragedy. Jewish tradition frequently engages in theodicy, in the justification of Divine ways to human beings. Chief among the Divine ways that require justification is the universality and often randomness of death.

But it is not the proper role of religion to provide comfort in the face of evil. Evil is the product of human choice, and religion should inspire, develop, and channel burning outrage at human violations of the Divine creation. Religion should encourage and demand that human beings take responsibility for correcting evil rather than accepting it.

e) It is the proper role of religion to bring human beings to an awareness of the universality of sin.

But this awareness must not be allowed to metastasize into a lack of sensitivity to the degrees of evil in this world. The desire not to be judgmental must not make judgement impossible, and thus make injustice inevitable.

f) Moral relativism is at least as dangerous as moral absolutism. Edmund Burke said "All that is required for the triumph of evil is that good men do nothing". I would rephrase: "All that is required for the triumph of evil is that good men do less than everything". Human beings who do nothing in the face of evil are accomplices and enablers.

g) I am Jewish. I am American. For the year between the outbreak of the intifada and the September 11 mass murder, my identities have lived parallel lives. Every night I read the Israeli newspapers hoping that the names of my friends and families would not be listed as victims of the latest murderous act of terrorism. As a Jew, I knew that every bullet was aimed at me as well, that from the perspective of the murderers we were all targets. As an American in America, I thought the danger to me unreal, that only the hate was real.

Now my identities have been fused in the heat of battle. I am no longer safe, and as an American and as a Jew I face the same threat and confront the same enemies.

h) Ten years ago, I was in Israel when Saddam Hussein lobbed unaimable Scud missiles toward us (and toward US troops in Saudi Arabia) in the hope that they would land somewhere populated and kill many people. Then, thousands of Palestinian men, women, and children danced openly on their rooftops as the terror missiles passed overhead. I see no reason to believe that the (thousands of) people (openly) cheering and the children handing out candy in celebration Tuesday and throughout the week were atypical. And many – perhaps – most - international and local Islamic leaders still justify the murder of Israelis, including children, sometimes even as they profess horror at the September 11 murders, sometimes spewing anti-Semitic venom and slander about those murders.

Who in the Islamic and Palestinian communities will take responsibility for undoing the corrosive education these children have had and continue to have?

Who in the Islamic and Palestinian communities will say what must be said – that until that education is undone, the world can neither justify nor afford giving these children control of their collective destiny?

i) I believe in the Hereafter, in monotheism, in Revelation, and in the authority of religious tradition. So, it seems likely, did the people who murdered thousands (including themselves) last September 11. That means that they and I belonged to the same subset of the human race, the community of the religious. This means that I have special responsibility for them. It means that as a believing Jew I must accept complete responsibility for the consequences of my own beliefs, and as a rabbi, of my own teachings. It means that I, and the Orthodox community especially, must ensure that our religion is never used to justify such acts. We must be eternally vigilant regarding both the implications of what we intend and the implications of how we are understood.

This is particularly critical now that the establishment of the State of Israel has given Jews far greater power for both evil and good than we have had for several thousand years. It means that we must be eternally vigilant lest our legitimate self-defense against Palestinian murderers blind us to the reality that all human beings are created *b'tzelem Elokim*, and that we must have the courage to admit our failures in this regard.

I pray that this article helps us accomplish those tasks.

Halakhah and Military Ethics

(Meorot, Shevat 5767)

How much of Jewish law and ethics are suspended during wartime? With his customary lucidity, Rabbi Michael Broyde has identified³ this question as central to the development of a Jewish military ethic. His unflinching answer is that “the battlefield ethics of Jewish law, as a matter of concrete practical policy, place no ‘real’ restrictions on the conduct of the Jewish army during wartime”⁴. Thus he endorses administratively authorized torture of prisoners⁵, reprisal killings⁶, exemplary executions⁷, and even the deliberate “killing of a dozen innocent infants in the enemy camp”⁸.

Rabbi Broyde provides a startlingly novel halakhic basis for these opinions. He argues that wartime creates a “presumptive *hora’at sha’ah* (temporary edict/suspension of the law)” which enables duly constituted authorities to use whatever means they consider necessary for victory. All halakhic prohibitions and ethical principles, however ironclad in law or exalted in Jewish tradition, are therefore irrelevant in practice, even if they specifically relate to war.

Rabbi Broyde’s vision of war is diametrically opposed to the vision articulated by Rabbi Aharon Lichtenstein in an interview published in *Techumin*.⁹

“It is most important that a person going out to war understand that he is not passing from a world possessed of one hierarchy of values to a world with a different hierarchy of values. One person, one nation, cannot split into two.”

For Rav Lichtenstein, wartime must be a fully integrated category of *halakhah* and Jewish ethics. Just as we do not see the *halakhah* of *rodef*¹⁰ as a suspension of Jewish ethics, but rather as an embodiment of our commitment to both life and law, so too we must develop a theory of war that expresses the deepest values of our Tradition.

My sympathy is entirely with Rav Lichtenstein’s vision, and I believe that Rabbi Broyde’s detailed halakhic conclusions are intellectually unconvincing as well as morally repugnant. This introductory essay is largely devoted to fleshing out that sympathy and belief within the texts of Jewish tradition. But I also hope to make a small contribution toward a Jewish moral theory of war, and begin the much-needed process of concretizing Rav Lichtenstein’s vision into formal halakhic principles that can guide soldiers and citizens.

Let me acknowledge at the outset that Jewish tradition, and particularly post-Biblical Jewish legal tradition, provides little direct evidence regarding the grounds on which one should morally

³ Broyde, “The Bounds of Wartime Military Conduct in Jewish Law: An Expansive Conception” (2006: Queens College). Rabbi Broyde published a provocative distillation of this monograph’s conclusion as an op-ed in *The Jewish Week*, 8/7/06. I will assume throughout that the op-ed and the monograph are in substantive agreement. As will be noted below, Rabbi Broyde’s radical anethicalism appears only in the conclusion of his essay; an earlier article of his, “Fighting the War and the Peace: Battlefield Ethics, Peace Talks, Treaties, and Pacifism in the Jewish Tradition”, available at www.jlaw.com, contains no hint of it.

⁴ “Bounds” p. 42

⁵ “Bounds”, ftnt. 121; op-ed

⁶ “Bounds”, ftnt. 132; op-ed

⁷ “Bounds”, ftnt. 126; op-ed

⁸ Bounds, p. 39

⁹ Interview published in *Techumin* 4:185 (Hebrew: translation here mine).

¹⁰ the requirement to kill a pursuer when necessary to save the pursued

evaluate a war, and less with regard to how one ought behave in wars once they have started. While there is sufficient material to establish Rav Lichtenstein's broad claim, developing a halakhic code of military ethics is of necessity a creative enterprise¹¹.

The presumed reason for this striking lacuna is that the Jewish legal tradition developed largely in an era of Jewish powerlessness. That era is past, and we cannot leave *halakhah* incapable of responding to the central moral questions of our times. The resurrection of Jewish sovereignty in Israel, and the growing recognition that our full citizenship in American democracy imposes on Jewish Americans moral responsibility for American actions, have created genuine and legitimate demand for religious guidance in the area of war, both for the sovereign Jewish polity in Israel and for the fully participatory American Jewish minority¹².

Those of us in Israel and the free world who are committed to Jewish law of course welcome this thirst for Torah. At the same time, we must acknowledge that there is no consensus as to the proper approach to take in areas of law that are becoming real after years of desuetude or development in intellectual greenhouses, and whose existing formulations may therefore not be capable of surviving contact with reality¹³.

This article accordingly presents aspirational guideposts for practical *halakhah*, in other words *halakhah* as it could be if Halakhic authorities and communities embraced the principles set out below. I begin with a general halakhic conception of the nature and legitimacy of war that supports Rabbi Lichtenstein's contention that standard ethical principles apply to war. I then develop that conception's implications for the legitimacy of tactics, with specific reference to torture.

As both Rabbi Broyde and Rabbi Lichtenstein note, it may be that law is not the ideal regulatory mechanism for behavior during war. "Hard cases make bad law", and war is an endless series of hard cases. Military *halakhah* may correctly leave many cases, especially those involving life and death, up to the conscience of the individual soldier. In nonetheless seeking to create a legal framework for military ethics, I am following the position of Rabbi Walter Wurzberger *z"l* that routine *halakhah* is designed to

¹¹ See in this regard the dispute between Sifte Cohen Choshen Mishpat 73:39 and Chazon Ish Likutim Nezikin 16 as to whether there are questions of *halakhah* regarding which there is no binding precedent at any level of the Tradition, in other words cases of genuine first impression. My position here follows Sifte Cohen. I owe this reference to my teacher Rabbi J. David Bleich.

¹² Furthermore, as neither Israel nor the Western democracies accept *halakhah* as binding, but Jews nonetheless serve willingly in their armies, it is necessary to distinguish between the *halakhah* as it must be practiced by a soldier whose country and superiors do not share his commitments, and the *halakhah* as it would be practiced by an army fully committed to *halakhah*. A soldier in a country committed to Halakhah would be obligated to disobey many contrahalakhic orders on the assumption that his actions would be upheld upon review. Soldiers in nonhalakhic armies, by contrast, risk severe punishments up to and including death for disobedience of orders that contradict halakhah but not their army's standards, and therefore likely need disobey only if orders meet the standard of *yehareg v'al yaavor*, of requiring martyrdom before committing them. See "Bounds", p. 35 and ftnt. 109, where Rabbi Broyde argues that obedience is the soldier's primary duty unless orders are certainly in "obvious violation of law and normative ethics"; I think this position considerably overstated, and hope in future work to more fully address the proper balance between obedience and moral responsibility in military contexts.

¹³ Here I follow the Talmudic dictum (Bava Batra 130b) that a legal position cannot serve as a legal precedent unless delivered in a context of practical application. While there are many ways to understand that statement, this formulation seems to me to represent a minimal consensus.

perfect character in ordinary situations so that we can make proper decisions in extraordinary situations¹⁴.

A. The Nature and Legitimacy of War

The primary ethical question one must ask with regard to war is of course: What justifies the killing of other human beings? There are two basic answers:

- a. War is defined as a legitimately anethical zone, in which all interpersonal obligations and prohibitions toward one's opponents are suspended¹⁵. This is the approach taken by Rabbi Broyde¹⁶.
- b. Killing in war must be justified ethically on the same grounds used to justify killing at any other time, in other words as punishment, as atonement, or as necessary to protect a more innocent life. For example, individuals may kill when necessary for self-defense under the rules of "*rodef*" (pursuer) and "*ba bamachteret*" (furtive trespasser). "*Rodef*" here refers to the classic case of defense against an immediate mortal threat, and "*ba bamachteret*" to the more troubling cases of potential or presumptive threat¹⁷. Killing in war would then be justified on the application of these categories to communal situations¹⁸.

Which of these answers accords best with the evidence?

The existence of halakhic regulations of war tends toward Rav Lichtenstein's approach, but Rabbi Broyde argues that all such regulations are subordinate to the goal of victory, and can be superseded whenever militarily advantageous. No specific halakhic regulation can by itself demonstrate that soldiers must act on the basis of the values of general halakhah, or that halakhic decisors should develop martial halakhah in accordance with those values.

But I think a broader philosophic argument can bear considerable weight. Saying that war is legitimately anethical means that one does not judge military tactics in accordance with any end other than victory, and that one is entitled to engage in military activities which have no moral purpose, and indeed no positive purpose at all, other than military victory¹⁹. This is true regardless of whether military victory supports or undermines the values of the victor. Under this analysis, there seems no ground for saying that wars can only be begun in support of moral aims, as they can certainly be continued for any purpose whatsoever.

If war is a halakhically anethical zone, then the halakhic legitimacy of a war should not depend on the cause for which the war is being fought. Saying that war is legitimately anethical means that one

¹⁴ See Rabbi Wurzbarger's magnificent "Covenantal Imperatives", in *Samuel K. Mirsky Memorial Volume*, ed. Gershon Appel (New York: Yeshiva University, 1970) pp. 3-12. See also his *Ethics of Responsibility* (Philadelphia: JPS, 1994), for example pp. 26-7.

¹⁵ An important question beyond the scope of this article is the definition of "opponent" and "participation" in the war.

¹⁶ "Bounds", p.42; op-ed.

¹⁷ As it happens, Rambam believes intervention even to the point of killing is obligatory with regard to a *rodef*, but optional with regard to a *ba bamachteret*. These two areas of law may therefore respectively be models for the categories of "commanded war" (*milchemet mitzvah*) and "authorized war" (*milchemet reshut*) established by the Mishnah in *Sotah*.

¹⁸ I exclude the possibility that war is a separate and distinct ethical zone in which the rules are different from the normal civilian zone. Ethical principles are universal— while the applications of those principles may legitimately vary by context, I don't see how the underlying principles can change similarly.

¹⁹ The definition of "victory" is of course problematic. Consider for instance the question of whether, under this theory, it would be permitted to launch a retaliatory nuclear strike.

is no longer relating means to ends, and therefore the legitimacy of the means cannot depend on the legitimacy of the ends. Conversely, if the legitimacy of war can be shown to depend on the *casus belli*, then the means of war must be consonant with and proportional to the ends, and there must accordingly be space for martial ethics²⁰.

So does the halakhic legitimacy of war depend on its cause? In other words, are there wars that *halakhah* prohibits?

The *locus classicus* for rabbinic views of war is Mishnah Sotah 8:7, which divides legitimate wars into two categories²¹, but has no term for illegitimate war. The example given of *milchemet reshut* (authorized war) is the Davidic wars of territorial expansion, whereas the example of *milchemet mitzvah* (either commanded war or war to fulfill a commandment; see my discussion below) is Joshua's war of original conquest. This may be²² because all wars are legitimate, but it may also be that the Mishnah works on the presumption that all wars are illegitimate unless they can be justified as parallel to either the Davidic or else the Joshuan paradigms.

Regardless, the Talmud²³ concludes that a *milchemet reshut* can only be conducted with the authorization of the *urim vetumim* (oracle of the High Priest's breastplate). It follows that wars conducted without said authorization are forbidden wars²⁴.

Furthermore, Rabbi Joseph B. Soloveitchik zt"l argued²⁵ that even in the case of *milchemet mitzvah*, war itself is not self-justifying – the war is not a mitzvah, rather war accomplishes a mitzvah²⁶. Similarly,

²⁰ My argument here assumes a largely consequentialist view of ethics. On that view, it is difficult to ethically justify a decision to go to war when one knows that there will be no ethical constraint against winning in ways that undermine and outweigh the ethical impulse that legitimated the war to begin with. Note that in some cases war can be a legitimate option for both sides in a conflict, as for example if it is grounded in an irresolvable factual dispute.

²¹ Rabbi Yehudah and the sages disagree as to whether the proper division is between "*milchemet chovah*" and "*milchemet mitzvah*", or rather between "*milchemet mitzvah*" and "*milchemet reshut*". It is unclear whether the dispute is semantic or rather substantive. I use the latter terms throughout the article following the ruling in virtually all halakhic sources.

²² See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2d ed. (New York: Basic Books, 1992).

²³ Sanhedrin 16a. See on this Nachmanides, List of Alternate Negative Commandments, toward the end. Note that Mishnah Sanhedrin 1:5 and all subsequent halakhah also require the permission of the Great Sanhedrin for a *milchemet reshut*; however, this has been understood as a political requirement to gain the consent of the population to go to battle rather than a test of the war's religious acceptability.

²⁴ While this point is philosophically valuable within the current construction of *halakhah* as it is, in practice it can cause great difficulty; as the *urim vetumim*'s current location is unknown, this rule apparently bars all Israeli wars unless they are formally defined *milchamot mitzvah*. Thus a rule apparently intended to limit wars has had the ironic effect of causing politically right-wing halakhists to expand their definition of *milchemet mitzvah*. The same issue does not arise with regard to the requirement that the Great Sanhedrin consent to such wars, as the argument is that democratic consent fulfills the same function.

²⁵ *Kavod Chakhamim: In honor of Rabbi Dov Leventhal* (1935), pp. 95-98, and republished in *Kovetz Chiddushei Torah*. I published an English exposition of this article in *Mayim Acharonim* vol. 7 (2003, Maimonides High School).

²⁶ In this framework, the difference between a *milchemet mitzvah* and a *milchemet reshut* may be whether it is fought to fulfill a mitzvah *chiyuvit* (commandment one must fulfill) or rather a mitzvah *kiyunit* (commandment which one receives credit for fulfilling, but which one is not blameworthy for failing to fulfill if the circumstances necessary for its fulfillment never independently arise in one's life). However, see the discussion below as to whether a formal mitzvah is always necessary to justify war.

Rambam²⁷, amplified by Responsa Tzitz Eliezer²⁸, argues that war can only be fought for religious purpose.

There is accordingly ample evidence that *halakhah* sees war as justified only by its cause²⁹, and therefore sees military tactics as subject to ethical analysis and critique³⁰.

However, with all due respect, I suggest that we should not take Tzitz Eliezer's idealistic mission statement as determining the parameters of justified war. It seems likely that no mitzvah is fulfilled by defending one's own property. Accordingly, if *ba bamachteret*³¹ is among the paradigms of war, some non-mitzvah causes must suffice to justify war.

My suggestion is that there is a right to normal life³², financial and religious, and one that is entitled to live a normal life even if doing so will aggravate others to the point of violence. One is therefore entitled to defend oneself against that violence, and sometimes even to preempt it.³³ Obviously, this suggestion requires a definition of the normal national life, a project which is beyond the scope of this article. I will say here only that this model would align the philosophic interests of religious Zionism with those of political Zionism, and therefore has the potential to heal the current schism between adherents of those ideologies.

Here I must note that Rabbi Broyde himself concedes that "it is crucial to realize that there are situations where war – in the Jewish tradition – is simply not permitted"³⁴, and further that "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 entails a different moral response and a different right to wage war. In sum it is crucially important to examine the justice of every cause."³⁵ While he never makes this connection explicit, it seems likely that he intends his *horaat shaah* to apply with varying

²⁷ Laws of Kings and Their Wars 4:10: "All the land that the king conquers belongs to him, and he may give it to his servants and warriors as he desires and leave for himself as he desires. In all these matters his law is law, and in all these matters his deeds must be for the sake of Heaven, and his purpose and intent must be to raise up the true religion, and to fill the world with justice and to break the arms of the wicked, and to fight the wars of G-d."

²⁸ 13:100

²⁹ I assume that, technical halakhic details aside, the principles of war are the same for Jews and Gentiles. See in this regard Ethics of Responsibility p. 7-8. Rabbi Dr. Eugene Korn reports hearing Rav Aharon Soloveitchik zt"l, whose enormous contributions to communal halakhic ethics through both analysis and personal example merit greater recognition and study, make this assumption when analyzing the legitimacy of tactics in the Vietnam War.

³⁰ Rabbi Broyde himself writes ("Bounds", p.35) that "the moral license that 'war' grants a person 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". I largely agree with this statement, but I am not clear how it is derived. I also fail to see how it coheres with his conclusion that Jewish law leaves an army morally unconstrained as to means.

³¹ There are of course other ways to understand *ba bamachteret*, ranging from complete assimilation with *rodef* to on the other extreme as unjustified but excused homicide.

³² The right to normal life has wide-ranging halakhic implications. I first heard it used as a halakhic concept by Rav Aharon Lichtenstein Shlita as an explanation of why one is not strictly liable for damage caused by an ox with no previous history of damaging. See also halakhic discussions of the principle that "Hashem is the Guardian of fools", as well as the incisive analysis of modesty laws in Rabbi Y. H. Henkin, *Equality Lost* (Jerusalem: Uri Publications, 1999), pp. 76-77. I apply it as well in a forthcoming analysis of the laws of parent-child relationships.

³³ Of course, that one is entitled to do so does not mean that one always should.

³⁴ "Bounds", p. 19

³⁵ "Bounds", p. 35

force, and for ethics to be suspended completely only in a “basic battle for good with an enemy that is evil”. I am however unaware of any grounds for such a distinction within the realm of *horaat shaah*, and the notion that a *horaat shaah* can be limited by law is inherently contradictory.

A concession of my own is in order as well. No serious halakhist can deny that halakhah contains provisions for its own suspension, and that prophets, courts, and likely other political authorities may order violations of the law for sufficient cause. With the possible exception of idolatry, halakhah contains no categorical prohibitions.

But in this regard war is no different than any other situation in life. To claim, as Rabbi Broyde does, that the possibility of the law’s suspension during war means that law has no relevance in principle or in practice, would be to claim that halakhah generally is meaningless.

Furthermore, the concept of a “presumptive *horaat shaah*” that Rabbi Broyde asserts is oxymoronic. A *horaat shaah* is defined as a suspension of the law in reaction to specific circumstances³⁶. If it can be presumed, then it is law and not *horaat shaah*.

Finally, it is not at all clear to me why the Written and Oral Torahs persisted in legally regulating and ethically evaluating military behavior if all such regulations and evaluations are irrelevant. Perhaps these laws were written only so that we might expound them and receive heavenly reward, but such a contention requires evidence.

In sum, it seems to me that there is no compelling practical, legal, or textual evidence that wartime behavior should be exempt from standard halakhic and hashkafic review. A close reading of the “Personal Reflections on Halakhah and War in the Reality of our Time” that form the conclusion of Rabbi Broyde’s essay leads me to suspect that Rabbi Broyde knows this as well, and that his real argument is that the current world conflict is a battle between good and evil which, for specific practical reasons, requires the total suspension of law and ethics. I disagree.

B. What Tactics May Be Used Legitimately in War?

In the previous section I concluded that Judaism sees war as a particular case of *halakhah* and Jewish ethics rather than as an exception to their principles. This section will develop that conclusion with specific reference to Rabbi Broyde’s contentions that “torture in the context of war is no more problematic than death itself”³⁷ and that “the wholesale suspension of the sanctity of life that occurs in wartime also entails the suspension of such secondary human rights issues as the notion of human dignity (and) the fear of the ethical decline of our soldiers”.³⁸

A brief methodological excursus is in order. Some believe that *halakhah* should develop exclusively through internal analytic categories; ethics, if they play any role at all, develop by extending halakhic principles beyond the realm of law. In this Kantian vision one must not consider the consequences of legal formulations when deciding among them. Others believe that halakhic conclusions are best arrived at through an interplay between values and law, and that, so far as is practical, one should commit to legal formulations only after fully understanding their practical impact.

³⁶ Maimonides, Mishneh Torah, Hilkhhot Mamrim 2:4

³⁷ “Bounds”, ft. 121

³⁸ op-ed

I subscribe strongly to the second school. What follows, then is an attempt to see how certain legal formulations can be used to develop a halakhic military ethic that is consistent with the values of Judaism and *halakhah* generally. Should it be demonstrated to me that my suggested formulations generate practical conclusions I find morally repugnant, and that alternative formulations are available that adequately account for the traditional evidence, I would abandon my formulations before they would compel me to abandon my moral commitments.

Halakhah permits killing in non-war settings for a variety of reasons. For example, the death penalty can be administered for reasons of retribution, punishment, atonement, or deterrence, and under a set of severely limited circumstances zealots and family members of an accidental homicide victim can use lethal force as well. But the two models that seem most likely relevant to war are *rodef* and *bamachteret*.

Rabbi Broyde argues that war allows killing the enemy, and anyone who may be killed may also be tortured, so long as the torture accomplishes the same ends as the killing, as “the wholesale suspension of the sanctity of life that occurs in wartime also entails the suspension of such secondary human rights issues as the notion of human dignity, the fear of the ethical decline of our soldiers, or even the historical fear of our ongoing victimhood”.³⁹ I don’t see the relevance of historical fear, but will respond to the issues of human dignity and corruption of character.

The parallel question regarding human dignity would be whether one is entitled to torture a *rodef* or *ba bamahteret*⁴⁰, a point about which to my knowledge there is little halakhic precedent. Rabbi Yaakov Ettlinger⁴¹ did suggest, however, that one cannot save one’s life by utterly humiliating a *rodef*⁴². A variety of rabbinic sources also acknowledge that great physical or emotional pain can be worse than death⁴³. There are accordingly grounds for contending that human dignity is a primary rather than a secondary issue that cannot be resolved by simple appeal to the permission to kill.

Rabbinic tradition emphasizes that “peace is necessary even in time of war”⁴⁴, meaning that one must not allow the state of war to erode basic values and ethical priorities. In line with this point, Judaism [Bible and Jewish law?] has been careful to limit the honor it grants military prowess. G-d forbade David to build the Temple because his hands had shed blood, and swords used in the most justified of wars cannot be used to build the Temple. The Talmud⁴⁵ further notes that the Torah makes equal provision on each side of the Jordan for cities of refuge, even though the West Bank had a vastly larger population, because the culture on the East Bank was endemically violent; the best explanation

³⁹ Op-ed. “Bounds” (p.39) repeats this idea in more tentative language: “once ‘killing’ becomes permitted as a matter of Jewish law, much of the hierarchical values of Jewish law seem to be suspended as well, at least to the extent that the ones who are hurt are people who may also be killed”.

⁴⁰ Leaving aside the question of whether a disarmed prisoner can still be considered a *rodef* or *ba bamahteret*

⁴¹ Responsa Binyan Tziyon 172. Cf. Rabbi S. Z. Auerbach zt”l, Responsa Minchat Shlomo 1:7

⁴² It is not clear that he fully endorses this suggestion. His alternative proposal that one can only kill a direct *rodef*, and not for example a person who offers a reward for your death, is deeply implausible in all perspectives, but I would suggest other modes of accounting for the evidence he brings that require neither of his alternatives. It is also not clear that this responsum was intended to have practical legal weight.

⁴³ See for example Ketubot 104a (regarding Rabbi Yehudah HaNasi), Beit Lechem Yehudah YD 345, Ketubot 33b (regarding Chananiah Mishael and Azaryah), Taanit 23a (regarding Choni), and the interpretational history of I Samuel 31:4.

⁴⁴ Sifri Bamidbar 42

⁴⁵ Makkot 10a

for this is that the East Bank culture was founded by the frontline soldiers of Joshua's war, and participating in even the most legitimate of wars causes lasting spiritual trauma.

It may therefore be that we maintain apparently lesser prohibitions in wartime precisely because we need them to prevent wholesale moral deterioration, a point made by Ramban in his commentary to Deuteronomy 23:10. One may kill animals for food but not remove limbs from live animals for the same purpose⁴⁶; the prohibition prevents us from being degraded by the permission. Deuteronomy's regulation of the destruction of enemy trees and the treatment of female captives serves the same purpose. The Torah is conscious that war corrupts, and therefore tells us that we need to maintain boundaries even in war. That it is necessary to permit killing does not mean that we need to permit everything, as we need to protect ourselves from war as well.

There is also a philosophic sense in which torture is worse than killing. The torturer inflict pain so as to convince the prisoner to do his or her will, whereas killing acknowledges an irreconcilable conflict of wills. One might choose torturing over killing since the prisoner will have later opportunities to exercise free will, but permission to kill in no way implies permission to torture in addition to killing⁴⁷.

Even if one accepted Rabbi Broyde's basic assumption, moreover, there would remain more than sufficient grounds for banning torture halakhically in practice. First, many experienced intelligence officers believe that torture is useless. Second, legalizing torture will lead to numerous cases of torture that cannot be justified by military exigencies, such as happened at Abu Ghraib. Halakhic legislation often creates blanket prohibitions even where exceptions could be justified; according to Rambam⁴⁸, this is the fundamental principle of Biblical legislation. If allowing torture in some cases would cause the prohibitions against causing pain and the deep halakhic concern for human dignity to be more broadly disregarded, a blanket prohibition is justified.

For this reason the "ticking bomb" case generally cited by torture advocates has little if any halakhic relevance. Suppose, they say, a terrorist has hidden a nuclear explosive in New York City, which will go off within a day unless police convince a captured terrorist to tell them where it is. Shouldn't the police be permitted to torture the terrorist to find out where the bomb is, thereby saving millions of lives? Almost certainly, but, as the American legal proverb has it, hard cases make bad law. In real life, the alleged terrorist would not have been tried, the existence of the bomb would not be proven, and the police would likely waste precious time and resources following a lie. If a policeman actually tortured a genuine terrorist and thereby prevented a nuclear holocaust, I might recommend promotion rather than prosecution⁴⁹. But farfetched hypothetical possibilities do not determine law.

Finally, endorsing torture fundamentally desecrates God's Name. The role of Judaism is to raise moral standards in the world, not to legitimate a lowest moral common denominator. The brutalities and savage inhumanities of our enemies must not blind us to the impressive and genuine moral commitments of our friends to human dignity, or to use the rabbinic term, *kavod habriyot*. Short of a

⁴⁶ I owe this argument to my colleague Rabbi Eliezer Finkelman

⁴⁷ However, this argument fails to explain the cases in which halakhah permits "compelling a person until he says "I desire it", e.g. Mishnah Arakhin 5:6.

⁴⁸ Guide for the Perplexed 3:34

⁴⁹ Here my halakhic approach is very similar to that taken by the Israeli Supreme Court on the issue of torture in a 1999 decision. The internal halakhic term for the policeman's action is "*aveirah lishmoh*".

genuine threat to survival that can be met no other way, we must not respond to the former by undermining the latter.⁵⁰

Let me emphasize again in closing that the halakhic arguments above show that torture can be forbidden halakhically, not that it must be. Technical counterclaims can easily be made; for example, one might suggest that the blanket prohibition I describe could only be rabbinic, and that there is no capacity to legislate rabbinically in our day. Halakhic decisors and halakhic communities must take responsibility for the way Torah responds to moral challenges⁵¹. What I describe is *halakhah* as I believe it ought to be, and as it can be if we acknowledge that ethical principles have a critical role to play in both physical war and in *milchamtah shel Torah*.

⁵⁰ See Jerusalem Talmud Bava Kamma 4:3 for a case in which the absence of a formal halakhic prohibition is taken as a desecration of G-d's Name that mandates a legislative response.

⁵¹ See in this regard www.torahleadership.org

Is there a Mitzvah to Prevent Genocide?

Kol Hamevaser Tuesday, December 18, 2007

Adapted from a lecture at Young Israel of Sharon, July 5, 2006

Is there a mitzvah to prevent genocide? If "mitzvah" means "a deed recognized by Judaism as good," the answer plainly is yes. We live still in the shadow of the Holocaust and see the world's general indifference to the destruction of European Jewry as an epic scandal; surely, then, we must see ourselves as religiously compelled to avoid such indifference, and to protest when we observe it in others. Our own moral sense demands this conclusion.

If our community had internalized Rabbi Norman Lamm *shlita's* pithy declaration that "Halakha is minimalist Judaism"; if we had accepted Rabbi Walter Wurzbarger *z"l's* contention that covenantal imperatives lie at the core of Torah; if we saw our religious purpose as expanding G-d's presence in the world beyond the four cubits of halakha, rather than as limiting our own image of His presence to that constricted space; in short, if we read Torah like Ramban – a legal treatment of this issue would discuss the parameters of the obligation without feeling the need to demonstrate its existence.

But for better or worse, much of the Modern/Centrist Orthodox community tends to understand religious obligation exclusively as a formal legal category. It is accordingly necessary to approach the question again, this time with halakhic rigor: Is preventing the annihilation of defined gentile communities a halakhically significant act? Does this significance rise to the level of *mitzvah kiyumit*, a legally recognized positive deed, or even more strongly, a *mitzvah chiyuvit*, a legal obligation?

My answers to these questions are founded on three assumptions which I wish to make explicit from the beginning.

- 1) All human beings are created *b'tzelem Elokim*.
- 2) Halakhic obligations differ from moral obligations in that they are not abstractions that exist regardless of the rulings of *poskim*, especially contemporary *poskim*. Moral obligations are generated by principles and circumstances; halakhic obligations are generated by authority.

Therefore – while I reject Professor Yeshayahu Leibowitz's sharp dysjunction between ethical/moral and religious/halakhic obligations¹, and hold instead that we generally should seek to translate ethical/moral obligations into religious/Halakhic obligations, the existence of an ethical/moral obligation demonstrates only that there probably should be a legal obligation, not that such a legal obligation already exists.

- 3) Jewish history has religious significance. This belief, which Dr. David Berger² has powerfully shown underlies and mandates Religious Zionism, also means that the experiences of every Jewish community legitimately and necessarily shape its approach to specific halakhic issues. Thus our community's memory of the Holocaust legitimately affects our approach to the issue of whether we are halakhically obligated to prevent genocide.

We declare at the Seder that a genocidal attempt on us takes place every generation. In that respect at least, then, the Holocaust is not qualitatively unique in Jewish history. What may well be unique, however, is the attitude toward America that emerged from the ashes. In the aftermath of the Holocaust, instead of being unreservedly thankful towards the US for opposing the attempt to exterminate us, we Jews came out thinking that country should have done more to prevent it!

In previous persecutions, the best we hoped for was nonparticipation. The notion that a gentle country, with a minor Jewish population, should be obligated to intervene in another country's internal affairs to save us, risking its own soldiers and people in the effort, would have been incomprehensible. Now, if we have any sense of moral reciprocity, this new feeling that others are obligated to save us should generate an obligation for us to save them, even if previously we had limited our obligation toward them to our expectation of them, namely not killing us themselves

Furthermore, our sense that America was obligated to save us during the Holocaust is not formulated in terms of Jewish chosenness, that America has an obligation to save G-d's chosen people, but rather in terms of America's obligation to humanity in general. This obligation to humanity applies equally to us as it did to 1940s Americans. By demanding more of WWII America, we have bought into the notion of universal human responsibility. America has given us a realistic sense that we can require of non-Jews intervention on our behalf, and this sense should require us to intervene on behalf of non-Jews.

Moreover, throughout Exile, Jews only had the power to save themselves, if that. We could therefore deferred to the Messianic era any discussion of the responsibilities of power. The establishment of Medinat Yisrael changed this, of course, but I contend that our American experience has also been a catalyst for radical rethinking. Since America is a genuine democracy, in which we have genuine influence— not the power to compel others, but responsibility alongside them, where our voice is as meaningful as anyone else's—American citizenship makes us responsible for the moral tone and actions of American society. Before America, it would have been absurd to discuss Jewish responsibility for the rate of abortion in the society of their host nation; today, we cannot evade partial responsibility for that circumstance in America. Similarly, we bear responsibility for America's reactions to attempts at genocide.

For these reasons it seems clear to me that there *should* be a halakhic obligation to prevent genocide. I cannot argue that the halakhic tradition unequivocally supports the existence of such an obligation. But I will seek to demonstrate that that preventing genocide is plausibly a halakhically significant thing, and perhaps even a halakhic obligation. This case may not convince someone who does not share my moral assumptions and evaluations, but it should convince someone who does share them that they are acting legitimately and with integrity when they treat it as such and think others should too. I contend in general that our responsibility to Torah is to ensure that the normative Halakhah reflects and embodies our moral assumptions, so long as we are confident that those assumptions themselves are products of Torah rather than impositions on Torah³.

Making that case requires me to show

- a) that halakha obligates Jews to intervene on behalf of non-Jews.
- b) that the category of genocide – the attempt to extinguish a particular cultural, ethnic or racial group – is halakhically significant.

Of course all murder is halakhically significant, let alone mass murder. But it seems unrealistic and unwise to impose on the United States the responsibility to intervene, militarily or otherwise, every time any government behaves cruelly toward its own population. Halakhic Jews should not have to vote for all humanitarian interventions everywhere. The United States, like any other community, should have at least a limited right to mind its own business. Rather, the obligation to act should be activated only when a humanitarian crisis rises to the level of genocide.

A Jewish obligation to intervene on behalf of non-Jews emerges from the positions of Rav Chaim Brisker (*Yesodei ha-Torah* 5:1, *Rotzeach u-Shemirat ha-Nefesh*) that

1. the moral *sevara* "who says your blood is redder than his" prevents Jews from choosing their own lives over those of Gentiles, and
2. the obligation to defend those pursued (*nirdafim*) with murderous intent against their pursuers, even at the cost of killing the pursuer (*rodef*), is part of the Noachide commandment of "*dinim*," i.e. essential to the construction of civilized society.

Rav Chaim's contention is bolstered by the universalistic formulation of Rambam (*Sanhedrin* 12:3) that one who saves any human life is considered to have saved an entire world. *Sefer Hachinukh* (Mitzvah 600) also formulates the obligation to save a *rodef* in universal terms – "the settlement of the world requires championing of the weak," and "the oppressed turn their eyes to G-d." This appears to impose a particular obligation on Jews, as G-d's agents on earth, to answer the prayers of the oppressed, whether they be Jewish or Gentile.

Moshe Rabbeinu's championing of the Gentile daughters of Yitro (*Shemot* 2:17, and see especially Seforno there) is a powerful Biblical precedent for such an obligation. Furthermore, while Rav Chaim may only obligate Jews to prevent the murder of gentiles, Rav Yaakov Emden (*Sh'eilat Yaavetz* 2:51) derives from this narrative that a Jewish *adam chashuv* is responsible to rescue any oppressed person from any oppressor,

In Rav Emden's case, a Jew borrowed money from a non-Jew, with two Jewish witnesses. The Jew then reneged. R. Emden argues that the two witnesses must respond to a subpoena from the non-Jewish governments' courts. He makes the technical argument that the Talmudic prohibition against testifying against Jews in secular court doesn't apply to an *adam chashuv*. But whereas the Talmudic distinction between *chashuv* and non-*chashuv* seems to be pragmatic- whether one can successfully evade the subpoena without consequence – Rav Emden transforms this into a moral claim.

It is not clear why, once R. Emden introduces his rhetoric of universal moral obligation, the Talmud should consider *adam chashuv* exceptional rather than paradigmatic. For our purposes, however, it suffices that his definition of *adam chashuv* is somebody who plays a role in the moral functioning of the society, somebody of whom people have moral expectations. In America, where society has moral expectations of Jews as it does of every other citizen, every Jew is an *adam chashuv*. According to R. Emden, we all have the obligation to save even a non-Jewish oppressed from the hands of a Jewish oppressor.

But this obligation is undefined. How severe does the oppression have to be to trigger our obligation? We cannot be obligated to intervene every time the judicial system goes awry. R. Emden's obligation, as opposed to R. Chaim's, can only be a *mitzvah kiyumit*. Even R. Chaim's obligation, which is *chiyuvit*, must have limits; we are not obligated to become roaming knights-errant, to devote all our time to preventing individual murders, even in our day when everyone who reads newspapers is constantly made aware of specific acts of injustice rising to the level of killing and rape all around the globe. Neither should the United States be obligated to play that role throughout the world.

My suggestion is that there is generally a communal analogue to the moral principles that generate halakhic obligations for individuals. Individuals must keep honest weights and measures – communities must establish fair marketplaces. Similarly, the individual obligation to save a *nirdaf* from

being killed is paralleled by a communal obligation to ensure that everyone can live safely without fear of being killed.

Furthermore, the communal obligation to create a safe society exists on both a local and global scale. In other words, communities have obligations both to their own individual citizens, and toward other communities. The communal obligation to save a *nirdaf* extends to preventing the deaths of entire other communities.

This argument leaves much undefined. International lawyers have wrangled for decades about the exact meaning of genocide, and halakhah need not accept whatever definition emerges from their discussion. There are resources within the *Masoret* for distinguishing qualitatively between the deaths of individuals and the deaths of communities, but they have not yet been developed. It is certainly a challenge to distinguish halakhically between Saddam Hussein's killing of 25,000 Kurds and his killing of all 25,000 Marsh Arabs, but I think it can be done.

Similarly, there are resources within the *Masoret* for determining the boundaries of the obligation to pursue justice and prevent injustice. For example, while Rambam (Laws of Kings 9:14) holds the entire city of *Shkhem* capitally liable for failing to prevent the kidnapping and rape of Dinah, he does not extend this liability to the rest of the population of Canaan.

What risks must one take to fulfill this obligation to prevent genocide? Surely one must be willing to sacrifice a portion of one's time and money. However, the obligation to intervene does not imply that one has to risk one's life. Individuals have little if any obligation to risk their own lives to challenge a *rodef*. Certainly, in the context of a volunteer army such as the United States', we cannot risk others' lives for our own moral obligations. It is morally questionable to vote for war when neither one's own life nor those of one's children will thereby be put at risk. Furthermore, Rav Herschel Schachter *shlit"o* has argued convincingly that there is rarely if ever an obligation to fight a losing war.

At the same time, the Rav *z"l* argued that a *milchemet mitzvah* is best defined as "a war that accomplishes a mitzvah," and *Minhat Chinukh* argues that any mitzvah which requires a war to accomplish necessarily requires risking one's life. Along the lines of our previous argument, it may be that a community has no obligation to risk its existence to save another community, but is obligated to risk the lives of some of its members. We supported a draft to fight against the Holocaust; in the absence of a draft, perhaps we are obligated to volunteer when war is halakhically called for.

All these questions require the attention of great *lamdanim* and *poskim*. My purpose here is only to call them to that attention, and to argue that ignoring them is a failure of our responsibility to ensure that the face which the eternal Torah presents to our time is one that sanctifies the Divine Name.

Torah Does Not Support Torture
(Wisconsin Jewish Chronicle)

"All's fair in love and war." This pithy proverb reflects a common belief that what soldiers do during wartime is not bound by ethical considerations. And while one expects little from a silly saying, it is shocking to hear this same point articulated by a prominent scholar.

In a recent article, Rabbi Michael Broyde, argues that the halakhic idea of war entails "the general suspension of our ethical sensibilities." Essentially, he is saying that Halacha itself would accept the position that "all's fair in war." No one would argue that war is anything but hell, but that does not mean that all is fair.

Broyde's assertion is flatly opposed to both biblical text and oral law. The Bible contains laws specifically aimed at maintaining a Jewish army's ethical sensibility during wartime. Deuteronomy 21:10-14 provides rules for the treatment of female captives, and Deuteronomy 20:19-20 regulates the destruction of enemy trees. The oral law codifies and expands these into exhortations against wanton destruction. Rabbinic tradition also emphasizes that "peace is necessary even in time of war," meaning that one must not allow the state of war to erode basic values and ethical priorities.

Accepting Rabbinic ethics does not mean, of course, that Judaism endorses all the details of the Geneva Convention. But Broyde's statement that "there is no logical reason that halacha would categorically prohibit duly authorized wartime torture" knocks down a straw man; with the possible exception of idolatrous worship, halacha has no categorical prohibitions. Even adultery and killing are permitted when the stakes are high enough. The right question is whether halakhah would sanction any plausible contemporary torture regime. The right answer to that question is no.

There are several reasons why no is the right answer. First, many experienced intelligence officers believe that torture is useless. From the Spanish Inquisition to the present day, false confessions produced by torture have wasted massive government resources and fostered destructive suspicions that tear apart communities. Since halacha considers humiliating and degrading someone tantamount to murder, and recognizes that pain can be worse than death, torture seriously violates the Torah, especially given the significant risk of such torture's uselessness. In addition, legalizing torture will almost certainly lead to numerous cases of unjustified torture.

Broyde follows Alan Dershowitz's suggestion that we legalize torture only when approved case-by-case, although unlike Dershowitz he relies on the military to police itself rather than requiring judicial review. But as we saw recently in Abu Ghraib or with regard to government eavesdropping, such processes are sooner or later evaded or else degenerate into mere formality. Legitimizing some torture without proper outside controls would lead inexorably to a rise in illegitimate torture, and halacha therefore prohibits doing so.

Finally, endorsing torture fundamentally desecrates God's Name. The role of Judaism is to raise moral standards in the world, not to legitimate a lowest moral common denominator. The brutalities and savage inhumanities of our enemies must not blind us to the impressive and genuine moral commitments to human dignity, or to use the Rabbinic term, kavod habriyot. Short of a genuine threat to survival that can be met no other way, we must not respond to the former by undermining the latter.

Advocates of torture always bring up the "ticking bomb" case. Suppose, they say, a terrorist has hidden a nuclear explosive in New York City, which will go off within a day unless police convince a

captured terrorist to tell them where it is. Shouldn't the police be permitted to torture the terrorist to find out where the bomb is, thereby saving millions of lives?

Almost certainly, but, as the American legal proverb has it, hard cases make bad law. That torture may be morally acceptable in farfetched hypothetical cases does not mean that it should ever be legal. In real life, the alleged terrorist would not have been tried, the existence of the bomb would not be proven, and the police would likely waste precious time and resources following a lie. If a policeman actually tortured a genuine terrorist and thereby prevented a nuclear holocaust, I might recommend promotion rather than prosecution. Yet hypothetical possibility is irrelevant to law and a repugnant means to override ethical concerns.

Broyde himself goes so far as to apparently justify reprisal killing of unarmed prisoners, using the argument that Jewish law requires no belligerent to behave better than his enemy. Here again I respectfully disagree. Jewish tradition sees each individual human life as infinitely precious, and therefore forbids killing an innocent even to save many others. Nothing in the Jewish laws of war permits deliberately murdering people who pose no threat.

The article provides a rationale for terrorism. If you can summarily execute non-threatening enemy combatants for strategic advantage, it's a short step down the slippery slope to the execution of civilian populations eating in a restaurant or sitting on a bus.

Jewish law legitimates killing enemy soldiers during war, but it also recognizes that even the most meritorious killing corrupts the killer. The midrash describes how the frontline soldiers of the original conquest of Canaan under Joshua return to create endemically violent societies. Reality demands spiritual as well as physical sacrifices. But the reality that we cannot avoid getting our hands dirty does not mean that we can blithely play in moral muck or descend to the moral level of our enemies.

[What Judaism Says About Drones](#)

Jewish tradition is weighted definitively against pacifism. But does that mean drone warfare is kosher?

Are drones an ethical tool of war? In the past 10 years, as Israel and the United States have increasingly relied on unmanned aerial vehicles to kill enemy combatants, that question has become extremely pressing for policymakers, politicians, and just war theorists.

Advocates of drones contend that the remote-controlled vehicles are merely a delivery mechanism for conventional weapons: They do not kill, maim, or injure in ways or numbers that can be invidiously distinguished from cruise missiles, bombers, or artillery. On the contrary, they often add a level of verification and precision unmatched by other types of tools. And they enable proactive defense in ways that were previously impossible. Critics contend that drones make war prohibitively easy.

What, if anything, does Judaism have to add to this debate? Anyone who tells you that Jewish law has a definitive stance on the use of aerial drones—or any other public issue—is selling you something. This isn't simply because Jewish tradition is complex and multi-vocal. It's because Jewish law is often technically irrelevant to non-Jews, who are not bound by the majority of its dictates. Thus, even if Jewish sources told us something about the obligations of Jewish drone pilots, or even about how the state of Israel should or should not deploy drones, they would not necessarily make the same demands on policymakers in the United States or the European Union. A useful Jewish perspective on drones, then, is a philosophical argument that incorporates the concepts, tensions, and arguments of *halakha* (Jewish law) in an effort to inform the general debate.

Before we get to the details, we need to establish a fundamental premise: While Judaism never celebrates war, the overwhelming weight of Jewish tradition is against pacifism, for both Jews and non-Jews. For example, [Rabbi Chaim Soloveitchik](#) argues in his commentary to Rambam's Laws of Murder that there is a universal human obligation to use deadly force when necessary to protect potential murder victims. Likewise, [Rabbi Naftali Zvi Yehuda Berlin](#), head of the famed Yeshiva of Volozhin, writes in his commentary to Genesis 9:5 that the Torah demands punishment for the shedding of the blood of a human being only "from the hand of his brother-man"—but not for killing in wartime, when men are legitimately not brothers.

Some oppose drone warfare because it allows someone from side A to kill someone from side B without any risk that side B will kill him first. To the best of my knowledge, however, Judaism has never recognized unsportsmanlike conduct as a violation of military ethics. In westerns, it is often considered unethical to shoot an unarmed man, even if you and everyone else in the room knows that the man is not unarmed by choice, and that he will do his best to kill you the moment he lays hands on a viable weapon. Judaism by contrast contends that "One who comes to kill you, anticipate and kill him first" (Talmud Sanhedrin 72a). Rambam writes (Laws of Theft 9:7) that one may kill someone whom one has a reasonable expectation will try to kill you "using any deadly means that will be effective." There is no intrinsic Jewish reason to avoid using guns against knives, or tanks against cavalry, so long as the knives or cavalry pose a genuine threat to one's life.

What of the argument that drone warfare violates international law? Prominent Jewish legal thinkers, such as the great 20th-century religious Zionist jurist [Rabbi Shaul Yisraeli](#), have argued that Judaism mandates obedience to international law in warfare and other matters. So, it might follow that Jewish law forbids drone warfare as well. However, even if one concedes the principle that international law carries significant Jewish weight—and in a different context I might dispute that principle sharply—

that weight would apply only to *settled* international law. Drones are new enough that no settled international law exists regarding their use.

Thus, so long as a plausible argument exists for the legality of drone warfare, Jewish law would avoid ruling on it so as to avoid an excessive entanglement of religion with politics. Since Jewish law will eventually recognize whichever position the international system adopts, deciding it now will correctly be understood as preemptively imposing a secular predisposition without Jewish basis. This can only diminish respect for *halakhic* authority, especially as the decision may soon be summarily reversed when the secular authorities reach a consensus on the issue.

I don't find these objections to drone warfare compelling.

But I do believe that serious Jewish and ethical objections to drone warfare arise out of three other questions:

1) When one side of a war develops a qualitative technological advantage, must it ethically consider what will happen on future battlefields when the technology spreads? Or is it rather entitled to win its own war and leave the future to be negotiated?

Judaism generally sees ethics as a device by which the strong constrain themselves. As Pirkei Avot teaches, "Who is powerful? The one who conquers his evil inclination." As such, I think there is room for a Jewish argument that imposes ethical responsibility for the consequences of drone warfare beyond the immediate military horizon.

Drones have the potential to allow totalitarian governments an unprecedented capacity to observe the actions of their subjects, and they likely will also give them the capacity to kill their political opponents with less risk of politically dangerous collateral damage. These are the same capacities that make drones attractive to the United States. Should the destructive potential of widespread drone use militate against our development and use of them? A Jewish approach to drones would take responsibility for not only our own deployments, but also for the ways in which our precedent will reverberate.

2) To what extent should one object to particular weapons because they provide the potential and temptation to abuse, even if they have highly legitimate uses?

Rabbinic law is largely composed of *seyagim*, legal "fences" erected to prevent individuals or communities from setting foot on slippery slopes. Thus, chicken may not be cooked with milk lest one come to cook beef with milk; one may not read by candlelight on Shabbat, in case one might come to adjust the flame; and one should avoid [romantic precursors](#) with forbidden sexual partners. Along these lines, a strong Jewish argument can be made for proactively regulating weapons to prevent potential abuses.

Such an argument unfolds as follows: Drone warfare has enabled the United States and Israel to carry out preemptive attacks outside their borders against persons allegedly threatening their security, at very low risk to their own personnel. The Obama Administration has used them to kill an American citizen abroad who recruited suicide bombers, even though that citizen had not engaged in violence himself and had never been tried by a U.S. court. It is likely that, were drones unavailable, a simple cost-

benefit analysis would have prevented many of those attacks. But drones dramatically change that equation, and one might conclude that no leader could withstand the pressure to use them in deeply problematic circumstances. As such, the only way to prevent such alluring abuse would be to impose strict regulations on drone use, carefully circumscribing how they can be deployed.

3) Do drones make the prospect of perpetual, if undeclared, war more likely, and is this objectionable?

Over the past 50 years, the concept of “declaring war” has generally declined, but this decline has been particularly marked in the United States, for political reasons. Since the U.S. Constitution reserves to Congress the right to declare war, the weakening of that concept has led to an increase in executive authority, such that executives can fight decade-long police actions without a declaration. Drones offer the capacity to accomplish military objectives without committing troops to foreign soil, and therefore likely without need for explicit congressional approval. If one opposes this trend, drones are a troubling development.

This is indeed a vexing issue. However, it is not one that can be resolved by resorting to Jewish texts. In fact, there is little or no direct Jewish precedent for the idea that the status of war is created verbally, by the declaration of one or more sides, rather than simply by circumstances. From the Jewish vantage point, what matters is not a formal announcement, but whether or not there is an ongoing violent conflict between significant political entities. In other words, Jewish law has little stake in whether war is officially declared.

Nor is there extensive Jewish discussion of whether it is best to distinguish sharply between war and peace—as the United States previously has—rather than see the two as existing on a continuum. Each of these models has its pros and cons. A binary war/peace system has the advantage of barring violence in the absence of any formal declaration of war. But it runs the risk of encouraging significant escalation beyond immediate political or security goals once war is declared and all bets are off. By contrast, a more flexible model of war and peace decreases the risk of such escalation at the cost of constant lower levels of violence. Drones make the latter model more likely, at least until the drones are explicitly and formally regulated by international law. But from a Jewish perspective, whether this is advisable is a purely political question outside the scope of traditional sources

To sum up, I see no Jewish reason to object intrinsically to warfare by remotely piloted vehicle any more than one would object to warfare by tank or naval destroyer. However, I see reasonable arguments for believing that the availability of drones makes certain forms of problematic policy choices more likely and that, in the absence of proactive regulation, drone warfare will have more pernicious consequences as the technology becomes more widely available.

I don't think there are particularly Jewish ways to discuss the likelihood of those consequences; those are practical questions to be addressed by experts, not rabbis. But it seems to me that Judaism can contribute to the conversation by insisting that the conversation include long-term and indirect as well as short-term and direct effects. As Rabbi Shimon says in Pirkei Avot 2:9: “Which is the straight path to which human beings should cleave? The one that considers consequences.”

Is the G-d of the Book of Joshua a moral G-d? Is Joshua a moral leader?

(moderntoraleadership.wordpress.com June 13, 2014)

Is the G-d of the Book of Joshua a moral G-d? Is Joshua a moral leader? Eric Cohen, Executive Director of the Tikvah Fund, triggered a lively and fascinating conversation with those questions. Their premise is that at least on first reading Yehoshua has Divine sanction to act in ways that defy contemporary morality. For example, he exterminates the inhabitants of various cities, including children, without regard for the innocence or guilt of particular individuals, and not distinguishing between combatants and non-combatants.

I admitted early in the conversation that this issue had bothered me since high school, and that I had not yet found a satisfying way to read the Book. This is still the case, and I'm glad to be challenged to revisit the issue. However, based on the conversation at the Tikvah seminar, it seems to me that there may be value in laying out some preliminary methodological thoughts and tentative theological guideposts.

1. One can simply invalidate the question, or deny it any significance. Behavior that G-d approves is proper, and "morality" is a useful category only insofar as it enables us to accurately predict what behaviors G-d will approve.

This is not an approach I generally find religiously useful or attractive. From an internal Biblical perspective, as several participants noted, there are clear instances where prophets challenge G-d on the basis of an external standard, and from a Rabbinic perspective, Torah can be properly interpreted only on the basis of a priori moral intuitions.

We do recognize a category of *hora'at sha'ah*, of actions that are given Divine sanction even though they violate our standard norms. However, this category refers generically to actions that violate legal norms for the sake of principles that antecede the law – they do not refer specifically to teleological suspensions of the ethical. It may be at times useful to argue that a *hora'at sha'ah* legitimates violation of moral norms as well, but that seems to me at best a last resort.

2. One can morally rationalize Joshua's actions in a way that seeks to prevent them from serving as a legitimating precedent for any subsequent behavior. One can say, for example, that such behavior is justified only when a people is returning to its Divinely granted homeland, or when an enemy population is so culturally corrupt as to make the prospect of their repenting – even partial – utterly ridiculous. Or one can say that his behavior was grounded in prophetic knowledge of consequences, so that he was able to make utilitarian judgments in circumstances where uncertainty would generally forbid them.

My sense is that such approaches fail in practice. I may think that I have effectively quarantined a text, but someone else will come along and argue that his or her circumstances exactly match those I described. For example, the conversation at Tikvah took place with an unspoken agreement that no one would evaluate interpretations by their implications for current or past Israeli policies, but it was clear to all that such implications were lurking close to hand.

Furthermore, defending Joshua's actions on utilitarian grounds often fails empirically. If the justification is that it was necessary to prevent all Canaanite resistance, and/or eliminate all subsequent Canaanite cultural influence, why is it that he did not in fact complete the conquest, and that Canaanite influence seems alive and well in subsequent Biblical narratives?

3) One can critique the applicability of ordinary morality to particular political situations. For example, one may believe that national origin stories inevitably involve aggressive violence, and that nonetheless nations have a right to emerge, as birds have the right to crack their shells. Joshua – or the American West – must be judged by a different standard than we use to judge life as conducted within an existing political entity. This position is to some degree embodied in the rabbinic presumption, sometimes given legal effect, that all land outside Israel was obtained by robbery. I understand this as a recognition that all land titles that don't trace directly to G-d trace back rather to an act of conquest, and conquest per se can rarely if ever be condoned by the moral rules that apply within a political community.

I am not willing, however, to concede that moral rules by definition apply only within settled political communities. As I have written elsewhere, the practical ethical rules of war may not be those of ordinary society, but that does not mean that there are no rules. So it may not be proper to judge Yehoshua by the standards of behavior within a state, or by the standards of international behavior in a community of nations that recognize an effective system of international law. But there must nonetheless be standards by which his behavior can be judged.

4) One can seek to reinterpret the story so that Joshua's actions conform to a standard of morality one is willing to defend in ordinary life. For example: One can adopt the halakhic position that the Canaanites were entitled to convert or flee, and adequately informed of this right, and thus anyone remaining in the cities was in fact a combatant.

This seems to me a plausible approach in some cases.

5) One can seek to reinterpret the text so that it is not evident that G-d approves some of Joshua's actions.


This is difficult, as overall Divine approval of Joshua is repeated and unquestioned in the book. In general, the Book of Joshua seems to have a more values-transparent narrator than is usual in Biblical narratives, and to leave less space for readers to make their own evaluations. Nonetheless, this is the approach I find most religiously attractive, because I think it most allows genuinely wrestling with the text rather than imposing on it – and in the end, if we come to the conclusion that G-d did approve, we will need to rethink our assumptions. But I want to make clear that I think it is legitimate to say that for the time a narrative's meaning is opaque to us, and therefore that we will not seek to derive values from it, although we aspire to do so in the future.

Here is one resource that I hope and suspect will eventually prove helpful: In 5:13, before the conquest of Jericho, Joshua sees an angel holding its sword drawn, and asks: "Are you for us, or for our enemies?" I think the most plausible reading of his uncertainty, following the Talmud, is that he fears that the angel intends to slaughter the Jews, because they have done or intend to do something wrong. The Rabbis identify that wrong with failure to study Torah or bring the daily sacrifice, but these are in the first instance likely symbolic, and in the second instance difficult to find evidence for in the text (see Radak for a remarkably pointed rejection of this midrash).

The angel's possible ambivalence here puts me in mind of G-d's ambivalence in the story of the Concubine of Giv'ah (Judges 19-21). In that story, the Urim veTumim endorses an attack on the tribe of Binyamin – and the attack fails, twice, with heavy losses. A third attack is endorsed with the note that it will lead to victory, which it does. To me, this clearly indicates that G-d is (to put it mildly) not wholly

comfortable with those He grants overall victory, and perhaps the angel indicates something similar here.

Those who seek to argue that only Divine command matters in this narrative cannot, to my mind, well explain why Rachav and her family are saved from Jericho, and the Gibeonites from among the Canaanites generally. In each case the presumptive command to kill everyone seems to be trumped by a humanly assumed commitment, and at least in the case of Rachav, the decision to spare her seems to be as endorsed as the killing of everyone else. What if, as a tactic to induce surrender rather than fighting to the last man, Joshua had sent in a herald promising to spare noncombatants generally? So I don't think that the question is so easily evadable. But as noted, this is not yet a reading, only a suggestion of a possible seed out of which such a reading might develop. I welcome your suggestions, assistance, and critiques.



When Is Military Intervention Obligatory?

(The Jewish Advocate, August 22, 2014)

When is humanitarian military intervention morally required? The U.S. re-intervention in Iraq to protect the Yazidis, against the background of the Syrian and Libyan implosions and ongoing human rights crises in other parts of the world, makes this question vital and immediate. Jewish tradition suggests that the obligation to intervene militarily exists when and only when the alternative is genocide.

To avoid dangerously incoherent decision-making, we need to articulate a policy that mandates some interventions without obligating us to intervene in every difficult humanitarian circumstance. We cannot reasonably base our policy on quantitative criteria such as the number of potential deaths – each human being is an entire world of infinite value. But the United States also cannot be the world's policeman, and our troops cannot be sent to stand against all brutes, despots and injustices everywhere.

As an American Jew, I have one fixed reference point: The United States had an obligation to prevent the Holocaust. This premise had no antecedents in Jewish, and perhaps in human, history; I'm not aware of any other time that a persecuted minority felt morally entitled to expect the intervention of an unrelated party. The development of an environment in which such expectations seem reasonable is among the great moral contributions of the United States.

The Holocaust therefore demanded military intervention for humanitarian purposes. But it cannot be the only such event. The Jewish law known as "rodef" can be helpful in determining the parameters for required intervention.

Rodef obligates every individual human being to rescue their fellow human from the threat of murder. Under Jewish law, where moral principles generate a legal obligation on individuals, there is generally a communal analogue. For example, just as individuals must keep honest weights and measures, communities must establish fair marketplaces. The individual obligation to save others from being killed or raped is therefore paralleled by a communal obligation to ensure that everyone can walk about without fear of being killed. The communal obligation to save others extends to preventing the deaths of entire other communities – in other words, to prevent genocide.

Must we risk the lives of our soldiers to fulfill this obligation? Jewish law does recognize the category "obligatory war." It may be that a community has no obligation to risk its own existence to save another community, but that it is obligated to risk the lives of some of its members. This still leaves much undefined. But I hope that Jewish law can be helpful in both affirming the obligation of intervention, against the hardcore realists, and in limiting that obligation, despite the hardcore idealists.

Putting a Price on Human Life in Times of War

(Looking Forward: The Official Journal of the Aspen Center for Social Values, Volume 1, Issue 4)
(September 2014)

Are the lives of civilians worth more than those of soldiers in wartime? The assumption that civilian lives are worth more is built into the moral critiques emanating from both sides of the conflict in Gaza. To bolster these critiques, civilians are described as “innocent”, with the implication that soldiers are – by definition – “guilty”. The underlying argument is that endangering civilians is wrong because they are innocent, and targeting soldiers is legitimate because they are guilty.

Every step of this argument is wrong. Identifying and correcting the errors is vital to developing an ethics and a law of war that are practical guides for the conduct of conscience-driven armies, rather than being additional weapons in the hands of their unethical opponents. In particular, we need to identify and correct the ways in which this argument distorts the “doctrine of proportionality”.

The distortion I will identify in this article is the application of the doctrine to cases where a military action is undertaken in order to protect the civilians of one side against deliberate attack from the other.

The doctrine of proportionality requires military forces to endanger civilians through their use of force only to an extent proportional to the importance of the military objective involved. This is an inherently vague and perhaps subjective principle, but some examples may help clarify the point.

For example, it may be legitimate to bomb a crucial enemy supply depot even if there are inhabited private houses nearby, but the same bombing would be illegitimate if carried out to kill a single unremarkable enemy soldier. Similarly, the same bombing may be illegitimate if destroying the supply depot will have no effect on the enemy's ability to fight. None of this applies to the killing of enemy soldiers. One is legally permitted to bomb enemy soldiers even if they have minor military roles, and one legally may kill unlimited enemy soldiers to achieve even minor tactical goals.

Why is it permitted to kill many soldiers for a goal that would not permit the killing of a single civilian? Let us first consider and reject several popular answers.

1) Soldiers accept the risks as part of their profession.

This is demonstrably wrong simply because most armies consist of conscripts, not volunteers. There are more complex objections as well, but this is sufficient.

2) Soldiers are more important militarily.

Actually, many civilians are more crucial to war efforts than many soldiers. For example, research scientists and workers in munitions factories play more important roles than a general's aides. An ongoing question in the United States is whether many bureaucratic jobs currently performed by uniformed personnel should be privatized.

As a thought experiment: From the perspective of the Japanese empire, were the Manhattan Project scientists less of a military threat than the average Navy midshipman?

3) Soldiers are more responsible for war's outbreak and continuation.

This is essentially the argument from guilt, and it too is demonstrably false. Most soldiers have no interest in fighting precisely because it is their lives at risk, whereas civilians – especially when they expect the laws of war to be followed – may feel they have much less to lose. Furthermore, the essence of democracy is that each citizen must take responsibility for such decisions.

The true answer, I think, is a combination of: a) There is a sense that war is less terrible the less it interferes with the non-military life of a culture or society, and b) Soldiers are presumptive threats, whereas civilians are presumptively not threats.

Here is where proportionality enters. The desire for non-disruption does not ban war, and war is inevitably disruptive. To contain that disruption, we ban the deliberate targeting of civilians absolutely – even if they are directly involved in the war effort, i.e. not “innocent” - and we require the disruption to be proportional to the significance of the military aim.

This requirement rarely results in a military objective being foregone. Rather, the military means used to achieve the objective are altered so as to decrease the risk to civilians at the cost of increasing the risk to one's own soldiers.

For example, it may be decided that destroying a particular munitions store legitimates endangering 10 but not 50 civilians. This eliminates aerial bombing as a feasible method of attack, even though it would put the pilot at minimal risk and almost certainly destroy the target, and likely results in a raid by ground forces that carries much lower risk of civilian deaths but is much riskier for the soldiers involved. The requirement of proportionality does not apply to enemy military forces because killing enemy military personnel is in and of itself a legitimate military goal, and one which is presumed to have minimal impact on non-military culture.

None of this relates to the “innocence” of civilians. Civilians may have instigated the war, authorized the war, politically supported the war, be funding or supplying the war, and so on. They may be serial killers or saints. The war itself may be an idealistic humanitarian intervention or a naked and bloodthirsty power grab. The rule of proportionality applies regardless.

However – all this assumes that the aims of the military in question can be evaluated in military terms – that is, whether they make it more likely for one's side to win the war, and diminish the enemy's capacity to resist one's military force. This calculus should and must change dramatically when the military goal in question is to prevent the enemy from deliberately killing your civilians, and the price of considering proportionality is not risk to soldiers, but risk to one's own civilians. Here we are measuring civilian lives against each other.

Here a certain form of “innocence” is relevant. There is a general intuition that hostages have a particular immunity that justifies the police in not shooting the hostage-takers immediately, even if that risks having the hostage-takers endanger many more people subsequently. I suggest that the same is true when military forces essentially hold an entire population captive by operating from their midst without their consent. So it is likely that a version of proportionality applies in such circumstances.

However, wars are fought between political communities, and when a military force represents the government of a political community, the nonmilitary members of that community are not hostages, but rather enemy civilians. This remains so even if the military chooses to operate from their midst, and all the more so if the civilians actively cooperate with the military, for example by allowing their homes, schools, hospitals, or religious buildings to be used for military purposes. (Volunteering to be human

shields for military equipment of personnel is self-defeating, as anyone doing so is directly engaging in military activity and loses their civilian status.)

When an army must choose between the lives of its own civilian population and those of enemy civilians, I contend that the doctrine of proportionality does not apply, just as it does not apply to choices between one's own soldiers and those of the enemy military.

It should be clear that even the targeting of civilians by one side does not give the other side the right to target civilians, or to be unconcerned generally about civilian casualties and collateral damage. However, it does permit the side whose civilians are being targeted to take whatever actions will be most effective in eliminating the threat to its civilians, even if those actions will cause “disproportionate” collateral damage.

For example – if a missile is on the verge of being fired from within a densely populated enemy suburb at your own suburb, and your most effective tactic for preventing that firing is to bomb the launcher, you may do so, despite the likelihood that the number of enemy civilians harmed in the process will be much greater than the number of your civilians likely to have been harmed by the missile.

I believe that this analysis properly applies to the recent conflict in Gaza. If one accepts that Hamas is the de facto government of Gaza, the Gazan population are members of the political community that Hamas' military arm represents. They are enemy civilians, not hostages. On that analysis, Israel was entitled to use whatever means were most effective in removing the threat posed by Hamas rockets to Israeli civilians, regardless of collateral damage. However, Israel would still not have been permitted to deliberately target Gazan civilians, or to engage in actions that caused more collateral damage than necessary to maximally protect its civilians.

For both pragmatic and moral reasons, Israel properly avoids using this license except in extremis. Pragmatically, collateral damage caused for the best of reasons and after the most rigorous of analyses weakens Israel's position internationally and builds a reservoir of hatred in Gaza that may create greater long-term threats. Morally, the closer to the line one comes, the more likely it is that some of one's soldiers will step over.

The murder of Muhammad Abu Khdeir reminds us that Jews are not immune to the temptations of violence for the sake of emotional expression. It is for this reason that Israel properly and consistently takes precautions beyond the minimally morally essential to protect the lives of enemy civilians. We should make every effort, consistent with military prudence, to ensure that this essential willingness to go lifnim mishurat hadin (beyond the letter of the law), with a recognition of what is morally right over and above what is legal, flourishes and endures forever.

At the same time, we must ensure that distortions of ethical and legal principles do not prevent Israel – and all other political communities of conscience – from effectively defending themselves militarily, philosophically, and legally against cynical or idealistic assailants.

The Elor Azaria Case: A Halakhic Framework

JANUARY 13, 2017 · 2:09 AM

Last spring, IDF soldier Elor Azaria deliberately shot and killed a wounded man lying on the ground. Several minutes before, that man had deliberately knifed one of Elor's comrades.

Last week, a military tribunal found Azaria guilty of "*harigah*". Generals and philosophers and rabbis weighed in to support or denounce the verdict, while accusing each other of ignoring or distorting Torah and ethics. Some voices supported the verdict but called for either a pardon or for very lenient sentencing.

The verdict depended on both a determination of fact – that Azaria had no reasonable basis to believe that the man posed a threat – and a determination of law.

Given the determination of fact, was the determination of law compatible with the letter and spirit of Halakhah?

One halakhic framework many opiners cited is Rambam's ruling (Laws of Murder and Life-Preservation 1:13) that one must use the minimum force necessary to stop a *rodef* (person attempting to kill another). One who kills a *rodef* unnecessarily is called a *shofekh damim* (bloodshedder), but is not executed by Torah courts.

Why is he not executed? Rambam distinguishes between *retzichah* (murder), which is automatically punished by execution, and *shefikhut damim* (bloodshedding), which is not. As in many legal systems, a variety of mitigating factors can lower a crime from first to second degree homicide, or from murder to manslaughter.

The Israeli military system apparently makes a similar distinction between "*retzichah*" and "*harigah*", with *harigah* parallel to *shefikhut damim*. (The analogy some have made to the halakhic category *retzichah beshogeg* (accidental homicide), which is punished by internal exile, is incorrect.)

While halakhah does not **mandate** executing a *shofekh damim*, Rambam makes clear that the state has the authority to punish the sinner in accordance with social need and communal ethics.

Therefore, if *rodef* is the proper framework, Halakhah leaves Azaria's punishment to the judgement of the secular authorities. It is within the letter and spirit of halakhah to argue for leniency or stringency on moral or policy grounds.

However, *rodef* is not the proper framework, for several reasons.

1) Rambam discusses situations where the *rodef* is still dangerous; he never considers permitting the extrajudicial killing of an incapacitated *rodef*. If a terrorist no longer poses a threat, only formally constituted authorities may execute him. (The related halakhic framework of *ba bamachteret* (furtive trespass) yields the same result.)

2) *Rodef* does not apply in the context of war. Soldiers engaged in battle have no halakhic obligation to wound rather than kill enemies, even when wounding would accomplish the same military objective. (I discuss captured or surrendering soldiers below.)

With *rodef* eliminated, what is the proper framework? Should the man Elor Azaria killed be treated as a civilian who attempted murder, or rather as a soldier in an enemy army?

Professor Asa Kasher, an author of the IDF code of ethics, contends that terrorists must be treated as civilian criminals⁵². I suggest that from a halakhic perspective, the issue may depend on the status of non-Jews living under Jewish rule in the Land of Israel today.

Popular halakhah often uses the term *geri toshav* (resident aliens) to refer to non-Jews who observe the Seven Noachide Commandments, including the prohibition against bloodshedding. However, this halakhic category formally applies only when the Jubilee is in force, and only in territory under Jewish rule. The Jubilee is not in force today, and throughout the Diaspora Jews live and have lived under non-Jewish sovereignty. Clearly the non-Jews of those societies are not formal *geri toshav*. There must be a category that covers at least non-Jews living under their own sovereignty outside the Land of Israel.

My tradition from my teachers is to distinguish between de jure and de facto *geri toshav*. De jure *geri toshav* undergo a formal naturalization process which includes acceptance of Jewish rule and of the binding force of the Seven Noachide Commandments, including the prohibition against bloodshedding. De facto *geri toshav* simply live in accordance with the Seven Noachide Commandments. The conditions of the Jubilee et al apply only to de jure *geri toshav*, whereas our obligations of sustaining (including the law of pursuit) apply to both categories of *geri toshav*.

Three relevant questions remain open:

1. What is the status of a de facto *ger toshav* who lives in an area under legitimate Jewish rule but actively resists that rule?
2. Can the status of de facto *ger toshav* result from membership in a community or group, or must it be acquired individually on the basis of behavior?
3. If a de facto *ger toshav* deliberately violates one of the Seven Noachide Commandments, is he or she now considered a sinning *ger toshav*, or rather an *ex-ger toshav*?

I suggest that along these three axes it is possible to distinguish between citizens of Israel and non-citizens living in the Territories. Perhaps Israeli citizenship automatically grants a person the status of de facto *ger toshav*, and so long as the person retains citizenship, regardless of their crimes, they remain *geri toshav*. However, residents of the territories living under military administration have no such collective grant. Their status depends on their individual actions, and so an attempted murderer from the territories loses the status of *ger toshav*. Furthermore, perhaps attempted murderers with political motivations, having lost the status of *ger toshav*, may be treated halakhically as enemy combatants. (But there really is very little halakhic discussion of irregular warfare.)

Terrorists who are not Israeli citizens are therefore not *geri toshav*, and likely should be regarded as enemy combatants. (We must still consider whether soldiers should presume that terrorists are citizens.) Elor Azaria's case should accordingly be treated as equivalent to shooting an incapacitated prisoner of war.

⁵² See [here](#) for a Torah in Motion panel on military ethics featuring Dr. Kasher and myself

The halakhah regarding prisoners of war is undeveloped. But there is universal agreement that the IDF can hold its soldiers accountable to its own code of conduct in this regard. The IDF has the right to punish Elor Azaria as it sees fit for violating its halakhically legitimate ethical norms.

I celebrate the continued vitality of those norms, and support their robust enforcement.

Some of those who demonstrated against the Azaria verdict did so with reprehensible motivations, such as racism, or actions, such as threats of violence. There is no room for threats against a legitimate system of justice. The defendant seems to show no remorse. There is grave danger of a slippery slope, and of emboldening dangerous elements of Israeli society. For all these reasons, I oppose showing Azaria extraordinary leniency.

But I do not think it is fair to tar all those who call for leniency as denying obvious principles of halakhah or Jewish ethics. There is no developed body of halakhah dealing with the ethics of ethically asymmetrical warfare. Having never been a soldier, I prefer not to make absolute judgments about what it is fair to expect of human beings in the fog of battle, although in this case my instincts are with the prosecution.

It is rarely good for justice when individual cases become symbols. For example, symbolic defendants often cannot be acquitted when there is strong evidence of guilt, even if reasonable doubt remains. Such cases are a good time for scholars to heed the Rabbinic injunction “Sages, be cautious with your words”, lest you mislead your students and they suffer the consequences. I hope my words here meet that standard.

The Spiritual Dangers of Ideological Camping

SEPTEMBER 1, 2017 · 1:10 PM

Parshat Ki Teitzei opens with a famous dispensation for soldiers: “The Law of the Beautiful Captive”. This law can reasonably be understood as a bulwark against the use of rape as a military tactic, as is prevalent in many modern conflicts. Nonetheless, the clear overall impression is that soldiers in the field are given more license than civilians.

A quite different impression emerges from a verse later in the parshah. Devarim 23:10 reads:

כִּי־תֵצֵא מַחֲנֶה עַל־אֹיְבֶיךָ
וְנִשְׁמַרְתָּ מִכָּל דְּבַר רָע:

*When you go out as a camp against your enemies
You must be guarded against any evil davar*

Here the sense is that soldiers must be especially vigilant, spiritually and morally. Nachmanides explains that

והנכון בעיני בענין המצוה הזאת,
כי הכתוב יזהיר בעת אשר החטא מצוי בו.
והידוע במנהגי המחנות היוצאות למלחמה,
כי יאכלו כל תועבה,
יגזלו ויחמסו ולא יתבוששו אפילו בניאוף וכל נבלה,
הישר בבני אדם בטבעו
יתלבש אכזריות וחמה כצאת מחנה על אויב.
ועל כן הזהיר בו הכתוב “ונשמרת מכל דבר רע”
ועל דרך הפשט היא אזהרה מכל הנאסר:

*What is correct in my eyes regarding this mitzvah
is that Scripture cautions in the time that sin is commonly found
and it is known regarding the practice of camps that go out to war
that they eat all abominations
they rob and plunder without shame
even with regard to married women and all disgraces.
The straightest of human beings by nature
will put on cruelty and rage when the camp goes out against the enemy
Therefore Scripture cautions regarding it “You must be guarded against any evil davar”
and using the approach of pshat this is a caution against all (already)
forbidden things*

So which is it? Is war a time for accommodationist leniency, or rather for countercultural stringency?

Most likely both. We can easily explain that soldiers need to be especially vigilant, and yet that we need to make allowances for their inevitable failures, and provide queasifying outlets to prevent even worse transgressions.

Rabbinic literature tends to build up the spiritual risks. “Any evil davar” becomes a specific warning against the Big 3 sins that a Jew must die rather than commit. There is no point fighting a war if

one becomes the enemy in the process. So we must be sure that there are monotheists in foxholes, despite the prevalence of superstition and the human tendency to worship all conceivable higher powers in times of great danger; again, that we avoid rape; and that we shed no innocent blood unnecessarily, even as we shed blood necessarily.

The need for this reminder emphasizes Ramban's notion that war desperately tries men's souls, so that even our deepest inhibitions come under fire.

But the Sifri adds a disconcerting anticlimax:

כשהוא אומר "דבר" – אף על לשון הרע
By saying "davar" – it includes lashon hora as well

Textually, it is easy to understand where Sifri is coming from. The word *davar*, translated as "thing" or "matter", could be removed without changing the verse's meaning. Therefore, it should be translated as "word".

But what is the point of mentioning *lashon hora* in the aftermath of the Big 3 sins? And why is *lashon hora* especially relevant in the context of war-camps?

An approach may emerge from comparing our parshah's opening formula

כי תצא למלחמה על אויבך
When you go out to war against your enemy

to the one that opens 23:10

כי תצא מחנה על אויבך
When you go out as a camp against your enemy.

What is the difference between "going out to war" and "going out as a camp"?

I suggest that the simplest explanation is that in the first verse, the war precedes the camp; if there is a camp, it is only because we are already at war. By contrast, in 23:10 the camp precedes the war. There is an enemy, and in response to the enemy we create an armed camp – but there is as yet no war.

This distinction may be implied in Ramban. Ramban is careful not to say that the verse seeks to prevent depraved wartime behavior; rather, it seeks to guard against the depraved behavior of war-camps.

In war, we sometimes have to compromise, and let things go in the hope of preventing greater transgressions. But in the run-up or prelude to war, this may not be the case. During such times, our goals must be to

1. Prevent the war if possible
2. Strengthen our inhibitions so as to prepare ourselves to withstand the trials of war
3. Controlling our speech is crucial for both these efforts.

The mere existence of a war-camp creates enormous pressure for war. The financial and social burden of the camp is enormous, and often not sustainable, so that war must be fought soon if at all. Simply being in a camp creates pressure towards ideological homogeneity. Internal conflict within a camp is dangerous and intolerable, so all aggressions are deliberately redirected toward the enemy. Language is therefore used to exacerbate the conflict rather than to create space for nonviolent resolution.

Moreover, war-preparation *davka* often involves breaking down moral intuitions by dehumanizing the other side.

Into this breach the Torah steps. These are temptations of ordinary strength, and there is no need for special understanding or dispensations. You must be especially careful to guard yourself against “evil speech”.

Now Ramban, and the Torah, are talking about physical, armed conflict. But it seems to me that the lessons apply equally to conflicts within or between Jewish denominations.

Here are some such applications:

- 1) Camps naturally tend to self-justify and self-perpetuate. Once a group identity has developed – especially if that identity is largely defined by your exclusion or rejection of specified others – reintegrating with “outsiders” is extraordinarily difficult. Even if we maintain an overall shared identity, the other side will soon form their own war-camp in response to ours! So we should think twice or three times before developing exclusive self-definitions (even or especially if that self-definition is about being less exclusive than the group you are excluding.)
- 2) War-camps naturally tend toward diminishing the value and humanity of their enemies. A genuinely “these and those” outlook rarely survives in such circumstances; “pluralism” becomes a buzzword whose major purpose is to tar those outside one’s camp as intolerant fanatic extremists.
- 3) The morality of language is often the first casualty of devolution into camps, the canary in the communal coal mine. When attack essayists are among the most prominent participants in public halakhic discourse, and crude insults become the stock in trade of serious talmidei chakhamim, our spiritual atmosphere has clearly become toxic.

These points will not make any impression on those who genuinely want ideological war within Orthodoxy, or Modern Orthodoxy, whether their desires arise out of admirable religious sincerity or are rather the manifestation of deep character flaws. But the rest of us can and should use this Elul to consciously diminish their influence.

This Dvar Torah was sponsored in memory of Fishel Yitzchak ben Shmuel Zisblatt by his children, grandchildren and great-grandchildren.

How Not to Talk About Amalek

MAR 4, 2020, 10:04 AM



“The War with Amalek”, from the Yossi Rosenstein Haggadah

The mitzvah of wiping out Amalek properly troubles the soul of any Jew who is committed to both Torah and ethics. How can G-d command genocide?

One approach, advanced independently by the Chofetz Chayyim and Rav Aharon Lichtenstein zt”l, is to declare this mitzvah an ultimate *chok*. Some mitzvot can be done properly only if we understand their purpose; some can be done properly regardless of whether we understand their purpose; but *mechiyyat Amalek* is forbidden as mass murder unless we fully acknowledge that it has no humanly intelligible rationale and are acting exclusively to fulfill G-d’s command. Shaul loses the monarchy not because he spares Agag, but rather because by sparing Agag, he reveals that he thought he understood why he was killing the rest of the nation.

This approach has great literary and moral appeal. But it also carries a great risk. It insulates the mitzvah from moral critique, and allows us in principle to be “good people” while carrying out awful deeds. This could be catastrophic if it spread to other mitzvot, or if an interpretation arose that misidentified some other group as Amalek.

An opposite approach is *davka* to seek an ethical justification for the mitzvah. The inherent danger of this approach is that if one genocide can be justified, others can be as well.

The danger of providing ethical rationales for the mitzvah of mechiyyat Amalek is that if one genocide can be justified, others can be as well.

Declaring a mitzvah an absolute *chok* is in the long-term contrary to human religious nature. We have a deep drive to make sense of our actions. Think of how many explanations you’ve heard for the *parah adumah*, or for *shaatnez*! This drive is only strengthened when the mitzvah seems unethical.

But our *masoret* also recognizes the vital need for profound humility in the realm of *taamei hamitzvot*. The vast majority of rationales are offered for religious inspiration with no expectation of influencing the law. This is particularly so with regard to mitzvot that raise ethical challenges, where the risks of getting the law wrong are so great, both practically and spiritually. Thinking that he understood

the mitzvah of mechiyvat Amalek made Shaul a murderer by *not* killing Agag; imagine if it had led him to kill someone extra!

It is in this light that I wish to examine one famous *derush* on Amalek. The Rav cited his father Rav Moshe Soloveitchik as asserting that Amalek represents the desire to commit genocide against the Jews, and that any nation with such an intention becomes Amalek.

This rhetorical move had great appeal in light of the Shoah, and the establishment and survival of the State of Israel in the face of attacks with explicitly announced genocidal intentions. The trope of Amalek serves the beneficial purpose of convincing us that genocidal threats can be real, and that we need to respond to them militarily as well as spiritually.

But the risk involved in such a rhetorical move is also great. Listeners may make a category error akin to taking “an eye for an eye” literally, and believe that the mitzvah applies to contemporary enemies.

Listeners to sermons that try to make Amalek relevant today may make a category error akin to taking “an eye for an eye” literally, and believe that the mitzvah applies to contemporary enemies.

In our days, when loose halakhic rhetoric contributed to the assassination of Yitzchak Rabin by an Orthodox Jew, we cannot run that risk. So we must say with absolute clarity: There is no valid justification for any claim that the mitzvah of wiping out Amalek has any practical contemporary application.

The rhetorical hook for Rav Moshe Soloveitchik’s idea is the language of Rambam in Laws of Kings 5:2-3.

There is a positive commandment to devastate the Seven Nations, as Scripture says You must surely devastate them. Anyone who had one of them come to his hand and did not kill him – violates a negative commandment, as Scripture says Leave no soul alive. But their memory has already been erased.

So too, there is a positive commandment to destroy the memory of Amalek, as Scripture writes You must erase the memory of Amalek, and a positive commandment to continually remember his evil deeds and his ambush so as to arouse hatred for him, as Scripture says: Remember that which Amalek did to you.

Rambam says “their memory has already been erased” regarding the Seven Nations, but not regarding Amalek. Since Amalek should be as gone as the Seven Nations – no one argues that genealogical Amalekites were identifiable in Rambam’s time or in ours – it seems to follow that there must be a non-genealogical Amalek.

This does not actually follow. In his Introduction to the Book of Commandments, Rambam explains why the mitzvah to destroy the Seven Nations is considered “for the generations”, and therefore among the 613, even though the Seven Nations have already been destroyed:

So too, to kill the Seven Nations and destroy them is a commandment we were commanded, and it is an obligatory war, and we are commanded to scour after and pursue them in every generation until they are ended and no man remains from them. And so we did, until they ended and were cut off via David and scattered and mixed in among the nations until they were left with no name.

In other words, the mitzvah to destroy the Seven Nations is not purely genealogical – it is fulfilled even if genealogical descendants remain, so long as the culture is gone. By contrast, regarding Amalek,

Would you think that when Hashem the exalted destroys the **descendants** of Amalek utterly and cuts them off to their end, as **will happen speedily in our days** as He promised “for I will surely erase the memory of Amalek”, that we would say then that the Exalted’s statement “You must erase the memory of Amalek” is not a mitzvah ‘for the generations’?

This cannot be said, rather it is for each and every generation: Any time that a descendant of Amalek can be found – there is a commandment to cut him off.

In other words, it is precisely **because** the mitzvah of Amalek is **purely** genealogical that it remains operative in our day, even though it cannot be fulfilled, because we have no way of identifying Amalekites. (This is why the consensus opinion is that conversion applicants from the Seven Nations are accepted, but there is controversy about whether the same is true regarding Amalekites.)

There are numerous other grounds on which **any** attempt to give the mitzvah contemporary halakhic are demonstrably wrong, among them:

- 1) Rabbi Yehudah states on [Sanhedrin 20b](#) that “The Jews were given three commandments upon entering the Land: to appoint a king, to destroy the descendants of Amalek, and to build the Temple”. Rambam cites this statement in Laws of Kings (footnote) , and makes clear, as both its language and interpretational history do, that the commandment to destroy Amalek is dependent on the presence of an anointed king. Sefer Yereim even states that the Mitzvah applies only to the king.
- 2) Hagahot Maimoniyot states that the commandment applies only in the Messianic Era, after the full conquest of the Land. His position is almost a medieval consensus.
- 3) The verse containing the Mitzvah begins: “When G-d give you respite from all your enemies surrounding . . .” The plain meaning of the verse is that it applies only when there is peace on our borders.
- 4) The implication of that plain meaning is that even if we were to accept that a symbolic interpretation of Amalek has halakhic implications, Amalek stands for an enemy who is not on our borders, which means they must have no territorial dispute with us. Possibly it means that they cannot have any practical conflict of interest with us.

While the halakhic conclusion is undisputed, some people have noted that Radbaz challenges several of the grounds above on the grounds that Shaul was commanded by Shmuel to destroy Amalek. A standard response is that this was a *hora'at sha'ah*, an ad hoc decree rather than a fulfillment of the Torah command. This response may seem forced. However, in Rambam’s Introduction to his Mishnah Commentary, he cites Shmuel’s command to Shaul as an example of prophetic “commands and warnings that are not about religious law”, or *horaot sha'ah*. So this is certainly the correct understanding according to Rambam.

A fine contemporary scholar has argued that genealogical Amalek was completely wiped out, on the basis of Divrei Hayamim 1:4:43: “ויבו את שארית הפליטה אשר לעמלק”. As noted above, this cannot be the position of Rambam, who states that the “seed of Amalek” has not yet been wiped out. Regardless,

the Hebrew word ויכו by itself does not refer to killing everyone on the defeated side, as evidenced by the verses that add a variety of phrases such as “not one of them was left”. The verse as a whole means “They smote the exiled remnant of Amalek”, not “They killed off the last remnants of Amalek”.

Let me be clear that the rationale for a mitzvah is sometimes given practical halakhic significance. This is what we call *darshinan taama dikra* (which is subject to its own extensive halakhic discussion). However, there remains a difference between rationale and law. Law is about balancing values. Any claim that a rationale extends the law, especially to an entirely new set of cases, must be subjected to extremely careful and rigorous halakhic scrutiny.

Rabbi Soloveitchik’s symbolization of Amalek cannot survive such scrutiny in principle, let alone in any potential contemporary application. It therefore must be understood purely as rhetoric, and every citation of it must make that absolutely clear. Rav Tzvi Yehudah Kook argued against its being taught in his yeshiva, and *laaniyut da’ati*, it would be safest and best not to use it even rhetorically in the vast majority of contemporary contexts, so as to fulfill the Mishnah’s dictum “Sages, be careful with your words!”.

Think of Rachav facing the spies as parallel to Rabban Yochanan ben Zakkai facing Vespasian before the Destruction of the Second Temple. If she asks for too much, she will probably lose everything.

Yavneh and Yericho: A Tale of Two Cities

Rabbi Norman Lamm z"l liked to say that "Halakhah is a floor, not a ceiling"¹. His point was that halakhah does not constitute the entirety of Jewish and human obligation. Once astonishingly prevalent in Yeshiva University circles, that idea is rarely heard today except in the context of Rav Aharon Lichtenstein's inverted claim that all Jewish and human obligations, however derived, are halakhah.

Ramban wrote that Halakhah is not a solid floor. Because a legal system cannot account for all the details of life, one can be a *naval birshut haTorah* = a disgusting person acting under the authority of Halakhah, and fall through into spiritual cellars or dungeons.

Architectural metaphors generally carry connotations of fixedness and objectivity. Floor and ceiling remain the same distance from each other, and for every person. We might need more dynamic analogies to express the ways in which human beings can subjectively alter the relationship between halakhic and other obligations.

The simplest method is to take an oath that has halakhic force. An oath of *nezirut*, for instance. We can say that the additional prohibitions against consuming alcohol and becoming *tamei* raise the floor, and also lower certain ceilings; for example, a *nazir* cannot participate in a *chevra kadisha*. Do *nazirs* and *kohanim* really live within a more constricted range of spiritual possibilities? Imagining the *nazir* as having more elbowroom but less headroom doesn't seem to really capture the experience.

However, I think this framing can usefully force us to consider whether the reverse case exists. Can human decisions lower halakhic floors, and raise spiritual ceilings? How should we evaluate decisions that do both simultaneously? Can our commitments affect other people's spiritual range?

One case that interests me is the commitment that the spies make to Rachav HaZonah in Yericho. Their dialogue takes place in Yehoshua 2:9-14, **after** she has already hidden them and misdirected the authorities searching for them.

וְתֹאמַר אֶל־הָאֲנָשִׁים:
"יְדַעְתִּי
כִּי־נָתַן יְהוָה לְכֶם אֶת־הָאָרֶץ
וְכִי־נִפְלְאָה אֵימַתְכֶם עָלַי
וְכִי נִמְגַּו כָּל־יֹשְׁבֵי הָאָרֶץ מִפְּנֵיכֶם.
כִּי שָׁמַעְנוּ
אֶת אֲשֶׁר־הוֹדִישׁ יְהוָה אֶת־מִי יִסּוּר מִפְּנֵיכֶם בְּצֵאתְכֶם מִמִּצְרָיִם
וְאֲשֶׁר עָשִׂיתֶם לְשָׂבִי מֶלֶךְ הָאֲמֹרִי אֲשֶׁר בְּעֶבֶר הַיַּרְדֵּן
לְסִיחָן וְלַעֹג אֲשֶׁר הִחְרַמְתֶּם אוֹתָם:
וְנִשְׁמַע וַיִּמַּס לְבַבְנוּ וְלֹא־קָמָה עוֹד רוּחַ בְּאִישׁ מִפְּנֵיכֶם
כִּי יְהוָה אֶל־הֵיכֶם הוּא אֶל־הֵיכֶם בְּשָׂמַיִם מִמַּעַל וְעַל־הָאָרֶץ מִתַּחַת:
וְעַתָּה
הִשָּׁבְעוּ־נָא לִי בַיהוָה
כִּי־עָשִׂיתִי עִמָּכֶם חֶסֶד
וְעָשִׂיתֶם גַּם־אֵתָם עִם־בֵּית אָבִי חֶסֶד
וְנִתַּתֶּם לִי אֹת אֲמַת:
וְהִחִיתֶם אֶת־אָבִי וְאֶת־אִמִּי וְאֶת־אֲחֵי וְאֶת־אֲחֵיוֹתַי וְאֶת כָּל־אֲשֶׁר לָהֶם
וְהִצַּלְתֶּם אֶת־נַפְשֹׁתַי מִמָּוֶת."
וַיֹּאמְרוּ לָהּ הָאֲנָשִׁים:
"נַפְשֵׁנוּ תַחְתִּיכֶם לְמוֹת אִם לֹא תִגִּידוּ אֶת־דְּבָרֵנוּ זֶה

וְהָיָה בְּתֵת־יְקִיָּקָה לְנוֹ אֶת־הָאָרֶץ
וְעָשִׂינוּ עִמָּךְ חֶסֶד וְאֱמֶת.

She said to the men:

“I have come to know

that Hashem has given you the land

and that your terror has fallen upon us

and that all the inhabitants of the land tremble before you,

because we have heard that Hashem swept away the waters of the Reed Sea from before you

and what you did to the two Kings of the Amorites across the Yarden

to Sichon and Og, that you devastated them;

we heard, and our hearts melted away, and no man could any longer sustain his spirit because of
you

because Hashem your G-d, He is the God in the heavens above, and on the land below.

Now -

swear to me, please, by Hashem

that/because I have done *chesed* to you

and you also will do *chesed* with my father’s house

and you will give me a true sign,

You will give life to my father and my mother and my brothers and my sisters and all who are theirs

and you will preserve our souls from death.

The men said to her:

“Our souls in your steads to death

if you do not tell of our matters

then it will be that when Hashem gives us the land

we will do *chesed* and *emet* with you.

Rachav’s speech calls to mind the opening verses of Parshat Yitro, where Yitro similarly reports having heard all that G-d did for the Jews in Mitzrayim, and Az Yashir, which predicts the psychological impact she reports. Apparently the 39-year delay in the Jews’ arrival has not diminished G-d’s image of power, or else that image was revived by the total defeat inflicted on Sichon and Og.

What genre are we dealing with here? It’s easy to read this as a conversion narrative, which is a standard way of understanding Yitro. Rachav recognizes that G-d is One above and below, and that G-d has a special relationship with the Jewish people, and so she asks to join them.

However, Rachav also asks for the lives of her biological family, and perhaps the lives of their loved ones as well. With apologies to Malbim, there is no basis in the text for saying that any of these would convert. Rachav is an excellent precedent for contemporary *beit din* practice, which recognizes not just the reality but the value of converts maintaining (healthy) emotional ties with their biological families. We saw last week as well that Yitro planned to return to his *eretz* and *moledet* (although possibly his leaving out *el beit avi* was significant, and also some commentaries assume that his motive for returning was to proselytize his family).

However, what gave the spies the authority to grant Rachav’s request? Wasn’t there a specific Divine command to spare no (unconverted) Canaanite? Note that Rachav says “please”, and nothing in her language suggests an ultimatum. She makes the request only after lying about the spies to those searching for them, meaning after she has surrendered the power to expose them without risking herself. There is no *quid pro quo* here.

But Rachav does emphasize that saving her loved ones would be THE RIGHT THING TO DO. Radak notes that she described herself as having done *chesed* to them because they had as yet done nothing

for her; a commentary that AlHatorah identified only as “from the Sages of France” makes her appeal explicit:

וראוי לכם לעשות כן כי עשיתי עמכם חסד –
It is **fitting** for you to do so **because** I have done *chesed* with you

Abravanel understands Rachav as arguing that since she had saved two of them, they had a moral obligation to save that extended beyond her as a single individual. But that would seem to grant her only one relative. Hoil Mosheh, by contrast, notes that the spies promise to do both *chesed* and *emet* for her; *emet* required them to reciprocate by saving her, but saving her family was an act of *chesed*, like G-d saving not only Lot but Lot’s family from Sodom for the sake of Avraham. But what justified the spies to commit to a voluntary *chesed* in defiance of a Divine command? If such a *chesed* is legitimate, does it have any necessary limits?

Ralbag (=Gersonides) reads Rachav facing the spies as parallel to Rabban Yochanan ben Zakkai facing Vespasian before the Destruction of the Second Temple. She has their goodwill – but how far will that goodwill extend? Is her family (=Yavneh and its sages) the most she can save, or should she ask for her entire nation? If she asks for too much, she will probably lose everything. She reasons that her moral claim is on the spies as individuals, because the G-d of Israel can bring them victory whether or not their mission is successful, and therefore it would be utterly improper (פנים לא יאות להם בשום) for the spies to commit to permitting another large nation to remain in their land . So she makes the same decision as Rabban Yochanan, and likely also wonders for the rest of her life whether that decision beatified or damned her.

Ralbag’s psychological reconstruction suggests that had Rachav felt she had a moral claim on the Jewish nation, she might well have asked for her entire people to be spared, and the spies might have acceded, if that could be done without impeding the conquest.

One might think that “leave no soul alive” (=לא תחיה כל נשמה) set the halakhic floor for the Conquest. But Rachav’s active recognition of the legitimacy and inevitability of the Jewish return to Israel gave her the moral right to demand that the spies raise the halakhic floor by taking an oath to save her family.

The spies’ oath raised the halakhic floor to the level of the moral floor. But it seems likely that Rachav’s demand did not raise the moral floor – she merely enabled the spies to correctly perceive its level. They were halakhically obligated once they took the oath, but they were morally obligated to take the oath, In fact, they were obligated to take the oath even before made any demand, because without such an oath, halakhah was setting its ceiling below the moral floor.

Confidence-Building Measures in Biblical Foreign Policy

JUNE 18, 2021 · 2:15 AM

On his way back to Canaan from Aram,

*Yaakov sent mal'akhim (messengers or angels) – before him to Esav his brother, toward Seir, the fields of Edom, as follows:
“So you must say to my master, to Esav:
‘So says your servant Yaakov . . .’”
(Bereishis 33:4-5).*

On Yaakov's descendants' way back to Canaan from Mitzrayim,

*“Mosheh sent mal'akhim from Kadesh to the King of Edom:
‘So says your brother Israel . . .’”
(Bamidbar 20:14)*

The parallel is striking. But in Bereishis it is the narrator who describes Esav as Yaakov's brother, while Yaakov refers to Esav as his master. By contrast, Mosheh himself presents Israel and Edom as brothers and as equals.

The outcomes are also different.

While Yaakov's *mal'akhim* initially report that Esav is on his way with 400 (presumably armed and bellicose) men, the brothers' physical encounter ends in a rapprochement. Esav then departs Canaan in favor of Yaakov. (Esav suggests that he and Yaakov travel together, but Yaakov replies that he would come to Seir eventually. The valence of Yaakov's reply, and its connection to the episode in Bamidbar, is beyond our scope this week.)

By contrast, when Edom responds to Bnei Yisroel's second message with a curt “No” and a visible display of force, Bnei Yisroel change their plans and take a circuitous route to Canaan that avoids Edom.

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The simplest way of accounting for these differences is to say that Edom/Esav acknowledged Yaakov/Bnei Yisroel's absolute right to Canaan, but in turn demanded recognition of their own equal authority over Seir. This can plausibly be called “The Two State Solution”, with Esav firmly believing that good fences make good neighbors.

This approach deliberately avoids asking the kind of questions that would necessitate more nuance. For example, it assumes that Mosheh and Bnei Yisroel's words and actions were irrelevant to Edom's response.

We can be more imaginative. Mosheh could have copied Yaakov's policy by sending a massive caravan of gifts along with his messengers. Bnei Yisroel might have divided their camp in half, and sent one half forward (including women and children) to kneel before the King of Edom. Would Edom have responded graciously?

Maybe Mosheh and Bnei Yisroel had real agency here.

Maybe. Or maybe Edom would have seized the opportunity for demigenocide.

Yaakov had no way around Esav. His only alternative was permanent landlessness and never reaching his father's house again. Risking heavy casualties was a reasonable choice for him. By contrast, Mosheh and Bnei Yisroel had the option of avoiding confrontation by taking a much less convenient route. They had no need to take large risks for the mere possibility of peace.

Netziv finds a third way. Mosheh had agency here, but he had no genuine interest in traversing Edom. Rather, his goal was to empower Edom. His message was literally a confidence-building measure. Moreover, Mosheh had to accomplish this without letting Bnei Yisroel understand his purpose. Here is Netziv, followed by my translation:

אמנם עוד יש בזה דבר עמוק,
שהרי אנו רואים דשליחות הראשון כתיב וישלח משה, ושליחות שניה כתיב ויאמרו אליו בני ישראל
אלא באמת ידע משה היטב כי לא יאבה מלך אדום, כמו שאמר לו ה' כי לא אתן לכם מארצו עד מדרך כף רגל, אבל משום
שאמר ה' למשה וייראו מכם ונשמרתם מאד
והיה בזה המצוה להשמר שלא ייראו
ויהיו בטוחים שלא בכח ישראל לעבור עליהם בעל כרחם,
על כן עשה משה זה השליחות
כדי שיבין מלך אדום שתלוי ברצונו
—וכיון שענה מלך אדום פן בחרב אצא לקראתך
ידע משה שסר פחד ישראל ממנו, ושוב לא שלח אליו
אבל בני ישראל – הוסיפו לנסות
ומשום הכי לא רצה משה לשלח אנשי ישראל
שמא יראו השלוחים כמה המה נפחדים ונמוגים
כאשר כן היה באמת
והיו ישראל מתאמצים ללכת בלי פחד מחרב אדום
והיה צריך למשה להלוך נגד רוחם
על כן ראה לשלוח מאומות העולם
שלא שמו לב כי אם לדעת תשובת המלך
והיו סבורים ישראל שבאמת לבם ברי עליהם
ושוב לא עלה על לב להלוך בעל כרחם וע' בסמוך
...
—עבור בגבולו
העיד הכתוב שלא בשביל איזה טעם מיאן
אלא לא רצה שיעברו בגבולו
והיינו משנאה כבושה לא עשה להם טובת הנאה

There is something else deep here,
because regarding the first agency it writes *And Mosheh sent*, but for the second *Bnei Yisroel said to him*.

The truth is that Mosheh knew well that the King of Edom would not agree,
as Hashem had said to him (Devarim 2:5) *I will not give you from his land even a footfall*.
However, because Hashem said to Mosheh (D'varim 2:4): *They will be in terror of you, be very careful*,
meaning a commandment to be careful (to ensure) that Edom not be in terror,
and that they be secure that Israel would not use force to traverse their territory against their will.

So Mosheh did this sending
so that the King of Edom would understand that all depended on his will.
Once the king of Edom replied *lest I go out to greet you with the sword*,
Mosheh knew that fear of Israel had departed from him, and he no longer sent (messages) to him.
But Bnei Yisroel made a further try.

Moshe therefore did not want to send Jews,
because he was afraid that the agents would see that the Edomites were in fact afraid and trembling,
as was in fact the case,
and then Israel would therefore be aggressive to go through without fear of Edom's sword,
and Mosheh would then have to oppose the spirit of the people.
Therefore he sent non-Jewish agents, who cared only to hear the words of the king's response,
so the Jews would think that the Edomites were actually stouthearted,
and thus they no longer thought of traversing against their will. See what I write below

...
"Pass within his boundaries" –

Scripture testifies that Edom refuses not because of a genuine rationale,
but rather he simply did not wish them to traverse within his boundaries,
meaning that because of a deep-seated hatred he would not give them even a costless benefit.

Netziv argues that the *mal'akhim* that Mosheh sends to Edom are neither angels nor Jewish – rather, Mosheh sends residents of the place where Bnei Yisroel are staying: "*Mosheh sent mal'akhim who were from Kadesh to the King of Edom.*" Mosheh fully expects the Edomites to respond angrily, and chooses neutral agents in the hope that they will not suffer from that anger.

(As an aside: Talmud Pesachim 113b tells the story of a single witness who testifies in court about someone else's sin, and is whipped for defamation, since a single witness can have no legal effect. He protests: "Tovah sinned, and Zygud is whipped?" Talmud Makkot 11a suggests that this is a folk proverb rather than a historical report. Now Onkelos translates *mal'akhim* here as "izgadin", because the Aramaic root z g d means "messenger". So the proverb may actually be an early version of "Don't shoot the messenger!")

More convincingly, Netziv notes that while Mosheh sends the initial agents, it is Bnei Yisroel as a whole who respond to Edom's refusal. His explanation is that Bnei Yisroel were unaware that Mosheh wanted and expected the negotiations to fail.

I have a suggestion that builds on Netziv.

The Torah places the dialogue with Edom immediately after the episode of the Waters of Controversy, which ends with Mosheh and Aharon being denied entry to Canaan. Chazal interpret this juxtaposition as emphasizing Mosheh's egoless leadership:

"In the ordinary way of the world,
if a person engages in business with a fellow and loses thereby,
he separates from him and wishes not to see him;
but Mosheh,
even though he was punished because of Benei Yisroel,
he did not unload their burden from his shoulders"

This explanation pays no heed to an apparent thematic connection. Mosheh's punishment was the result of Bnei Yisroel's excessive worry about water, and the negotiations with Edom center around water. "*We will not drink well-water*". "*If we drink your water, I and my cattle, I will pay their sale price*". The goal seems to be to ensure that Bnei Yisroel will not ever again be dependent on miracles for water.

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Perhaps the second message is from Bnei Yisroel rather than from Mosheh because his political power waned once everyone knew that a leadership transition would soon be necessary, especially regarding water. I wonder whether Netziv's portrait of Mosheh as leader casting a veil over his own actions and keeping his constituents in the dark about his goal seems proper and ethical to us.

But I'm also reflecting on Netziv's understanding that G-d commanded us not only to leave Edom's sovereignty over its land intact, but also to ensure that Edom felt secure about our intentions. I'm also fascinated that Mosheh Rabbeinu interpreted this as requiring proactive measures to build Edom's self-confidence, even though that self-confidence could be based only on security about our intentions and not on actual military parity, and that the key threat to G-d's policy came from Jews who could not understand why might did not make right so long as we were not seizing land permanently.

All this because Edom is our brother, whom we must not abominate, even though he continues to cultivate his hatred for us and expresses this hatred by choosing lose-lose over win-win propositions. Was the hatred grounded in a contention that Esav's departure from Canaan was involuntary, or at the least insufficiently considered? Do Moshe and G-d think that their policy will eventually diminish the hatred?

Not so long ago, in our very own galaxy, even raising the last possibility might have seemed silly blue-skying. And yet the Roman Catholic Church, which our tradition often identifies with Edom, has changed dramatically, almost unimaginably, on anti-Semitism in the past 60 years. So perhaps there are lessons to learn here, and to consider applying, with enormous caution, to relationships with other relatives.

Does the Torah Support the Avraham Accords?

OCTOBER 21, 2021

Around the time of Yishmael's expulsion, the Philistine King Avimelekh came to Avraham, together with the head of his military, and proposed a treaty. "G-d is with you in all that you do. Now swear to me etc.". Avraham said: "I will swear". Then Avraham rebuked Avimelekh about the illegal and corrupt activities of his subordinates, and Avimelekh denied knowing anything about them. Then Avraham gave Avimelekh stuff for free, and they cut a deal/covenant. Sometime after that, G-d said to Avraham: *Take, please, your son, your unique one, who, you have loved, Yitzchak . . .*"

It's not clear why this story is in Torah. It seems to change nothing. In next week's parshah, Yitzchak copies his father's trick of passing his wife Rivkah off as his sister when he moves to Gerar, demonstrating that Yitzchak believes that there is still no fear of G-d in Philistia. The result is different only because Avimelekh is wariier this time around. Also, Yitzchak finds his father's wells vandalized, and his own are vandalized as well, and eventually he is asked to leave.

We don't know for certain whether Avraham and Yitzchak's assessment of Philistia as a G-dfearless society is correct. Evidence for their view is that in Genesis 26:11, Avimelekh restrains his society by threatening the death penalty for maltreating *the man or his wife*, not simply by revealing that she is his wife. Also, his language "*hanogeia*" seems intended to recall the plague (*vayenaga*) that G-d sent in 12:17 for maltreating Sarah – perhaps one can have a society that fears G-d only in very narrow ways. Regardless, Avraham is willing to covenant with a society that he believes lacks all fear of G-d, in which visiting women can be confiscated by the monarch. Was that wrong of him?

Rashbam says that making the treaty was wrong. In a characteristically brute-force effort to explain why the Akeidah is introduced by "It happened after these things", Rashbam comments:

אף כאן, "אחר הדברים" שכרת אברהם ברית לאבימלך,
לו ולנינו ולנכדו של אברהם,
ונתן לו שבע בבשות הצאן.
וחרה אפו של הק' על זאת,
שהרי ארץ פלשתים בכלל גבול ישראל,
והק' ציוה עליהם לא תחיה כל נשמה
לכן והאלהים נסה את אברהם = קינתו וציערו . . .

So too here, "after these things" means after Avraham cut a covenant with Avimelekh, with him and running through his grandchildren and Avraham's, and gave him the seven sheep.

The anger of the Holy Blessed One was kindled by this, because the land of the Philistines was included within the boundary of Israel, and G-d commanded regarding them "You must not leave any soul alive". Therefore "and G-d tested Avraham, meaning that he harassed and afflicted him . . .

I experience Rashbam's reading as doing violence to the text. The Akeidah is not a punishment – that much at least is clear from G-d saying "*please*" at its outset. I like the argument that this episode is introduced with "*It happened at that same time*" specifically to exclude it from the general sequence of the narrative and prevent Rashbam's argument (albeit it seems to have failed at that task). But discounting Rashbam's evidence, we are left with his opinion that making the treaty expressed a lack of faith.

This too fails to convince me. The Covenant Between the Pieces tells Avraham that his descendants will not inherit the Land until the fourth generation, and this covenant seems to run only for three generations rather than eternally (although *nin* and *nekhed* may not have their contemporary meaning here). Indeed, we can learn from the example of the Giv'onim that maintaining a sworn treaty commitment would have overridden the mitzvah of "You must not leave any soul alive", and yet no mention is made of any such commitment when the Jews return to the Land after the interlude in Egypt. (That Philistines are also not mentioned as residents of Canaan at all in the Torah, even though their presence is given in Judges and Samuel, is a separate but possibly in-some-way-related issue.)

In contrast to Rashbam, Rav Yaakov Kaminetzky (Emet l'Yaakov Genesis 21:2) expresses a positive view of both Avimelekh and the treaty, while retaining a deeply negative view of Philistine culture:

What seems correct is that after the angel guaranteed that Yishmael would become a great nation, and it is mentioned in the name of the Zohar that it was in the merit of circumcision that Yishmael merited having the Land of Israel under his hand until the coming of the redeemer – therefore Scripture introduces Avraham's cutting the covenant with Avimelekh King of the Philistines, because no nation that is identified with lack of circumcision so much as the Philistines, as we find several times in Tanakh – see Judges 14:3 "to take a wife from among the daughters of the uncircumcised Philistines", and so also Judges 15:18, 1 Samuel 14:6 and 31:4, 2 Samuel 1:20, 2 Chronicles 10:4. So we see that the Philistines symbolize the uncircumcisedness in the world, but nonetheless Avraham did not refrain from cutting a covenant with their king, because he was an *ish yashar* = "man of integrity", which shows that circumcision is not the main thing . . .

Note however that the covenant mentions nothing whatsoever about Avraham's relationship with the Philistine people. It seems to be a personal alliance with the rulers of an immoral society. The truth is that even Rashbam criticizes the treaty only because it reflects a lack of faith, not because it reflects an accommodation with evil.

How can we square all this with Avraham's inspiring refusal in 14:23 to accept anything from the King of Sodom "so that you will not (be able to) say: I made Avraham wealthy"? I see at least three fundamental approaches:

- 1) Sodom was much worse than Gerar, and its king was no different than any of his subjects. In this regard, it is worth reflecting on the king's non-appearance in the subsequent story of Lot and the angels. It is also worth reflecting on the reality that much of Avraham's wealth came from the King of Mitzrayim's gifts after his own mistreatment of Sarah.
- 2) Unlike Avimelekh, the King of Sodom did not ask for a covenant of mutual interest, but rather sought to bribe Avraham.
- 3) Avraham regretted his decision about Sodom, and deliberately acted differently with regard to Avimelekh and Gerar.

The third approach seems most attractive to me, as follows: After the destruction of Sodom, Avraham realized that non-engagement had been a disaster. Perhaps he should have taken both the people and the money, and tried to build a better society! Not having that option in Gerar, he decided that maintaining some form of *realpolitik* influence was worth the cost of being tarnished by association.

But the Torah never tells us how this calculation worked out. Maybe Avraham's influence kept Gerar from becoming Sodom. Or maybe engagement is worthwhile, and nation-building possible, only when you have the capacity to completely redo an evil but defeated society, and here Avraham became an unintentional accessory to evil.

In both foreign policy and individual relationships, there is no sure way to maximize the good when dealing with evil, and the Torah does not pretend otherwise. Effective policy may depend on many characteristics of those involved other than their goodness or evil, and on overall context.

Recognizing this complexity does not mean that there is no space for impassioned advocacy, as for example [this op-ed by Rabbi Avidan Freedman](#) against Israeli arms sales to human rights abusers.

I don't know which/whether today's covenantal partners are parallel to Sodom, Gerar, or Avraham's genuine friends Aner, Eshkol, and Mamrei, or something else entirely. But I'm grateful to be challenged to think about it.

On the Halakhic Status of Wars of Self-Defense

October 12, 2023

Rav Yosef Dov Soloveitchik held that there is never a mitzvah to fight a war, only to achieve desired ends using means up to and including war as necessary. Rav Herschel Schachter argues for the near-corollary that there is never a mitzvah to fight a losing war. In this essay, I develop Chazon Ish's somewhat related position that standard halakhic exemptions from military service are suspended when there is risk of losing a war. This position may have surprising implications.

Devarim 20:5-7 exempts bridegrooms and several others from military duty for a year. Mishnah Sotah 4:8 clarifies that these exemptions are not absolute. The *tanna kamma* (anonymous first opinion) states that they apply only in a *milchemet reshut* (authorized but optional war), while in a *milchemet mitzvah*, "even the bridegroom must depart his bedchamber and the bride her canopy". Rabbi Yehudah says that the exemptions apply only in a *milchemet-mitzvah*, but that in a *milchemet chovah* (obligatory war), "even the bridegroom etc."

Rabbi Yehudah's position is introduced as *Amar Rabbi Yehudah*, a structure that generally indicates a comment rather than a disagreement. The Yerushalmi accordingly opens by quoting Rabbi Yochanan as saying that Rabbi Yehudah agrees with the *tanna kamma* and changes only the language.

However, Rav Chisda understands Rabbi Yehudah as disagreeing with the *tanna kamma*. According to Rav Chisda, the *tanna kamma* applies the exemptions only in *milchamot mitzvah*, defined as "the war of David", and not to *milchamot chovah*, defined as the "the war of Yehoshua". By contrast, Rabbi Yehudah defines *milchamot mitzvah* as wars where they attack us, and *milchamot reshut* as wars where we attack them.

(A fundamental problem with our text of the Yerushalmi's presentation of Rav Chisda is that his terms for war are not used consistently with the Mishnah.)

The Bavli also records two Amoraic interpretations of the Mishnah. Each is subtly different from those in the Yerushalmi, or at least understood in a subtly different way.

The first position in the Bavli, also attributed to Rav Yochanan, contends that the *tanna kamma* and Rabbi Yehudah have only two categories of wars, and that the *tanna kamma* and Rabbi Yehuda draw the line between those categories in the same place. However, they use different names for the categories; what the *tanna kamma* calls *reshut*, Rabbi Yehudah calls *mitzvah*, and what the *tanna kamma* calls *mitzvah*, Rabbi Yehudah calls *chovah*. The Bavli does not say whether this semantic dispute has any practical implication. Rabbi Yochanan also provides no explanation the categories beyond their names.

The Bavli's second position is attributed to Rava. He suggests that the *tanna kamma* and Rabbi Yehuda agree that the exemptions apply to cases parallel to "the war of David for expansion", and that they don't apply to the "war of Yehoshua for conquest". Their disagreement is only in the case of a war "to diminish the idolaters so that they won't attack us". The *tanna kamma* calls this *reshut*, and Rabbi Yehuda calls this *mitzvah*. These semantics make a practical halakhic difference (*nafka mina*), because wars termed *mitzvah* or *chovah* exempt participants from other mitzvah duties on the principle that "one who is engaged in a mitzvah is exempt from other mitzvot", whereas wars termed *reshut* do not.

Rashi contends that Rava is (re)interpreting rather than disagreeing with Rav Yochanan. Whether one accepts that position or not, Rashi makes clear that the *nafka mina* regarding “one who is engaged in a mitzvah etc.” applies within Rabbi Yochanan’s explanation as well.

My question is: What compels the Bavli to provide a *nafka mina* other than the one in the mishnah, namely whether the exemptions apply?

Another question: If we grant that everyone agrees which wars the exemptions apply to, and which they don’t apply to, which side does the case of “diminish the idolaters so that they won’t attack us” fall on? Rashi holds that everyone agrees that the exemptions apply in such a case, even according to Rabbi Yehudah who calls that a *milchemet mitzvah* and applies *osek bemitzvah* to it.

Rambam in his Commentary on the Mishnah follows Rava’s explanation and then states that the Halakhah is “not like Rabbi Yehudah”. In other words, a preventive war is considered a *reshut*, meaning that the exemptions apply and *osek bamitzvah* does not.

In Mishneh Torah Laws of Kings 7:4, Rambam writes that the exemptions apply to cases of *reshut* and not to cases of *mitzvah*. In Laws of Kings, 5:1, he offers a taxonomy of wars more detailed than those in the Mishnah and Talmuds:

What is a *milchemet mitzvah*?
This is the war against the Seven Nations,
and the War against Amalek,
and aiding Israel out of the hand of an enemy who attacked them;
afterward (the king) may wage a *milchemet reshut*,
which is a war that he wages with other nations
so as to widen the boundary of Israel
and to increase his greatness and reputation.
ואי זו היא מלחמת מצוה?
זו מלחמת שבעה עממים,
ומלחמת עמלק,
ועזרת ישראל מיד צר שבא עליהם,
ואחר כך נלחם במלחמת הרשות,
והיא המלחמה שנלחם עם שאר העמים
כדי להרחיב גבול ישראל
ולהרבות בגדולתו ושמעו.

Rambam adopts Rav Chisda’s category of ‘reactive defensive war’. According to the Yerushalmi, all sides agree that such a war is a *milchemet chovah*. Rambam does not mention Rav Chisda’s category of preemptive war. The simple meaning, parallel to his Commentary, is that it is *reshut*, meaning that the exemptions apply to such a war, and *osek bamitzvah* does not.

(After the First Lebanon War, much ink was spilled around the question of whether this meant that a preemptive war cannot be launched in the absence of a Sanhedrin. I assume that issue can be finessed in one of the many ways developed in that literature; it matters which, but that is an issue for another day.)

Chazon Ish understands the case of preemptive war to be one in which

The language of Rambam in the Commentary (*ADK: in the old translation but not in R. Kafah's*) implies that (the idolaters) are intermittently killing Jews, but not forming up for war, just that they have no dread of Jews, so that when they encounter an individual Jew or Jews – they kill him, and we go to war to weaken them and to place the dread of Israel upon them.

ובלשון הר"מ בפ"י המשנה משמע
 שהורגים ישראל לפרקים, אלא שאינם עורכים מלחמה,
 אלא שאין אימת ישראל עליהם,
 וכשפוגשים ישראל יחידי או יחידים - הורגים אותו,
 ולוחמים להחלישם ולהטיל אימת ישראל עליהם,

Chazon Ish is puzzled as to how anyone can see this as *reshut* – Jews are dying, how can it not be a mitzvah to fight to save them?! His answer is that such wars are obligatory for ordinary citizens – the dispute was about whether they are obligatory for those to whom the Torah gives draft exemptions.

Chazon Ish Laws of Eiruvim 114(3)

It seems that that which we learn in Mishnah Sotah 4:8 that for a mitzvah-war ‘even a groom leaves his bedchamber’ – is not dealing with a time where one needs their help to achieve military victory, as this is obvious, that because of lifesaving and nationsaving – all are obligated; rather, even in a time when there is need only for a set number – and that was the case in most of their wars, that there was no place for the entire army or warriors but only for a set number – there was permission to take the groom from his bedchamber, because “those who go back” have no privileges in a mitzvah-war; and so also in a *reshut*-war – they are exempt only in times when the victory of Israel does not depend on them, because the necessary number of soldiers exists apart from them, but if they are necessary – they are obligated to come to the aid of their brothers, and in fact that returns the situation to one of *mitzvah*-war; but this is only if Israel has already entered the war, but at the outset – one may not enter a *reshut*-war if it is impossible to win without “those who go back”. But after one enters a *reshut*-war with a set army, if they see the need to add soldiers – they do not take those whom we have been commanded to send back so long as the necessary number exists apart from them; even though they are now attacking us, and had they attacked us initially – this would be considered a mitzvah-war, nonetheless, since they initially entered the war as a *reshut*-war – those who go back have their privilege so long as it is possible to war using others. But if there is need for them for military victory – even the groom exits his bedchamber, even if they initiated the war as a *reshut*-war.

Exemptions apply to preemptive defensive wars so long as an adequate army can be raised without drafting the bridegrooms etc. With regard to a mitzvah war, there is no need to consider such exemptions, even if an adequate army can be raised regardless.

Moreover, Chazon Ish, contends, even if the war goes badly and more soldiers are needed, the exemptions remain in force under the same conditions, meaning that one must not draft the bridegrooms etc. so long as an adequate army can be raised without them. The war does not become a technical *mitzvah*-war, and it seems clear that *osek bamitzvah* doesn't apply, even though participating in the war certainly fulfills a mitzvah. IN ALL WARS, bridegrooms etc. can be drafted when they are necessary for victory.

Chazon Ish thus creates a category of war that fulfills a mitzvah (rescuing Jews) but is not technically a *milchemet mitzvah* because it began as a war of choice, even though the goal was preemptive defense. The existence of this category is what's at stake in the dispute between the *tanna kamma* and Rabbi Yehudah in Mishnah Sotah.

We follow the *tanna kamma* and rule that this category exists. It is worth pondering what halakhah seeks to convey by acknowledging such a category. I suggest that there may be practical differences beyond the inapplicability of *osek bamitzvah* and the applicability of exemptions, and welcome your suggestions as to what those might be.

A NOTE ON THE RHETORIC OF GENOCIDE

OCTOBER 20, 2023 · 3:01 AM

Accusations of genocide serve to legitimate unrestrained violent resistance. No one thinks that a community facing genocide needs to abide by the rules of war if that means they lose. To accuse X of attempting genocide against Y means that Y can do whatever it takes to defeat X, up to and perhaps including counter-genocide.

Therefore, accusations of genocide are extremely dangerous. They are almost by definition incitements to the worst forms of violence. Sometimes that is necessary and salutary. But handle with extreme care.

THOSE WHO ACCUSE ISRAEL OF GENOCIDE AGAINST PALESTINIANS, REAL OR INTENDED, HAVE BLOOD ON THEIR HANDS. The accusation is absurd, trivializing, insulting, and murderous, all at the same time.

I need to put out a word of caution the other way as well.

Rhetoric encouraging genocide is just as dangerous, even or especially if framed as counter-genocide. JEWS MUST NOT APPLY THE CATEGORY OF AMALEK TO REAL PEOPLE. Full stop. Every violation of this principle harms our cause.

This is true even with regard to real people who have genocidal intentions toward us.

This is true even if the category Amalek is hedged about with qualifiers to obscure its genocidal implications.

This is true even if one claims to be engaged purely in textual interpretation.

What Does Halakhah Say about Civilian Casualties in Wartime?
The Positions of Rav Herschel Schachter and Rav Asher Weiss

OCTOBER 27, 2023 · 5:30 AM

Absent a guarantee of miracles, permission to wage war entails permission to risk killing people who have done no harm and intend no harm. Where halakhah permits war, it therefore permits taking such risks.

The morally relevant questions are: What risk of killing innocents may or must one accept, for what military ends? Under what circumstances, if any, does that permission or obligation extend to deliberately killing one or many innocents? How are people classified as guilty or innocent, and are those the only relevant categories?

The halakhic answers to these crucial questions may depend significantly on the sources used to derive the essential underlying permissions and obligations. We must therefore evaluate these sources not just on whether they convincingly establish those permissions and obligation, but on what guidance they give us, or allow us to incorporate, on how to apply them and/or limit them.

Some rabbis have suggested using Maharal's supercommentary Gur Aryeh to Rashi on Bereishit 34:13 as a source to permit killing noncombatants in wartime. Maharal there justifies the massacre of the inhabitants of Shekhem by Shimon and Levi after their eponymous prince kidnapped and raped Dinah. Let's read Maharal carefully.

But this is difficult. Granted that Shekhem sinned, what sin did the whole city commit to deserve being killed?

Rambam answered that Noachides are commanded to establish a legal system, and any transgression should lead to execution, but here they saw this evil deed and did not prosecute it. Therefore they deserved death, for not judging evil deeds.

But in truth these words are astonishing, because how was it possible for them to judge the son of the *nasi* of the land? They were afraid of him, and even though they were commanded to establish a legal system – that's only when they are able to judge, but “the Torah exempts those who act (or fail to act) as the result of forces beyond their control”, so how could Shimon and Levi prosecute them?

It seems that there is no difficulty, because the case of two *ummot* is not the same, such as the Children of Israel and (the) Canaanites, who are two *ummot* . . . and therefore they were permitted to go to war, as is the law regarding one *umma* that comes to war on another *umma*, which the Torah permits.

Even though the Torah says “*when you approach a city to war upon it, you must call out peace to it* – that is only when they have done nothing to Israel,

but when they have done something to Israel, such as here, when they violated (Israel) to do an outrage, even though it was done by only one of them –

since that one is part of the *am*, and since they violated them first – they are permitted to take their vengeance out of them.

The same is true of all war in which they find themselves, such as “*Afflict the Midyanites . . .*”

Even though there were many who did not do (the evil deed) – this makes no difference, since they were part of that *ummah* that did evil to them, they are permitted to make war upon them, and that is how all wars are.

אך קשה, אם שכם חטא כל העיר מה חטאו להרוג!?

ותירץ הרמב"ם (הלכות מלכים פ"ט הי"ד) דבני נח מצווים על הדינין, ועבירה אחת שעובר - נהרג על ידו, וכאן ראו המעשה הרע הזה ולא דנוהו, לכך היו חייבין מיתה שלא היו דנין אותם.

ובאמת דבר תימה הם אלו הדברים, כי איך אפשר להם לדון את בן נשיא הארץ (פסוק ב), כי היו יראים מהם, ואף על גב שנצטוו על הדינין - היינו כשיוכלו לדון, אבל אונס רחמנא פטריה, ואיך אפשר להם לדון אותם?! ונראה דלא קשיא מידי, משום דלא דמי שני אומות, כגון בני ישראל וכנעניים, שהם שני אומות . . . ולפיכך הותר להם ללחום, כדין אומה שבא ללחום על אומה אחרת, שהתירה התורה.

ואף על גב דאמרה התורה (דברים כ"י) "כי תקרב אל עיר להלחם עליה וקראת אליה לשלום" - היינו היכי דלא עשו לישראל דבר, אבל היכי דעשו לישראל דבר, כגון זה שפרצו בהם לעשות להם נבלה, אף על גב דלא עשה רק אחד מהם - כיון דמכלל העם הוא, כיון שפרצו להם תחלה - מותרים ליקח נקמתם מהם. והכי נמי כל המלחמות שהם נמצאים, כגון "צרו את המדיינים וגו'" (במדבר כה:ז).

אף על גב דהוי הרבה שלא עשו - אין זה חילוק, כיון שהיו באותה אומה שעשה רע להם - מותרין לבא עליהם למלחמה, וכן הם כל המלחמות:

Maharal is not deriving laws of war from the actions of Shimon and Levi. Rather, he is using a priori assumptions about the law of war to explain their actions. He takes it as given that war permits any member of one fighting nation to kill any member of their enemy nation. The story puzzles him only because it doesn't seem to be about nations, and therefore he believes by definition is not about war. He resolves this by demonstrating textually from the Shekhemites offer "*We will become one nation*" that the Jews and the Shekhemites were separate nations.

If we take Maharal as legal precedent, what might we derive?

1. Avenging a single wrong done by a single member of one nation to a member of another nation is a legitimate ground for war, even if the perpetrator's fellow citizens did not support the wrong but were too afraid of the perpetrator to prevent or adequately punish it.
2. All members of the enemy nation may be killed, without warning, regardless of their guilt in the wrong or of whether they pose any present or future threat.
3. Nations are defined by ethnicity, not by political unity. Thus the Shekhemites are defined as Canaanites. Shimon and Levi apparently could have killed Canaanites beyond the boundaries of Shekhem had they chosen to do so.

Since the rules of war must apply equally to both sides, it follows that a nonJew who was injured by a Jew may thereafter kill any other Jew, without restriction. So may any other member of that nonJew's nation, however defined. (At some point they may need to acknowledge being at war in order to maintain their belligerent status.)

I find these outcomes morally unacceptable. Rabbi Alex Ozar pointed out in a Facebook comment that Rav Herschel Schachter agrees. He states repeatedly in *B'ikvei Hatzon* Chapter 21 that Maharal applies only when the deaths of the innocent are a military necessity, or necessary for victory. Rabbi Chaim Jachter inserts the same restrictions in his chapter on civilian casualties in [Gray Matters 3](#).

Rav Asher Weiss (Minchat Asher Devarim #32, p.229-233), notes that Gur Aryeh to Bereishis 32:8 describes Yaakov as bothered by the prospect of killing members of Esav's posse under the false impression that they intend to kill him. He calls such killing an accidental (*shogeg*) sin. Rabbi Weiss contends that this contradicts the Gur Aryeh we've been studying; since Yaakov and Esav were clearly at war, Yaakov would be justified in killing any member of Esav's *umma* regardless!

Rav Weiss offers three possible resolutions. The first is that Yaakov was bothered on a level of piety beyond the law. The second is that Esav and Yaakov were not yet considered nations. The third is that Yaakov was worried about killing them under the mistaken impression that they posed a threat to his life. (A possibility not mentioned by Rav Weiss is that Esav hired mercenaries from outside his *umma*.) Rav Weiss concedes that the second approach is a much better fit in Maharal's language than the first or third. However, he recognizes that this approach leaves Maharal imposing no restrictions on the killing of civilians in wartime. As a result, he states in traditionally polite terminology – “were it not for the words of Maharal, it would seem more correct” – that we need to take a different approach. In his alternate approach, each individual life matters profoundly, but there is a special halakhah in wartime that permits killing innocents when there is no other way to attack enemy warriors.

Rav Weiss also notes a second important difficulty with using Maharal as a source. Maharal is explaining the self-justification of Shimon and Levi, but Yaakov rejects their justification and condemns them. The question of whether the halakhah is more in line with Yaakov or rather his sons has been debated for millennia.

Rav Jachter also cites Rav Yitzchak Blau and Rav Neriyah Gutel as questioning the significance of Gur Aryeh as a halakhic course, although he disagrees. I would add that it's not perfectly clear that Gur Aryeh sides with Shimon and Levi against Yaakov – this could be a fifth resolution to the contradiction in Gur Aryeh raised by Rav Weiss. Also, even if Gur Aryeh is a viable source, it is certainly not dispositive, and certainly not if understood as taking a position that violates many great scholars' fundamental sense of Torah ethics.

The upshot is that Rav Weiss, Rav Jachter, and Rav Schachter all reject the surface reading of Maharal that war licenses the killing of enemy innocents. Rav Schachter assumes that Maharal did not mean that position; Rav Weiss is less certain, but would not follow it either way. The problem is that they provide no compelling Torah source for the restrictions they assume, and no ground other than moral intuition for working them out in practice.

SAFEK NEFASHOT IN THE TRENCHES

NOVEMBER 10, 2023 · 2:50 PM

Dear Rabbi Klapper,

If I understood your online shiurim correctly, you argued that Halakhah isn't yet in a place to articulate clear boundaries on civilian casualties. But where does that leave us now? Should we say that almost everything in war is Mutar, until someone demonstrates that it's Asur (and it's not entirely clear to me what it would take to reach that point, given how long it sometimes takes for new ideas to become Halakhah instead of ethics or policy)? Or is it the reverse: are we constrained from doing anything until we can demonstrate its propriety?

Y

Dear Y,

Your question goes to the heart of the enterprise of teaching and learning Torah as I teach and learn it. What follows is an incomplete, unpolished, thinking-out-loud cheshbon-hanefesh-in-process inspired by your question, which deserves an answer even if I don't yet have one in the shape I'd like it to be in.

Jews are bound by halakhah, full stop. But halakhah is not the entirety of meritorious Jewish action. For example, some meritorious actions are *lifnim mishurat hadin* = "further in than the line of the law". Therefore, "Halakhah is a floor not a ceiling".

One can argue that the non-comprehensiveness of halakhah reflects human failure. Thus *lifnim mishurat hadin* may be binding on people of sufficient spiritual stature. Perhaps if we all achieved that level, halakhah would be a ceiling.

Similarly: Aggadah and other forms of nonlegal Torah exist. Chumash contains both narrative and law. However, we might aspire to translate all other forms of Torah into law. In Soloveitchik terms, we could look for the objectifiable normative component of every religious experience. We could accept the premise of the opening question of Rashi on Chumash that Torah ought to contain nothing but law.

The Rav himself acknowledged a critical limit to this aspiration. Law is an abstraction, meaning that it relates to the common element of disparate experiences. Some sorts of obligations may be governed by chaos theory, meaning that they are infinitely sensitive to details, especially to the individuality of human beings in relationship. Law is definitionally irrelevant to those sorts of obligations.

Moreover, the efficacy of legal reasoning fades toward zero long before we reach infinite complexity. When the law depends on a mere ten thousand variables, one already needs a holistic sensibility to get anywhere.

But often the point of making law is *davka* to simplify situations so that ordinary human beings can make decisions well. Creative halakhah can be about establishing floors rather than revealing them. The law will always get some situations wrong. But people following the law will, on average, make fewer and less serious mistakes than people acting without the constraint of law.

War seems a prime example of a space where law plays this role.

There is a middle ground. We can establish a limited set of coherent "halakhic bundles", and let people choose individually or microcommunally which to be bound by. But an army cannot function that way

with regard to civilian casualties. The rules must be uniform and enforceable, and rulebreakers must be held accountable.

Some people think that this is true for all *am Yisrael*, in all areas of life. I disagree.

Properly understood, the Rav's "halakhic objectification of the norm" is actually about preserving autonomy and individuality. His "objective halakhah" means that you must do what you think everyone else must do; it does not bind you to do what everyone else rules is halakhah, nor is it about binding others to do what you rule is halakhah.

Some time ago, Akiva Weisinger sent me a selection from Rav Amiel that seems to express this disagreement forcefully and well; it was *davka* about halakhah's resistance to allowing a draft to create an army situation for the entire community. I hope to explore that aspect of Rav Amiel's thought further.

But many of my usual instincts about preserving autonomy within halakhah clearly don't apply to combat halakhah. So why am I hesitant, and in what ways?

Here's a more directly challenging way of framing the question. If an individual student asked for psak on an advance-regulation-basis or in a live-fire case, would I refuse to answer and tell them to make the decision on their own? Would I help them think it through within parameters to reach their own halakhic conclusion? What if it wasn't a student but rather a military unit or institution? Would I refer the sheilah to someone else?

If I would give psak in such circumstances, or refer the issue to someone else for psak, could that possibly be consistent with the contention that "Halakhah isn't yet in a place to articulate clear boundaries on civilian casualties"?

One important role for a posek is making decisions for people in circumstances where it's unreasonable or unfair to expect them to decide well. Poskim can help either in real time or by providing a clear checklist decision procedure in advance. The obvious cost either way is depriving the questioner of agency and insulating them from accountability.

However, the IDF has a code of conduct, as does the US military. I think that obedience to orders is the strong halakhic default for someone serving in the army of a political order that one sees as fundamentally legitimate. I see the US and Israel that way.

As an analogy: Early in COVID, hospitals established regulations for the allocation of ventilators. Some of those regulations did not conform to halakhah as I would have paskened it *ab initio*, to the point that I might have ruled some actions mandated by those regulations to be homicide halakhically. Doctors following such a ruling would have been unable to work in the hospitals at a time of great need. Should I have ruled that way? Or was it better to say that while halakhah would be capable of articulating detailed triage regulations if given control of the space, it had not yet done so, and so doctors were entitled to follow regulations that fit within the extremely broad range of possibilities currently viable in halakhah? And yet at the same time, make clear that there were aspects of the current regulations that I would fight hard to change because they violated my understanding of what halakhah should be once decided?

I chose the latter. On that analogy, there are policy positions that I would advocate for because they are what halakhah should say, but paskening for individuals would be relevant only where the existing secular regulations violate a soldier's conscience, or in cases where they provide no clear boundaries.

And to a significant extent, I would have to pasken those cases on a sort of *dina demalkhuta dina* basis, meaning that to avoid incoherence, I could not pasken on a basis that would compel violating other orders that accord with secular regulations and are not unconscionable.

So that is one reason that halakhah is not ready to issue detailed guidelines – they would put halakhically obedient soldiers in an untenable situation. If such guidelines already existed, we would figure out what to do, I imagine, hopefully without civil war or severely weakening the IDF, but I don't see it as a mitzvah to incur those risks.

A second reason is related to the question of whether it would be a good idea to restart the Sanhedrin. Granting that there are no current detailed guidelines that have gained widespread assent and therefore authority, if it became politically necessary and possible to issue such guidelines, do I think they would turn out well? Do I have confidence that the benefits of standardization would outweigh the inevitable places where I disagreed? The honest answer is no. I would be terrified that the process would give very significant weight to positions that I see as terrible, either because they undervalue non-Jewish human life, or because they understand the modern State of Israel as part of an irreversible historical process of Redemption and therefore disregard significant practical and moral risks.

So what must frum Jews do in the interim?

What I hoped emerged from the shiur was that the notion that civilian casualties require military justification seems very widespread in halakhah. Certainly a halakhic soldier has no justification for going against or beyond orders to harm civilians. In a recent Q & A session, Rav Yitzchak Sheilat expressed this essentially in the framework you raised of *safek nefashot lekula*. So: any killing that is not permitted by orders is forbidden, and hierarchically, any illegal orders that err on the side of killing civilians must not be obeyed. I understand that there are situations where *chumra* and *kulla* have an inverse relationship with passive and active, but I think the framework will handle most situations well.

What do frum citizens want the state to do in the interim?

What halakhic authority I have extends only to people who care about my positions. For them, I can say in a certain sense what the halakhah is. But I can't say what the halakhah is for the state when there are many plausible answers backed by competent *poskim*, and the state is not asking for my *psak*; I can only say what I think the halakhah should be, and what I hope it will be.

I can and do say that I think some positions are out of bounds. I am particularly willing to say this about positions that are intellectually creative and ethically repugnant, since they are unprecedented and against Torah as I understand it about many issues where I have *paskened* in detail.

For example: The state must not make policy, nor may individual soldiers consider in their military decisions, any positions that assign contemporary enemies the status of Torah categories such as Amalek or Canaan. Or: The state must not make policy, nor may individual soldiers consider in their military decisions, any positions that consider killing for the sake of revenge a *per se* military goal.

Thank you again for the challenge. I look forward to more, and invite readers to join in.

We cannot allow fear of gentile censure to control all our actions. But a decent respect for the opinions of humankind is organic to Torah.

“WHAT WILL THE GENTILES THINK?”

NOVEMBER 24, 2023 · 4:29 AM

Members of disparaged, disadvantaged, discriminated-against minorities tend to compensate by closing ranks. If “No Martians need apply”, then Martians will hire Martians and patronize Martian businesses. If Earthling courts disproportionately convict Martians, then Martians will believe in the innocence of any specific Martian defendant, or express sympathy for Martian criminals. Communal cohesion is mostly a good thing in such circumstances.

Earthlings often react by accusing Martians of “clannishness”, of caring more about the good of their community than the good of the country or world. Inevitably, some Martians internalize this critique and then regurgitate it. They become more universalist than Earthlings, in the hope or belief that Earthlings are genuinely universalist and will treat them as equals. They loudly separate themselves from Martian misdeeds and outdo Earthling condemnations of Martian criminals.

The thing is that Earthlings also value loyalty. Few people ever trust known traitors, even if they abandoned their side to join yours. So universalist Martians draw the barb that they don’t care **even** about their own.

These dynamics produce complex patterns of philo-Martianism and anti-Martianism among Earthlings. Attitudes toward Martians may differ by class, race, profession, geography, ideology, and so forth. Martian community leaders face hard choices as they navigate these social currents.

How ought Jews to handle the same dynamics? Which gentile opinions do we care about, and which must we disregard? In the 17th century, Rabbi Yair Bachrach offered an astonishing prescription.

Responsa Chavot Yair #139.

I was asked by distinguished individuals (*yechidei segulah*) from Community X regarding a Jewish thief who was caught there many years ago, and recently was hanged, and the baron seeks a great sum to give leave for him to be buried in a Jewish grave, whether they are obligated to spend a great sum for this, as some of the citizenry are criticizing them and saying that they are obligated to spend whatever it takes, since after all the breach is within their borders.

This is my answer:

Certainly there is much room to criticize you, but not regarding burial – rather regarding saving this poor man, whom according to what is heard you could have saved, and at minor expense, but you procrastinated about this. Because this martyr/victim was in your midst – it was upon you to act, and to cause others to act via agents.

As for the excuse that some of you make, that he was a known thief who had violated several ancient bans, and (therefore) he endangered the many, and therefore they were permitted to hand him over to gentiles –
it is not a clear thing that his actions endangered the many,
because if caught – he the evildoer would die (alone) for his sin
and even though there is a desecration of the Name in that the gentiles impute his wickedness to the entirety of Jewry because of this –
these are only the opinions of the masses, and not of the wise among them nor of the rulers,
as among and from the gentiles there (such thieves) can be found and seen by the thousands . . .

Chavot Yair castigates the rich men who abandoned the thief out of fear of arousing antisemitism. Only the stupid and unsophisticated, he says, would generalize the thief's behavior to all Jews, because smart, sophisticated gentiles recognize that thieves are no more common among Jews than among gentiles, or perhaps, that gentiles steal at the same rate as Jews when placed in similar economic situations.

Why does it matter whether antisemitism is absurd or intellectually justifiable? Fear of antisemitism is a purely practical matter. Perhaps Chavot Yair thought that populist antisemitism could easily be contained by philosemitic aristocratic leadership.

But I find this hard to swallow. Rabbi Bachrach was born in 1639, and the Chmelnitzky pogroms began in 1648. I'm not a historian, but my guess – feel free to send in corrections – is that his formative years were dominated by news of a lower-class rebellion murdering Jews. It would be intolerably naïve of him to be unaware of the dangers posed by lower-class antisemitism. So there must be another explanation.

Moreover, why is there no obligation to prevent a Desecration of the Name among the gentile masses?!

Rabbi Bachrach next takes on a second possible excuse for leaving the thief unburied. Perhaps the habitual thief could be considered a *mumar l'davar echad*, one like-an-apostate because of their disregard for a single religious law, and therefore the Jewish community had no obligations toward him? He responds that only an apostate who intends their actions to spite G-d is so excluded. Pointedly, he comments that broadening the category would remove many other people from the community for their habitual violations of ritual laws such as those against charging interest to fellow Jews, drinking gentile wine, and shaving one's peyos. The community in question had no business feeling superior to the thief.

All this is about the past failure to ransom the live thief. But, says Rabbi Bachrach,

 this is not so regarding saving him from where he is hung to bring him to a Jewish grave

–

 I don't know whether to go so far as to obligate the congregation of Hashem to spend money on that,

 if not because of the recriminations of the masses, as per the above.

Here Chavot Yair is concerned about the masses, who will take the display of the thief's body as an occasion to spread antisemitic stereotypes.

What if the educated aristocracy were to denigrate all Jews because of the thief?

Writing in Beit Yitzchak 44, Rav Asher Bush contends that Chavot Yair does not apply to the contemporary observant community.

In our day, when most of the Jews in the world are not observant of Torah and mitzvot, when people see someone who presents themselves as observant of Torah and mitzvot caught stealing and the like – this is a desecration of the Name of Heaven, because the gentiles or the Jews who don't know Torah say that this was done with the permission of the rabbis, or that all Torah-observers are con-men and tricksters, especially when we don't distance ourselves from them . . .

Rav Bush discusses Chavot Yair's cases exclusively in terms of Desecration of the Name. I understand him to be saying that in America, the concern that negative Jewish stereotypes will lead to pogroms is faint. But such stereotypes are inherently a bad thing. If so, why wasn't Chavot Yair concerned about the masses? Because we cannot allow fear of gentile censure to control all our actions. Therefore, we respond only to opinions we respect.

This distinction is made explicitly by Rav Yehudah Herzl Henkin z"l in Responsa B'nei Banim 3, Ma'amar 4:

However, Desecration of the Name applies even to actions that are halakhically permitted, even in a time of war . . .

Even though Desecration of the Name is not a well-defined prohibition – would we forbid everything that doesn't find favor in the eyes of the gentiles?! These extremes must not prevent us from banning an action that is abhorrent to most Jews and to most gentiles, such as killing a bound prisoner. See Chavot Yair 139 . . . therefore, any (repugnant) action that is not common among the gentiles, and that their wise men and rulers are united in denigrating, certainly the category Desecration of G-d's Name applies to this for Jews, and killing a bound terrorist is such a case . . .

Rav Henkin does not tell us what to do in a world where education sometimes seems inversely proportional to moral sense. But I take from him that concern for Desecration of the Name is not a matter of mere public relations, but rather of substantive ethics. Killing a bound prisoner nowadays is wrong, even if no one will ever find out. A decent respect for the opinions of humankind is organic to Torah. Communities that answer only to themselves will go morally adrift, and eventually answer to no one, not even the One.

Rabbi Samson Raphael Hirsch saw Yaakov as the exemplar of exile. But Rav Hirsch's etymology can be given a Zionist twist. Yaakov fell asleep Neturei Karta and awoke dati leumi.

War, Ethics, and Esav

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An oft-cited but unsourced basic tenet of military strategy is “Never divide your forces in the face of a superior enemy”. Such principles are often honored in the breach, meaning that the discouraged tactic is used to gain the element of surprise against a by-the-book opponent.

But Yaakov does not seek any strategic advantage by dividing his forces in the face of Esav. His instructions are explicit; the camp that isn't initially engaged must flee rather than outflank Esav. The hope seems to be that Esav and his troops will be sated by the destruction of the first camp, or weighed down by spoil.⁵³

But that's a very short-term solution. Where will Yaakov's second camp regroup, and to what purpose? How will they avoid being tracked, pursued, and destroyed as well? If the second camp is supposed to retreat in haste, why weigh them down with cattle and camels?!⁵⁴

The Torah (Genesis 32:7-8) seems to describe Yaakov as reacting emotionally rather than acting strategically.

The messengers returned to Yaakov, saying:

We have reached to your brother, to Esav,

and indeed, he is on the way to greet you, and four hundred men with him.

ויירא יעקב מאד – Yaakov became very afraid

ויצר לו – he experienced affliction

He divided the people who were with him, and the flocks and the cattle, and the camels, into two camps.

Rashi famously cites Midrash Rabbah to explain Yaakov's emotions:

ויירא - שמא יהרג;

ויצר לו - אם יהרוג הוא את אחרים

He became very afraid – lest he be killed;

He experienced affliction – if he would kill others.

Rabbi Samson Raphael Hirsch argues that *vayetzer lo* here is etymologically related to *narrowness*. He connects this to the experience of exile and powerlessness. In this reading, Yaakov's strategy of dividing “so that at least the rest would be a surviving remnant” foreshadows G-d's strategy of scattering us over the globe “so that when our blood is shed in the West, our brothers in the East are secure”. But are they?

Rav Hirsch's etymology can instead be given a Zionist twist ala Golda Meir. The *narrowness* that Yaakov experienced was a sense that Esav was forcing him into a lose-lose choice between being killed and becoming a killer.

⁵³ However, Bekhor Shor suggests that the second camp will attack after Esav is exhausted from subduing the first.

⁵⁴ However Malbim and others argue however that the division was between cattle and people, and that the “camp of cattle” met Esav first, as intended: *Who gave you all that camp that I encountered?*

Yaakov overcomes this feeling of narrowness. He meets Esav with his camp unified and entire. Maybe he scrapped the two-camp plan overnight; maybe it was never more than a thought-experiment. If so, the presumed catalyst for the change must be the wrestling match, and that match must somehow counter the emotions that drove him to consider the division.

One possibility is that Yaakov's lack of agency extended to believing that he could not defeat Esav. His only choices were to fight and lose, meaning to kill before being killed, or to surrender. He divided his camp so that fighting would not be a choice. Believing that he had no genuine choices, he tried only to deprive Esav of the moral illusion that he would be massacring in self-defense. But Yaakov learns from the wrestling match that resistance is not futile.

Another possibility is that Yaakov thought the moral price of defeating Esav would be too great. Aviva Zornberg beautifully contends that Yaakov was haunted by the success of his imposture – maybe the difference between him and Esav is only skin-deep. The simple pshat, as I learned from Nechama Leibowitz, is that the angel is both an avatar of Esav and a part of Yaakov, and the wrestling match is a process of reintegrating some aspect of personality/soul that he shares with Esav. Yaakov-in-the-morning knows that he can fight without losing himself. He goes to sleep Neturei Karta and wakes up dati leumi.

That story is also too simple. If Yaakov's moral life is to be a model for us, we cannot simply say "then a miracle occurred" to solve his soul-challenging dilemma. It would be unrealistic, absurd, and soul-deadening to say that Yaakov suddenly realized that killing in a righteous cause carries no spiritual cost.

Chazal sometimes dramatize moral complexity as halakhic disputation. Here, many acharonim challenge Rashi: Doesn't the Torah say that "One who comes to kill you, arise early and kill them"?! Why should Yaakov have been bothered even initially by the prospect of killing Esav or his men?

The 13th Century commentator Rav Chaim Paltiel (see also Moshav Zekeinim, and others) suggests that Yaakov was afraid of killing unnecessarily.

He was afraid lest he be able to save life by (taking) only a limb (of the pursuer),
and yet still kill him

However, the great posek and Rashi supercommentator Rabbi Eliyahu Mizrachi (1455-1525) contended that the obligation to use the minimum necessary force applies only to third parties. People acting to preserve their own lives can use whatever force they have available. Surely Esav intended to kill Yaakov! Mizrachi therefore offers a more nuanced solution:

It makes sense regarding the men who came with Esav –
it was proper for Yaakov to feel afflicted lest he kill some of them,
because maybe they didn't intend to kill Yaakov, rather only the people with him,
which would make them *rodfim*/pursuers of third parties,
who may be killed only when one cannot save the *nirdafim*/pursued by only maiming them,
and (Yaakov) was afraid lest he kill them
at the time of the battle (*milchamah*)
out of his great distraction (*bilbul*)
even though he would be capable of saving through only maiming,
which would make him like an absolute murderer (*k'rotzeach gamur*).

The halakhically radical claim here is that killing in warfare is subject to the same rules as lifesaving in civilian life.

Mizrachi envisions hand-to-hand combat among highly experienced warriors, tending inexorably toward a direct and decisive duel between chieftains or champions. This entirely plausible account of Biblical, Homeric, or Arthurian battlefields seems irrelevant to the individual soldier in modern warfare. For that matter, the soldiers on either side were not constrained from killing each other.

However, I suggest that the key point in Mizrachi is that for Yaakov, Esav's men were considered noncombatants for capital evaluations, even though their whole purpose in being there was to enable Esav to kill Yaakov⁵⁵.

Mizrachi's claim that Yaakov would be *like an absolute murderer* may be overstated regardless. Talmud Sanhedrin 57a (also 74a) records the following *beraita*:

רבי יונתן בן שאול אומר:
רודף שהיה רודף אחר חבירו להורגו,
ויכול להצילו באחד מאבריו,
ולא הציל –
נהרג עליו.

Rabbi Yonatan ben Shaul⁵⁶ says:

A pursuer who was pursuing his fellow to kill him,
and (a third party: Mizrachi) is able to save the pursued,
but he does not save (using the minimum necessary force, rather kills the pursuer) –
(the killer) is killed for (killing) the pursuer.

While the Talmud records no alternative halakhic position, the Talmudic context and the introductory formula "X says" may suggest that the *beraita* is being excerpted.⁵⁷ Therefore, when Rambam Mishneh Torah Laws of Murder writes:

כל היכול להציל באבר מאיבריו
ולא טרח בכך אלא הציל בנפשו של רודף והרגו
הרי זה שופך דמים וחייב מיתה
אבל אין בית דין ממיתין אותו.

Anyone capable of saving (a pursued) by (only) injuring one limb of the pursuer
who did not bother to do so, rather saved by killing the pursuer –

⁵⁵ Rav Ovadyah Yosef z"l suggests (Yabia Omer 4CM:5) that Mizrachi's exemption for self-defense applies only to soldiers in the fog of war; it does not exempt civilians defending themselves against individual assailants, nor military planners. However, all halakhists must account for the category *ba bamachteret*, the furtive trespasser with murderous intent, who may be killed preemptively even when capture is possible. My preferred account of *ba bamachteret* is Abravanel's, who posits that the unacceptable alternative is requiring the targeted to live in perpetual terror of ambush. It's not clear how Abravanel's rationale, and legal outcome, would be affected by the existence of an effective criminal justice system which punishes attempted murder with extended imprisonment. Nor is it clear how Abravanel's rationale would apply to the accomplices of a *ba bamachteret*, especially to conspirators who may hire a better assassin if the first one fails.

⁵⁶ The name Yonatan ben Shaul is astounding and unlikely to be coincidental. Suggestions for its significance here are very welcome. Note that the Talmud's prime example of a warrior who kills a pursuer unnecessarily is Avner ben Ner, general for IshBoshet ben Shaul, who kills Asahel brother of Yoav in the civil war following King Shaul's death.

⁵⁷ Compare the report on Eiruvin 96a of the position that "Michal bat Kushi wore tefillin, and the Sages did not object". The conflicting position is found in the Talmud Yerushalmi (which makes it clear that Kushi=Shaul; this I think is coincidence), and literarily, it seems likely that the Bavli is excerpting a text that contained both positions.

behold this one is a bloodshedder and deserves death
but the beit din does not execute them.

it is unclear whether Rambam is ruling for or against Rabbi Yonatan ben Shaul.⁵⁸

The formal halakhic conversation about the details of this issue could obviously extend indefinitely. My suggestion is that having this conversation is precisely how we follow in Yaakov's footsteps and succeed in maintaining our moral identity while at war. We overcome the "narrowness" of a forced confrontation by recognizing that we still have moral agency, and our choices matter.

⁵⁸ Rambam Laws of Kings 9:4 rules that Noachides may be executed for killing a pursuer unnecessarily, but a Jew may not be. Raavad objects from the case of Avner – most commentaries understand Raavad to be suggesting that Jews can be executed for this crime. My preferred explanation is that Rambam accepts Rabbi Yonatan ben Shaul's ruling but sees it as technically impossible to achieve the standard of proof necessary for execution.

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Civilian Casualties in the Light of *Halakhah* and Ethics: Revisiting Rav Shaul Yisraeli's Analysis

Aryeh Klapper

General Introduction

On the night of October 12, 1953, terrorists infiltrated from Jordan and threw a hand grenade into a private house in Israel, killing a mother, her three-year-old daughter, and her infant son. Her thirteen-year-old son was severely injured. Three nights later, a retaliation raid into the Jordanian village of Qibiyeh blew up more than forty houses, and in the process killed approximately sixty residents, including women and children.

In 1954, Rav Shaul Yisraeli published a magisterial article, “The Raid on Qibiyeh by the Light of *Halakhah*” (Hebrew),⁵⁹ examining whether the raid was halakhically justifiable. The article has evergreen significance for a wide variety of halakhic and metahalakhic topics. As with many groundbreaking works that “uproot mountains and grind them against each other,” its practical implications may be tempered or rejected without diminishing the honor due its author or the magnitude of his achievement.

R. Yisraeli prefaced the article with a narrative about the raid. This narrative is an essential context for evaluating his arguments, regardless of its historical accuracy.

He believed that the terrorists unquestionably came from Qibiyeh, as had many previous attackers, and that they were supported and encouraged in their terrorist activities by “the majority that might as well be the entirety” of Qibiyeh’s residents. He conceded that the raid killed noncombatant men, women, and children. He assumed that the raiders knew that women and children were present and vulnerable, but does not say whether they were targeted.

My primary concern here is to understand and evaluate the article’s halakhic position about civilian casualties in wartime. But a metahalakhic introduction is warranted.

***Halakhah* and Ethics**

Halakhah and Jewish ethics are not the same discipline practically or intellectually. *Halakhah* may leave practical options open that ethics foreclose, or demand behavior that ethics proscribe, and vice versa. *Halakhah* may utilize formal reasoning that is meaningless in ethical terms, and ethics may assume principles never formulated in halakhic terms.

Competent Jewish ethicists nonetheless derive much of their data from *halakhah*, and competent *poskim* nonetheless account for ethics in their halakhic process. These accountings may not be explicit. A halakhic responsum may appear to move smoothly and inexorably, via formal reasoning, to its edifying conclusion. Yet, latent flaws in the formal arguments might have been exposed had they led to ethically disturbing outcomes. Conversely, legal principles that individually seem incompatible with ethical principles may combine to generate ethically satisfying outcomes.

⁵⁹ R. Shaul Yisraeli, “The Raid on Qibiyeh by the Light of *Halakhah*,” *Hatorah ve-HaMedinah*, vols. 5-6 (5713-5714): 70.

A standard principle of modern ethics⁶⁰ is “universalizability,” meaning that rules for action must bind every rational actor in the same way. A related principle is ‘reversibility,’ meaning that the rules for Side X toward Side Y must be identical to the rules of Side Y toward Side X. Thus, the rules of military ethics must be the same for all parties to a conflict, and they apply regardless of soldiers’ race, intelligence, gender, etc.

However, Dr. Noam Zohar argues convincingly in *Alternatives in Jewish Bioethics*⁶¹ that universalizability cannot be an absolute requirement without dramatically limiting the scope of ethics. Questions such as “Should I violate Shabbat to help an elderly person carry a package?” have no meaning unless the actor considers themselves Jewish. Therefore, ethics that don’t take subjective identifications and motivations into account will be of limited relevance and use to real people.

I suggest that Dr. Zohar’s argument can be extended to methods as well as cases. To demand that a Jew abandon halakhic reasoning in any area of practical decision making is to totalitarianize ethics, just as it would to assume that a Muslim may not consider hurting a host’s feelings in order to avoid eating pork.

The profound challenge is to incorporate the particularistic without making ethics meaningless. One possible approach is to evaluate the outcomes of alternate systems within an ethical framework to see whether they are defensible, as opposed to whether they would be the most likely result of ethical reasoning.

R. Yisraeli’s halakhic analysis in “The Raid on Qibiyeh” does not pay even lip service to universalizability and reversibility. He assumes that *halakhah* obligates, treats, and values Jews and non-Jews differently. Any ethically meaningful evaluation of his article therefore must focus on its conclusions rather than on its arguments. Which asymmetrical outcomes does he accept, which does he reject, and why?

Civilian Law

R. Yisraeli first examines a set of potential justifications based on civilian law, including:

1. holding the village capitally responsible under Noahide law for not bringing the terrorists to justice
2. regarding the terrorists as agents of the village citizenry, and therefore holding the citizenry guilty of murder, even if the terrorists would have killed just as many without support from the village citizenry
3. regarding everyone in the village as *rodefim* (enablers of pursuers-with-intent-to-kill), and therefore liable to be killed if necessary to stop the pursuers.

R. Yisraeli rejects #1 on the grounds that the terrorists would likely have punished or even killed any villager daring to oppose them, and that non-Jews are not required to sacrifice their lives (Rambam), or perhaps even endure serious deprivation (his understanding of Ramban), rather than transgress. Furthermore, Tosafot require a formal court verdict for non-Jews to be capitally punished.

He rejects #2 on the grounds of the general halakhic principle that “there is no agency for Gentiles,” meaning that *halakhah* does not recognize non-Jews either as agents or as having agents.

⁶⁰ Rabbi Francis Nataf suggests that I am overweighting the influence of Kantian ethics on contemporary ethics, and he may well be correct. If so, I will say in my own voice that universalizability and reversibility are rationally compelling starting points, but not absolute conclusions. Rabbi David Fried concurs with R. Nataf’s critique and adds, in his own voice, that law needs to be universalizable, but ethics need not be.

⁶¹ Noam J. Zohar, *Alternatives in Jewish Bioethics*, (Albany: State University of New York Press, 1997), 1-14.

He rejects #3 on the grounds that the raid killed children, whereas only willing, conscious, and responsible humans are liable to execution as accessories-to-pursuers. However, he finds #3 sufficient to justify the collateral deaths and even the targeting of adult noncombatants. In other words, he believes that one may kill a deliberate *rodeif* (enabler) if killing the enabler will save the *rodeif's* intended victims.

A possible explanation for R. Yisraeli beginning with non-war arguments is that the civilian law section of the essay may establish principles that are crucial to his later analysis of the laws of war. Here are two examples:

1) In his discussion of agency, R. Yisraeli raises the possibility that assassination-by-agent is prohibited as an exception to the general rule that non-Jews are excluded from halakhic agency. This exception is midrashically derived from Genesis 9:5.

However, while Rambam includes the prohibition against hiring assassins in his outline of the prohibition of bloodshedding (*Laws of Murder and Preserving Life* 2:2), he omits it in his outline of the Noahide prohibition of bloodshedding (*Laws of Kings* 9:4).

The prohibition against suicide is also derived from Genesis 9:5. This prohibition, as well, is included in *Laws of Murder* and omitted in *Laws of Kings*. R. Yisraeli concludes that Rambam holds that the prohibitions against suicide and hiring assassins do not bind non-Jews⁶².

He then takes this conclusion two steps farther. First, he argues that if suicide is not prohibited to non-Jews, they may license others to kill them. Killing a non-Jew who has consented to be killed is therefore not a violation of bloodshedding.

Second, he contends that such consent can be given in advance, conditionally, and reciprocally. Thus X and Y may legally contract to duel to the death, and the surviving party will not be liable so long as they obeyed all agreed-upon rules. This analysis applies to soldiers as well.

2) In his discussion of *rodeif*, R. Yisraeli notes an apparent contradiction in Rambam's *Mishneh Torah*. *Hilkhot Yesodei Ha-Torah* 5:4 states that although a Jew is obligated to die rather than violate *avodah zarah* (idolatry), *gilui arayot* (forbidden sexual relations), or *shefikhut damim* (murder), a Jew who violates those prohibitions under threat of death is exempt from punishment. However, 5:6 states that a Jew who heals themselves from a fatal condition by violating one of those prohibitions is given "the punishment appropriate to their sin." Why do these cases have different outcomes?

R. Yisraeli explains that in 5:4 the violation is considered coerced ("the action is not done at all with his intent"), whereas in 5:6 it is considered a willing choice to commit the sin, even though the motivation is to save one's own or someone else's life. Therefore, in 5:4, the only culpable violation is failure to fulfill the command to sanctify God's Name, which is not a capital crime. In 5:6, however, a capital prohibition has been deliberately flouted.

If violations performed to save a life are not considered coerced, why may the deathly ill violate prohibitions other than "the big three" to save their lives? R. Yisraeli answers that the verse "*and live by them*" (Vayikra 18:5), which entails an obligation to save life, overrides many prohibitions.

⁶² As Rav Yisraeli notes, his argument and conclusion about non-Jews and suicide are largely taken from *Minhat Hinukh* 34.

However, he contends, “*and live by them*” is not by itself sufficient to override all prohibitions other than *avodah zarah*, *gilui arayot*, and *shefikhut damim*. He derives from a number of Rishonim that lifesaving does not justify imposing costs on third parties, and therefore does not justify violating prohibitions such as theft. It follows that “*and live by them*” cannot permit killing someone else to save one’s own or another’s life. Therefore, “*and live by them*” is not sufficient to permit killing a *rodeif*.

Why then is killing a *rodeif* permitted? R. Yisraeli answers that a deliberate *rodeif* forfeits their life, so death is not legally an imposed cost.

However, Rambam applies the law of *rodeif* in two cases that cannot be considered “deliberate.” First, in *Laws of Murder and Preserving Life* 1:9, he declares that a fetus may be aborted to save the mother’s life because it is a *rodeif*. Second, in *Laws of Wounders and Damagers* 8:16, he rules that one may throw another person’s luggage overboard to prevent a ship from sinking and causing those on board to be drowned. These cases seem to demonstrate that the status of *rodeif* is independent of intentionality.

R. Yisraeli responds that when X is pursuing Y directly, then one is permitted, and even obligated, to kill X to save Y, even if X has no malicious intent; all the more so if X is inanimate luggage. But if X is indirectly threatening Y, then if X is a person, even if killing X would save Y, X is considered a *rodeif* only if acting deliberately. Thus, one cannot kill an emerged infant to save the mother, even though one could have aborted it as a fetus moments earlier.

Therefore, even in the context of war, the law of *rodeif* would not permit targeting infants to save one’s soldiers, even when the infants are being used as human shields by the enemy. It certainly would not allow killing infants in the course of a retaliatory raid intended to deter acts of terrorism.

However, there remains an avenue of halakhic justification for the raid via *rodeif*, one that brings us back to this essay’s introduction. Our discussion of *rodeif* so far has made no distinctions between Jews and non-Jews. R. Yisraeli is open to such distinctions.

We noted above that Rambam permits aborting a fetus to save the life of its mother, but forbids killing an infant under otherwise identical circumstances. One might argue that the difference between the cases is the *homer ha-aveirah* (the severity of the sin), and define that as follows: killing an infant is a violation of *retzihah* (the prohibition of murdering a “fellow”), derived from Exodus 14:14, whereas killing a fetus is a violation of *shefikhut damim* (bloodshedding), derived from Genesis 9:6.

The prohibition of killing Gentiles is also derived from Genesis 9:6. It would follow that the rules for killing an infant Gentile as a *rodeif* are the same as those for killing a fetal Jew, meaning that one can kill even an indirect and unintentional infant gentile *rodeif*. That would suffice to justify the killing of infants in Qibiyeh.

One might object on the grounds that for a Jew to kill an unintentional Gentile *rodeif*, whether infant or adult, is a violation of the moral principle “Who says that your blood is redder than his?!” (*Sanhedrin* 74a). But R. Yisraeli does not treat that as a purely rhetorical question. He is in principle willing to say that Jewish blood is redder.

However, he argues that because a *hiyuv hatzalah* (duty to save a life) is not sufficient to impose costs on someone else, the moral *sevara* (logic) of “who says your blood is redder than his” is unnecessary to forbid killing one human being to save another. The *sevara* is necessary only when from the perspective of

halakhah there are no imposed costs. (Conversely, the *sevara* can apply even in cases where all prohibitions against killing are overridden.)

R. Yisraeli therefore does not justify the Qibiyeh raid using this approach. Instead, he argues that the principle of not imposing costs on a third party to save a life is derived from the verse “and your brother shall live with you” (Vayikra 36:36). Rabbi Akiva derives from that verse that “your life comes first” (*Bava Metzia* 62a), and R. Yisraeli understands this to mean that the obligation to save a life does not create an obligation to incur costs greater than those obligatory to fulfill any other positive commandment. R. Yisraeli then argues that this verse creates a universal principle, not just one among Jews, and that therefore one may not take a Gentile life to save a Jewish life.

I don’t know what drove R. Yisraeli to understand R. Akiva’s statement as universal, while, at the same time, limiting “whose blood is redder” to intra-Jewish comparisons. He does not provide any evidence for either position.

Bottom line: R. Yisraeli does not find a civilian-law justification for the raid. He rules that the *mitzvah* of saving a Jewish life cannot justify taking the life of a non-Jew who is not classified as a willing and responsible pursuer-enabler. This certainly excludes taking the lives of infants. However, he does think that the enabling-a-pursuer argument is sufficient to justify the killing of noncombatants who willingly support the pursuer and whose killing would save the pursued.

Finally, R. Yisraeli turns to the *halakhah* of war.

Milhemet Reshut

Can an act of war be legitimate if it foreseeably leads to the deaths of noncombatant adults, innocent adults, and/or infants? And if so, can it be legitimate, still, if any of these were targeted?

R. Yisraeli approaches this issue from a conventional Maimonidean platform. According to *Laws of Kings and their Wars* 5:1, channeling the Mishnah (*Sotah* 9:7), *halakhah* recognizes two categories of legitimate war, *mitzvah* (obligatory) and *reshut* (permissible but not obligatory).

The prima facie problem with classifying any contemporary Israeli act as *milhemet reshut* is that a king must obtain the consent of the Sanhedrin in order to launch a *milhemet reshut*, and there is no Sanhedrin nowadays. R. Yisraeli does not see that argument as dispositive. His primary ground is that the Sanhedrin’s permission is necessary for a coercive draft, as in a monarchy, but that a democratically elected government may go to war without such permission because the soldiers are considered to be volunteers.

However, R. Yisraeli notes that the entire concept of *milhemet reshut* seems morally impossible: Why should it be permitted to kill people to gain political ends, especially if *halakhah* forbids imposing costs on others even to save a life? He answers that going to war constitutes a waiver of one’s right to life, conditional on the other side fighting in accordance with the rules accepted by both sides.⁶³

There is much room to discuss how one determines consent, who has consented, and which rules were consented to. One might argue that if the permission to kill in war depends upon consent, then since it is

⁶³ R. David Fried asks: “If we initiated the conflict, as with most cases of *milhemet reshut*, how can the other side be said to have consented?” I’m not certain how R. Yisraeli would answer. Possibly he thinks soldiers consent to the rules even though they’re forced to play the game. More likely, a general consent to the rules of war is expressed by the state on behalf of all of its citizens, which applies even to wars of defense against aggression. However, this rationale might not apply to wars that *halakhah* prohibits.

impossible for infants to give such consent, infants cannot be targeted. Since R. Yisraeli does not make this argument, he probably thinks that *national* consent to war binds even infants.

Nonetheless, R. Yisraeli is clear that a *milhemet reshut* cannot justify killing except within the generally agreed rules of war. It seems to me that he holds this way even with regard to enemies who themselves do not obey the rules of war, so long as they acknowledge their disobedience as transgressive. Therefore, R. Yisraeli concludes that the Qibiyeh raid can be justified as an act of *milhemet reshut* only if it conformed to international norms of war. Rather than adjudicate that issue, he turns back to *milhemet mitzvah*.

Milhemet Mitzvah

Rambam includes wars with the purpose of *ezrat Yisrael mi-yad tzar* (aiding Israel from the hands of an attacker) in the *mitzvah* category. Does *ezrat Yisrael mi-yad tzar* include preemptive wars? Rambam, in his Commentary on the Mishnah, classifies at least some preemptive attacks as *reshut* rather than *mitzvah*.

The Mishnah (*Sotah* 9:7) records a dispute between an anonymous position (which the Talmud identifies as “the Sages”) and Rabbi Yehudah regarding the Torah’s exemptions from the battle line. The Sages say that the exemptions apply in a *milhemet reshut* but not in a *milhemet mitzvah*; R. Yehudah says that they apply in a *milhemet mitzvah*, (laudable, but not obligatory,⁶⁴ war) but not in a *milhemet hovah* (obligatory war). In *Sotah* 45b, Rabbi Yohanan contends that this dispute is purely semantic. Rava, however, states that there is a practical difference – whether the concept of *oseik be-mitzvah patur min ha-mitzvah* (one who is engaged in performing a *mitzvah* is exempt from other *mitzvot*) applies. However, he also narrows the dispute to one case: a war intended “to diminish the idolaters, lest they attack us.”

R. Yisraeli notes that there are many other practical halakhic differences between *milhemet reshut* and *milhemet mitzvah*. For example, as noted above, a king requires the consent of the Sanhedrin to draft for a *milhemet reshut*. Why, then, does Rava suggest that *oseik be-mitzvah* is the only practical difference between calling a war “to diminish the idolaters, lest they attack us” a *mitzvah* as opposed to a *reshut*?

R. Yisraeli’s answer sends us to Yerushalmi *Sotah*. Yerushalmi *Sotah* also first cites R. Yohanan, saying that the dispute between the Sages and R. Yehudah is purely semantic. Rav Hisda then greatly broadens the dispute. He understands the Sages to be thinking in terms of *classical* categories: “the wars of David (*mitzvah*) and the wars of Joshua (*hovah*),” whereas R. Yehudah is thinking in *practical* categories: “us attacking them (*reshut*) and them attacking us (*mitzvah*).” (Note: R. Hisda seems to reverse the attribution of the terms *reshut* and *hovah* in our *mishnah*; this is addressed by many commentaries, and R. Yisraeli’s explanation can most likely be made compatible with any of them.)

R. Yisraeli asks: Since we have already established that there is no obligation to risk one’s life to save someone else’s, why should a war to save someone else be obligatory? He answers that both of R. Hisda’s categories within R. Yehuda are wars intended to save lives. However, the obligation to save life can make the war a *mitzvah* but not a *hovah*, since one need not risk one’s life to save another. R. Yehudah nonetheless thinks that one engaged in such a war is exempt from other *mitzvot*, since the *mitzvah* of lifesaving, even when engaged in voluntarily, pushes aside other *mitzvot*, while the Sages disagree.

⁶⁴ Note that this is different from how *milhemet mitzvah* was translated above. This is consistent with the dual usage of the word *mitzvah* that occurs throughout the Talmud. When contrasted with *reshut*, *mitzvah* should be translated as “obligatory,” while when contrasted with *hovah*, it should be translated as “laudable, but not obligatory.”

Why, then, does it matter which side attacks? Here, R. Yisraeli makes an astounding leap. He asserts that “when they attack us” transforms the war from a war of self-defense, which entails and fulfills the *mitzvah* of lifesaving, into a war of revenge, which is a *mitzvah* in and of itself, and does indeed obligate risking one’s life.

Where does the idea of a “war of revenge” come from? The obvious source is Bamidbar 31:2, where Hashem tells Moshe: “Avenge the vengeance of Benei Yisrael from the Midianites.”⁶⁵ 31:7 reports that Benei Yisrael marched against Midian as commanded by Moshe, and that they killed all of the males. Nonetheless, when the army returns in 31:14, Moshe is angry with them for having left non-virgin girls alive.

What justifies Moshe’s anger, when he had given no specific instructions? R. Yisraeli argues that Benei Yisrael applied the regular rules of *milhemet mitzvah*, whereas they should have known via reason that the rules for a war of vengeance are different and what those differences are.

One might expect R. Yisraeli to jump straight from there to justifying the Qibiyeh raid. But that would not be sufficient, as infant girls were killed. He may also have had moral qualms about justifying the targeting of any children.

Rather, R. Yisraeli makes the following argument:

The war against Midian in its details was exceptional, because those details were related specifically to the Midianesses’ seduction of Jewish men into idolatry at Ba’al Peor. The closest comparison is to the *Ir Ha-Nidahat*, the Law of the Idolatrous City among Jews. However, from the Midian war one can derive the principle that a war of vengeance is a *milhemet mitzvah*.

This suffices to make the Qibiyeh raid a *milhemet mitzvah* act. But it is not sufficient to justify the deaths of children in the raid. So R. Yisraeli goes one step further – but it is vital to note that he goes *only* one step further.

The cases of *Ir Ha-Nidahat* and Midian teach us that, under some circumstances, minors can be punished for the sins of their parents. While this principle is never applied by human courts, Jewish or Noahide, except in the narrow idolatry-related contexts above, these cases teach us that sometimes that is the ruling of the Heavenly Court.

If so, R. Yisraeli argues, the *incidental* death of children as *collateral damage* from ordinary acts of war aimed at military targets is not necessarily an injustice; it may instead represent the judgment of the Heavenly Court. Therefore, in a war of vengeance, one may engage in military activities without specific attention to whether the collateral damage will involve infants and children as well as adults. However, one still may not target children and certainly not infants, even if that targeting serves a military purpose, and certainly not in the name of revenge.

Evaluation

The details of the war against Midian – its *jus in bello* – make it a dangerous precedent for contemporary military ethics, as R. Yisraeli concedes. He nonetheless argues that we can derive a hitherto unrecognized

⁶⁵ All translations are my own.

category of *milhemet mitzvah* from its *jus ad bellum* (grounds for war). I find two arguments against this compelling.

a. In Devarim 2:9, God tells Moshe, “Do not attack Moab.” *Bava Kamma* 38a asks: Why is this instruction necessary? Isn’t the default not going to war? It answers that Moshe thought that he could derive via reason that Moab had behaved at least as badly toward the Jews as Midian had, and therefore deserved to be attacked. But his perspective was too narrow. Moab, as it was, indeed deserved to be attacked and destroyed. But Moab could not be attacked, lest that prevent the birth of extraordinary descendants.

I have argued publicly that this passage disproves R. Yisraeli. How can the war against Midian be used to justify any subsequent war, let alone create a category of obligatory war, if even Moshe Rabbeinu would have misapplied the precedent!?

R. Yisraeli might reply that God accepted Moshe’s logic and merely stepped in to prevent this specific application. Regarding Moab (and Ammon), God had humanly-unknowable reasons for protecting them; the model of Midian applies whenever God doesn’t step in.

I reply that we do not live in an age of prophecy, let alone in the time of Moshe Rabbeinu. How are we to know if God has unknowable reasons in a case facing us?⁶⁶

R. Yisraeli might reply that God would have built any further exceptions into the law.

b. The war against Midian is directly commanded by God in Bamidbar 25:16-18 and again in Bamidbar 31:1-2. Nonetheless, there is halakhic consensus that the war against Midian was a *hora’at sha’ah* (a onetime ruling). There is no halakhic imperative for Jews to fight Midianites nowadays. War against Midian is absent from the various lists of the 613 *mitzvot*.

R. Yisraeli argues, however, that only the application to Midian was a *hora’at sha’ah*. However, war with any nation (perhaps other than Moab, Ammon, and Edom) with regard to whom Israel has a similar *jus ad bellum* is a *mitzvah*, just as the war with Midian was.

However, I’m not aware of a rabbinic text or medieval authority who explicitly describes the war with Midian as a *milhemet mitzvah*.⁶⁷

Moreover, *Sifri* (Matot 157) cites Rabbi Natan as deriving from the war with Midian that besieging Jews must leave the fourth side open, and by halakhic consensus that requirement applies only to a *milhemet*

⁶⁶ R. David Fried asks why this principle doesn’t prevent all halakhic executions. My answer is that *halakhah* permits executions only for offenses specifically commanded by God; one cannot execute as the result of a *kal va-homer* (*Sanhedrin* 73a and others. See *Encyclopedia Talmudit* s.v. “*Ein onshin min ha-din*”). I suggest that God’s reply to Moshe is best understood as an invocation of that principle.

⁶⁷ However, *Amar Yosef* to Rambam (*Laws of Kings* 7:4) describes it as a *milhemet mitzvah* on the basis of the biblical command, and *Shabbat Shel Mi* to *Shabbat* 64a cites Maharit as describing it as a *milhemet hovah*.

reshut. Here, for example, is Ramban, *Forgotten Positive commands*, 5: “This is not a *mitzvah* just for the hour in Midian; rather, it is a *mitzvah* for all future generations in every *milhemet ha-reshut*.”⁶⁸

So the evidence indicates that the war with Midian was a *milhemet reshut*. How can that be, since it was directly and explicitly commanded by God?⁶⁹

My answer begins with R. Yisraeli’s suggestion that there are (at least) three halakhic categories of war. The third, which includes a preemptive attack, fulfills a *mitzvah*, but is classified as a *milhemet reshut*, except for the purposes of *oseik be-mitzvah patur min ha-mitzvah*. As I’ve argued in a previous essay,⁷⁰ Hazon Ish made a similar claim about a war that began with the Jews attacking but in which they are now on the defensive.

I therefore suggest that the war with Midian similarly remained a *milhemet reshut* even though it fulfilled a direct Divine command, and cannot serve as a paradigm for a previously unknown type of *milhemet mitzvah*.⁷¹

R. Yisraeli might respond that one can use the *jus in bello* of as a precedent for a *milhemet reshut* while using its *jus ad bellum* as a paradigm for a *milhemet mitzvah*. But this seems quite complicated, unjustified, and unnecessary.

I find many of R. Yisraeli’s other leaps and readings unpersuasive. Yet, the essay overall is certainly a work of genius. Moreover, it is a work of humanist genius in its commitment – which I don’t see as incidental – to human autonomy, even to the point of permitting suicide, but also to the point of valorizing heroic risk.

At the same time, there are moments in the argument that seem perched on a tottering edifice over a vast abyss. R. Yisraeli’s understanding of “what have you seen that makes your blood redder” allows Jewishness to be a valid answer, which leads easily to devaluing or dehumanizing non-Jews; his category of “war of vengeance” can in principle legitimate genocide. In each case, he finds a way – I think not accidentally or fortuitously, but with benevolence and humanistic aforethought – to prevent the great fall. The argument

⁶⁸ The disagreement that impels Ramban is only about whether to count this as one of the 613 *mitzvot*. However, Rambam (*Laws of Kings* 4:7) is not explicit about the limitation.

⁶⁹ This question is asked by *Minhat Hinukh* (227:1). He notes that Ramban, cited above, clearly classifies it as a *milhemet reshut*, and leaves the question unanswered.

⁷⁰ <https://moderntoraleadership.wordpress.com/2023/10/12/on-the-halakhic-status-of-wars-of-self-defense/>

⁷¹ On 16 Tammuz 5720, six years after publishing “The Raid on Kibiyeh,” Rav Yisraeli, in a shiur at Yeshivat Mercaz HaRav, addressed how the war with Midian can be called a *milhemet reshut* with regard to the law of sieges while at the same time being a *milhemet mitzvah*. He argued that wars which are purely collective obligations may be called *reshut* with regard to individuals. However, that shiur makes no mention of the “war of revenge” theory, and furthermore does not directly mention that theory’s core position that the war with Midian included an individual obligation. It is therefore irrelevant to my objection here.

See R. Shaul Yisraeli, “Establishing the Concept of Milchemet Reshut and Milchemet Mitzvah,” in *Lahai RO'I: A Memorial Volume for the Brilliant Young Avraham Yitzhak Raanan-Kuk z"l* (Hebrew), (Jerusalem: Mercaz HaRav, 5721).

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of “what have you seen” is needed only when no prohibition is involved in killing, and when would that be? Our wars of vengeance are “not at the severity” of the original.

R. Yisraeli’s article makes brilliant, essential, and indelible contributions to the development of military *halakhah* and halakhic military ethics. I applaud the halakhic dexterity which enables him to land on his moral feet time and again. Yet many who follow in his footsteps are likely to stumble.⁷² Therefore, contemporary *poskim* and ethicists must engage with his arguments and conclusions deeply, critically, and cautiously, as we seek to build a compelling and practical Torah framework for waging war.

⁷² I must also note that R. Yisraeli’s moral and halakhic universe cannot be constructed out of this article alone. Rav Yitzchak Roness, writing in *Tzohar* 29, notes that R. Yisraeli’s essay on Entebbe constructs another original type of *milhemet mitzvah*, and in that context declares that *kiddush Hashem* is at the core of the overall category. R. Roness suggests that, according to R. Yisraeli, this should prevent a Jewish state from violating international law, treaty commitments, and broadly accepted moral norms, even in the pursuit of a *milhemet mitzvah*, even during a “war of vengeance,” even if doing so would cost soldiers’ lives. R. Yisraeli’s son in law, Rav Avraham Yisrael Sharir, in *Tzohar* 30, pushed back hard at the last claim, and challenged R. Roness’ understanding of the category of *hillul Hashem*. I hope to treat their dialogue in the near future.