

# CENTER FOR MODERN TORAH LEADERSHIP

Center for Modern Torah Leadership



חירות ואחריות

www.TorahLeadership.org

"Taking Responsibility for Torah"

## IS A MILCHAMAH THE SAME THING AS A WAR?

### IS EVERY LEGITIMATE USE OF FORCE FOR THE SAKE OF A MITZVAH A MILCHEMET MITZVAH?

By Rabbi Aryeh Klapper

The use of American military force against Iran without Congressional authorization has rekindled the debate about what the Constitution means by giving Congress the power to declare war. We can divide the sides roughly into nominalists (people who care what something is called) and essentialists (people who care what something is). Nominalists, who have largely held sway on this issue since the Korean Police Action, believe that the president can use force however he pleases so long as he does not call it war, while essentialists seek to define war in terms of purpose, intensity, duration, etc., and limit the president's prerogative accordingly.

Of course, nominalists must accept that there are *nafka minas*, practical legal differences, that depend on whether something is CALLED a war. But they believe that these outcomes are choices, not inherent to the nature of what is happening. Essentialists may believe that these outcomes are part of what defines a war. Consider, for example, whether one can imagine conducting a war while maintaining full diplomatic relations with the enemy.

The issue of whether a military conflict is a war may also have halakhic ramifications.

Mishnah Sotah 44b records an anonymous position that divides wars conducted by a Jewish polity into "*milchamot reshut*" and "*milchamot mitzvah*". A *milchemet reshut* formally requires authorization from the Sanhedrin<sup>1</sup>. Since we have no Sanhedrin, halakhic justification for any Israeli wars requires ruling either that

- 1) the war in question is a *milchemet mitzvah*, or that
- 2) a democratically elected government can serve the same role as the Sanhedrin. (This approach may mean that retaining Israel's form of government as a democracy is essential for its halakhic survivability), or that
- 3) the military conflict in question is not a war.

Oceans of ink have been spilled to define the difference between *milchamot mitzvah* and *milchamot reshut*, and the Rav among others wrote on which powers of the Sanhedrin can revert to the populace and why, but to my knowledge, very little work has been done on the halakhic definition of war.

One can construct a nominalist position within which halakhah permits any legitimate Jewish government to order any projection of military force for any purpose so long as it does not call the result a war. We would still need to ask what halakhic implications the language of war has, and why halakhah legislates those implications.

Alternatively, one can construct an essentialist position within halakhah.

Some past poskim seriously entertained the position that the State of Israel is halakhically prohibited to engage in *milchamot reshut* until the Sanhedrin is revived. However, the effect of taking that position seriously was not a limit to the State's discretionary use of military force, but rather an expansion of the category of *milchamot mitzvah*, as follows: Preemptive attacks might be classified as *milchamot reshut*. The First Lebanon War could therefore have been classified as a *milchemet reshut*. However, few if any poskim opposed the war on halakhic grounds. They instead defined *milchemet mitzvah* broadly enough to include it.

Here are the key texts. Mishnah Sotah 44b states:

In what context were these words (about the *shotrim* sending various men home from the front lines) said?

In the context of a *milchemet reshut*, but in the context of a *milchemet mitzvah* - everyone goes out, even the groom from his chamber and the bride from her canopy.

Rabbi Yehudah said:

In what context were these words said?

In the context of a *milchemet mitzvah*, but in the context of a *milchemet chovah* - everyone goes out, even the groom from his chamber and the bride from her canopy.

Talmud Sotah 44b comments:

Said Rabbi Yochanan: What the rabbis called *reshut* - this is what Rabbi Yehudah called *mitzvah*; What the rabbis called *mitzvah* - this is what Rabbi Yehudah called *chovah*.

Said Rava: The wars of Yehoshua to conquer - all agree are *chovah*; The wars of the House of David for expansion - all agree are *reshut*; They disagree about diminishing the idolaters so that they won't attack us: One calls that *mitzvah*, and the other calls that *reshut*.

What is the practical difference? For the rule that a person engaged in one mitzvah is exempt from all others.

<sup>1</sup> The role of the Urim veTumim is beyond the scope of this essay.

“Diminishing the idolaters so that they won’t attack us” seems like a pretty clear reference to preemptive attack. Since to my knowledge all subsequent poskim adopt the Rabbis’ “*reshut/mitzvah*” rather than Rabbi Yehudah’s “*mitzvah/choval*”, it follows that they should classify a preemptive war as a *milchemet reshut*.

However, Rambam Laws of Kings 5:1 does not list preemptive war at all, and (without clear Talmudic basis) classifies war “to aid Israel against a foe” as a *milchemet mitzvah*. It is possible to argue, as some poskim did to halakhically justify the First Lebanon War, that Rambam includes preemptive war in the category of defensive war, and classifies all defensive wars as *milchamot mitzvah*.

Alternatively, one might distinguish between attacking first in a situation where war is already inevitable (*milchemet mitzvah*) and attacking in order to prevent a situation in which war will become inevitable (*milchemet reshut*). Other fine distinctions can be offered as well.

However, these distinctions are hard to connect back to the terms *mitzvah* and *reshut*.<sup>2</sup>

In other words, it is obvious that “aiding Israel against a foe” fulfills the mitzvah of *pikuach nefesh*. It seems reasonable that the Talmud does not address such a war because the mitzvah involved does not necessarily entail war, and because the status of a war-to-aid should depend on the status of the initial fighting. Rescuing a Jewish army from a foe in an optional war should be a mitzvah, but not a *milchemet mitzvah*.

Alternatively, the question of when using force for the sake of *pikuach nefesh* becomes a *milchemet mitzvah* may depend not on the nature of the specific war, but rather on the definition of war overall. Many uses of force for the sake of *pikuach nefesh* may only be police actions.

This assumes that “war” has an essentialist definition. What if whether something is a war depends entirely on whether the body authorized to declare it decides to call it that? (That would be whatever current person or body replaces the Sanhedrin in a *milchemet reshut*, or the king for a *milchemet mitzvah*.)

The recognition that the category *milchamah* may be nominal rather than essential may entail a parallel recognition about the categories “*mitzvah*” and “*reshut*”. A *milchemet reshut* may accomplish a glorious *mitzvah*, and a *milchemet mitzvah* may be a terrible mistake practically and morally because of its consequences. This is an excellent example of Netziv’s dictum that there is an obligation to engage in a cost-benefit analysis before performing *mitzvot*.

Furthermore, the recognition that the categories *mitzvah* and *reshut* with regard to war may be nominal rather than essential, at least to a degree, means that the halakhic consequences of those categories may also be choices rather than definitional and inevitable. This raises the possibility that not all the *nafka minas*

play out the same way with regard to all wars, or that (what amounts to the same thing) the definitions of *milchemet reshut* and *milchemet mitzvah* may vary by legal context.

As a possible example: Chazon Ish Hilkhhot Eruvin 114:3 argues that even in a *milchemet reshut*, exemptions apply only if enough soldiers to implement the strategic plan can be found despite the exemptions. However, it is forbidden to enter into a *milchemet reshut* if one knows (or possibly even if one strongly suspects) that honoring exemptions will lead to a manpower shortage. If projections turn out to have been overoptimistic, and the war is being lost, one can draft even grooms and brides, but only after everyone without an exemption has been enlisted.

In other words: According to Chazon Ish, the order of the draft remains mandatory even if the war is not a matter of existential threat, meaning that it is a vital mitzvah to fight it. Any war begun as a *milchemet reshut* maintains that status throughout for the purpose of draft-order. Identical military situations may therefore fall into different categories of war.

The category *milchemet reshut* has long raised ethical qualms for me: Aren’t the consequences of war so terrible that an optional war should be unthinkable? The current war against Iran has helped me understand why fighting a war RIGHT NOW might be optional even though the war once begun would certainly fulfill a mitzvah, and certainly anyone helping in the war effort would be aiding Israel to escape the weapons of a dangerous and deadly-intentioned foe.

However, expanding the range of ethically justifiable war should generate an equal and opposite reaction, namely an increased obligation to deliberate carefully before going to war. I suspect that the Constitution requires Congress to declare war in order to compel us to do the cost-benefit calculation with great seriousness. Evading this responsibility carries a serious moral cost over time if not immediately. The practical objections people raise against requiring Congressional authorization for military action generally seem to run along lines parallel to some of the distinctions made above between *milchamot reshut* and *milchamot mitzvah*. Everyone agrees that the Executive must be able to commit forces on his own to defend American citizens against immediate foreign threats (= *milchamot mitzvah*); but would it be unsafe to insist that a Davidic king consult a Sanhedrin before launching preemptive wars intended to prevent the enemy from assembling the resources needed to successfully attack?

In any given situation, of course, there is a risk that the Sanhedrin would dither and avoid responsibility. But halakhah presumably took that risk into account when it assigned the Sanhedrin the responsibility of declaring *milchamot reshut*, and in my humble opinion, there would be profound moral risk in making that assignment meaningless.

*Shabbat shalom!*

<sup>2</sup> Note that Rambam does not raise the issue of which wars entail being exempt from other mitzvot