

# *War and Peace in the Jewish Tradition*

EDITED BY

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and Joel B. Wolowelsky

Robert S. Hirt, Series Editor



THE MICHAEL SCHARF PUBLICATION TRUST  
OF THE YESHIVA UNIVERSITY PRESS  
NEW YORK

## THE ORTHODOX FORUM

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The Orthodox Forum  
gratefully acknowledges the support  
of the Joseph J. and Bertha K. Green Memorial Fund  
at the Rabbi Isaac Elchanan Theological Seminary  
established by Morris L. Green, of blessed memory.

The Orthodox Forum Series  
is a project of the Rabbi Isaac Elchanan Theological Seminary,  
an affiliate of Yeshiva University

*Published by*  
**KTAV Publishing House, Inc.**  
930 Newark Avenue  
Jersey City, NJ 07306  
Tel. (201) 963-9524  
Fax. (201) 963-0102  
www.ktav.com  
bernie@ktav.com

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This book was typeset by Jerusalem Typesetting, [www.jerusalemtype.com](http://www.jerusalemtype.com)

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Library of Congress Cataloging-in-Publication Data

Orthodox Forum (16<sup>th</sup> : 2004 : New York, NY)

War and peace in the Jewish tradition / edited by Lawrence Schiffman, Joel B. Wolowelsky.

p. cm. – (Orthodox forum series)

ISBN 0-88125-945-4

1. War – Religious aspects – Judaism. 2. War (Jewish law) 3. Just war doctrine.  
4. Peace – Religious aspects – Judaism. 5. Reconciliation – Religious aspects –  
Judaism. I. Schiffman, Lawrence H. II. Wolowelsky, Joel B. III. Title.

BM538.P3O78 2004

296.3'6242 – dc22

2006038084

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Just Wars, Just Battles  
and Just Conduct in  
Jewish Law: Jewish Law  
Is Not a Suicide Pact!\*

*Michael J. Broyde*

*Rabbi Jose the Galilean states: "How meritorious is peace? Even in time of war Jewish law requires that one initiate discussions of peace." <sup>1</sup>*

**I. PREAMBLE**

About ten years ago I wrote an article<sup>2</sup> on the halakhic issues raised by starting wars, fighting wars, and ending wars. Over the past five years, as I have spoken about the topic on various occasions,<sup>3</sup> the article has been updated, modified, and expanded and it forms the basis of some sections of this article.

Over the last five years, I have been privileged to serve as the

*rosh kollel* (academic head) of the Atlanta Torah MiTzion Kollel, where I give a daily *shiur* (lecture) to its members. I have had numerous opportunities to speak with the Atlanta Torah MiTzion members about many different halakhic issues, and *halakhot* related to war is a regular topic of interest and discussion, as these members are in Atlanta having only recently completed five years of combined army service and serious Torah study in the course of their *hesder yeshiva* experience.<sup>4</sup>

Yet year after year, presentations of my article never interested any of these young men very much – they would listen politely (as such is *kavod ha-Torah*), but displayed no real enthusiasm for the theoretical topics put forward. What was of interest to these recent Israeli soldiers in *halakhot* of war? The answer is simple. As soldiers, they felt that they were not given enough real guidance to deal with the practical issues of battlefield ethics – actually fighting a war as a private, sergeant, or captain, with all of the moral ambiguities of the combat encounter. In fact, upon examination, I found that many of these halakhic issues are poorly addressed. The standard works that deal with Jewish law in the army omit these matters and provide no guidance at all as to basic issues related to fighting a war!<sup>5</sup>

The conceptual reason behind this absence of discussion is pointed out by Rabbi Eliezer Yehudah Waldenberg in his responsa,<sup>6</sup> when he addresses the question of governmental policy concerning the obligation of rescuing captives (*pidyon shevuyim*). The basic rule, well known in Jewish law, is that one may not ransom captives for more than they are worth.<sup>7</sup> Rabbi Waldenberg was asked about a government's decision to send troops to rescue other captured soldiers, even when more soldiers might or will be killed during the mission than had been captured in the first place – which would seem to violate the Talmudic rule. Rabbi Waldenberg responds by positing two conceptual points. The first is that war is different from individual ethics and has a different set of rules. The second is that governmental decisions are different from individual decisions and also follow a separate set of rules. By this, Rabbi Waldenberg means that the basic *halakhot* of war allow the killing of human beings in circumstances that are otherwise prohibited. Furthermore, a govern-

ment, by dint of serving the vast national interest of many people, is permitted – in situations of war – to consider diverse factors and reach results predicated on a vast national interest or consensus, even if it risks many lives for seemingly little real short-term gain. Thus, a government could conclude, he states, that it is proper to lose the lives of three soldiers to rescue one. (Of course, the reverse conclusion is also possible, although he does not dwell on that prospect.)

These two startling observations, which I believe to be correct and supported by many other sources in many different contexts related to war,<sup>8</sup> cause one to realize that Jewish law's view of combat conduct and battlefield ethics is, in fact, much simpler than one might think. If a government can choose as a matter of policy to engage in retaliatory military action that risks the lives of its own soldiers and civilians in a time of war, does it not follow that it may do so with enemy soldiers and civilians as well? Likewise, recognition of the responsibility of the government for such difficult wartime decisions would apply to the so-called Hannibal procedure, which refers to instructions in the case where a soldier has been kidnapped and the government realizes that it cannot rescue him. It then sets out to kill the soldier, so as to avoid the long, drawn out demoralizing situation of a soldier in enemy hands, when it concludes that such a policy best serves the nation.<sup>9</sup> While controversial as a matter of policy, it seems to be a valid option from the perspective of Jewish law. In wartime, Halakhah permits even the killing of innocent civilians as a side consequence of war. In this circumstance the government has decided that it must kill the terrorists who engage in the kidnapping of Israeli soldiers at any cost, and that cost might entail the death of the soldiers who are taken prisoner. The soldiers who are hostages are like innocent civilians, and their death by friendly fire is not an act of murder by those who have shot them. This would not be the case outside of the army setting.

Similarly, what might be otherwise considered outrageous pressure in extracting the information needed to save a soldier the government is seeking to rescue might well be permissible according to Jewish law, assuming that it would be effective in extracting the information, that less outrageous pressures would not be as effective,

and assuming it is ordered by the army through a duly authorized military order following the “chain of command,” and did not violate international treaties.

This view – that all conduct in war that is needed to win is permitted by *Halakhah* – was adopted by the late Rabbi Shaul Israeli, judge of Supreme Rabbinical Court in Jerusalem, in a famous essay.<sup>10</sup> Certainly there is a deep consensus that every violation of Jewish law other than *ervah* and idolatry would be permitted in the course of fulfilling valid military orders.<sup>11</sup> Moreover, it should seem quite reasonable to argue that if, for example, someone sent in to kill the enemy general – which we all agree is permitted in wartime – determines as a matter of strategy that it is tactically more effective to seduce the general, violating *ervah*, and steal the war plans than to kill him, that it should be allowed. (This approach, however, is not sufficient to explain the conduct of the heroine Yael in Judges 4:17–19, as she was not a combatant at all [as the text points out]; thus, the Talmudic rabbis resorted to a different rationale of *averah lishmah* to defend her *ma'aseh ervah*.<sup>12</sup>)

Let me take it to the next step. If the government can rescue a soldier only by killing a dozen innocent infants in the enemy camp, may it do that? Are enemy civilians more or less sacred than one's own soldiers, and if they are not less sacred as a matter of technical *Halakhah*, might they be by dint of a presumptive *hora'at sha'ah* (temporary edict/suspension of law) that would permit such? Indeed, the basic thrust of this introductory section of the paper is that war has, by its very nature, an element of *hora'at sha'ah*, in which basic elements of “regular” Jewish law are suspended – 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 also may be killed. Rabbi Abraham Isaac Kook,<sup>13</sup> for example, permits the sacrifice of oneself as a form of *hora'at sha'ah* that is allowed by Jewish law to save the community. While the voluntary act of heroic self-sacrifice and the killing of an unwilling victim are not parallel, I think that one who would permit a Jewish soldier to kill himself to save the community, would permit the killing of “less

innocent” enemy soldiers or even civilians in such situations as well. In grave times of national war, every battle and every encounter rises to such a level, I suspect. Rabbi Joseph Karo in his commentary to Maimonides’ Code explicitly notes that the power of a *beit din* (rabbinical court) includes the authority not only to kill people who are guilty of some violation of Jewish law but whose conviction otherwise lacks in technical proof, but also to kill people who are completely innocent, if in the judgment of the rabbinical court the exigencies of the times require such.<sup>14</sup> The authority for a *beit din* to make such a determination stems from its leadership role over the nation (*manhigei ha-kehillah*).<sup>15</sup> The same ability thus applies to duly authorized governments (secular and Jewish), and can be relegated to their structures of military command.

Indeed, the Israeli army assumes such a responsibility. Consider the following text from the Israel Defense Forces Code:

Purity of Arms. The IDF serviceman will use force of arms only for the purpose of subduing the enemy to the *necessary* extent and will limit his use of force so as to prevent *unnecessary* harm to human life and limb, dignity and property. The IDF servicemen’s purity of arms is their self control in use of armed force. They will use their arms only for the purpose of achieving their mission, without inflicting unnecessary injury to human life or limb, dignity or property, of both soldiers and civilians, with special consideration for the defenseless, whether in wartime, or during routine security operations, or in the absence of combat, or times of peace.<sup>16</sup>

The Talmud, in discussing why King David spared the life of Mephibosheth, son of Jonathan and grandson of Saul,<sup>17</sup> when the Gibeonites sought to have the remnants of King Saul’s family killed, seems to recognize that in wartime the concept of *hillul Hashem* (avoiding the desecration of God’s name) permits even the killing of otherwise innocent civilians. In this particular case, these killings were a naked act of retaliation, which the Talmud criticizes only as lacking in the proper morality for the Jewish people. The Talmud

makes no mention of the fact that the underlying act – the murder of seven absolutely innocent people as an act of retaliation – violates the Jewish law rules of murder. The reason that it is so is clear. This retaliatory conduct in wartime does not violate any such prohibition.<sup>18</sup> Indeed, this seems logical, as retaliation when done to teach a lesson is not a general violation of Jewish law,<sup>19</sup> and killing for a purpose is not prohibited in wartime: thus, retaliatory killing in war is permitted to the extent that it does not violate international treaties.

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

How are all obligated by *dinim*? They must create courts and appoint judges in every province to enforce these six commandments and to warn the people about the need to obey the law. A person who violates any of these seven obligations (may be) (is)<sup>20</sup> killed with a sword. For this reason the inhabitants of Shekhem [the city] were liable to be killed<sup>21</sup> since Shekhem [the person] stole<sup>22</sup> [Dina], and the inhabitants saw and knew this and did nothing.<sup>23</sup>

Consequently, if one is in a situation where innocent people are being killed by terrorist acts that cannot be stopped by catching the perpetrators themselves, and those terrorists are supported by a civilian population that passively protects them and does not condemn them, collective punishment might well be permitted by Jewish law.<sup>24</sup> Nahmanides has a much more expansive conception

of *dinim*, and would certainly permit regulations that include collective punishment.<sup>25</sup>

Admittedly, this lengthy preamble is terribly disquieting, and it heads in a direction that is deeply uncomfortable to me: Jewish law has no “real” restrictions on the conduct of the Jewish army during wartime, so long as the actions being performed are all authorized by the command structure of the military in order to fulfill a valid and authorized goal and do not violate international treaties. Sadly enough, it might turn out that most of these unpleasant activities we have considered might have to become tools in this quite gruesome *danse macabre* to which the long term consequences of defeat are too great to ponder. This is true both in the Jewish homeland and our beloved America.

Of course, this does not mean that there are no limits to the law of war. Rather, it means that the Jewish tradition does not impose upon its adherents any intrinsic limitations on the *Halakhah* of war except those that are derived from mutually agreed upon treaties or conventions agreed to by the combatants. Those limitations – external to Jewish law, but fully binding on all Jewish adherents – have the status either of treaties (which as explained below in section VI are fully binding) or international law accepted by the parties (which I explain elsewhere<sup>26</sup> are binding). Absent these mutually agreed upon limitations, Jewish law has few, if any, rules of battle. This makes the careful examination of proper guidelines especially important in light of both Halakhah’s overriding commitment to general moral conduct and the stresses of a wartime situation.

## II. INTRODUCTION

This article reviews Jewish law’s attitude to an area of modern social behavior that “law” as an institution has shied away from regulating, and which “ethics” as a discipline has failed to successfully regulate: war. In this area, as in many others, the legal and the ethical are freely combined in the Jewish tradition. Unlike Jewish law’s rules concerning “regular” war, regulations concerning those biblical wars as those against Amalek and the Seven Nations are not based on normative ethical values, but were designed to be used solely in

the initial period of Jewish conquest of the land of Israel or solely in circumstances where God's direct divine commandment to the Jewish nation was clear. Thus, "Jewish law" as used in this article refers to that time period when direct visible divine direction in and interaction with the world has ceased; it is methodologically improper to discuss Jewish ethics in the presence of the active Divine with any other system of ethics, since the active (acknowledged) presence of the Divine changes the ground rules for ethical norms. Normative Jewish law confines itself to a discussion of what to do when the active divine presence is no longer in the world, and thus normative rules are in effect. This distinction, and the distinction between Old Testament Judaism and modern Jewish law, has been lost to some commentators.<sup>27</sup>

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

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

### III. GROUNDS FOR STARTING WAR

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

Historically, Jews have been (and to a great extent, still are) a people living in a Diaspora, foreigners in and, later, citizens of countries where Jewish law was not the ethical or legal touchstone of moral conduct by the government. Even as citizens of a host country, it is necessary for adherents to the Jewish legal tradition to develop a method for determining whether that nation's military activity is indeed permissible according to Jewish law. Should the host country's military activities be deemed a violation of Jewish law, Jewish law would prohibit one from assisting that nation in its unlawful military activity and certainly would prohibit serving in its armed forces and killing soldiers who are members of the opposing army.<sup>28</sup>

Two distinctly different rationales are extant to justify the use of military force. The first is the general principle of self-defense, whose rules are as applicable to the defense of a group of people as they are to the defense of a single person. The Talmud<sup>29</sup> rules that a person is permitted to kill a pursuer to save his or her own life regardless of whether the person being pursued is a Jew or a non-Jew. While there is some dispute among modern Jewish law authorities as to whether Jewish law *mandates* or merely *permits* a non-Jew or bystander to take the life of one who is trying to kill another, nearly all authorities posit that such conduct is, at the least, permissible.<sup>30</sup>

It is obvious that the laws of pursuit are equally applicable to a group of individuals or a nation as they are to a single person. Military action thus becomes permissible, or more likely obligatory, when it is defensive in nature, or undertaken to aid the victim of aggression. However, using the pursuer paradigm to analyze "war" leads one to conclude that all of the restrictions related to this rationale apply as well.<sup>31</sup> War, if it is to exist legally as a morally sanctioned event, must permit some forms of killing other than those which are allowed through the self-defense rationale; the permissibility of the modern institution of "war" as a separate legal category by Jewish law standards cannot exist solely as a derivative of these self-defense rules.

There are a number of recent authorities who explicitly state that the institution of “war” is legally recognized as a distinct moral license (independent of the laws of pursuer and self-defense) to terminate life according to Jewish law, even for secular nations. R. Naf-tali Tzvi Yehudah Berlin<sup>32</sup> argues that the very verse that prohibits murder permits war. He claims that the term “At the hand of man, his brother”<sup>33</sup> prohibits killing only when it is proper to behave in a brotherly manner, but *at times of war, killing that would otherwise be prohibited is permitted*. Indeed, such an opinion can also be found in the medieval Talmudic commentary of Tosafot.<sup>34</sup> Rabbi Judah Loew (Maharal of Prague) in his commentary on Genesis 32, also states that war is permitted under Noahide Law. He claims that this is the justification for the actions of Simeon and Levi in the massacre of the inhabitants of Shechem. Furthermore, by this analysis even preemptive action, like the kind taken by Simeon and Levi, would be permitted. Also, Maharal at least implies that the killing of civilians who are not liable under the pursuer rationale is nonetheless permissible. It is worth noting that the dispute between Jacob on one side and Simeon and Levi on the other side as to the propriety of their conduct in Shechem is one of the few (maybe the only) incidents in the Torah where it is unclear who is ultimately correct. R. Shlomo Goren<sup>35</sup> posits that Jacob was correct, and thus Maharal of Prague is wrong.

Other authorities disagree. R. Moses Sofer<sup>36</sup> seemingly adopts a middle position and accepts that wars of aggression are never permitted to secular nations; however, he does appear to recognize the institution of “war” distinct from the pursuer rationale in the context of defensive wars. A number of other rabbinic authorities seem to accept this position as well.<sup>37</sup>

Indeed, the approach of R. Israel Meir Kagan to halakhic matters pertaining to Jewish soldiers in secular armies can only be explained if there is a basic halakhic legitimacy to war by secular (Noahide) nations, as R. Berlin claims. In his *Mishnah Berurah*, R. Kagan permits conscription into a secular nation’s draft.<sup>38</sup> Although the central issues raised there regarding Sabbath violations (*hillul Shabbat*) of a soldier are beyond the scope of this article,

Rabbi Kagan's underlying view permits (and in some circumstances mandates) military service, and when called upon, killing people in the course of that duty: such can only be validated in a model of lawful war by secular nations. The same view is taken by R. Moses Feinstein as well as R. Yosef Eliyahu Henkin.<sup>39</sup>

One basic point needs to be made. It is not obvious to this writer that the military conduct of the State of Israel cannot be categorized under the rubric of "war" established by the above sources. Although there is a known tendency to seek to justify the conduct of the State of Israel in the context of "Jewish" wars (whose parameters are explained below), there is an equally clear trend among modern decisors of Jewish Law to seek to fit the conduct of the State of Israel into the general (universal) idea of war, and not the uniquely Jewish law model.<sup>40</sup> Among the halakhic authorities who advance arguments that can only stand if predicated on the correctness of the approach of R. Berlin and others are Rabbis Shaul Israeli, Yaakov Ariel, Dov Lior, Shlomo Goren and others.<sup>41</sup> The crux of this argument, often unstated, is that the government of Israel is not bound to uphold the obligations of war imposed on a "Jewish Kingdom" but merely must conduct itself in accordance with the international law norms that R. Berlin mentions. In this model, the rules discussed in the next section apply strictly to a Davidic dynasty, and the real rules of war simply follow international law norms as codified by treaties.

Of course, the approach of R. Berlin recognizes that treaties restrict the rights of combatants, but that exercise in self-restraint stems from a voluntary decision to agree to such rules and is thus beyond the scope of this paper and of limited applicability to the modern wars against terrorism fought by both America and Israel. As Captain Seltzer, formerly of the Judge Advocate General corps, notes:

Members of the armed forces of a party to a conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as POWs whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering

military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy and engaging in combat are examples of concealment of the status of a member of the armed forces and qualify as a war crime. *Unprivileged belligerents – or unlawful combatants – may include spies, saboteurs or civilians who are participating in the hostilities or who otherwise engage in unauthorized attacks or other combatant acts. They are not entitled to POW status, but merely “humane treatment,” are prosecutable by the captor, and may be executed or imprisoned. They are subject to the extreme penalty of death because of the danger inherent in their conduct.*<sup>42</sup>

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

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

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

The Talmud<sup>43</sup> understands that a special category of permitted killing called “war” exists that is analytically different from other permitted forms of killing, like the killing of a pursuer or a home invader. The Talmud delimits two categories of permissible war: Obligatory and Authorized.<sup>44</sup> It is crucial to determine which category of “war” any particular type of conflict is. As explained below, many of the restrictions placed by Jewish law on the type of conduct permitted by war is frequently limited to Authorized rather than Obligatory wars.<sup>45</sup>

Before examining the exact line drawn by the commentators to differentiate between Obligatory and Authorized wars, a more basic question must be addressed: by what license can the Jewish tradition permit wars that are not obligatory, with all of the resulting carnage and destruction? Michael Waltzer, in his analysis of the

Jewish tradition, comes to the conclusion that optional or authorized wars are fundamentally improper, and merely tolerated by the Jewish tradition as an evil that cannot be abolished.<sup>46</sup> Noam Zohar rightly notes that such an answer is contrary to the basic thrust of the Jewish commandments, and proposes that optional or authorized wars are those wars whose moral license is clearly just, but whose fundamental obligation is not present, such as when the military costs of the war (at least in terms of casualties) are high enough that it is morally permissible to decline to fight.<sup>47</sup> As will be explained further below, I think this explanation is itself deeply incomplete, as the essential characterization of war entails risk, and declining to fight due to the cost would label all wars, other than those where the soldiers' lives are directly and immediately at stake, to be optional. A third answer is suggested by Rabbi Eliezer Waldenberg, who posits that even authorized or optional wars are limited by the duty to insure that all such wars have to be with the goal and intent to elevate true faith and to fill the world with righteousness, to break the strength of those who do evil, and to fight the battles of God.<sup>48</sup>

Rabbi Waldenberg's view, then, is that these wars are like all positive commandments that are not mandatory but are still considered good deeds. There is no obvious reason why all good deeds must be mandatory in the Jewish tradition – some good deeds, and some good wars, may be optional.<sup>49</sup>

### **C. Obligatory vs. Authorized Wars**

According to the Talmud,<sup>50</sup> Obligatory wars are those wars started in direct fulfillment of a specific biblical commandment, such as the obligation to destroy the tribe of Amalek in biblical times. Authorized wars are wars undertaken to increase territory or “to diminish the heathens so that they shall not march” which is, as explained below, a category of military action given different parameters by different authorities.<sup>51</sup> Maimonides, in his codification of the law, writes that:

The king must first wage only Obligatory wars. What is an Obligatory war? It is a war against the seven nations, the war

against Amalek, and a war to deliver Israel from an enemy who has attacked them. Then he may wage Authorized wars, which is a war against others in order to enlarge the borders of Israel and to increase his greatness and prestige.<sup>52</sup>

Surprisingly enough, the category of “to deliver Israel from an enemy...” is not found in the Talmud. In addition, the category of preemptive war<sup>53</sup> is not mentioned in Maimonides’ formulation of the law even though it is found in the Talmud.

What was Maimonides’ understanding of the Talmud and how did he develop these categories? These questions are the key focus of a discussion on the laws of starting wars. The classic rabbinic commentaries, both medieval and modern, grapple with the dividing line between “a war to deliver Israel from an enemy who has attacked them” and a war “to enlarge the borders of Israel and to increase [the king’s] greatness and prestige.” Behind each of these approaches lies a different understanding of when a war is obligatory, authorized, or prohibited and the ethical duties associated with each category.

Judah ben Samuel al-Harizi’s translation of Maimonides’ commentary on the Mishnah suggests that Maimonides was of the opinion that an Obligatory war does not start until one is actually attacked by an army; Authorized wars include all defensive non-obligatory wars and all military actions commenced for any reason other than self-defense.<sup>54</sup> According to this definition, military action prior to the initial use of force by one’s opponents can only be justified through the “pursuer” or self-defense rationale. All other military activity is prohibited.

R. Joseph Kapah, in his translation of the same commentary of Maimonides, understands Maimonides to permit war against nations that have previously fought with Israel and that are still technically at war with the Jewish nation – even though no fighting is now going on. An offensive war cannot be justified even as an Authorized war unless a prior state of belligerency existed.<sup>55</sup>

R. Abraham diBotton, in his commentary on Maimonides’ Code (*Lehem Mishneh*),<sup>56</sup> posits that the phrase “to enhance the king’s greatness and prestige” includes all of the categories of au-

thorized war permitted in the Talmud. Once again, all wars other than purely defensive wars where military activity is initiated solely by one's opponents are classified as Authorized wars or illegal wars. Obligatory wars are limited to purely defensive wars.

R. Menahem ben Meir (Meiri), in his commentary on the Talmud,<sup>57</sup> states that an Authorized war is any attack which is commenced in order to prevent an attack in the future. Once hostilities begin, all military activity falls under the rubric of Obligatory. Similarly, R. Abraham Isaiah Karelitz (Hazon Ish) claims that Maimonides' definition of an Authorized war is referring to a use of force in a war of attrition situation.<sup>58</sup> In any circumstance in which prior "battle" has occurred and that battle was initiated by the enemy, the war that is being fought is an Obligatory one. According to this approach, the use of military force prior to the start of a war of attrition is prohibited (unless justified by the general rules of self-defense, in which case a "war" is not being fought according to Jewish law.)

R. Yehiel Mikhel Epstein, in his *Arukh ha-Shulhan he-Atid*, advances a unique explanation. He writes that the only difference between an Authorized and an Obligatory war is the status of those people exempt from being drafted – the categories mentioned in Deuteronomy 20.<sup>59</sup> In an Obligatory war, even those people must fight. However, he writes, the king is obligated to defend Israel "even when there is only suspicion that they may attack us." Thus the position he takes is that vis-à-vis the government there is only a slight difference between Authorized and Obligatory wars – the pool of draftable candidates.<sup>60</sup>

#### D. Summary

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

- (1) War to save the nation that is now, or soon to be, under attack. This is not technically war but is permitted because of the law of "pursuer" and is subject to all of the restrictions related to the law of pursuer and the rules of self-defense.

- (2) War to aid an innocent third party who is under attack. This too, is not technically war, but most commentators mandate this, also under the “pursuer” rationale, while some rule this is merely permitted. In either case, it is subject to all of the restrictions related to the “pursuer” rationale.
- (3) Wars of self defense and perhaps territorial expansion. A number of commentators permit “war” as an institution even in situations where non-combatants might be killed; most authorities limit this license to defensive wars.

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

- (1) Defending the people of Israel from attack by an aggressive neighbor. This is an Obligatory war.
- (2) Fighting offensive wars against belligerent neighbors.
- (3) Protecting individuals through the use of the laws of “pursuer” and self defense from aggressive neighbors. This is not a “war” according to the Jewish tradition.<sup>61</sup>

Finally, it is crucial to realize that there are situations where war is – in the Jewish tradition – simply not permitted. The killing that takes place in such wars, if not directly based on immediate self-defense needs,<sup>62</sup> is simply murder and participation in those wars is prohibited according to Jewish law. (How one categorizes each individual conflict can sometimes be a judgment about which reasonable scholars of Jewish law might differ; that does not, however, mean that such decisions are purely a function of individual choice. As with all such matters in Jewish law, there is a manner and matter for resolving such disagreements.<sup>63</sup>) This statement, of course, is incomplete. If Noahide law permits a war in situations that Jewish law does not, and Jewish law recognizes the use of Noahide law as a justification for such a war, then such wars cannot be a categorical violation of Jewish law (in the sense of being prohibited for Jews to engage in this conduct). I will leave that topic for another discus-

sion, although the proper resolution of that matter has been hinted at elsewhere.<sup>64</sup>

#### IV. BATTLEFIELD ETHICS

##### A. Type of War

The initial question that needs to be addressed when discussing battlefield ethics is whether the rules for these situations differ from all other applications of Jewish ethics, or if “battlefield ethics” are merely an application of the general rules of Jewish ethics to the combat situation. This question is essentially a rephrasing of the question: What is the moral license according to the Jewish tradition that permits war to be waged? As explained above, the Jewish tradition divides “armed conflict” into three different categories: obligatory war, permissible war, and societal applications of the “pursuer” rationale.<sup>65</sup> Each of these situations comes with different licenses. The easiest one to address is the final one, the pursuer rationale: battlefield ethics based on the pursuer model are simply a generic application of the [general] field of Jewish ethics relating to stopping one who is an evildoer from harming (killing) an innocent person. While it is beyond the scope of this article to completely explain that detailed area of Jewish ethics, the touchstone rules of self-defense according to Jewish law are fourfold: Even when self-defense is mandatory or permissible and one may kill a person or group of people who are seeking to kill one who is innocent, one may not:

- (1) Kill an innocent<sup>66</sup> third party to save a life;
- (2) Compel a person to risk his or her life to save the life of another;
- (3) Kill the pursuer after his or her evil act is over as a form of punishment.
- (4) Use more force than minimally needed.<sup>67</sup>

These are generic rules of Jewish law derived from different Talmudic sources and methodologically unrelated to “war” as an institution.<sup>68</sup> Thus, the application of the rules of this type of “armed conflict”

would resemble an activity by a police force rather than an activity by an army. Only the most genteel of modern armies can function in accordance with these rules.

On the other hand, both the situation of Obligatory war and Authorized war are not merely a further extrapolation of the principles of “self-defense” or “pursuer.” There are ethical liberalities (and strictures) associated with the battlefield setting that have unique ethical and legal rules unrelated to other fields of Jewish law or ethics.<sup>69</sup> They permit the killing of a fellow human being in situations where that action – but for the permissibility of war – would be murder. In order to understand what precisely is the “license to kill,” it is necessary to explain the preliminary steps required by Jewish law to actually fight a battle after war has been properly declared. It is through an understanding of these prescriptions (and proscriptions) that one grasps the limits on the license to kill one’s opponents in military action according to Jewish law. Indeed, nearly all of the preliminary requirements to a permissible war are designed to remove non-combatants, civilians, and others who do not wish to fight from the battlefield.

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

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

When you approach a city to do battle with it, you shall call to it in peace. And if they respond in peace and they open the city to you, all the people in the city shall pay taxes to you and be subservient. And if they do not make peace with you, you shall wage war with them and you may besiege them.<sup>70</sup>

Thus the Bible clearly sets out the obligation to seek peace as a prelude to any offensive military activity; absent the seeking of peace, the use of force in a war violates Jewish law. Although unstated in the text, it is apparent that while one need not engage in negotiations over the legitimacy of one’s goals, one must explain

what one is seeking through this military action and what military goals are (and are not) sought.<sup>71</sup> Before this seeking of peace, battle is prohibited. The Tannaitic authority R. Jose the Galilean is quoted as stating, “How meritorious is peace? Even in a time of war one must initiate all activities with a request for peace.”<sup>72</sup> This procedural requirement is quite significant: it prevents the escalation of hostilities and allows both sides to rationally plan the cost of war and the virtues of peace.

R. Shlomo Yitzhaki (Rashi), in his commentary on the Bible,<sup>73</sup> indicates that the obligation to seek peace prior to firing the first shot is limited to Authorized wars. However, in Obligatory or Compulsory wars there is no obligation to seek a peaceful solution. Indeed, such a position can be found in the Midrash Halakhah.<sup>74</sup> Maimonides, in his classic code of Jewish law disagrees. He states:

One does not wage war with anyone in the world until one seeks peace with him. Thus is true both of Authorized and Obligatory wars, as it says [in the Torah], “When you approach a city to wage war, you shall [first] call to it in peace.” If they respond positively and accept the seven Noahide commandments, one may not kill any of them and they shall pay tribute...<sup>75</sup>

Thus, according to Maimonides, the obligation to seek peace applies to all circumstances where war is to be waged. Such an approach is also agreed to in principle by Nahmanides.<sup>76</sup>

It is clear, however, according to both schools of thought, that in Authorized wars one must initially seek a negotiated settlement of the cause of the conflict (although, it is crucial to add, Jewish law does not require that each side compromise its claim so as to reach a peaceful solution).<sup>77</sup> Ancillary to this obligation is the need that the goal of the war be communicated to one’s opponents. One must detail to one’s enemies the basic goals of the war, and what one seeks as a victory in this conflict.<sup>78</sup> This allows one’s opponents to evaluate the costs of fighting and to seek a rational peace. Peace must be genuinely sought before war may begin.

A fundamental and very important dispute exists with regard

to one facet of this obligation. Maimonides requires that the peaceful surrender terms offered must include an acknowledgment of and agreement to follow the seven Noahide laws, which (Jewish law asserts) govern all members of the world and form the basic groundwork for moral behavior;<sup>79</sup> *part and parcel of the peace must be the imposition of ethical values on the defeated society*. Nahmanides does not list that requirement as being necessary for the “peaceful” cessation of hostilities.<sup>80</sup> He indicates that it is the military goals alone which determine whether peace terms are acceptable. According to Nahmanides, Jewish law would compel the presumptive “victor” to accept peace terms that include all of the victors’ initial demands save for the imposition of ethical values in the defeated society; Maimonides would reject that rule and permit war in those circumstances purely to impose ethical values in a non-ethical society.<sup>81</sup> To this writer this approach seems very logical and provides the basis for the comments of Rabbi Waldenberg that even Authorized wars have to be with the goal and intent to elevate true faith and fill the world with righteousness and fight the battles of God.<sup>82</sup>

### c. The Civilian, the Siege,<sup>83</sup> and Standard of Conduct

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

Joshua, before he entered the land of Israel, sent three letters to its inhabitants. The first one said that those that wish to flee [the oncoming army] should flee. The second one said that those that wish to make peace should make peace. The third letter said that those that want to fight a war should prepare to fight a war.<sup>84</sup>

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

When one surrounds a city to lay siege to it, it is prohibited to surround it from four sides; only three sides are permissible. One must leave a place for inhabitants to flee for all those who wish to abscond to save their life.<sup>85</sup>

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

God commanded us that when we lay siege to a city that we leave one of the sides without a siege so as to give them a place to flee to. *It is from this commandment that we learn to deal with compassion even with our enemies even at time of war*; in addition, by giving our enemies a place to flee to, they will not charge at us with as much force.<sup>86</sup>

Nahmanides believes that this obligation is so basic as to require that it be one of the 613 fundamental biblical commandments in Jewish law. However, Nahmanides clearly limits this ethical obligation to Authorized and not Obligatory wars, and this is agreed to by most other authorities.<sup>87</sup>

Essentially Jewish law completely rejects the notion of a “siege” as that term is understood by military tacticians and contemporary articulators of international law. Modern international law generally assumes that in a situation where “the commander of a besieged place expel[s] the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure to drive them back so as to hasten the surrender.”<sup>88</sup> Secular law and morals allow the use of the civilians as pawns in the siege. *The Jewish tradition prohibited that and mandated that non-combatants who wished to flee must be allowed to flee the scene of the battle.* (I would add, however, that I do not understand Maimonides’ words literally. It is not surrounding the city on all four sides that is prohibited – rather, it is the preventing of the *outflow of civilians or soldiers* who are seeking to flee. Of course, Jewish law would allow one to stop the *inflow of supplies* to a besieged city through this fourth side.<sup>89</sup>)

This approach solves another difficult problem according to Jewish law: the role of the “innocent” civilian in combat. Since the Jewish tradition accepts that civilians (and soldiers who are surrendering) are always entitled to flee from the scene of the battle, it would logically follow that all who remain voluntarily are classified as combatants, since the opportunity to leave is continuously present. Particularly in combination with Joshua’s practice of sending letters of warning in advance of combat, this legal approach limits greatly the role of the doctrine of “innocent civilian” in the Jewish tradition. Essentially, the Jewish tradition feels that innocent civilians should do their very best to remove themselves from the battlefield, and those who remain are not so innocent. If one voluntarily stays in a city that is under siege, one assumes the mantle of a combatant.<sup>90</sup>

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

Not surprisingly, the contours of that debate have played out with considerable force in the pages of *Tehumin*, a contemporary periodical of the Religious Zionist community. Indeed, the earliest modern discussion of this topic was presented by R. Shaul Israeli in 1954 in response to the killing of civilians by Israel Defense Forces Unit 101 at Kibia (Qibya) in 1953.<sup>91</sup> R. Israeli argues that civilians who conspire to assist in the undertaking of military operations can be killed through the pursuer rationale, as they are materially aiding the murderers. (He notes that this is a basic distinction in Jewish law between judicial punishment, which can only be meted out to principals, and the pursuer rationale, which allows one to kill someone who has joined a conspiracy to kill an innocent person, if killing that conspirator will cause the end of the murderous act.<sup>92</sup>) Indeed, R. Israeli goes even further, and seems to adopt the view that those who simply extend support to terror – by encouraging acts of

violence with mere words – can be labeled combatants as well. This is not, R. Israeli posits, any form of collective punishment, as only people who are guilty (whether of murder or conspiracy to commit murder) are actually being punished. However, as is obvious, this is a vast expansion of the simple understanding of the rules of *rodef*, or even the more complex statistical analysis of life-threatening activity put forward by some modern *aharonim* (latter-day decisors).<sup>93</sup>

This stands in sharp contrast with the approach taken by the late R. Hayyim Dovid Halevi (author of the *Aseh Lekha Rav* series), who categorically denies that the concept of pursuer can be applied in situations other than when the person is actually threatening the life of another person, and certainly may not be applied to cases where the person under discussion is ‘merely’ a political supporter of those who engage in such activities.<sup>94</sup>

The unintentional and undesired slaying of innocent civilians who involuntarily remain behind seems to this author to be the one “killing” activity which is permissible in Jewish law in war situations that would not be permissible in the pursuer/self-defense situations. Just like Jewish law permits one to send one’s own soldiers out to combat (without their consent) to perhaps be killed, Jewish law would allow the unintentional killing of innocent civilians as a necessary (but undesired) byproduct of the moral license of war.<sup>95</sup>

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

The first of these goals is within the ambit of that which is permissible, since civilian deaths are unintentional. The same would appear to be true about the second, providing that the targets are genuine economic targets related to the economic base needed to

wage the war and the death of civilians are not directly desired. It would appear that the third goal is not legitimate absent the designation of “Compulsory” or “Obligatory” war. The final goal raises a whole series of issues beyond the scope of this article and could perhaps provide some sort of justification for certain types of conduct in combat that would otherwise be prohibited, although its detailed analysis in Jewish law is beyond the scope of this paper and relates to circumstances where retaliation or specific deterrence might permit that which is normally prohibited.

R. Yaakov Ariel advances one possible explanation for this killing of ‘innocent’ civilians that places this exception in a different light. R. Ariel posits that war is, at its core, societal in nature and thus different from pursuer rationales in its basic model. War is the collective battle of societies, R. Ariel posits, and thus there are no innocent civilians; even babes in their mothers’ arms are to be killed, harsh as that sounds.<sup>96</sup>

The Jewish tradition mandated a number of other rules so as to prevent certain types of tactics that violated the norms of ethical behavior even in war. Maimonides recounts that it is prohibited to remove fruit trees so as to induce suffering, famine, and unnecessary waste in the camp of the enemy, and this is accepted as normative in Jewish law.<sup>97</sup> In his enumeration of the commandments, Maimonides explicitly links this to the deliberate intention to expose the enemy to undue suffering.<sup>98</sup> Nahmanides adds that the removal of all trees is permissible if needed for the building of fortification; it is only when done to deliberately induce unneeded suffering that it is prohibited. However, Nahmanides still understands the Jewish tradition as requiring one to have mercy on one’s enemy as one would have mercy on one’s own, and to not engage in unduly cruel activity.<sup>99</sup> Even the greatest of scourges – exploitation of the female civilian population of the enemy – was regulated under Jewish law.<sup>100</sup>

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

The use of nuclear technology as a weapon of mass destruction is very problematic in Jewish law. In a situation resulting in Mutually

Assured Destruction if weapons are used, it is clear that the Jewish tradition would prohibit the actual use of such armaments if they were to cause the large scale destruction of human life on the earth as it currently exists. The Talmud<sup>101</sup> explicitly prohibits the waging of war in a situation where the casualty rate exceeds a sixth of the population. Lord Jakobovits, in an article written more than forty years ago, summarized the Jewish law on this topic in his eloquent manner:

In view of this vital limitation of the law of self-defense, it would appear that a defensive war likely to endanger the survival of the attacking and the defending nations alike, if not indeed the entire human race, can never be justified. *On the assumption, then, that the choice posed by a threatened nuclear attack would be either complete destruction or surrender, only the second may be morally vindicated.*<sup>102</sup>

However, one caveat is needed: It is permissible to threaten to adopt a military strategy that one is in fact prohibited to implement in order to deter a war. While one injustice cannot ever justify another injustice, sometimes threatening to do a wrong can prevent the initial wrong from occurring. *Just because one cannot pull the nuclear trigger does not mean one cannot own a nuclear gun.*<sup>103</sup> It is important to understand the logical syllogism that permits this conduct. It is forbidden – because of the prohibition to lie – to threaten to use a weapon that one is prohibited from actually using. However, it can be clearly demonstrated that lying to save the life of an innocent person is permissible.<sup>104</sup> Thus, this lie becomes legally justifiable to save one's own life too. An example proves this point: If a person sought to kill an innocent party and one could not prevent that act by killing the potential murderer, one could threaten this person by saying, "If you kill this innocent person, I will kill your children." While, of course, one could not carry out the threat in response to the murder, the threat itself would be a permissible deterrent because lying to avoid a murder is permitted. This demonstrates that threatening to

do that which one cannot actually do is generally permissible to save a life. The possession of nuclear weapons is simply an amplification of this logical analysis.

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

The use of tactical (battlefield) nuclear weapons designed solely to be used on the field of battle (assuming that such weapons exist and have the stated limited effect), in circumstances where the complete destruction of the combatants would be permissible (such as after the proper warning and peace seeking), would be acceptable as well in Jewish law.

### **E. Summary**

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

## **V. FIGHTING ON THE SAME TEAM: ETHICS WITHIN THE ARMY**

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

And when you approach the time for battle, the priest shall approach and speak to the people. He should say to them, "Listen Israel, today you are approaching war with your enemies; do not be faint in heart; do not be fearful and do not be alarmed; do not be frightened of them. Because God, your God, is going with you to battle your enemies and to save you." And the officers shall say to the people "Who is the person who has built a house and not yet dedicated it? He should return to his house lest he die in battle and another dedicate it. Who is the person who has planted a vineyard and never used the fruit? He should leave and return lest he die in battle and another use the fruit. Who is the person who is engaged to a woman and has not married her? He should leave and return home lest he die in battle and another marry her." *And the officers should add to this saying "Who is the person who is scared and frightened in his heart? He should leave and return lest his neighbor's heart grow weak as his has."*<sup>105</sup>

Two distinctly different exemptions are present in the Torah. The first is that of a person whose death will cause a clear incompleteness in an impending life cycle event. The second is a person whose conduct is deleterious to the morale of the army as a whole. While the position of Maimonides is unclear, Rabbi Abraham ben David of Posquières (*Ravad*) immediately notes that these two categories of exemptions are different in purpose and application.<sup>106</sup> *Ravad* states that the exemptions which relate to impending life cycle events apply only to an Authorized war; in an Obligatory war all must fight. However, he states that it is possible that the exemption for one who is fearful would apply even to an Obligatory war.<sup>107</sup>

The Talmud<sup>108</sup> explains this second exemption in two different ways. Rabbi Akiva states that it refers to a person who is lacking the moral courage to do battle and to see combat and watch people perish. Rabbi Yossi asserts that the fearfulness describes a person whose personal actions have been sinful (and who is thus afraid that in wartime he will be punished for his sins).<sup>109</sup> Most authorities

maintain that one who is fearful of the war to such a degree that he classifies for such an exemption is compelled to take this deferral – it is not optional;<sup>110</sup> Jewish law prohibits one who is of such character from fighting.<sup>111</sup> While one could claim that this type of an exemption is a form of selective conscientious objection, such an understanding of the law would be in error. A person who “objects” is not given an exemption; certainly a person who is physically and psychologically capable – but who merely opposes this particular war – can be compelled to fight. It is only a form of psychological unfitness that earns one this type of exemption.

However, the most important limitation on this exemption is that it is limited to Authorized wars. In Obligatory wars, all who can, must fight.<sup>112</sup> Although one modern commentator seeks to argue that this is a basic model of a voluntary army,<sup>113</sup> I do not think that this argument is cogent. Rather, given the nature of a threat posed by a mandatory war, all – even those who are basically unfit – need to serve. Since the nation is in danger, the long term planning which allows those who have unfinished tasks to be exempt from fighting obviously is less relevant.

In addition to the question of who serves, Jewish law mandates certain ethical norms on the battlefield so as to ensure certain moral behavior. For example, the Torah requires, and it is quoted in the Midrash Halakhah and codes, that basic sanitary rules be observed while in military encampment.<sup>114</sup>

## **VI. PEACE TREATIES**

The book of Joshua recounts that when the Gibeonites tricked the Jews into ratifying a treaty with them, they were not subsequently attacked because “We swore [not to attack them] by the name of the God of Israel and thus we cannot touch them.”<sup>115</sup> Even though the treaty was entered into under fraudulent pretenses, the Jewish people maintained that the treaty was morally binding on them. Indeed, Maimonides in his classic medieval code of Jewish law, basing himself almost exclusively on this Biblical incident, codifies the central rule of treaties as follows:

It is prohibited to lie [or breach] in treaties and it is prohibited to make them [the defeated nation] suffer after they have settled and accepted the seven commandments.<sup>116</sup>

Rabbi David Ibn Zimra (*Radvaz*), in his commentary on Maimonides there, explains that “this is learned from the incident of the Gibeonites, since breaking one’s treaties is a profanation of God’s name.”<sup>117</sup> According to this rationale, the reason why the Jewish nation felt compelled to honor its treaty with the Gibeonites – a treaty that in the very least was entered into under false pretenses – was that *others would not grasp the full circumstances under which the treaty was signed, and would have interpreted the breach of the treaty as a sign of moral laxity on the part of the Jewish people*. One could argue based on this rationale that in circumstances where the breach of a treaty would be considered reasonable by others, it would be permissible to breach.<sup>118</sup>

Rabbi Levi ben Gershon (*Ralbag*) understands the nature of the obligation to observe treaties differently; he claims that the reason the treaty with the Gibeonites had to be honored was that the Jewish nation “swore” to observe its obligation and the nations of the world would have otherwise thought that the Jewish people do not believe in a God and thus do not take their promises seriously (collectively and individually).<sup>119</sup>

Rabbi David ben Kimhi (*Radak*) advances an even more radical understanding of the nature of this obligation. Among the possible reasons he advances to explain why the treaty was honored – even though it was actually void because it was entered into based solely on the fraudulent assurances of the Gibeonites – is that others would not be aware that the treaty was really void and would (incorrectly) identify the Jewish nation as the breaker of the treaty. This fear, that the Jewish nation would be wrongly identified as a treaty breaker, he states, is enough to require that the Jewish nation keep all treaties duly entered into.<sup>120</sup>

Each of these theories, whatever the precise boundaries of the obligation to keep treaties is based on, presupposes that treaties are

basically binding according to Jewish law.<sup>121</sup> It is only in the case of a visibly obvious breach of the treaty by one party that the second party may decline to honor it. Thus, Jewish law accepts that when a war is over, the peace that is agreed to is binding. Indeed, even in a situation where there is some unnoticed fraud in its enactment or ratification, such a treaty is still in force.

## VII. CONCLUDING COMMENTS

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

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

Eisenhower formulated the United States response with three defensive axioms. First, the U.S. would never start a war with the Warsaw Pact; second, the U.S. reserved the right to first use of nuclear weapons; and finally, such weapons would be targeted against civil-

ian centers should war be initiated by the Soviets.<sup>122</sup> These policies prevented another world war from breaking out, as the Soviets were genuinely afraid of the massive destruction of their civilian populations.

We now know that President Eisenhower understood that these strategies were unethical if implemented in a war, but furthermore recognized that absent these policies, another world war would break out, and Europe might be overrun. Thus, he authorized these exact policies, notwithstanding his deep reservations about them (and perhaps even unwillingness to actually implement them in wartime).<sup>123</sup> Furthermore, to give these unethical policies ‘teeth,’ he promoted officers to be in command who provided a demeanor and mindset of being ready, willing and able to order a nuclear response without ethical reservations.<sup>124</sup> Such was needed to ensure that the policy – at its core, a bluff – would be effective.

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

The articulation of the *halakhah* of war has an element of this type of public policy in it. War law is thus not an area where it is wise to actually articulate one’s own ethical limits, as one must assume that both friend and foe read the literature. One should not expect candid statements of the limits of Halakhah (Jewish law), as such might be like Eisenhower announcing that the nuclear option is merely a bluff. Bluffs only work if others are uncertain that one is bluffing.<sup>125</sup>

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

## NOTES

\*Cf. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting): “There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”

1. *Lev. Rabbah*, *Tzav*, 9.

2. Michael Brojde, “Fighting for Peace: Battlefield Ethics, Peace Talks, Treaties and Pacifism in the Jewish Tradition,” in Patout Burns, ed., *War and its Discontents*:

- Pacifism and Quietism in the Abrahamic Traditions* (Georgetown University Press, 1996), 1–30.
3. See, e.g., Michael Broyde, “Battlefield Ethics in the Jewish Tradition,” 95<sup>th</sup> *Annual Proceedings of the American Society for International Law* (2001), 92–98 (published in 2002).
  4. On the ideology of *hesder* yeshivot see e.g., R. Aharon Lichtenstein, “The Ideology of Hesder,” *Tradition*, 19:3 (Fall 1981), 199–217.
  5. Thus both R. Yitshak Kofman’s *Ha-Tzava ke-Hilkhatah* (Kol Mevaser, 1992) and the more standard *Hilkhot Tzava* by R. Zekharyah Ben-Shelomoh (Yeshivat Sha’alvim, 1988) leave them out completely and focus exclusively on questions of ritual observance of Jewish law in the army setting. For an excellent review of *Hilkhot Tzava*, see Michael Berger, Book Review, *Tradition*, 25:3 (Spring 1991), pp. 98–100.
  6. *Tzitz Eliezer* 12:57 and 13:100.
  7. *Shulhan Arukh, Yoreh De’ah* 252:4.
  8. The starting point for such a list is the thoughtful article by R. Shaul Israeli in *Amud ha-Yemini* 16, which has produced a wealth of intellectual progeny on parade in nearly every issue of *Tehumin* by such luminary authors as R. Yaakov Ariel, R. Shlomo Goren, R. Ovadya Yosef, and many others. There are no less than 64 articles dealing with war-related issues in the 23 volumes of *Tehumin*, the overwhelming number of which agree with the starting point of R. Israeli.
  9. These Hannibal procedures have become a source of some controversy in Israel, where for nearly twenty years they have been standing orders in the case of a kidnapping. See Sara Leibovich-Dar, “Rescue by Death,” *Ha-Aretz*, May 22, 2003 (article number 996968), which states that the three Israeli soldiers whose remains were recently returned were killed in such a fashion.
  10. R. Shaul Israeli, “Military Activities of National Defense (Heb.),” first published in *Ha-Torah ve-ha-Medinah* 5/6 (1953–54): 71–113, reprinted in his *Amud ha-Yemini* (rev ed., Jerusalem, 1991) as Ch. 16, 168–205.
  11. See e.g., R. Yaakov Ariel, “*Gezel ha-Goy be-Milhamah*,” *Tehumin* 23:11–17 (5763). Although *yefat to’ar* requires discussion, this matter is different in that such conduct is not directly engaged in as part the pursuit of a valid military goal, but rather the law represents an attempt to address an issue that relates to troop morale and other such issues. See also note 100.
  12. See *Yalkut Shim’oni, Shoftim* 247 and the comments of R. Moses Isserles, *Responsa of Rama* 11 and R. Jacob Reischer, *Shevut Yaakov* 2:117.
  13. See *Mishpat Kohen* 143.
  14. R. Joseph Karo, *Kesef Mishneh* on Maimonides, *Hilkhot Mamrim* (Laws of Rebels) 2:4–5 (see also notes of *Radvaz* there) as well as *Hilkhot Sanhedrin* (Laws of Courts) 24:4.
  15. See R. Abraham Kahana-Shapiro, *Dvar Avraham* 1:1.
  16. *The Spirit of the IDF: The Ethical Code of the Israel Defense Forces*, 1995 version, emphasis added. It is worth noting that when the code was rewritten in concise, bullet-point form in 2001, the language of the Purity of Arms clause was updated:

*Purity of Arms* – The IDF servicemen and women will use their weapons and force only for the purpose of their mission, only to the necessary extent and will maintain their humanity even during combat. IDF soldiers will not use their weapons and force to harm human beings who are not combatants or prisoners of war, and will do all in their power to avoid causing harm to their lives, bodies, dignity and property (The Spirit of the IDF, 2001 version, available online at [www.idf.il/DOVER/site/mainpage.asp?sl=EN&id=32](http://www.idf.il/DOVER/site/mainpage.asp?sl=EN&id=32)).

Among other revisions (including decreased emphasis of the term ‘unnecessary’), the newer version actually seems to maintain that the Israeli military reserves greater latitude to determine the extent that force – and collateral harm – is necessary and appropriate.

17. *Yevamot* 79a, but see Tosafot ad loc., s.v. *Armoni u-Mefiboshet*.
18. See e.g. the comments of Rashi, ad loc., s.v. *ve-al yithalleh shem shamayim*.
19. For a recent, excellent work on this topic, see Tzvi H. Weinberger and Boruch Heifetz, *Sefer Limud le-Hilkhot Bein Adam la-Havero* (vol. 2): *Lo Tikom ve-Lo Titor* (Tsefat, 2003), which notes this point many times.
20. See R. Ahron Soloveitchik, “On Noachides,” *Beit Yitzhak* 19:335–338 (5747), and see also R. Joab Joshua Weingarten, *Helkat Yo’av, Tanyana 14* for the uncertainty of the translation.
21. See Genesis 34.
22. As to why Maimonides uses the word “stole” to describe abduction, see *Sanhedrin* 55a and R. Moses Sofer, *Hatam Sofer, Yoreh De’ah* 19.
23. Maimonides, *Hilkhot Melakhim* (Laws of Kings), 9:14.
24. And this is without any notion of *hora’at sha’ah*; See opinion of *Kesef Mishneh* supra, text accompanying note 14.
25. Commentary of Nahmanides, Genesis 34:14. For more on this dispute see Michael Broyde, “Jewish Law and the Obligation to Enforce Secular Law,” in D. Shatz & C. Waxman eds., *The Orthodox Forum Proceedings VI: Jewish Responsibilities to Society* (1997), 103–143, which discusses the duties of citizenship from a Jewish law view. For more on Nahmanides’ position, see R. Shlomo Goren, “Combat Morality and the Halakhah,” *Crossroads* 1:211–231 (1987).
26. Michael J. Broyde, “A Jewish Law View of World Law,” *Emory Law Journal* 54 (2005 Special Edition): 79–97.
27. See e.g., Maj. Guy B. Roberts, “Note: Judaic Sources of and Views on the Laws of War,” *Naval Law Review* 37 (1988): 221.
28. For precisely such a determination in the context of the Vietnam war, see David Novak, “A Jewish View of War,” in his *Law and Theology in Judaism* vol. 1 (New York, 1974), 125–135.
29. *Sanhedrin* 74a–b.
30. Jewish law compels a Jew to take the life of a pursuer (Jewish or otherwise) who is trying to take the life of a Jew; *Shulhan Arukh, Hoshen Mishpat* 425:1. *Minhat Hinmukh* says that this is permissible but not mandatory for a non-Jew; see R. Joseph Babad, *Minhat Hinmukh*, positive commandment 296. R. Shelomoh Zevin argues

with this position, claiming that it is an obligation; see R. Shelomoh Yosef Zevin, *Le-Or ha-Halakhah: Be'ayot u-Verurim* (2<sup>nd</sup> ed., Tel Aviv: Tziyoni 1957), pages 150–57. Other modern commentaries also disagree with the *Minhat Hinnukh*; for a summary of the discourse on this point, see R. Yehudah Shaviv, *Betzur Eviezer*, (Tzomet, 1990) pages 96–99, who appears to conclude that most authorities are in agreement with R. Zevin's ruling; see also R. Yitzhak Schmelks, *Beit Yitzhak, Yoreh De'ah* 11, 162 and *Novellae of R. Hayyim Soloveitchik on Maimonides, Hilkhot Rotzeah* 1:9. For an excellent article on this topic, and on the general status of preemptive war in Jewish law, see R. J. David Bleich, "Preemptive War in Jewish Law," *Contemporary Halakhic Problems* IV (Ktav, 1989), 251.

31. What precisely these restrictions are, will be explained infra section III:A.
32. R. Naftali Tzvi Yehudah Berlin, *Ha'amek Davar*, Genesis 9:5.
33. Genesis 9:5; In Hebrew, "Mi-yad ish ahiv."
34. Tosafot *Shevu'ot* 35b, s.v. *katla had*.
35. R. Shlomo Goren, "Combat Morality and the Halakhah."
36. R. Moses Sofer, *Hatam Sofer, Yoreh De'ah* 1:19.
37. See e.g., R. Abraham Kahana-Shapiro, *Dvar Avraham*, 1:11; R. Menachem Zemba, *Zera Avraham* #24. The issue of selling weapons to non-Jewish nations is addressed in an essay of R. J. David Bleich, "Sale of Arms," in his *Contemporary Halakhic Problems* III, 10–13. In this essay, he demonstrates that the consensus opinion within Jewish law permits the sale of arms to governments that typically use these weapons to protect themselves from bandits.
38. R. Israel Meir Kagan, *Mishnah Berurah* 329:17.
39. Similar sentiments can be found in R. Samson Raphael Hirsch, who clearly enthusiastically endorses military service for one's own country; see *Horeb* at pp. 461–463. A similar but murkier view can be found in R. David Tzvi Hoffman, *Responsa Melamed le-Ho'il* 42–43. R. Joseph Elijah Henkin states in a letter written on December 23, 1941:

On the matter to enlist to volunteer for the Army: In my opinion, there is a difference between the rules of the army which existed before now in America and England, and the obligation of the army now. Before, when the entire army consisted only of volunteers, and during wartime they called upon volunteers by appealing to sacrifice for one's own people and country, then certainly everyone was required to take on the burden; but now that there is obligatory service, and the obligations are changed and reorganized according to need and function, I see no reason why one should volunteer to go, so that someone else will be exempted, for there are boundaries to this – there needs to be a space, uniforms, and weapons for them... So now the correct way is a middle position: everyone should fulfill the obligation placed on him by the government and intend to improve his nation in every area and function he performs, not to show indifference nor get riled up against the Allies (reprinted in R. Yehudah H. Henkin, *Responsa Benei Banim* IV, pp. 93–94).

- R. Moses Feinstein reaches a similar conclusion in *Iggerot Moshe Yoreh De'ah* 2:158, s.v. *u-be-davar* where he writes, "Even more so, when one is drafted into the army, where even more so one is obligated to serve in the Army under the principle of *din malkhut*." On a personal note, I can attest to the prevalence of this practice in the Orthodox community of Germany during World War I, as my great uncle Jacob Buehler O.B.M. was killed in the battle of Verdun in 1916 fighting as a member of Kaiser Wilhelm's army.
40. See for example, a fine article (with whose conclusion I do not agree) by Ya'acov (Gerald) Blidstein, "The Treatment of Hostile Civilian Populations: The Contemporary Halakhic Discussion In Israel," *Israel Studies* 1:2 (1996): 27–44.
  41. For R. Lior, see "Gishat ha-Halakhah le-Sihot ha-Shalom bi-Zmanenu," *Shvilitin* 33:35 (5745): 146–150. The others are referenced above, and yet others are cited in Blidstein's article, *supra* note 40. Many other contemporary Israeli poskim could be added to this list.
  42. Captain Yosefi M. Seltzer, "How the Laws of Armed Conflict Have Changed," in this volume.
  43. *Sotah* 44b.
  44. The word *reshut* is sometimes translated as "permitted;" this is not correct, for reasons to be explained *infra*. R. Joseph Karo, in *Kessef Mishneh (Hilkhot Melakhim 6:1)* further divides the category of "Obligatory" into two categories, "Compulsory" and "Commanded." Thus, some modern commentaries divide the types of war into three. While this division is not incorrect, the legal differences between "Commanded" and "Compulsory" wars are not very significant; for this reason this article will continue to use the common bifurcation rather than any other type of division, as does the Mishnah and Maimonides.
  45. Or perhaps on "Compulsory" wars according to those who accept a trifurcation of the categories; see note 44.
  46. Michael Waltzer, "War and Peace in the Jewish Tradition," in *The Ethics of War*, ed. T. Nardin (Princeton, 1997).
  47. Noam Zohar, "Can a War be Morally Optional?" *Journal of Political Philosophy* 4:3 (1996): 229–241.
  48. *Tzitz Eliezer* 13:100.
  49. From this it is clear that the Jewish tradition neither favors pacifism as a value superior to all other values nor incorporates it as a basic moral doctrine within Judaism. Judaism has long accepted a practical form of pacifism as appropriate in the "right" circumstances. For example, the Talmud recounts that in response to the persecutions of the second century (C.E.), the Jewish people agreed (literally: took an oath) that mandated pacifism in the process of seeking political independence or autonomy for the Jewish state (*Ketubot* 111a). This action is explained by noting that, frequently, pacifism is the best response to total political defeat; only through the complete abjuring of the right to use force can survival be insured. So too, the phenomena of martyrdom, even with the extreme example of killing one's own children rather than allowing them to be converted out of the faith, represents a

form of pacifism in the face of violence; See e.g., Haym Soloveitchik, "Religious Law and Change: The Medieval Ashkenazic Example," *AJS Review* 12:2 (1987): 205–223 and *Shulhan Arukh, Yoreh De'ah* 151 for a description of when such conduct is permissible.

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

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

It must be affirmed that Judaism rejected total pacifism, but that it believed strongly in pragmatic pacifism as a higher morally more noteworthy religious position. Nonetheless, this selective pacifism is only a public, national decision, and not a personal one. (Maurice Lamm, "After the War – Another Look at Pacifism and Selective Conscientious Objection," in *Contemporary Jewish Ethics*, M. Kellner, ed. [New York, 1978], 221–238).

50. *Sotah* 44b.
51. The Talmud additionally recounts that there are three ritual requirements for an Authorized war to commence. The details of the ritual requirements for such a war are beyond the scope of this paper; see generally, Bleich, *supra* note 30 and Zevin, "Ha-milhamah" in his *Le-Or ha-Halakhah*.
52. Maimonides, *Hilkhot Melakhim* 5:1.
53. "To diminish..." *supra* text accompanying notes.
54. See Maimonides' commentary to *Sotah* 8:7. Maimonides' commentary to Mishnah was originally written in Arabic. This version, printed in the commentary section appended to the Vilna edition of the Talmud, is the most common translation.
55. See Translation of R. Joseph Kapah, *Mishnah Sotah* 8:7. This is generally considered the better translation. For more on the distinction between the two translations of Maimonides' *Commentary on the Mishnah*, see R. J. David Bleich, "Preemptive War in Jewish Law," *Tradition* 21:1 (Spring 1983): 3–41, pp. 9–11.
56. Commenting on Maimonides, *id.* R. David bar Naftali Hirsch, *Korban ha-Edah* (in his addendum, *Shiurei Korban*, to the Palestinian Talmud, 8:10) has a slightly narrower definition, which is very similar to diBoton. An authorized war may be undertaken "against neighbors in the fear that with the passage of time they will wage war. Thus, Israel may attack them in order to destroy them." Thus, an

- authorized war is permitted as a preemptive attack against *militaristic* neighbors. However, war cannot occur without evidence of bellicose activity.
57. R. Menahem ben Meir, Commentary of *Meiri to Sotah* 43b.
  58. See R. Abraham Isaiah Karelitz, *Hazon Ish*, *Mo'ed* 114:2. He writes, "they kill Israel intermittently, but do not engage in battle."
  59. See *infra*, Section v.
  60. See R. Yehiel Mikhel Epstein, *Arukh ha-Shulhan he-Atid*, *Melakhim* 74:3–4. The thesis of Noam Zohar (at note 47 above) is buttressed by the approach of the *Arukh ha-Shulhan*.
  61. In addition, the varying types of wars are flexible, not rigid. Armed aggression can begin as being permissible because of "pursuer" and then, due to a massive unwarranted counter-attack by the enemy, can turn into an Obligatory war; after the battlefield has stabilized the war can become an Authorized war.
  62. See R. Joseph Karo, *Beit Yosef*, *Hoshen Mishpat* 425:6–7 (uncensored version).
  63. For further discussion of this issue, see *Shulhan Arukh*, *Yoreh De'ah* 242 and commentaries *ad locum*.
  64. See R. Shaul Israeli, *Amud ha-Yemini* 16. For an example of this type of discussion, see Michael Broyde and Michael Hecht, "The Return of Lost Property According to Jewish & Common Law: A Comparison," *The Journal of Law and Religion* 13 (1996): 225–254, Michael Broyde and Michael Hecht, "The Gentile and Returning Lost Property According to Jewish Law: A Theory of Reciprocity," *Jewish Law Annual* XIII (2000): 31–45.
  65. And prohibited wars. Perhaps the most pressing ethical dilemma is what to do in a situation where society is waging a prohibited war and severely penalizes (perhaps even executes) citizens who do not cooperate with the war effort. This question is beyond the scope of the paper, as the primary focus of such a paper would be the ethical liberalities one may take to protect one's own life, limb, or property in times of great duress; see e.g., R. Mordecai Winkler, *Levushei Mordekhai* 2:174 (permitting Sabbath violation to avoid fighting in unjust wars); but see R. Meir Eisenstadt, *Imrei Eish*, *Yoreh De'ah* 52.
  66. The question of who is "innocent" in this context is difficult to quantify precisely. One can be a pursuer in situations where the law does not label one a "murderer" in Jewish law; thus a minor (*Sanhedrin* 74b) and, according to most authorities, an unintentional murderer both may be killed to prevent the loss of life of another. So, too, it would appear reasonable to derive from Maimonides' rule that one who directs the murder, even though he does not directly participate in it, is a murderer, and may be killed. So, too, it appears that one who assists in the murder, even if he is not actually participating in it directly, is not "innocent;" see comments of *Maharal* of Prague on Genesis 32. From this *Maharal* one could derive that any who encourage this activity fall within the rubric of one who is a combatant. Thus, typically all soldiers would be defined as "combatants." It would appear difficult, however, to define "combatant" as opposed to "innocent" in all combat situations with a general rule; each military activity requires its own assessment of what is

needed to wage this war and what is not. (For example, sometimes the role of medical personnel is to repair injured troops so that they can return to the front as soon as possible and sometimes medical personnel's role is to heal soldiers who are returning home, so as to allow these soldiers a normal civilian life.) See also the discussion below.

67. This last rule has been subject to a considerable amount of renewed examination in light of the analysis of R. Yitzhak Ze'ev Soloveitchik that one may, as a matter of right, kill a *rodef* (pursuer) as he is a *gavra bar katila* (someone deserving to be put to death who has the status of "living dead"). While Blidstein, *supra* n. 40, notes that it is surprising how quickly that theoretical analysis has moved into practical *halakhah*, I am not surprised at all, and this is part (I suspect) of the dramatic impact conceptual *lamdut* has had on normative *halakhah*, a topic worthy of an article in its own right.
68. For a discussion of these rules generally, as well as various applications, see R. Joseph Karo, *Shulhan Arukh, Hoshen Mishpat 425* (and commentaries). In addition, R. Jacob ben Asher, *Tur, Hoshen Mishpat 425* contains many crucial insights into the law. (However, the standard text of this section of the *Tur* has been heavily censored, and is not nearly as valuable a reference as the less widely available uncensored version.)
69. See Section I.
70. Deuteronomy 20:10–12.
71. See e.g., Numbers 21:21–24, where the Jewish people clearly promised to limit their goals in return for a peaceful passage through the lands belonging to Sihon and the Amorites.
72. *Lev. Rabbah, Tzav, 9*.
73. Rashi, commentary to Deuteronomy 20:10.
74. *Sifri* 199, commenting on *id.* One could distinguish in this context between Obligatory wars and Commanded wars in this regard, and limit the license only to wars that are Obligatory, rather than merely Commanded. It would appear that such a position is also accepted by *Ravad*; see *Ravad* commenting on *Hilkhot Melakhim* 6:1 and Commentary of *Malbim* on Deuteronomy 20:10.
75. Maimonides, *Hilkhot Melakhim* 6:1.
76. See his commentary on *id.*
77. I would, however, note that such is clearly permissible as a function of prudent planning. Thus, the Jewish nation offered to avoid an authorized war with the Amorites if that nation would agree to a lesser violation of its sovereignty; see Numbers 21:21.
78. Of course, there is no obligation to do so with specificity as to detailed battle plans; however, a clear assertion of the goals of the war are needed.
79. *Hilkhot Melakhim* 6:1. These seven commandments are: acknowledging God; prohibiting idol worship; prohibition of murder; prohibition of theft; prohibition of incest and adultery; prohibition of eating the flesh of still living animals; and the obligation to enforce these (and others, perhaps) laws. For a discussion of these laws in context, see *Arukh ha-Shulhan he-Atid, Hilkhot Melakhim* 78–80.

80. Commentary of Nahmanides on Deuteronomy 20:1; of course, if after the surrender, a Jewish government were to rule that society, such a government would enforce these seven laws; however, it is not a condition of surrender according to Nahmanides.
81. This is just one facet in the debate between Maimonides and most other authorities as to whether Jewish law requires the imposition of the Noahide code on secular society. Elsewhere (*Hilkhot Melakhim* 8:10), Maimonides explains that in his opinion there is a general obligation on all (Jews and non-Jews) to compel enforcement of these basic ethical rules even through force in all circumstances; see also *Hilkhot Melakhim* 9:14 for a similar sentiment by Maimonides. Nahmanides disagrees with this conception of the obligation and seems to understand that the obligation to enforce the seven laws is limited to the non-Jewish rulers of the nation, and is of a totally different scope; for a general discussion of this, see R. Yehudah Gershuni, *Mishpetei Melukhah* 165–167. It is worth noting that a strong claim can be made that Tosafot agrees with Nahmanides in this area; see Tosafot, *Avodah Zarah* 26b, s.v. *ve-lo moredim*.
82. *Tzitz Eliezer* 13:100, supra at note 48.
83. Or naval blockade.
84. *Hilkhot Melakhim* 6:5. Maimonides understands the Jerusalem Talmud's discussion of this topic to require three different letters. If one examines *Shevi'it* 6:1 closely, one could conclude that one can send only one letter with all three texts; see *Arukh ha-Shulhan he-Atid*, *Hilkhot Melakhim* 75:6–7.
85. *Hilkhot Melakhim* 6:7.
86. *Supplement of Nahmanides to Maimonides' Book of Commandments*, Positive Commandment #4 (emphasis added).
87. *Id.* See also *Minhat Hinukh* 527. R. Gershuni indicates that the commandment is limited to Compulsory wars, rather than Commanded wars. His insight would seem correct; *Mishpetei Melukhah* commenting on *id.* It is only in a situation where total victory is the aim that such conduct is not obligatory.
88. Charles C. Hyde, *International Law* (Boston, 1922), §656; for an article on this topic from the Jewish perspective, see Bradley Shavit Artson, “The Siege and the Civilian,” *Judaism* 36:1 (Winter 1987): 54–65. A number of the points made by R. Artson are incorporated into this article, although the theme of the purpose of the Jewish tradition in the two articles differs somewhat.
89. See R. Yehiel Mikhel Epstein, *Arukh ha-Shulhan he-Atid*, *Hilkhot Melakhim* 76:12.
90. Although I have seen no modern Jewish law authorities who state this, I would apply this rule in modern combat situations to all civilians who remain voluntarily in the locale of the war in a way which facilitates combat.
91. R. Shaul Israeli, “Military Activities of National Defense (Heb.),” first published in *Ha-Torah ve-ha-Medinah* 5/6 (1953–54): 71–113, reprinted in his *Amud ha-Yemini* (rev ed., Jerusalem, 1991) as Ch. 16, 168–205.
92. To the best of my knowledge, this principle is first cogently noted by R. Meir Simha of Dvinsk in *Or Sameah*, *Hilkhot Rotzeah* 1:8.

93. For examples of this, see R. Abraham Isaiah Karelitz, *Hazon Ish*, *Ohalot* 22:32 and R. Isser Yehudah Unterman, *Shevet mi-Yehudah* 1:8. (See also R. Unterman's analysis of heart transplantation, "Be'ayat Hashtalat Lev me-Nekudat Halakhah," in *Torah she-be-al Peh* 11 (1969):11–18 and *Noam* 13:4 (1971):1–9). Both of these authorities employ statistical analysis to delimit Jewish law status. Regarding the rules of pursuit – one may kill a person as a pursuer only in a situation where the likelihood that such a person is not a pursuer is so statistically unlikely as to be considered a *mi'ut she-eino matzui*.
94. See R. Hayyim Dovid Halevi, "Din ha-Ba le-Hargekha Hashkem le-Hargo be-Hayyenu ha-Tzeboryim," *Tehumin* 1:343–348 (5740). This approach stands in sharp contrast with the insight of the *Maharatz Hayot*, who adopts the view that the King's ability to punish (kill) those who rebel is grounded in the rules of *rodef* and not the *dinei melek*. See R. Tzvi Hirsch Chajes, *Kol Kitvai Marahatz Hayot* 1:48. The most difficult and harsh example of this view, in this writer's opinion, is taken by R. Itamar Warhaftig, who writes (*halakha le-m aaseh*, to the Israeli police) that one may intentionally kill non-violent demonstrators in a violent demonstration as the public safety is threatened by their mere presence. See Dr. Itamar Warhaftig, "Haganah Atzmit be-Averot Retzah ve-Havalah," *Sinai* 81 (1977): 48–78.
95. See R. Shaul Israeli, *Amud ha-Yemini* 16:5 and R. Joseph Babad, *Minhat Hinnukh*, Commandment 425 who discusses "death" in war in a way which perhaps indicates that this approach is correct. See also Bleich, *supra* note 30, at 277 who states, "To this writer's knowledge, there exists no discussion in classical rabbinical sources that takes cognizance of the likelihood of causing civilian casualties in the course of hostilities..."
96. R. Yaakov Ariel, "Haganah Atzmit (*ha-intifada ba-halakhah*)," *Tehumin* 10: 62–75 (1991). He bases his view on the famous comments of the *Maharal* on the biblical incident of Shekhem, which defend the killing of the innocent civilians in that conflict along such a rationale. R. Shlomo Goren, "Combat Morality and the Halakhah," *Crossroads* 1:211–231 (1987) comes to the opposite conclusion. See also the article of R. Yoezer Ariel (brother of Yaakov Ariel), who also reaches a different conclusion; R. Yoezer Ariel, "Ha'onashat Nokhrim," *Tehumin* 5:350–363 (1979). In this writer's view, R. Yoezer Ariel's paper correctly distinguishes between individual and national goals in these matters.
97. *Hilkhot Melakhim* 6:8.
98. *Sefer ha-Mitzvot (Book of Commandments)*, Negative Commandment #57.
99. In his supplement to Maimonides, *Sefer ha-Mitzvot (Positive Commandment 6)*.
100. The rules related to sexuality in combat are unique in Jewish law because the Talmud (*Kidushin* 21b) explicitly states that even that which is permissible was only allowed because of the moral weakness of men in combat. While the details of these regulations are beyond the scope of this paper (See Zevin, *supra* note 30, at 52–54 for a detailed description of these various laws), it is clear that the Bible chose to permit (but discourage) in very narrow situations in wartime so as to inject some realistic notion of morality into what could otherwise be a completely

- immoral situation. The rules explicitly prohibited multiple rapes, encouraged marrying such women, and limited the time period where this was permitted to the immediate battlefield. A number of liberalities in ritual law were also allowed, reflecting the unique aspects of war. Why these particular laws did not apply in wartime, but others did, is also a topic beyond the scope of this paper.
101. *Shevu'ot* 35b. Tosafot notes that this applies even to a Jewish government fighting an authorized war; See generally, R. J. David Bleich, "Nuclear Warfare," *Tradition* 21:3 (Fall 1984): 84–88; (reprinted in *Confronting Omnicide: Jewish Reflections on Weapons of Mass Destruction*, D. Landes, ed. (1991), p.209 as well as in R. Bleich's own *Contemporary Halakhic Problems* III, 4–10).
  102. R. Immanuel Jakobovits, "Rejoinders," *Tradition* 4:2 (Spring 1962): 202 (emphasis in original); (reprinted in *Confronting Omnicide: Jewish Reflections on Weapons of Mass Destruction*, D. Landes, ed. (1991), p. 199). See also Walter Wurzberger, "Nuclear Deterrence and Nuclear War," in *Confronting Omnicide*, p. 224 and Maj. Guy B. Roberts, "Note: Judaic Sources of and Views on the Laws of War," *Naval Law Review* 37 (1988): 221.
  103. R. J. David Bleich, "Nuclear Warfare," supra n. 101. Although this author finds this logically persuasive, it is difficult to find a clear source in the Jewish tradition which permits one to threaten to do that which is prohibited to do; see e.g. R. Moses Isserles, *Hoshen Mishpat* 28:2.
  104. See e.g., R. Aharon Zakai, *ha-Bayit ha-Yehudi* (Jerusalem, 1986) vol. 7 ch. 3.
  105. Deuteronomy 20:2–9 (emphasis added).
  106. See *Hilkhot Melakhim* 7:1–4 and comments of *Kesef Mishneh*, *Radvaz*, and *Lehem Mishneh ad locum*, all of whom interpret Maimonides as agreeing with *Ravad* on this issue. Maimonides in his *Sefer ha-Mitzvot* appears to adopt the position of *Ravad* in total; see *Sefer ha-Mitzvot*, Commandment 191.
  107. Compare *Lehem Mishneh* commenting on *id.* and *Arukh ha-Shulhan he-Atid*, *Hilkhot Melakhim* 76:3 for an analysis of Maimonides' position.
  108. *Sotah* 44a.
  109. There is some dispute over how a person would prove his acceptability for any one of these exemptions; see R. Yehudah Gershuni, *Mishpetei Melukhah* 7:15 for a detailed discussion of this issue and R. Zevin, supra note 30, at 31–32.
  110. See commentaries on Maimonides.
  111. Maimonides accepts the opinion of Rabbi Akiva as normative (*Hilkhot Melakhim* 7:3); while *Hinukh* accepts the opinion of Rabbi Yossi (*Sefer ha-Hinukh*, Commandment 526). Most authorities accept Rabbi Akiva's opinion as normative; see *Arukh ha-Shulhan he-Atid*, *Melakhim* 76:22; see also R. Aryeh Leib Gunzberg, *Sha'agat Aryeh ha-Hadashot* 14:2 for more on this dispute.
  112. *Sifri* 198.
  113. Noam Zohar, "Can a War be Morally Optional?" supra n. 239.
  114. See Deuteronomy 23:10–15; *Sifri* 257; Maimonides, *Hilkhot Melakhim* 6:13–14; see also *Arukh ha-Shulhan he-Atid*, *Melakhim* 75:18.
  115. Joshua 9:19.

116. Maimonides, *Hilkhot Melakhim* (Laws of Kings and Their Kingdoms) 6:3. As explained above, it seems intuitive that those who argue with Maimonides' requirement of acceptance of the seven Noahide laws as explained above would disagree with its application here too; see e.g., R. Yehudah Gershuni, *Mishpetei Melukhah* p. 173.
117. Commentary of *Radvaz ad loc.* Such can also be implied from Maimonides' own comments of *Hilkhot Melakhim* 6:5.
118. In Judaism, the term "*hillul Hashem*" (desecration of God's name) denotes a prohibition whose parameters are fixed not by objective legal determinations, but by the perceptions of observers in the moral sphere. This is a very atypical prohibition in the Jewish legal system.
119. Commentary of *Ralbag* to Joshua 9:15.
120. Commentary of Radak to Joshua 9:7. This theory would have relevance to a duly entered into treaty that was breached by one side in a non-public manner and which the other side now wishes to abandon based on the private breach of the other side. Radak would state that this is not allowed because most people would think that the second breaker is actually the first one and is not taking the treaty seriously.
121. This is also the unstated assumption of the Babylonian Talmud, *Gittin* 45b–46a, which seeks to explain why treaties made in error might still be binding.
122. See "Statement of Policy by the National Security Council on Basic National Security Policy, October 30, 1953," in *The Pentagon Papers* (Gravel ed.), vol. 1, doc. 18, 412–429.
123. There is a great deal of debate among scholars and historians as to Eisenhower's true private feelings on the actual use of nuclear weapons in "massive retaliation." See e.g., Richard H. Immerman, "Confessions of an Eisenhower Revisionist: An Agonizing Reappraisal," *Diplomatic History* 14:3 (Summer 1990), p. 326, who felt that "Eisenhower never considered the nuclear option viable, except in the sense one considers suicide viable;" and Frederick W. Marks III, *Power and Peace: The Diplomacy of John Foster Dulles* (Praeger, 1993), pp. 108–09, who, though acknowledging Immerman's view as plausible, represents the consensus view of military and nuclear experts as holding that Eisenhower was clearly willing to "go nuclear." See also George H. Quester, "Was Eisenhower a Genius?" *International Security* 4 (Fall 1979): 159–79.
124. One of the contentions of Immerman's "Confessions" is that Eisenhower shrewdly used Secretary of State John Foster Dulles in a similar civilian role as a spokesperson and ambassador of these ends. Of course, there was the danger that even if Eisenhower himself would not have used nuclear weapons, at least some of his successors might have.
125. For an example of bluffing in Jewish law (whose truth ultimately cannot be determined), see the comments of R. Yehiel Mikhel Epstein regarding informing (*mesira*), *Arukh ha-Shulhan* 388:7; See also, Michael Broyde, "Informing on Others for Violating American Law: A Jewish Law View," *Journal of Halacha and*

*Contemporary Society* 41 (2002):5–49; Justice Menachem Elon, “Extradition in Jewish Law,” *Tehumin* 8 (1988):263–86, 304–09; R. J. David Bleich, “Extradition,” *Tehumin* 8 (1988): 297–303; and R. Shaul Israeli, “Extradition,” *Tehumin* 8 (1988): 287–96. See also R. Yehudah Herzl Henkin, *Responsa Benei Banim* III, p. 146.