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INTRODUCTION

Halakhic and moral decision-making, like other disciplines, benefit from repeated application of principles to the real world. Absent the repeated exposure of the theoretical to the practical, one applies principles to concrete cases only with difficulty. Who today could comfortably *pasken* a question, should one arise, of ritual impurity of fruit casings (*uktsin*)? It is our purpose in this special edition of *Tradition* to explore some of the practical issues connected with the making of war and peace that have not received sustained and serious attention as matters to be guided by the entirety of the *mesora*.

The halakhot of war-making have not been applied in any systematic way by a sovereign Jewish state since well before the destruction of the Second Temple, and before preserved sources in the Oral Law. Since then, the technology of warfare has changed numerous times, to the point where states, and even non-state actors like Hezbollah, have the capability to wreak untold suffering by remote control. A nation or terrorist group with nuclear weapons can wipe out not only its immediate opponent, but millions of others. If, as R. Shalom Carmy discusses, we still struggle with understanding the mitsva of *mehiyyat Amalek* and the destruction of the seven Canaanite nations, we surely ought to struggle with the morality of these new military modalities.

For all the problems with international law (of which more below), it is the case that not only military technology has changed. Moral thinking about warfare has changed, too. Increasingly, the law of war focuses not on how clashing armies treat each other (the treatment of prisoners of war, the wounded, permissible weapons, and defining who is a combatant). Instead, with a laser-like focus, it emphasizes protecting civilians at all costs, including, it seems, protecting those who abuse international law by shielding themselves behind civilians.

The resolution of these issues by the world community is not necessarily one Jewish thought readily accepts, as R. J. David Bleich demonstrates in his paper on torture and the ticking bomb. But the Orthodox community has not seriously grappled with these law of war issues. Leadership on them in Israel has passed to non-traditional Jews, at best not fully accepting the Jewish religious tradition.

The birth of the State of Israel required both collective and individual consideration of a wide range of issues concerning armies and the use of force. Many of these issues were matters of individual ritual observance (Shabbat, eruv, prayers, kashrut). These have generated an extensive literature in the form of responsa, articles, and handbooks for individual soldiers. Authored by rabbis across much of the religious and ideological spectrum, these, at least to my eye, seem remarkably independent of the authors' point of view on political Zionism.

These issues, though, were not entirely new. At least some post-emancipation European Jews served in the armed forces, usually involuntarily. *Poskim* of the stature of R. David Tsevi Hoffman responded to questions from them. No less a religious authority than Hafets Hayyim penned a religious handbook for Jewish soldiers.

In important ways, these questions of service in non-Jewish armies were different than the ones confronting soldiers in the Israeli army. Some of these diaspora armies (especially those of Russia and Poland) were either overtly or covertly anti-Semitic, with compliance with army regulations a given, and religious accommodation (in the American tradition) all but unknown. Soldiers in those armies had legitimate claims of *ones* and *pikku'ah nefesh* when (full) compliance with halakha was impossible. Jews often had little communal stake in the outcome of the wars in which they were forced to serve. Dr. Judith Bleich here surveys the literature on the subject, and concludes that Jews were reluctant warriors—on principled as well as practical grounds.

On the other hand, the presence of large numbers of non-Jewish soldiers meant that with regard to Shabbat and Yom Tov, at least, there was a possibility of relying to some extent on non-Jews to carry out Shabbat work. That possibility is near non-existent in an overwhelmingly Jewish army. Major moral decisions were the responsibilities of others. In the Israeli context, Jews have an existential interest in the army's success, and have full moral responsibility for the army's actions.

A second set of problems concerns religious objections to military service: yeshiva students, young women, and gender mixed units. One must add here, especially in light of the controversy over the evacuation

of Gush Katif, but also encompassing broader objections to the use of military force, the problem of religiously-based selective or general conscientious objection. These subjects, too, have drawn substantial rabbinic and popular commentary. Although the issue of service for yeshiva students is likely to arise again shortly in light of last year's Israeli Supreme Court decision suggesting that the existing exemption is inconsistent with Israel's Basic Law, it is not likely that much new need (or can) be written about these problems.

The third category of issues address what international lawyers call *jus ad bellum* (the law before the war, that is, when is war justified) and *jus in bellum* (the law of the conduct of war). Here we have relatively little in the way of practical guidance from Jewish sources, as illustrated by R. Shelomo Yosef Zevin's magisterial but abstract review of the issues in *Le-Or ha-Halakha*.¹ The reader of that essay cannot but be struck by the theoretical nature of most of the sources.

There is, therefore, an urgent need to develop a body of work, well grounded in the halakhic and, where appropriate, aggadic sources *and* in the current military, political, legal, and moral realities in which Israel finds itself, lest the religious community abdicate all influence to various secular philosophies. In particular, Israel's current efforts to deal with Palestinian terrorists and Hezbollah are different in kind and degree from battles against fixed armies operated by states, the classic subjects of the law of war. This is because neither is a state, with all the legal obligations that entails. Both groups place military operations amongst civilians, making civilian casualties inevitable. Neither, as of this writing, poses a threat to the very existence (as opposed to the peace and security) of Israel.

The war in Lebanon and the disengagement from Gaza (which took place after the articles in the symposium were written), and the incessant, often unfounded or exaggerated criticism of Israeli tactics, almost never matched with a full throated critique of Israel's opponents' tactics, lead many Jews, especially those in the national religious camp in Israel and the modern Orthodox community in the United States, to throw up their hands and urge, as the Council of Yesha Rabbis did recently, no restraints on Israeli actions: "According to Jewish law, during a time of battle and war, there is no such term as 'innocents' of the enemy." Moreover, "[a]ll the discussions on Christian morality are weakening the spirit of the army . . . and are costing us in blood."

On its merits, it is quite easy to rebut this claim, at least if Amalek and the Canaanite nations are not the relevant halakhic models. The Yesha

Rabbis would dispense entirely with the concept of *tohar ha-neshek* (purity of armies), and treat all opponents as if they were combatants.

The statement that Jewish law draws no distinction between combatants and others is refuted by the text of Humash itself. Jewish law certainly draws distinctions between active combatants and others, if for no other reason than to comply with the law against murder. In 1953, R. Shaul Yisraeli wrote a well-known responsum² rejecting (*inter alia*) the broadest formulation of the no-distinction position strictly limiting (but not ruling out altogether) the permissibility of retaliating against civilians (albeit not children) to deter further terrorist attacks where those civilians harbored terrorists. (R. Yitzchak Blau discusses that responsum in his article.)

What is noteworthy and worrisome about the Yesha Rabbis' position (over and above the moral issues it raises) is that it was quickly picked up by the Council of American Islamic Relations ("CAIR") and the websites of David Duke and other anti-Semites as proof of Israel's bloodthirstiness. The extremity of the Yesha Council of Rabbis' statement in its disregard for the value of non-Jewish lives was arguably itself a *hillul Ha-Shem*.

The Yesha Rabbis' position and its rejection by others have antecedents in earlier religious Zionism. R. Shaul Yisraeli's position against indiscriminate killing of civilians enjoyed the firm support of the then leader of Mizrachi, Moshe Chaim Shapiro. As a member of Israel's cabinet, he acted as if there were indeed limits on causing Arab civilian casualties to forestall future terror attacks.³ That position was sharply criticized contemporaneously by another Mizrachi leader, S.Z. Shragai.⁴ Those dueling positions were reprised by R. Aharon Lichtenstein and R. Dov Lior in 1982 in a sharp exchange over Israeli tactics in Lebanon.⁵

The Yesha Rabbinic Council's position finds a mirror image in the far reaches of the Jewish left which finds any civilian casualties intolerable, and deigns to determine that Israel's crimes in Lebanon were "greater than those of Hezbollah." Accustomed to Jewish powerlessness, these critics expect power to be exercised antiseptically or not at all. Maybe in some future world that will be possible. It is not possible in our world, not if the State of Israel is to defend itself against those who have vowed to destroy it.

Neither view is satisfactory. Neither position feels, to me at least, true to Jewish sources. Yet each has something to offer.

The Yesha Rabbis correctly point to a major difficulty with international law as espoused by groups like Amnesty International and

Human Rights Watch, and individuals such as Secretary General Kofi Annan: that the protection of civilians takes absolute precedence over effective war against terrorism. Annan, for example, on July 7, 2006 said that combatants have a duty under international law to avoid all attacks which *may* harm civilians or civilian property, in effect precluding effective use of arms against Hamas and Hezbollah.

No such duty exists under international law—Annan simply made it up. But it is a view of international law widely shared in various circles, including many European governments and so-called human rights groups. We ought to be able to do better, but without treating civilian casualties as a moral cipher, while remembering that the likely effect of enhanced protection for civilians shielding terrorists are increased military casualties.

Moreover, even if one rejects the view that civilians are always fair targets in war, one needs to consider when they may be killed as a collateral effect of an otherwise legitimate military attack. It is important in this regard to distinguish between the intentional killing of civilians (as was true in the case R. Yisraeli dealt with) and their death as a collateral consequence of otherwise legitimate military action. International law forbids the former. The latter is permissible, although the terms under which it is permitted are much disputed. As noted above, there is a danger—I think already realized—of international law tilting too far in favor of protecting civilians, especially in the context of anti-terrorist activities. The mirror image danger is devaluing civilian lives.

That is not just a problem of public relations or practical statecraft, of avoiding clashes with the United States or Europe. (Is that a legitimate concern of a Jewish state ruled by halakha, at least in the absence of prophetic intervention?) It is at first a halakhic question, and then, equally, a moral question. I remember vividly walking with the Rav outside Yeshiva shortly after an Israel air raid on Lebanon had inadvertently killed innocent Lebanese or Palestinian civilians. The Rav remarked in scathing fashion on Israeli tactics, which, he indicated, were not appropriate for a civilized nation. In our deliberations, we need to consider the corrosive moral effects of a policy that dehumanizes citizens of Arab nations.

Another issue over which Jewish law and tradition arguably clash with international law is when the right of self-defense is triggered. International law, it is commonly thought, requires something close to troops in motion before self-defense justifies the use of force. (Whether any state actually puts this limit into practice is a nice question.) Jewish

law and Israeli practice appear to have a much more flexible view of anticipatory self-defense.

At the center of the debate is the teaching “*ha-ba le-bargekha, hashkem le-borgo*.” Plainly, this teaching departs from much current international law (although not necessarily state practice) that forbids the invocation of the right of self-defense until an attack is either underway or imminent. There is a substantial case to be made that the regnant reading of the right of self-defense, designed to minimize resort to force which may be avoidable, is too narrow, especially when applied to terrorists whose attacks are not readily identifiable until it is too late to do anything to defend against them. It does not follow, as a very literal reading of Hazal might indicate, that even a rhetorical threat of attacks justifies a full-scale response.

In what has been said until now, I have cast international law in opposition to Jewish law. The possibility that the Jewish state as a member of the international community is bound by international *dina demalkhuta dina* needs to be considered. In his *teshuva*, R. Shaul Yisraeli accepted the possibility that international law (in the form of the then recently adopted Geneva Conventions) was binding for this reason on Israel as a state.

The Yesha Council, by contrast, dismisses international law out of hand as Christian morality, which a Jewish state is presumably forbidden to adopt as its own. (In point of fact, it is a more modern secular morality than a Christian one.)

S.Z. Shragai, for his part, objected to R. Yisraeli’s conclusion about protecting civilians. Pointedly, though, he did not address R. Yisraeli’s halakhic conclusions, relying instead on practical arguments. His response raises the question of whether halakha here exhausts the subject, or whether formal halakha is not entirely controlling and that there are other relevant factors. But which ones? R. Blau musters scriptural and aggadic sources suggesting that the *mesora* has a pacifistic streak not often heard today in religious circles. And, one must ask, are all these questions moot as a practical matter because Israel cannot realistically ignore international law even if it wished to do so?

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After almost two millennia without any military force to protect it from those who would destroy it, Jews are naturally enamored of a vital and effective military force. It is good, as the Rav memorably put it in *Kol*

Dodi Dofek, that “*dam yisrael eino hefker*”—“Jewish blood is not for the taking.” That attitude was reinforced by the euphoria over the 1967 war. Given that Israel is still surrounded by those who would “kill, obliterate, and destroy” the Jewish nation, an ethic which favors peace at (almost) any price necessarily means an end to Jewish state.

Anti-Zionist elements of the Orthodox community make just this point in arguing that it was a mistake to create a state, because its creation would inevitably lead to armed attacks by Arabs, resulting in Jewish deaths. But if one rejects that position—as no doubt almost all readers of *Tradition* do—does it follow that any number of deaths is acceptable, perhaps mandatory, to hold on to every centimeter of the land of Israel? If it is some other number, how is it chosen? And, again, by whom? And to how much? The 1948 partition plan? The 1967 borders? The Clinton plan, plus or minus Jerusalem?

In short, we have no practical *mesora* with regard to making war and we have no practical experience with making peace. If the modern religious community is to make a unique contribution on these issues, it needs to engage in a candid and thoughtful discussion, one not marred by name-calling and claims of betrayal of Jewish values. The discussions are too important, too difficult, and the sources too unclear, for that sort of treatment.

None of these issues is exhausted here. The authors certainly do not claim to have exhausted their topics, nor even to have represented all possible points of view. Events, too, overtook them. All of the papers were solicited and finished (except for this introduction) before the war in Lebanon with all the issues it raises. We hope only to begin a serious and informed discussion, so that if, God forbid, the Messiah still tarries, we will be able to confront war and peace forthrightly.

NOTES

1. R. S.Y. Zevin, “*Ha-Milhama*,” in *Le-Or ha-Halakha*, 9-63.
2. *Ammud ha-Yemini* (Tel Aviv: Moreshet, 1966), no. 16.
3. See E. Don-Yihya, “Leadership and Policy in Religious Zionism” [in Hebrew], pp. 135, 143, in *Ha-Tsiyyonut ha-Datit: Idan ha-Temurot* (Jerusalem: Mosad Bialik, 2004).
4. *Ben Dam le-Dam*, in S.Z. Shragai, *Tahalikhei ha-Temura ve-haGe’ula* (Jerusalem: Mosad ha-Rav Kook, 1959-60), 139-143.
5. The discussions are reprinted in the fourth volume of *Tehumin*.