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## BIBLICAL NARRATIVES AND THE STATUS OF ENEMY CIVILIANS IN WARTIME

Close to two thousand years without a state or army has produced a situation in which Jewish laws pertaining to wartime have not been fully developed and worked out against the backdrop of real life situations. Professor Michael Walzer puts the point well: “This is one of the meanings of exile: Jews are the victims, not the agents of war. And without a state or an army, they are also not the theorists of war.” One of Walzer’s prime examples is the question of harming enemy non-combatants. As Walzer correctly notes: “the resources of the tradition have not yet been fully mobilized and brought to bear in this (highly politicized) debate.”<sup>1</sup> In an interesting response to Walzer’s article, Aviezer Ravitzky argues for the “possibilities immanent in the classical religious sources—even if what these sources have to say on the subject is partial and fragmented—for developing a contemporary Jewish ethic of war.”<sup>2</sup> I shall try to continue Ravitzky’s project with regard to the issue of harming enemy civilians. Due to the fact that almost all halakhic codes of the millennium preceding modern day Israel ignore laws of warfare, Rambam’s *Mishneh Torah* being a notable exception, our search for sources necessarily goes beyond the classic halakhic literature. We shall see that the major commentaries on Genesis narratives involving our patriarchs engaged in battle, and some other sources as well, contain much valuable information regarding our central question.

While Walzer is correct that halakhic authorities have yet to utilize the full resources of our tradition on these matters, the last half a century has seen some important work toward realizing those goals. Perhaps the most comprehensive treatment of the status of enemy civilians is a long essay penned by R. Shaul Yisraeli after the events in Kibiyeh. After Palestinian terrorists had killed a woman and her two small children in Yehud (and following other terrorist infiltrations from Jordan), the IDF raided Kibiyeh, the village from which the terrorists came, on October 10, 1953. The army killed sixty people including women and children.

In response to this episode, R. Yisraeli wrote his analysis that ultimately justifies the operation.<sup>3</sup> While I shall criticize several aspects of his discussion, he presents the sources in an erudite and clear fashion and helps set the stage for any subsequent discussion. Other rabbinic writers, such as Rabbis J. David Bleich<sup>4</sup> and Neria Gutel,<sup>5</sup> have also made contributions. In addition, Ya'acov Blidstein has presented an insightful analysis of rabbinic writings on this topic.<sup>6</sup>

I emphasize at the outset that I am not attempting to offer a definitive approach to answering the question of how much weight to place on minimizing civilian casualties on the opposing side. The complexity of the question does not lend itself to neat formulas. Instead, I will try to argue against a position that would like to effectively render the question irrelevant, seeing the concern for enemy civilians as the unwanted intrusion of secular Western morality into Jewish teaching. Contrary to this claim, we will see sources from the Jewish religious tradition concerned with enemy innocents in wartime.

It bears mention that negating a position quick to justify harming civilians does not entail a position that would disallow any military operation if some chance existed of a civilian casualty. Such a view would make it impossible to fight almost any war, especially a modern war against terrorists or guerilla fighters who spend most of their day in close proximity to civilians. Indeed, one major position in general philosophy of war, “the doctrine of double effect,” sanctions a military act that might hurt innocent victims as long as those innocents are not the intended effect of the act. As Professor Walzer formulates this doctrine, it sanctions military operations that indirectly harm civilians when the direct act is morally acceptable, the actor aims at the good effect and not the evil effect, the good effect is sufficiently good to outweigh the evil effect, and the actor attempts to minimize the evil effect.<sup>7</sup>

Furthermore, the commonplace critique of military operations adopting the popular liberal position that collective punishment can never be justified rings false. As John Kekes points out, that position contradicts the liberal expression of guilt for the racism and discrimination in America’s past.<sup>8</sup> Nations, cultures, and religions function as a collective body, and justice, to say nothing of practicality, sometimes requires that these be addressed on that collective level. If it were otherwise, economic sanctions against rogue states would be unethical because some decent people will invariably be hurt by such sanctions. Of course, a chasm separates between causing economic hardship and killing those who do not deserve it. Sanctions against Saddam’s Iraq or

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Gaddafi's Libya can be countenanced much more easily than we can justify bombing civilian locations in these countries. Nevertheless, we should not too easily adopt the false position that outlaws all forms of collective judgment.

On the other hand, the opposing extreme position would justify blowing up a school building full of two thousand children as long as one enemy soldier was stationed there. In a panel discussion after the beginning of the 1982 war in Lebanon, R. Dov Lior basically adopted such a position. He stated that "in wartime, there exists halakhic basis for any action done to in order to prevent one of our soldiers from being injured, God forbid."<sup>9</sup> In the same discussion, R. Aharon Lichtenstein took a very different approach. Among the costs of war, he included the loss of life on our side, the loss of life on the other side, and the moral corrosion of our soldiers. He mentions that the amount of opposing casualties represents a factor to take into consideration before heading out to battle.<sup>10</sup> The bulk of the remainder of this article will show that R. Lichtenstein's position finds firm roots in our traditional sources.

The religious Zionist world includes some voices that argue vociferously for not worrying much about Palestinian civilian casualties. Perhaps most pronounced among them is R. Yisrael Rozen, head of the Zomet Institute and a frequent contributor to various Torah periodicals. In his weekly column printed in the popular *parasha* sheet, *Shabbat be-Shabbato*, R. Rozen often calls for harsher measures against Palestinian cities. In a column written after an IDF bombing killed a major terrorist, along with some children, he wrote that "a criminal bomber who surrounds himself with women and children will know, as will those around him, that 'woe to the wicked and woe to their neighbors.'"<sup>11</sup> In another column, he suggests exiling the families of suicide bombers and confiscating all of their property. In a follow up column, R. Rozen mentions that the only critical letter he received chided him on pragmatic grounds for erroneously assuming that Muslims care about what happens to their relatives.<sup>12</sup> When R. Yuval Cherlow wrote an article trying to convey the tension between minimizing one's own casualties on the one hand and wanting not to harm innocents from the opposition on the other hand, R. Rozen wrote an angry response in which he accused R. Cherlow as being too influenced by the world media's "humanitarian" criticism of Israel.<sup>13</sup> Note that R. Cherlow had not written about Israel in a critical vein. Apparently, even conveying opposing moral tensions on this issue is enough to raise R. Rozen's ire.

Those tensions do exist in our tradition and it is R. Rozen, not R. Cherlow, who distorts the tradition by ignoring them. The moral tensions should have two implications. There will be situations where Israel is morally obligated to avoid a military maneuver due to the excessive harm to innocents on the other side. Secondly, even with regard to situations in which self-defense mandates overcoming concern for enemy civilians, the moral tensions remain, manifest at least in an uneasy feeling about the implications of the maneuver. Occasionally, moral character is reflected in feeling bad about something forced upon us by necessity.

R. Rozen's attitude finds far too much support in religious Zionist circles. Both Rabbis Dov Lior<sup>14</sup> and Yaakov Ariel<sup>15</sup> rely upon Maharal's interpretation of the Shekhem episode in Genesis to allow for harming anyone belonging to an enemy nation in wartime. Yet Maharal represents a decidedly minority viewpoint with regard to that story and is thus a shaky leg upon which to build a far reaching position. To be fair, these contemporary rabbinic writings must be seen in context. When critics both within and outside of Israel seem intent on criticizing the Jewish state irrespective of what actually occurs, it is easy to go to the opposing extreme in response. If some editorialists for *Haaretz* and *The Guardian* criticize Israel for engaging in minimal self-defense, the temptation exists to shut off all moral questioning. However, this temptation must be resisted. No contradiction exists between continuing to point out the hypocrisy and the ethical unfairness of Israel's critics while maintaining internal vigilance regarding its own moral compass. The alternative of justifying any force the Israeli government might conceive of, without raising any questions about balancing strategic gains with the harm to innocent civilians, leads directly toward moral decay.

Before turning to the sources, a justification for this article's almost exclusive reliance on non-halakhic texts is in order. As mentioned above, topics that lack classic halakhic references invariably inspire *poskim* to look at other aspects of rabbinic literature for guidance. Indeed, a perusal of rabbinic responsa reveals instances in which halakhic authorities cite commentaries on Humash for help in analyzing a topic. Thus, our approach has solid precedent. Moreover, even if we grant that these sources do not carry halakhic weight, they surely still teach Jewish ideals. The classic division between halakhic sources and aggadic-midrashic texts never intended to render the latter irrelevant. On one level or another, the great biblical commentators help guide readers towards authentic Jewish values.

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The alternative to utilizing these sources often entails applying halakhic categories from other contexts and creatively extending their reach to the case at hand. R. Shaul Yisraeli's analysis of our issue basically functions in this fashion. While no one can deny that this type of creative application represents an important part of the halakhic process, it seems unreasonable to only rely upon debatable halakhic expansions while ignoring sources that explicitly relate to the case under discussion just because those sources appear in a commentary on Humash rather than as a gloss to *Shulhan Arukh*. Lacking clear halakhic directives, it behooves us to extract some guidance from the broader range of sources.

### THE GENESIS NARRATIVES

In a frequently quoted passage, R. Naftali Tsevi Yehuda Berlin wrote that the benevolent conduct of the patriarchs towards their gentile neighbors, even those whose conduct our forefathers abhorred, serves a model for our emulation.<sup>16</sup> We shall follow his suggestion and study the patriarchal narratives, as mediated through the words of the classic commentaries, for insight into the problem of harming innocents at wartime. Abraham and his descendents engaged in several military skirmishes in the first book of the Torah, and the comments of the exegetes offer much illumination. We shall not delve into Abraham's prayer on behalf of Sodom, even though it also conveys the value of the righteous innocents not being caught in the punishment of their broader society, because that prayer, and God's response to it, reflects the functioning of Divine providence rather than the moral dilemmas of humans at war.

### THE WAR AGAINST THE FOUR KINGS

After the four kings defeat the five kings and take Lot captive, Abraham sets out for battle to rescue his nephew. With the help of three hundred and eighteen men, Abraham wins the day on the battlefield. Immediately after the conclusion of that story, God tells Abraham: "Fear not Abraham, I shall shield you and your reward shall be very great" (Genesis 15:1). The obvious question is just what was Abraham afraid of at this moment? The Midrash (*Bereshit Rabba* 44:4) cites several opinions. Some sages explain that Abraham was afraid that his miraculous military victory had already eroded his accumulated merits. The Amora Levi offers two alternative suggestions. From a pragmatic perspective, any

military success runs the risk of vengeance from the descendents of the conquered. From a moral perspective, Abraham was concerned that perhaps he had killed a righteous person in the fighting. Note that in the midrash, God assures Abraham that all his victims were thorns. This implies that God does not reject the moral concern about the death of innocents per se, but only brings the good tidings that in this particular case, it does not apply.

Both Rashi<sup>17</sup> and R. Yosef Bekhor Shor<sup>18</sup> cite this midrashic interpretation in their commentaries. The supercommentaries on Rashi add some significant explanations of Abraham's concerns. According to R. Meir Danon, in his *Be'er ba-Sadeh*, Abraham's twin fears about killing the innocent and using up his reward in this world were related. He thought that the many mitzvot he had done would save him from punishments for any righteous people he had killed. However, if the military success had already utilized his stock of reward, nothing would remain to absolve him of punishment.<sup>19</sup> R. Danon clearly assumes that killing an innocent person in wartime, per se, would be deserving of punishment. At the same time, R. Danon limits the extent of the guilt when he envisions other mitzvot having the ability to negate the punishment for this offense.

R. Mordechai Jaffe suggests in his *Levush* that reward for the many wicked Abraham killed overrides any punishment for the smaller number of killed righteous. As a result, Abraham would neither receive reward for defeating the wicked nor punishment for killing the righteous. God reassures him that the killing of decent people will not detract from his reward as they are responsible for joining together with the wicked.<sup>20</sup> While *Levush* seems less concerned about the endeavor, even his interpretation raises questions about innocent casualties. Abraham viewed such casualties as problematic enough to cancel other rewards. God's response still assumes that innocents who did not make a choice to band together with the wicked should ideally not be harmed.<sup>21</sup>

## JACOB AND THE FOUR HUNDRED MEN

“Jacob was greatly afraid and distressed” (Genesis 32:8). The midrash (*Beresheet Rabba* 76:2) wonders about the two words conveying the patriarch's distress before encountering Esau and his band of four hundred men. The midrash suggests that he was dually concerned: lest he kill and lest he be killed. An obvious question emerges. If these men were com-

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ing to kill Jacob, why was he concerned lest he kill them? Such an act would be pure self-defense and fully morally justifiable. The *Tanbuma* version of this midrash neutralizes the question by claiming that Jacob was worried lest he kill Esau and be cursed by his father Isaac. An alternative suggestion sees Jacob as nervous that Rebekah's concern lest she lose both of her sons on one day turn prophetic as Esau's death would foreshadow his own. Both of the above possibilities argue that Jacob was not concerned about killing the four hundred men and only worried about killing Esau due to the pragmatic fallout from that act. Indeed, why should self-defense carry any moral opprobrium?

However, the *Tanbuma* version notwithstanding, many of the super-commentaries on Rashi do raise the moral question. The different ways in which they do so point to a number of different concerns about war. R. Shelomo Luria, in his *Yeri'ot Shelomo* raises the possibility that some of the men who came with Esau had no intent to harm Jacob.<sup>22</sup> Note the exact details of this situation! Men chose to come along with an armed band intent on harming Jacob, and Jacob still shows concern about harming those that personally had no desire to fight him. Along similar lines, Maharal suggests that Jacob would be justified in waging war with the entire group, but would still be an inadvertent sinner with regard to anyone he had killed who had not actually come to fight.<sup>23</sup>

R. Eliyahu Mizrahi explains Jacob's concern based on a legal distinction between the law of *rodef* and the law of "one who comes to kill you, kill him first." In the latter scenario, the potential victim is concerned for his own life and can kill without thinking about the possibility of disarming the opponent and avoiding any deaths. With regard to a *rodef*, a third party standing by can kill the pursuer but only when he cannot stop him with other means. Halakha assumes that the third party can muster the presence of mind to consider whether alternative methods of stopping the pursuer would prove effective. According to R. Mizrahi, some of the men may have come to wage war with the rest of Jacob's camp and not with Jacob himself. If so, Jacob was concerned lest he kill one of these men needlessly when he could have stopped that person without killing.<sup>24</sup>

Several other authorities contest the distinction suggested by R. Mizrahi and claim that even a pursued individual must consider non-lethal means to stop the pursuer. In fact, two talmudic sources seem to explicitly contradict his thesis. According to one source (*Sanhedrin* 49a), Abner was liable for killing his pursuer Asahel (2 Samuel 2:23) because he could have deterred him without killing him. *Sanhedrin* 74a

also seems to apply the need to neutralize the pursuer without killing him when possible to the victim of the pursuit as well. This led both R. Shemuel Strashun<sup>25</sup> and R. Tsevi Hirsch Hayyot<sup>26</sup> to reject R. Mizrahi's distinction. Thus, the halakhic responsibility to contemplate non-lethal means to disarm an aggressor may apply to both bystanders and the intended victims.<sup>27</sup>

R. David Pardo argues that Esau may have compelled some of these men to come fight. Even though Jews must give up their lives rather than be forced to kill another, this law might not apply to gentiles as they are exempt from the demand for martyrdom. Those forced to come are not blameworthy or guilty of a crime worthy of death.<sup>28</sup> Presumably this does not mean that Jacob should let himself be killed by them. It does mean that a moral discomfort hangs over the killing of those who did not decide to attack on their own accord. One can quibble with details of the halakhic analysis but the essential idea points to a mitigating factor with regard to those who choose to engage in violence out of fear for their own lives. Thus, three distinct moral concerns emerge from these possibilities: 1) Perhaps some of the group is innocent with no murderous intent. 2) All things being equal, it would be preferable to find ways to stop the invading army that avoids bloodshed. 3) Even those who come with malice may have been coerced into coming. Without ruling on any specific instance, all three concerns could certainly apply to Israel's present day confrontation with the Palestinians.

### THE SHEKHEM EPISODE

Simon and Levi's wiping out of the entire male population of Shekhem and Jacob's subsequent criticism of this act also touches upon the protection of civilians. Immediately following the act, Jacob raises a strategic critique. He apparently adds a moral critique at the end of his life. Although this event does not occur in full-blown wartime, it does raise the question of the death of innocents. Many commentaries fault Simon and Levi on moral/religious grounds. Ramban,<sup>29</sup> Netsiv,<sup>30</sup> and R. Hirsch<sup>31</sup> agree that they had a right to punish the individuals who had actually kidnapped and raped their sister, but no right to eradicate the entire town. While Ramban does suggest that the town may have been guilty of idolatry, this only means that each individual may have been independently worthy of punishment but not that the entire town bears collective guilt for the act of one of its members.

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Rambam famously justifies Simon and Levi based on his understanding of the mitsva of *Dinim*, one of the seven Noahide laws.<sup>32</sup> Ramban thinks this mitsva mandates setting up a court system to deal with the broad range of civil and criminal laws needed to run a decent society.<sup>33</sup> Rambam, on the other hand, thinks this mitsva calls on all gentiles to enforce the other six of the Noahide laws. Not doing so constitutes a crime worthy of the death penalty. According to Rambam, the rest of the town of Shekhem was derelict in prosecuting Shekhem and Hamor for their violation of the theft prohibition, and therefore everyone was worthy of death. While Rambam does talk about a level of collective responsibility, two related points minimize the impact of his position. Rambam does not state that the whole nation gets punished for the sins of some but that all are independently guilty for not prosecuting the criminals. Furthermore, Rambam seems to assume a situation in which the people had the ability to enforce the law. If any popular attempt to impose moral order on their leadership would likely lead to the death of the townspeople, halakha could not possibly hold them responsible for the crimes of those leaders. Along these lines, R. Nissim of Gerona,<sup>34</sup> R. Hayyim ibn Atar,<sup>35</sup> and Maharal<sup>36</sup> reject Rambam's view because they wonder how the common people of Shekhem could possibly have had sufficient power to judge their ruler.

R. Hayyim ibn Atar explains that the sons of Jacob initially intended only to harm those that had abducted Dinah. Unfortunately, when they came to punish the guilty parties the entire town rose up in battle against them. They were forced to defend themselves and killed the whole town in self-defense. R. ibn Atar justifies the actions of Simon and Levi but without accepting a doctrine of collective national responsibility. Thus, almost all of the commentators on this story reject the notion of punishing the entire town for the act of one individual.

Maharal serves as the singular exception to the above. He explains that Simon and Levi viewed the situation as one of war. In wars, nations fight against nations and this includes treating all the other nation's individuals as part of the enemy collective. One cannot deny that Maharal's theory allows for some indiscriminate bloodshed.<sup>37</sup> Yet we emphasize that all of the other commentators disagree. Some fault Jacob's sons, some say they killed in self-defense, some say that all the inhabitants of Shekhem were independently guilty, but only Maharal writes about being killed through no fault of one's own merely because of one's nationality. Given this consensus, relying on Maharal to exempt us from any worry about enemy civilians seems quite dubious. Further-

more, Maharal himself strikes a different note in explaining Jacob's concerns regarding killing Esau's four hundred men.

The analysis thus far has discovered concern that enemy innocents not be killed in battle. A reader might argue that the battle of Jacob and Esau cannot serve as a model for wartime because that battle represents a one-time skirmish rather than an ongoing struggle or a declared war. Anyone taking such a position must keep in mind that much of our contemporary fighting of Palestinian terror might also not qualify as war and therefore does resemble the Jacob model. For example, even after recognizing the evil done by terrorists, can it truly be said that modern Israel is in a state of war with the collective body of Palestinians when Israelis frequently hire Palestinian workers? If we answer the preceding question in the negative, the distinction between war and battle outside of the war context would not prove decisive in our current situation.

### HALAKHOT OF WARTIME

Some laws of wartime also indicate a concern for innocents on the opposing side. In his listing of the mitsvot he believes Rambam mistakenly omitted from *Sefer ha-Mitsvot*, Ramban cites a *Sifri* as a source for the obligation of a Jewish army laying siege to an enemy town to leave one direction open so that those on the other side who do not wish to fight can escape.<sup>38</sup> He explains this commandment on both pragmatic and moral grounds. In terms of the former, the flight of potential enemy soldiers will help weaken the enemy. In terms of the latter, the halakha expresses compassion for the humans across the battlefield and a desire to allow them a chance for survival. In Ramban's words, "With this we will learn to act with mercy, even toward our enemies in a time of war." This source clearly suggests the need for compassion for the other side even during a formal war.

Some writers attempt to downplay the significance of this Ramban by arguing that Rambam held a different view. Why does Rambam not list leaving a direction open as one of the mitsvot even though he does mention this obligation in his *Mishneh Torah*?<sup>39</sup> R. Meir Simha ha-Kohen of Dvinsk explains that Rambam only agrees with the strategic rationale. If the enemy feels that it has no escape route, it will redouble its fighting efforts. If it has an escape route, soldiers will run and the rest will lose fighting spirit. As this merely reflects a wartime strategy rather than a religious ideal, it does not merit being counted as a sepa-

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rate mitsva.<sup>40</sup> Many commentators on Rambam explain the absence of this mitsva from the list of six hundred and thirteen in a different fashion. R. Isaac de Leon explains that Rambam did not count it because it is a detail among the laws of *milhemet reshut* and does not require independent enumeration.<sup>41</sup> He does not base his explanation on the assumption that the mitsva is about military strategy but instead sees it as a detail of the broader mitsva of waging war, irrespective of its rationale. Furthermore, R. David ibn Zimra, Radvaz, finds the compassion theme in Rambam as well. Radvaz's comment on leaving a side of the besieged city open in the *Mishneh Torah* says: "And all this is the way of Torah, all of whose paths are peace."<sup>42</sup> In sum, Ramban explicitly endorses the compassion theme and Rambam may as well.

Ramban mentioned both the ethical reason and the strategic reason. Ramban does not say that the mitsva only applies when both of these factors are present. A maximalist reading of Ramban would find either reason of sufficient weight to activate this halakha. A minimalist reading might argue that only the juxtaposition of the two factors generates this law. In other words, we show compassion when it does not interfere with the war effort. Even if one accepts the minimalist reading, one must question whether or not civilian deaths are truly justified by military needs.

It bears mention that most authorities limit this requirement to a *milhemet reshut*. However, this should not generate the easy assumption that the requirement has no bearing on our contemporary military clashes. R. Yosef Babad argues that Rambam seems to apply this requirement to *milhemet mitsva* as well.<sup>43</sup> More importantly, the reason authorities limit this mitsva to an optional war is that in the mandated wars against Amalek or the seven nations, the Torah commands total eradication of the other side. It therefore appears illogical to give the enemy a chance for escape. However, the only type of obligatory war Israel could currently fight, saving the people of Israel from an enemy, does not include the directive to wipe out the other side. If so, the need to leave an escape route arguably still applies.<sup>44</sup>

Another Torah passage of relevance (Deut. 20: 11-18) distinguishes between wars with the seven nations and wars with other peoples. With regard to the former, once the peace efforts have proved fruitless, the Jewish army eradicates the enemy population. With regard to the latter, the war efforts must be directed solely to the enemy males but not to women and children. Abarbanel explains that the men made the decision to reject the peace offering and they must bear the consequences.

The women and children were not part of the decision making process and must be spared.<sup>45</sup> If so, the basic biblical laws of wartime indicate a desire to avoid harming those not responsible for the hostilities. Of course, one can still ask the difficult question of why the women and children of the seven nations do not merit the same treatment. Finding a satisfactory answer to that question is not easy. Yet halakha teaches that the laws dealing with the seven nations do not apply to any people today. Thus, the model of sparing those not responsible would remain the operative model regarding any people Israel wages war with today.

R. Yaakov Tsevi Mecklenberg struggles with the commandment to wipe out the women and children of the seven nations. He writes that

It appears to be a great cruelty to spill innocent blood. If the fathers sinned, and did not choose peace, how did the children, who lack understanding, sin? So too the women under their husband's hand and by nature, not those who wage war. It was not their strength and council that held back peace from their husbands. Why should they be killed?<sup>46</sup>

He also envisions a situation in which civilians wanted to make peace but were prevented from doing so by the army. "Would it even occur to you that in this situation, the Torah says, do not allow any souls to live, to kill several thousand peace seekers because of the wickedness of the war officers and their soldiers?"<sup>47</sup> R. Meckleneberg argues that the mitsva to kill all only applies when there was universal consent on the other side to reject the peace offer. While he clearly frames his approach in an apologetic context, his formulations indicate tremendous unease with the idea of deliberately punishing the innocent.

## MEGILLAT ESTHER

Towards the end of the Purim story, Esther and Mordecai convince the Persian king to issue a new set of instructions that allow the Jews to kill their enemies, including women and children (Esther 8:11). The book of Esther also reports that the Jews in fact did kill quite a large number of people (Esther 9:16). This account might indicate a willingness to kill everybody on the opposing side, without distinctions. Yet a survey of the classic commentators tells a different, far more humane tale. Ibn Ezra questions why it was necessary to kill so many people. He answers that under Persian law, it was impossible to overturn the original letters calling for the destruction of the Jews. Mordecai was forced to claim

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that the original letter had been altered by Haman to read that others would kill the Jews when the king's intent was that the Jews would kill the others.<sup>48</sup> In other words, only the structure forced upon them by the original letters led to the more sweeping formulation.

The Vilna Gaon offers a similar explanation that also sees the second set of letters as a supplement that updates the first set of instructions but could not negate them. He writes: "The fact that they wrote about women and children and the spoils of war was only to negate the first letters but in truth they did not want this as it suffices to be redeemed from such an immense difficulty."<sup>49</sup> The subsequent account mentions the Jews killing a large number of enemies but does not explicitly say that this number included women and children. According to the above interpretations, the letters needed to refer to women and children but the killing might not have included them. The assumptions of our sages regarding Judaism's desire not to harm innocents emerges quite strongly.

### A MIDRASH ABOUT MOSES

Some midrashim note that Moses sent a peace emissary to Sihon, king of the Emori even though God commanded him to wage war with Sihon. According to *Midrash Tanhuma (Tsav 3)*, Moses said, "Now I will go and smite those who sinned and those who did not sin? Rather, I will come to them in peace." The sages clearly view concern about harming innocents as a worthy expression of Moses' noble character. At the same time, it must be admitted that after Sihon rejected the peace offer, his whole nation was eradicated. Yet this could be limited to the seven Cananite nations. With regard to other peoples, Moses' fears about harming the innocent might have continued even after the opposing leadership had chosen hostility. In any case, we find clear expression that compassion for the innocents among an opposing nation does reflect a rabbinic worldview.

### A COUNTER EXAMPLE

Towards the end of Numbers (31:1-17), God commands Moses to extract vengeance from the Midianites. The Jews swiftly win the battle, killing every male while sparing the women and children. Moses gets angry with the officers for not killing the women and commands them to wipe out every male child and every female "who has known a man."

Seforno<sup>50</sup> explains that the officers thought to apply the normal rules of warfare in which the women and children are spared. However, Moses was angry with them for sparing the Midianite women who had been involved in leading them astray in Shittim (Numbers 25:1-9). Additionally, he commanded them to kill the male children as an act of vengeance on Midian. Ramban<sup>51</sup> also explains the killing of the male children in identical fashion.

Here, the commentators justify the killing of those innocent of any crime as an act of national vengeance. Nevertheless, a few factors still restrict the impact of this example. The commentators agree that the people's mistake occurred because they applied the normal rules of warfare. If so, the vengeance theme may reflect an unusual scenario that God sometime commands in exceptional circumstances. Indeed, some sources (*Midrash ha-Gadol Bereshit* 37) suggest that humans are not to extend vengeance to any case not explicitly commanded by God. Moreover, even in this war of vengeance, the innocent female children were spared. Finally, a counter example does not nullify the force of the many sources we have seen thus far.

Thus, a good deal of source material indicates that we must try to avoid the deaths of innocents on the other side. This ideal can be found in the comments of *mefarshim* on Abraham's war with the four kings, Jacob's concern about the battle with the four hundred men, the criticism of Simon and Levi for destroying Shekhem, the basic laws of warfare, the reactions of commentators to the Purim story, and in a remarkable midrash about Moses. Most halakhic discussions of these topics fail to cite many of the sources we have mentioned. As noted, these sources do not, for the most part, come from the classic halakhic works such as Rambam, *Tur*, *Shulhan Arukh*, and the like, and they may not always be noted as a result. However, they do reflect the ideas and ideals of our leading voices and should influence our thinking on these topics.

## R. SHAUL YISRAELI'S ANALYSIS

Before concluding, we shall examine R. Yisraeli's thorough investigation of our topic as he does a fine job of categorizing the relevant issues and bringing pertinent sources to bear on the question.<sup>52</sup> Though I shall challenge several of his central conclusions, his work helps frame all future discussion of this matter. R. Yisraeli tries to determine if the Israeli forces had any halakhic justification for killing the women and children of Kibiyeh. He explores several possible grounds upon which

one might attack non-combatants, beginning with the possibility of viewing the society that encourages terrorists as fully culpable for their crimes. He cites the rule called “*ein shali’ah le-devar avera*,” there is no agency for sin. When a person encourages another to wrongdoing, we attribute the crime to the person who actually performed it and not to the fellow who sent him or encouraged him. Based on one midrashic source, R. Yisraeli considers the possibility that this rule would not apply to gentiles but in the end, he concludes that the same rule does extend to non-Jews.

In the second section, R. Yisraeli discusses the debate between Ramban and Rambam regarding the Shekhem episode. He assumes that had the townspeople of Shekhem been risking their lives to punish Shekhem, then Rambam would not have held them accountable. The situation must have involved some difficulties in carrying out the law but not a threat to life. In an instance of that type of pressure, Rambam holds the people responsible, while Ramban still does not.<sup>53</sup> A learned, analytic discussion of the principle of *ones* moves the discussion along but this is less central to our purpose.

R. Yisraeli also locates a second debate between Ramban and Rambam. He assumes that each *rishon* rejects the justification offered by the other. Just as Ramban did not find the people of Shekhem guilty of violating the mitsva of *Dinim*, Rambam did not think them worthy of deserving the death penalty due to idolatry. He suggests that gentiles brought up to violate the Noahide laws can only be held accountable for rational mitsvot such as murder and adultery. The Torah expects even those people not raised with a religious tradition to know and adhere to these mitsvot. The same expectation does not apply to idolatry, and a person raised as an idol worshiper does not merit the death penalty for such worship.<sup>54</sup> This analysis has significant implications beyond the question of harming innocents.<sup>55</sup>

In the third section, R. Yisraeli investigates whether or not those that support murder can be classified as *rodfim* despite the fact that they do not actively and directly threaten another’s life. He cites an *Or Same’ah*<sup>56</sup> that indicates that causative *rodfim* also fit into the legal category of *rodef*. This section also includes classic Lithuanian *lomdus* in its division between two categories of *rodef*. Based on *Or Same’ah*, R. Yisraeli concludes that the civilian population that supports terrorists would be categorized as *rodfim* and can be killed without hesitation. He does add that this would not include the children.<sup>57</sup> Here, I must register my first demurral. *Or Same’ah* discusses a case in which a mur-

derer incites a snake upon a victim. The indirect and causative nature of the act frees the perpetrator from the formal death penalty for murder in the Jewish legal system. However, the relationship between the act of the murderer and the death of the victim is quite strong. This does not resemble the case of a person who pats a terrorist on the back for killing. We would normally not consider the latter a murderer, morally odious as he is. Thus, even if one accepts the idea of a causative *rodef*, much more work needs to be done to determine the extent of the causative connection needed to classify a *rodef* as such.<sup>58</sup>

The fourth section deals with the possibility that even the enemy minors could be *rodfim* if their mere physical presence enables the terrorists to carry out their murderous plans. R. Yisraeli identifies a debate between Rambam and Ravad as to whether or not the category of *rodef* includes someone who endangers another's life without any malicious intent.<sup>59</sup> However, he does add that all authorities agree that *rodef* does not apply when the two factors of lack of intent and causative endangerment both apply.<sup>60</sup> As the Palestinian children do not directly harm or plan to harm Israelis, they are not *rodfim*. If not for this limitation, the *rodef* category would include almost anyone. Imagine two Israeli politicians or generals arguing over a strategic decision with life and death implications. Would we say that whichever one argues incorrectly endangers life, is a *rodef*, and can be killed? The very idea is absurd.

This fourth section also includes an important analysis in which R. Yisraeli argues that a Jew cannot kill a gentile to save his own life.<sup>61</sup> This section discusses whether the halakhic obligation to choose martyrdom over murder stems from the argument "how do you know that your blood is redder" (*Sanhedrin* 74a) or from the murder prohibition *per se*. According to this second possibility, the *mitsva* of martyrdom applies even if halakha determined that a given person's blood was redder. In any case, his decision carries great importance in light of subsequent rabbinic voices in the religious Zionist community that tend to downplay the severity of killing non-Jews.

Finally, the fifth section discusses the possibility that wartime changes the normal ethical analysis. R. Yisraeli includes a two-stage argument in his evaluation of the type of war manifest in the Kibiyeh operation. At first, he argues that it may be a *milhemet reshut*, a permissible war.<sup>62</sup> He subsequently suggests that it could even be viewed as a *milhemet mitsva*, an obligatory war. The war of vengeance against Midian serves as the paradigm for evaluating the military operation against the Palestinians of Kibiyeh as an obligatory war.<sup>63</sup> Having determined

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that the Kibiyeh episode was an act of war, R. Yisraeli then argues that we do not find halakhot in wartime that demand care in distinguishing between the guilty and the innocent on the opposing side.<sup>64</sup> Yet, the sources outlined in the earlier parts of this article do indicate such care. Furthermore, R. Yisraeli's analysis itself goes beyond the classic halakhic sources that do not list acts of indiscriminate vengeance as *milhemet mitsva*. If so, he must also relate to sources of a similar nature that incline in a different direction.

In his analysis of permissible wars, R. Yisraeli develops a theory that general international consent forms the rules of war and legally allows the bloodshed.<sup>65</sup> This section includes a debate with R. Shelomo Yosef Zevin about the legal force of allowing others to harm you. R. Zevin argues that consent of the victim carries no legal weight.<sup>66</sup> R. Yisraeli thinks that this only applies to Jews who belong to God in a more intimate way. Gentiles, on the other hand, have the ability to allow others to harm them. Therefore, the war convention decided by the majority of nations overrides objections of a dissenting minority, and allows murder of people on the other side.

A series of contentions limit the force of R. Yisraeli's argument. He concludes that the justification for killing in wartime depends upon the consent of nations and must therefore be carried out in accord with international conventions. He adds that this means acting according to the way nations fight in reality and not according to some idealized code honored only in the breach. However, it still emerges that if the countries of the world truly attempted to avoid harming enemy civilians, then this restriction would apply to us as well. Thus, he himself does not argue for a timeless ability to harm anyone on the other side. Rather, it depends on the general war convention in international society.

In addition, R. Yisraeli bases his distinction between Jew and non-Jew on the view of the Tanya that finds the Jews as inherently made up of different stuff than the gentile. No doubt, this position does exist in our tradition and other authorities concur. At the same time, major authorities do not seem to accept any inherent biological or genetic difference between Jew and gentile. Rather, any differences stem from the historical fact that our ancestors accepted the Torah and continue to pass it down to their descendents. Such an attitude appears implicit in Rambam's letter to Ovadiah the proselyte.<sup>67</sup> In R. Aharon Lichtenstein's words, "Chosenness, as we understand it, resides in our covenantal relation with God rather than in any inherent superiority."<sup>68</sup> Thus, R. Yisraeli's legal distinction might not work according to these other

views. Furthermore, we could accept the Tanya's view and still come to R. Zevin's conclusion that no one has the legal right to allow others to harm him or her.

R. Yisraeli assumes that the Israeli reality of 1953 constitutes a time of war. We need to work out a halakhic theory for a war of attrition or periods of intermittent battling when the two societies interact in a whole host of non-hostile ways as well. If we adopt an expansive definition of war, this would likely mandate viewing the battles of Abraham and Jacob as wars and thereby make the extent of their relevance even greater. R. Yisraeli also does not mention the possibility that such wartime maneuvers are justified but moral unease with the action should remain. Many moral conflicts mandate picking one ideal over another but still appreciating the harm caused to the other ideal and trying to compensate for it. Thus, R. Yisraeli's conclusion can be challenged on multiple grounds.

R. Gutel's<sup>69</sup> analysis ultimately follows the position outlined by R. Yisraeli. Yet he does discuss several sources not mentioned by R. Yisraeli and shows how these sources do not clearly justify the killing of enemy civilians. For example, *Massekhet Soferim* (15:9) states that "the good among the gentiles should be killed in war time." R. Gutel points out that the other statements adjacent to this quotation were certainly not intended for halakhic application. He also shows how other *rishonim* limit the relevance of this source to those actively engaging us in battle, thereby excluding those innocents not involved in the hostilities.<sup>70</sup>

## CONCLUSION

An earlier part of this article suggested that some of the hostility about this question in our community is a result of the unfair treatment that Israel and the Israeli army receive in segments of the international press as well as in the Israeli press. Of course, understanding this reaction does not include agreeing with it. In general, we should distinguish between our international posture and our internal posture. On the international front, we can continue to emphasize the hypocrisy of those who constantly criticize Israel while turning a blind eye to the many dictators, tyrants, and human rights abusers around the globe. Furthermore, we will not allow our critics to force us to set up an ethical standard of such difficulty that elementary self-defense becomes impossible. Yet, our internal discussions dare not cease from asking ethical questions. The corruption of a society that comes in wartime receives eloquent expression in our sources. Part of avoiding this corruption entails not treating war as a time of ethi-

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cal anarchy. We have seen that many of our traditional sources were concerned that we attempt to spare enemy innocents. We have found sources that teach this principle directly without even mentioning broader ethical commandments such as *imitatio Dei* or the desire to avoid *hillul Ha-Shem*. I will not be so presumptuous as to try to demarcate the exact lines as to the precise degree that this concern factors into our wartime strategy. However, I am convinced that it must be a factor.

## NOTES

I would like to thank Yonatan Miller, Josh Rosenthal, and especially Marc Stern for their editing of this article.

1. Michael Walzer, "War and Peace in the Jewish Tradition" in *The Ethics of War and Peace: Religions and Secular Perspectives*, ed. Terry Nardin (Princeton: Princeton University Press, 1996), pp. 95-114. The citations are found on page 96 and page 110.
2. Aviezer Ravitzky, "Prohibited Wars in the Jewish Tradition" in *The Ethics of War and Peace: Religions and Secular Perspectives*, pp. 115-127. The quote appears on page 115.
3. For analysis of how two significant religious Zionist leaders of that time responded to Kibiyeh, see Eliezer Don Yihye, "Leadership and Policies of Religious Zionism: Hayyim Moshe Shapira, the NRP and the Six Day War" [in Hebrew], in *Ha-Tsiyyonut ha-Datit: Idan ha-Temurot*, ed. Asher Cohen and Yisrael Harel (Jerusalem: Mosad Bialik, 2004), pp. 143-145.
4. See J. David Bleich, *Contemporary Halakhic Problems* Vol. 3 (New York: Ktav Publishing, 1989) and the exchange between R. Bleich and Noam Zohar in *Commandment and Community: New Essays in Jewish Legal and Political Philosophy* ed. Daniel H. Frank (New York: SUNY Press, 1995).
5. Neria Gutel, "Fighting in an Area Full of Civilians" [in Hebrew], *Tehumin* 23, pp. 18-42.
6. Ya'acov Blidstein, "The Treatment of Hostile Civilian Populations: The Contemporary Halakhic Discussion in Israel," *Israel Studies* 1:2 (1996), pp. 27-44.
7. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Penguin Books, 1980), pp. 151-159. For some fine articles on general philosophy of war, see the contributions in *War and Moral Responsibility*, ed. Marshall Cohen, Thomas Nagel and Thomas Scanlon (Princeton: Princeton University Press, 1974).
8. John Kekes, "Collective Responsibility as a Problem for Liberalism," in *Midwest Studies in Philosophy* (1996), pp. 416-430.
9. Dov Lior, "Ethics and War: a Dialogue" [in Hebrew], *Tehumin* 4 (5743), p. 186.
10. Aharon Lichtenstein, "Ethics and War: a Dialogue" [in Hebrew], *Tehumin*

- 4 (5743) p. 185.
11. Yisrael Rozen, “Musings on War and Ethics” [in Hebrew], *Shabbat be-Shabbato* (August 17, 2002).
  12. Yisrael Rozen, “A Referendum on Ethics” [in Hebrew], *Shabbat be-Shabbato* (October 20, 2001).
  13. Yisrael Rozen, “Non-Halakhic Apologetics” [in Hebrew], *Tsohar* 12 (Tishrei 5763), pp. 135-138.
  14. D. Lior, op. cit. p. 186.
  15. Yaakov Ariel, “The Torah’s Ethics of War” [in Hebrew], in *Arakhim be-Mivhan ha-Milhama* ed. E. Blum (Alon Shevut: Yeshivat Har Etzion, 5743) p. 83.
  16. See the introduction to Genesis in his *Ha-Emek Davar*.
  17. Rashi, commentary on Genesis 15:1.
  18. R. Yosef Bekhor Shor, commentary on Genesis 15:1.
  19. R. Meir Danon, *Be’er ba-Sadeh*, Genesis 15:1.
  20. R. Mordehai Jaffe, *Levush ha-Orah*, Genesis 15:1.
  21. Note also the explanation of this midrash in R. Avraham of Glogau’s commentary on *Midrash Rabba, Zera Avraham*. He draws a parallel between Abraham’s worry about killing a righteous opponent and Jacob’s concern about killing the four hundred men who accompany Esau. The factors that he thinks generated the concern of our patriarchs will be dealt with in the subsequent discussion in this article.
  22. R. Shelomo Luria, *Yeriot Shelomo* Genesis 32:7.
  23. R. Yehuda Loewe, *Gur Aryeh* Genesis 32:7.
  24. R. Eliyahu Mizrahi, commentary on Genesis 32:7.
  25. Commentary on *Sanhedrin* 49a.
  26. Commentary on *Sanhedrin* 74a.
  27. It is worthy of note that all of the above commentators assume that the need to consider non-lethal means of disarming a pursuer apply to non-Jewish *rodfim* as well. This contradicts the assumption of R. Yisrael Rozen in “Self Defense at the Cost of the Life of the Pursuer” [in Hebrew], *Tehumin* 10 (5749), pp. 76-88. On page 76, R. Rozen argues that his conclusion emerges clearly from *Sanhedrin* 57a but I do not see any proof for his thesis from that source. Actually, the first Rashi on 57b suggests that a Jew would not receive the death penalty for killing a gentile pursuer when an alternative existed but that such killing would in fact be forbidden.
  28. R. David Pardo, *Maskil le-David* Genesis 32:7
  29. R. Moshe ben Nahman, commentary on Genesis 34:13
  30. R. Naftali Tsevi Yehuda Berlin, *Ha-Emek Davar* on Genesis 49:5.
  31. R. Samson Raphael Hirsch, commentary on Genesis 34:25.
  32. *Mishneh Torah, Hilkhot Melakhim* 9:14.
  33. Commentary on Genesis 34:13.
  34. *Hiddushei ha-Ran Sanhedrin* 56b.
  35. R. Hayyim ibn Atar, commentary on Genesis 34:25.
  36. R. Yehuda Loewe, *Gur Aryeh* Genesis 34:13.
  37. Even according to Maharal, women and children were not killed as part of the collective.
  38. Ramban lists it as the fifth positive commandment Rambam mistakenly omitted.

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39. *Hilkhot Melakhim* 6:7.
40. R. Meir Simha ha-Kohen, *Meshekh Hokhma* Numbers 31:7.
41. See his *Megillat Esther* where he defends Rambam's *Sefer ha-Mitsvot* from the criticism of Ramban.
42. R. David ibn Zimra, *Hilkhot Melakhim* 6:7.
43. R. Yosef Babad, *Minhat Hinnukh*, *mitsva* 527.
44. This point is noted by R. Yehoshua Ehrenberg in *Devar Yehoshua*, volume 2, responsum 126.
45. R. Yitshak Abarbanel, *Perush al ha-Torah Devarim* (Jerusalem: Hapoel Hamizrahi, 5744), p. 192.
46. R. Yaakov Tsevi Mecklenberg, *Ketav ve-Kabbala Devarim*, p. 175.
47. *Ibid.*, p. 177. It must be admitted that Abarbanel and R. Mecklenberg might only be talking about treatment of innocents after the battle has finished and not during the hostilities proper. At the same time, most of the sources cited in this article relate to situations during the time of battle.
48. R. Abraham ibn Ezra, commentary on Esther 8:8.
49. R. Eliyahu of Vilna, commentary on Esther 8:12.
50. R. Ovadiah Seforno, commentary on Numbers 31:15.
51. R. Moshe ben Nahman, commentary on Numbers 31:6.
52. R. Shaul Yisraeli, *Ammud ha-Yemini* (Jerusalem: Erets Hemda, 5726), pp. 168-205.
53. *Ammud ha-Yemini*, pp. 179-181.
54. *Ammud ha-Yemini*, pp. 176-177.
55. For an interesting article that contests R. Yisraeli's distinction, see Yoezer Ariel, "The Punishment of Gentiles" [in Hebrew], *Tehumin* 5 (5744), pp. 350-363.
56. R. Meir Simha ha-Kohen, *Or Sameah*, *Hilkhot Rotse'ah* 1:8.
57. *Ammud ha-Yemini*, p. 184.
58. A parallel critique appears in Blidstein, "The Treatment of Hostile Civilian Populations," pp. 28-31.
59. *Ammud ha-Yemini*, pp. 184-186.
60. *Ammud ha-Yemini*, p. 186.
61. *Ammud ha-Yemini*, pp. 186-189.
62. *Ammud ha-Yemini*, pp. 189-205.
63. *Ammud ha-Yemini*, p. 204.
64. *Ammud ha-Yemini*, p. 189.
65. *Ammud ha-Yemini*, pp. 192-195.
66. R. Shlomo Zevin, *Le-Or ha-Halakha* (Jerusalem: Beit Hillel, 5738), pp. 310-338. The article is about whether or not Shylock could have a claim on a pound of flesh according to the halakha.
67. See Yitshak Shilat's edition of *Iggerot ha-Rambam* Vol. 1 (Jerusalem: Maaliyot, 5747), pp. 233-141. Also see Lawrence Kaplan, "Maimonides on the Singularity of the Jewish People," *Daat* 15 (1985) and Menachem Kellner, *Maimonides on Judaism and the Jewish People* (Albany: SUNY Press, 1991).
68. R. Aharon Lichtenstein, *Leaves of Faith: The World of Jewish Living* (Jersey City: Ktav Publishing, 2004), p. 341.
69. See note 5.
70. N. Gutel, "Fighting in an Area," pp. 33-34.