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BIBLICAL NARRATIVES AND THE STATUS OF ENEMY CIVILIANS IN WARTIME

TO THE EDITOR:

In his contribution to *Tradition's* Special Issue on War (*Tradition* 39:4, Winter 2006), Rabbi Yitzchak Blau demonstrates that concern for the welfare of enemy civilians during warfare is a genuine Torah value. In the absence of a well developed body of halakhic literature addressing this topic, R. Blau turns to Biblical narrative, and illustrates how traditional commentators understand the Biblical story to express sensitivity for the lives of enemy non-combatants. He concludes that the concern expressed by traditional sources for enemy civilians must be a factor in planning wartime strategy. Let me suggest that while Jewish sources do, indeed, emphasize the importance of developing a sensitivity towards enemy non-combatants, they differentiate between such sensitivity and the tactics utilized during warfare. In fact, an analysis of the relevant sources indicates that Biblical narrative sanctions the use of all measures necessary to defend ourselves from those who engage us in war.

R. Blau notes that Abraham is highly attuned to the possibility of harming innocent individuals during warfare. That Abraham was concerned with this issue is evident by God's assurance following the war of the Four Kings, "Fear not, Abram"—see Rashi's comment: "you will not be punished for all those persons you have killed." It should be noted, however, that Abraham's concern played no role in determining his wartime behavior. Indeed, God's assurance to Abraham was provided post facto. Abraham destroys the enemy, unimpeded by his concern for having to shed blood.

R. Blau then points to Jacob's concern regarding this issue during the confrontation with Esau's four hundred men—see Rashi's comment: "Jacob was distressed, perhaps he would slay others." Here again, the implication is clear that regardless of his concern for the consequences, Jacob would have undertaken all means to protect his family from harm.

I would further argue that King David represents a paradigm for the differentiation between ethical concerns and the strategic implementation of warfare during wartime. King David wanted to build the Holy Temple for God. Though his engagement in warfare prevented

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him from implementing his dream, he was not deterred from fulfilling his duty as a warrior defending the Jewish people.

The story of the Keni tribe in the book of Samuel I (15:6) deserves mention. Prior to going to war with Amalek, Saul warns the tribe of Keni, who lived amongst Amalek, to “depart from the Ameleki, lest I destroy thee with them.” As explained in *Metsuddot David*, this warning was necessary, since “during warfare it would be impossible to differentiate (between Amalek and Keni).” Undoubtedly, Saul would have felt moral anguish for killing the Keni had they not heeded his warning, yet there is no indication that he would have altered his military action.

This entire matter has preoccupied Jewish scholars from as far back as the Tannaitic period. R. Shimon Bar Yohai is quoted as having said that “during warfare, *tov she-bagoyim harog*—the most righteous amongst the nations is to be killed” (Jerusalem Talmud, *Kiddushin* 4:11). This radical conclusion is derived from the famous dilemma posed by the observation that Pharaoh used horses to pursue the Jews despite the fact that the only horses to be found in Egypt after the plagues were those which had belonged to “the God fearing amongst the Egyptians.” Apparently, these God fearing Egyptians, despite their religious awareness, identified with Pharaoh and assisted in the deadly chase after the Jews.

The Rishonim struggled to understand which individuals are included in R. Shimon’s statement. Rabbenu Bahya in his Torah commentary (*Shemot* 14:7) explains that R. Shimon is simply rephrasing the well known, and easily understood Talmudic dictum “he who rises to kill you, kill him first” (*Sanhedrin* 72a). According to Rabbenu Bahya, the rules governing the use of lethal force are similar in peacetime and during warfare. In both circumstances deadly counterforce may be employed solely against one who is in hot pursuit.

A contemporary scholar, R. Neria Gutel (*Tehumin* 23, pp. 33-34), suggests that Rambam holds a position similar to that of Rabbenu Bahya. Rambam (*Yad, Avoda Zara* 10:1) states that one is prohibited from killing a non-Jew when he is “not engaging us in war.” Rambam is alluding to the ruling that during warfare, *tov she-bagoyim harog*. R. Gutel argues that Rambam’s use of the phrase “engaging us in war” is meant to limit this ruling to those who, during warfare, are actively involved in hostilities.

However, Rambam elsewhere utilizes a somewhat different formulation when alluding to *tov she-bagoyim*. Rambam (*Yad, Rotse’ah* 4:11) states that one is prohibited from killing a non-Jew “when we are not at war with him.” This latter formulation, which does not refer to those “engaging us in war,” implies that Rambam understands *tov she-bagoyim* to refer to all individuals who are in a state of war with the Jew, including

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those not involved in hostilities. In light of this expansive definition of *tov she-bagoyim*, it appears that Rambam's earlier quoted phrase, "engaging us in war", is not to be understood literally. Indeed, both Maharal (*Be'er ha-Gola* no. 7) and R. Hayyim Benveniste (*Kenneset ha-Gedolah, Hoshen Mishpat, Hagahot Bet Yosef*, 425:13) apparently understood Rambam to view *tov she-bagoyim* as sanctioning the use of lethal force against individuals who are not engaged in battle. As Maharal explains, during wartime, "the righteous amongst the nations," who are to be killed, includes enemy non-combatants who provide support for the war effort by, for example, "lending horses to Pharaoh's army." R. Hayyim Benveniste offers a more far reaching explanation of R. Shimon's phrase. R. Benveniste explains that war is a conflict between nations. As such, *tov she-bagoyim* refers to killing those who belong to the nation with whom we are at war, irrespective of their involvement in hostilities.

In the commentaries, *Bah* and *Bet Yosef* (*Tur Yoreh Deah* 158), it is noted that the position of Tosafot (*Avoda Zara* 26b s.v. *Ve-Lo*) regarding *tov she-bagoyim* is similar to that of Rambam. Like Rambam, Tosafot distinguishes between peacetime rulings governing self defense and the more expansive rules of warfare expressed by *tov she-bagoyim*.

Tov she-bagoyim is actually a concept codified in *Shulhan Arukh*. In the sections dealing with the interactions between Jews and non-Jews (*Hoshen Mishpat* 425:5 and *Yoreh Deah* 158:1) R. Joseph Caro, states that one is prohibited from killing non-Jews so long as "we are not at war with them." R. Caro, who makes no mention of the need for the non-Jew to be engaged in hostilities during warfare, is understood by the commentaries *Shakh*, *Semah*, and *Bi'ur ha-Gra*, to be alluding to the unique wartime rulings of Tosafot and Rambam that during war, the most righteous of the enemy is to be killed.

Biblical narrative teaches that the ethically refined individual should be sensitive to the ramifications of his wartime actions. Killing human beings, no matter how justified, poses a supreme moral challenge. However, halakhic and extra-halakhic sources distinguish between ethical sensitivities and wartime tactics. The relevant sources view civilians whose presence provides cover for enemy maneuvers, as well as those who identify with the enemy or support the war effort, as legitimate military targets. Traditional sources require that the Jewish soldier possess a deeply rooted ethical sensitivity and at the same time that he should unhesitatingly employ all measures needed to defend his people from those who wage war against them.

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YITZCHAK BLAU RESPONDS

Dr. Becker's letter is a helpful contribution to our community's ongoing attempt to utilize the resources of the Jewish tradition in developing an approach to the laws of warfare. However, with the exception of *Keneset ha-Gedola*, the sources he cites do not truly provide additional basis for ignoring concern for enemy innocents beyond the position of Maharal already mentioned in my original article. As we shall see, I disagree with Dr. Becker's presentation of the sources on a number of grounds.

Some of the sources I cite in my article explicitly relate to the choice of tactics at wartime and not just to feeling bad about the consequences of the tactics employed. Ramban's listing of a mitzva to leave one part of an area we have under siege open due to compassion for enemy fighters who want to leave the battle certainly impacts on war strategy. According to *Tanhuma*, Moshe innovated a new halakhic position due to his concern that innocents will be hurt. Again, we have a concern for innocents impacting on the choices of war. The commentators who criticize the actions of Shimon and Levi at Shekhem are judging the military choices per se.

Moreover, Dr. Becker reads the sources regarding Jacob's fears about fighting the four hundred men in a debatable fashion. As Jacob expresses concern "lest he kill" before he goes to battle, why assume that it had no impact whatsoever on his choice of strategy? As I noted, R. Eliyahu Mizrahi explains that Jacob was concerned because he thought he might be able to stop some of these men without killing them. The issue of "*efshar le-hatsil be-ehad me-avarav*" relates to the choice of when to kill and not just to feelings after the fact. Thus, this explanation supports my reading of Jacob's concern.

Dr. Becker's co-opting of Rambam is also questionable. Unlike R. Gutel, Dr. Becker favors the formulation of Rambam in *Hilkhhot Rotse'ah* 4:11, that it is forbidden to kill a gentile when "there is no war between us or them." Yet he gives no reason for preferring this formulation over that of *Hilkhhot Avodah Zara* 10:1, where Rambam writes that it is forbidden to kill a non-Jewish idolater when "he is not making war with us." The latter formulation only allows killing those waging war with us, and not those people who happen to belong to the same national entity as the enemy combatants. Perhaps an easier resolution of the conflicting formulations is to read the formulation of *Hilkhhot Rotse'ah* ("*ein beineinu u-veinam milhama*"), in light of *Hilkhhot Avodah Zara*, as referring to those fighting. R. Gutel, who otherwise takes a

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position closer to that of Dr. Becker, apparently agrees with this reading of Rambam. Even if one disagrees, Rambam's position remains an open question. Maharal's position does not help us understand Rambam, as Maharal makes no mention of Rambam.

Nor am I convinced of Dr. Becker's reading of "*tov she-bagoyim*". This statement need not refer to children of the enemy and the like but rather to the decent people fighting on the opposing side of the battlefield. Soldiers fighting against a Jewish army may be decent people despite fighting on the wrong moral side due to national or ethnic loyalty. "*Tov she-bagoyim*" obligates us to ignore these distinctions when fighting the enemy soldiers. It says nothing about non-combatants. The example of the Egyptians fits with my interpretation. Those Egyptians who still had horses were better people yet they still joined the Egyptian army chasing the Jewish people. In such a battle setting, we attack every soldier from the enemy army without making distinctions.

Furthermore, despite the fact that Tosafot grant the literal rendition of the statement halakhic weight, R. Menahem Mendel Kasher (*Torah Shelema, va-Era Miluim* 19) and others call that into question. As R. Kasher notes, *Massekhet Soferim* 15:10 places the statement in the context of a longer list of such statements that includes "the best of the doctors goes to perdition." Dr. Becker probably agrees that statements such as these were not intended for literal interpretation or halakhic application.

Note that R. Shaul Yisraeli wrote a lengthy and comprehensive essay justifying the Israeli army's actions at Kibiyeh without citing these sources regarding "*tov she-bagoyim*." I submit that this indicates he did not see them as relevant to the question at hand. Either he thought that these sources address enemy fighters and not enemy civilians, or he did not attribute legal weight to the literal interpretation of this phrase.

Finally, even to the degree that Dr. Becker is correct, this would not mean that the Israeli army must fire away without asking some difficult questions. We need to determine how to evaluate who counts as part of the collective entity we are fighting. For instance, in the first Lebanon war, were Lebanese civilians part of the same entity as the PLO? Additionally, Dr. Becker agrees that remorse for innocents killed remains a significant theme in our tradition. At the very least, we would have an uneasy feeling about every child or other innocent killed by the strategies war needs force upon us. Such qualms do not seem to be a major motif in contemporary Religious Zionist discourse about war tactics. Educators bringing our tradition's sensitivity regarding this issue to

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their students' attention would be an important endeavor. However, if I am correct, our tradition asks for more. It demands that such consideration impact on our choice of tactics as well.

TORTURE AND THE TICKING BOMB

TO THE EDITOR:

In his review of "Torture and the Ticking Bomb" (*Tradition* 39:4, Winter 2006), R. J. David Bleich writes:

Early American settlers of the western territories were frequently attacked by Indians and frequently were forced to take refuge in hiding places in order to avoid discovery by Indian marauders. Apparently, in one such instance, a baby began to wail. There was a distinct danger that the infant's cries would become audible to the enemy. In revealing the site in which the settlers were hiding the infant would have compromised the safety of the entire group. In order to obviate the danger the child's mother placed her hand over the baby's nose and mouth causing him to suffocate. There was no other way to eliminate the threat caused by his cries.

I believe that there are three points here that deserve greater scrutiny. First, social vs. physical causes: There is a difference between a pursuer who is, say, about to throw a grenade at a crowd, and an infant alerting Indians, via continued crying, to the location of a group. In the first case the expected danger follows from physical laws, while in the second case the cause is informational-social, not physical. True, Rambam (*Hilkhot Sekhirut*, 3:5) does seem to recognize informational-social causality (arguing and bragging), but I would still question the idea that just as informational-social causality justifies monetary liability it can be generalized to a personal liability to lose one's life.

Second, there should have been greater focus on the degree/certainty of danger: The review states ". . . the infant's cries have compromised the safety of the group." Their safety was only compromised. It is not clear if this particular Indian tribe would kill all of them, or just take their money.

I believe a discussion about the degree of certainty of resulting death or loss of limb, as a requirement for relying on the *rodef* laws, is warranted. If I see a child throwing bombs into a group, I am obligated to kill the child; the child is a *rodef*. But if the child is only

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throwing small stones, then perhaps death or loss of limb is not certain. Is he still a *rodef*? To illustrate further, suppose Isaac insults Abraham, in my presence. Abraham becomes infuriated and says “I will kill you for this!” Abraham then starts pursuing Isaac, but without a weapon. If I have a gun am I really obligated to kill Abraham? Am I even allowed to?

This second objection ties in to the first objection: Precisely because the cause is social-informational—and not physical—we are not certain of resulting death or loss of limb.

Third, there is the issue of the possibility of using other methods to eliminate the danger: Jewish law is very clear and explicit:

A person who could have saved the pursued non-lethally, and did not bother to, but rather saved by killing the pursuer, is a murderer. Although he is liable to a death penalty, a court does not execute him.” (Rambam, *Hilkhot Rotse’ah u-Shemirat ha-Nefesh*, 1:13)

Were there really no other ways to eliminate the threat caused by the baby’s cries? For example nursing, coupled with fondling and cooing, can assuage most infant crying. Is an initial attempt to nurse or fondle the infant required?

(DR.) RUSSELL JAY HENDEL

J. DAVID BLEICH RESPONDS:

My article “Torture and the Ticking Bomb” was certainly not intended as an exhaustive or comprehensive treatment of the law of pursuit. Answers to the questions raised by Dr. Hendel are well known to all who are familiar with the halakhic category of *rodef* and have been discussed in the present article and elsewhere.

1. What Dr. Hendel terms “informational-social causality” clearly triggers the law of pursuit. Application of that point to the case of the crying baby is cogently established in the sources cited in footnote 18 of my article. “Informational-social causality” is a form of *gerama*, or non-proximate causality, sufficient to establish the miscreant as a *rodef*. Indeed, that is the fundamental point underlying the discussion in the second section of the article, *viz.*, whether even passive nonfeasance rises to the level of pursuit.

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2. Various opinions regarding the threshold level of certainty necessary for intervention were discussed some time ago in a previous column. That material is now readily accessible in my *Contemporary Halakhic Problems*, IV, 82-86. In the case of the baby, I wrote—and Dr. Hendel quotes—“There was *no other way* [emphasis added] to eliminate the threat caused by his cries.” The threat was clearly to life rather than to fortune. Facts presented in a hypothetical or an example from folklore are to be understood precisely as presented. I am somewhat surprised at this aspect of Dr. Hendel’s query since the very next example given relates to a crying baby in a Holocaust situation in which the enemy’s murderous intent was beyond cavil.

3. Jewish law is indeed “very clear and explicit” in providing that the law of pursuit cannot be invoked when there exists a possibility of employing other methods to eliminate the danger. Moreover, as pointed out in *Contemporary Halakhic Problems*, I, 364, the intervener’s intent to kill the aggressor in a situation in which maiming would suffice to eliminate the danger may be inferred circumstantially and result in culpability.