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PREEMPTIVE WAR IN JEWISH LAW

All that is recorded in the Torah is written for the sake of peace; and although warfare is recorded in the Torah, even warfare is recorded for the sake of peace.
TANHUMA, TSAV 3

I

The considerations of Jewish law and ethics as they apply to war in general, and to the Lebanese conflict of the summer of 1982 in particular, are complex. Halakhah does recognize a category of war "to deliver Israel from the enemy." Such war is not only legitimate but mandatory. Jewish law also recognizes as a category of permissible war, wars undertaken in order "to diminish the heathens so that they shall not march against them." And, of course, Halakhah recognizes the legitimacy of self-defense which need not be justified in terms of halakhically applicable categories of war. Any discussion of the Halakhah as it pertains to preemptive war must, of necessity, begin with an analysis of *Sotah* 44b, and of the exceedingly complex rabbinic commentaries thereto, as well as of the ruling of Rambam, *Hilkhot Melakhim* 5:1, which, as will be seen, lends itself to a variety of possible interpretations.

Jewish law recognizes two distinct types of war: *milhemet mitsvah*, i.e., war commanded by the Torah and *milhemet reshut*, i.e., war that is not commanded but that is permitted and hence is "discretionary." The primary locus of the talmudic formulation of these two categories of war is the final Mishnah of the eighth chapter

of *Sotah* and the accompanying discussion recorded in the Talmud, *Sotah* 44b. The Mishnah presents an elucidation of the scriptural verses that provide for a number of exemptions from military service. Deuteronomy 20:5–7 states:

And the officers shall speak unto the people, saying: who is the man who has built a new house and has not begun living in it? let him go and return to his house, lest he die in the battle and another man begin living in it. And who is the man who has planted a vineyard and has not redeemed [its fruit in the fourth year]? let him go and return to his house, lest he die in the battle and another man redeem it. And who is the man who has betrothed a wife and has not taken her? let him go and return to his house lest he die in the battle and another man take her.¹

The Mishnah concludes with the statement:

To what does the foregoing apply? To discretionary wars, but in wars commanded by the Torah (*milhamot mitsvah*) all go forth, even a bridegroom from his chamber and a bride from her canopy. R. Judah says: To what does the foregoing apply? To wars commanded by the Torah (*milhamot mitsvah*), but in obligatory wars (*milhamot hovah*) all go forth, even a bridegroom from his chamber and a bride from her canopy.²

The Gemara, as understood both by Rashi and by Rambam in his *Commentary on the Mishnah*, establishes that no controversy exists between R. Judah and the Sages with regard to the definition and scope of these basic categories. Insofar as the regulations specifically addressed by the Mishnah are concerned, the terms “*hovah*” (“obligatory”) and “*mitsvah*” (“commanded”) are to all intents and purposes synonymous in connotation. All agree that wars waged by the House of David for the purpose of territorial expansion were discretionary and hence were governed by the provisions of Deuteronomy 20:5–7; similarly, all agree that the wars waged by Joshua for the conquest of the land of Canaan were obligatory and hence were not governed by the provisions of Deuteronomy 20. Nevertheless, the Sages carefully employ the term “commanded” (*mitsvah*) in speaking of the latter while R. Judah uses the term “obligatory” (*hovah*) with equal precision, even though both are in total agreement with regard to the specific wars excluded from the provisions of Deuteronomy 20. The Gemara introduces a new category of war, viz., wars “to diminish the heathens so that they shall not march against them,” and posits a peripheral dispute between the Sages and R. Judah in order to explain their respective choice of nomenclature. The Gemara assumes that both the Sages

and R. Judah agree that the provisions of Deuteronomy 20 apply not only to the wars of the House of David but also to preemptive strikes “to diminish the heathens so that they shall not march against them.” The Sages regard such wars as “discretionary” because they are not undertaken in fulfillment of a biblical commandment and because such preemptive wars are conducted in the absence of any imminent danger. Accordingly, the Sages employ the terms “commanded” (*mitsvah*) and “discretionary” (*reshut*) as antonyms. R. Judah, although he concedes that for statutory purposes such preemptive wars are included among the discretionary wars to which the provisions of Deuteronomy 20 apply, refuses to term such wars “discretionary”; R. Judah, despite the absence of an explicit biblical injunction, views the waging of such wars as constituting a *mitsvah*. According to R. Judah, preventive war, although not obligatory, constitutes the fulfillment of a *mitsvah* when necessary for purposes of security. Hence R. Judah finds it necessary to seek a different term to describe wars that are explicitly commanded by Scripture, e.g. the wars of Joshua for the conquest of Canaan. The latter are termed “mandatory” (*hovah*) by R. Judah. His use of the appellation “*mitsvah*” in reference to preventive war notwithstanding, R. Judah concedes that only wars specifically mandated by Scripture are excluded from the provisions of Deuteronomy 20.

The Gemara seeks to discover a concrete halakhic application, as distinct from a purely semantic difference, of the issue that divides the Sages and R. Judah. A practical difference arising from their controversy is found by the Gemara in the application of a general principle that provides that a person engaged in performance of a *mitsvah* is exempt from the fulfillment of other commandments. R. Judah considers the waging of preemptive war to constitute fulfillment of a *mitsvah*; hence, according to R. Judah, combatants are exempt from fulfilling other commandments while engaged in military duties associated with preemptive war. The Sages regard such incursions as discretionary in nature and hence regard soldiers engaged in such battles as being fully obligated with regard to the fulfillment of other commandments.³

The question of whether a preemptive war is included in the category of *milhemet mitsvah* or *milhemet reshut* is crucial with regard to yet another aspect of Halakhah. The Mishnah, *Sanhedrin* 2a, stipulates that a discretionary war may be undertaken only upon the acquiescence of the Great Sanhedrin composed of seventy-one members. A subsequent Mishnah, *Sanhedrin* 20a, implies that a discretionary war may be undertaken only by a monarch. Thus, a

discretionary war cannot be justified unless undertaken by the king⁴ with the permission of the Great Sanhedrin.⁵ Moreover, in the context of a discussion of discretionary war, the Gemara, *Berakhot* 3b and *Sanhedrin* 16a, declares that the king may not undertake military action other than upon the approval of the *urim ve-tumim*.⁶ Although in *Hilkhot Melakhim* Rambam fails to mention consultation of the *urim ve-tumim* as a necessary precondition,⁷ nevertheless, in the introduction to his *Sefer ha-Mitsvot, shoresh 14*, Rambam does state that a High Priest is required for the undertaking of war; i.e., the king and the Sanhedrin may not undertake military action other than upon acquiescence of the *urim ve-tumim* which is attached to the breastplate worn by the High Priest. Hence, absent a High Priest⁸ who can consult the *urim ve-tumim*, offensive war in conformity with the stipulations of Jewish law is impossible. Rambam in his addenda to Rambam's *Sefer ha-Mitsvot, mitsvot lo ta'aseh*, no. 17, declares that the requirement for consultation and approval of the *urim ve-tumim* is not limited to discretionary wars but applies with equal force to obligatory wars as well.⁹

Since both the Sages and R. Judah agree that war "to diminish the heathens" is discretionary rather than mandatory, it follows that preemptive war may be waged only by a sovereign with the approval of the Sanhedrin and permission of the *urim ve-tumim*. Rambam, *Sefer ha-Mitsvot, shoresh 14*, expressly declares that "war and conquest of cities may not be other than by a king and upon the counsel of the Sanhedrin and a High Priest" and hence since *mitsvot* associated with "...a king or a discretionary war...are not incumbent other than during the existence of the Temple" it is self-understood that such *mitsvot* cannot be fulfilled in our day. Thus, it would appear that, in our day, preemptive war "to diminish the heathens" cannot be sanctioned by Jewish law since, at present, there exists neither Sanhedrin nor *urim ve-tumim* to grant prior approval.

II

The concept of preemptive war and the situations in which such military action may be undertaken, even within the context of a *milhemet reshut* is the subject of considerable controversy among rabbinic commentators. A number of conflicting views center around the correct understanding of Rambam's formulation of this concept.

It might be anticipated that in deciding between the conflicting views of R. Judah and the Sages the normative halakhic ruling would

be in accordance with the majority opinion, i.e., in accordance with the opinion of the Sages. Therefore, Rambam's formulation of the Halakhah is somewhat puzzling. In his *Mishneh Torah, Hilkhot Melakhim* 5:1, Rambam rules:

The king may first wage only a *milhemet mitsvah*. What is a *milhemet mitsvah*? It is the war against the Seven Nations,¹⁰ the war against Amalek and [a war] to deliver Israel from an enemy who has attacked them (*she-ba aleihem*). Thereafter he may wage a *milhemet reshut*, which is a war against other people in order to enlarge the borders of Israel and to enhance his greatness and prestige.¹¹

Rambam employs the terms *milhemet mitsvah* and *milhemet reshut* in establishing dichotomous categories in accordance with the nomenclature adopted by the Sages. The Sages, it will be remembered, regarded a preemptive war "to diminish the heathens so that they shall not march against them" as being entirely in the nature of a discretionary war and hence had no need to introduce a third term, viz., *milhemet hovah*, in order to distinguish between preemptive war and war for the conquest of Canaan. The term "*milhemet hovah*" is employed only by R. Judah in order to distinguish the various "commanded" wars from preemptive war.

Rambam's formulation is puzzling on two counts: (1) Rambam fails to state that preemptive wars are discretionary and hence can be undertaken only by a monarch with the approval of the Sanhedrin. Indeed, Rambam completely fails to rule upon or to record the status of preemptive war.¹³ (2) Among *milhamot mitsvah* Rambam posits a category of war for which there is no apparent talmudic reference, viz., "[a war] to deliver Israel from the enemy."

A facile solution to both problems might be found were it to be assumed that Rambam's use of the phrase "[a war] to deliver Israel from an enemy" is intended simply as a reformulation of the Gemara's concept of a preemptive war.¹⁴ However, such interpretation of Rambam's statement cannot be sustained for a number of reasons: (1) The appropriate canons of halakhic decision making require a ruling in accordance with the majority opinion, i.e., in accordance with the opinion of the Sages. (2) If Rambam rules in accordance with R. Judah's opinion it would have been necessary for him to employ terminology distinguishing between *milhemet mitsvah* and *milhemet hovah*. (3) Finally, although according to R. Judah, a preemptive war is analogous to war against the Seven Nations and war against Amalek and, since it does constitute fulfillment of a

mitsvah, participation in such wars exempts those so engaged from fulfilling other commandments, nevertheless, even according to R. Judah, the waging of preemptive war requires a monarch and the consent of the Sanhedrin. Since, in the very next paragraph, *Hilkhot Melakhim* 5:2, Rambam proceeds to state that the wars that he has categorized as *milhamot mitsvah* do not require consent of the Sanhedrin, it is clear that war “to deliver Israel from an enemy” is not identical with the war depicted by the Gemara as undertaken “to diminish the heathens so that they shall not march against them.”

Moreover, the phraseology employed by Rambam in this context—“*she-ba aleihem*”—although not entirely unequivocal, is most readily understood as referring to defensive warfare in response to an armed attack rather than as referring to a preemptive strike. Thus *Hazon Ish, Orah Hayyim-Mo’ed* 114:2, carefully defines the term “*she-ba aleihem*” as meaning “*she-kvar ba aleihem*—who has already attacked them.”¹⁵ This interpretation of Rambam is reflected in the comments of an early authority, R. Menahem Me’iri, in his *Bet ha-Behirah, Sotah* 43a. Me’iri indicates that the controversy between the Sages and R. Judah is limited to preemptive war against a potential aggressor. However, asserts Me’iri, in a situation in which an attack is already underway, all agree that military action in response constitutes an obligatory war. Me’iri writes, “[R. Judah and the Sages] disagree only when they go to war against their enemies because they fear lest [their enemies] attack or when it is known by them that the enemies are preparing themselves [for attack],” thereby implying that once the attack has commenced a defensive military response constitutes an obligatory war.

There is also a discrepancy between Rambam’s definition of *milhemet reshut* and the description of such war which is recorded by the Gemara. The Gemara, *Sotah* 44b, speaks of *milhamot reshut* as “the wars of the House of David for territorial expansion (*le-revahah*)” while Rambam speaks of war not only “to enlarge the borders of Israel,” but also “to enhance [the monarch’s] greatness and prestige.”

Lehem Mishneh endeavors to resolve these difficulties by interpreting Rambam’s categorization of war “to enhance [the monarch’s] greatness and prestige” as coextensive with war described by the Gemara as designed “to diminish the heathens so that they shall not march against them.” The phrase “to enhance his greatness and prestige” is understood by *Lehem Mishneh*, not as a reference to vainglorious considerations, but as a reference to war undertaken in

order to instill fear in potential enemies so that they refrain from attack. War of this nature can, of course, be undertaken only with the approval of the Sanhedrin and the consent of the *urim ve-tumim*. Rambam, then, according to *Lehem Mishneh*, rules entirely in accordance with the opinion of the Sages and does not fail to include preemptive war in the category of *milhemet reshut*.

Lehem Mishneh's equation of Rambam's phrase "to enhance his greatness and prestige" with the Gemara's notion of a war "to diminish the heathens so that they shall not march against them" serves to broaden the latter category so greatly as to make it all-inclusive.¹⁶ The Gemara's phrase certainly has the connotation that the heathens against whom the preemptive strike is undertaken constitute at least a potential danger. However, according to *Lehem Mishneh's* understanding, terrorization of even nations possessing no capability for harm would be justified as a *milhemet reshut* on the grounds that such action is designed to instill fear in all and sundry.

Lehem Mishneh's analysis of Rambam's views yields but one of a number of definitions of "war to diminish the heathens" and hence constitutes one of a number of positions with regard to the permissibility of preemptive war. A somewhat more restrictive definition of war "to diminish the heathens so that they shall not march against them" is advanced by *Shiyurei Korban* (addenda to *Korban ha-Edah*, a standard commentary on the Palestinian Talmud). *Shiyurei Korban*, Palestinian Talmud, *Sotah* 8:10, defines as a *milhemet reshut* a war undertaken "against neighbors in the fear that with the passage of time they will wage war [against Israel]; therefore [the king] wages war against them at the present time in order to decimate them so that they not possess the might to attack Israel." According to *Shiyurei Korban* preemptive war is warranted even in the absence of any fear of imminent attack but is justified only when directed against a potential aggressor and designed to thwart development of military capacity for attack.

The definitions of war "to diminish the heathens" presented both by *Lehem Mishneh* and by *Shiyurei Korban* are contradicted by Rambam's statement in his *Commentary on the Mishnah*, *Sotah* 8:7. In explaining the controversy between R. Judah and the Sages, Rambam, according to the standard Ibn Tibbon translation of the *Commentary on the Mishnah*, declares, "But they disagree only with regard to killing those who kill them in order to weaken them so that they will not kill [the people of] Israel and not do battle in their land." As depicted in this source, the war in question is hardly pre-

emptive; it is directed against “those who kill them” and hence in common parlance would be termed a defensive war. If understood literally, Rambam here declares war against “those who kill them” to be a *milhemet reshut* requiring for its conduct a king, Sanhedrin and *urim ve-tumim* and hence precluded in our day. According to this position, military action that is entirely of a preemptive nature does not qualify even as a *milhemet reshut* and hence is never legitimate.

Apart from the conceptual difficulties associated with a position that regards defensive action as being subject to the restrictions placed upon a *milhemet reshut*, a literal reading of the Ibn Tibbon text of the *Commentary on the Mishnah* is contradicted by Rambam’s own earlier-cited statement in *Hilkhot Melkhim* 5:1 in which Rambam enumerates war “to deliver Israel from an enemy which has attacked them” as an instance of *milhemet mitsvah*.

These apparently contradictory statements may perhaps be reconciled if due consideration is given to the concluding phrase found in the *Commentary on the Mishnah*: “. . .so that they will not kill [the People of] Israel *and not do battle in their land.*” Although the explanation is somewhat tenuous, the contradiction is resolved if it be postulated that Rambam views such wars as discretionary only when required for purposes of defense at a time when the enemy has as yet not penetrated the territory of the Land of Israel as is evidenced by the words “and not do battle *in their land.*” Rambam’s statement in the *Mishneh Torah* describing war “to deliver Israel from an enemy” as a mandatory war would then be understood as restricted solely to defensive war conducted within the boundaries of the Land of Israel.¹⁷ According to this analysis, military action designed only to defend the populace is categorized as discretionary; war for defense of the territorial integrity of the Land of Israel constitutes an obligatory war just as the original conquest of *Eretz Yisra’el* is categorized a *milhemet mitsvah*.

This resolution of the apparent contradiction found in Rambam’s statements is far from incontrovertible.¹⁸ The difficulty might well be resolved in an alternative manner by reinterpretation of Rambam’s phraseology in the *Commentary on the Mishnah*. It is therefore not at all surprising to find that *Hazon Ish, Orah Hayyim-Mo’ed* 114:2, understands the phrase “those who kill them” employed by Rambam in his *Commentary on the Mishnah* in defining war “to diminish the heathens” as referring, not to a situation in which Israel is under attack, but to a situation in which “they kill [people of] Israel intermittently but do not engage in battle. . .but

when they come upon an individual Jew or a group [of Jews] they kill him.” The situation depicted by *Hazon Ish* is roughly analogous to a war of attrition. According to *Hazon Ish*, then, participation in military action in response to a war of attrition, although it does not constitute a *milhemet hovah*, does nevertheless constitute fulfillment of a *mitsvah* according to R. Judah who, as will be remembered, describes war “to diminish the heathens” as a *milhemet mitsvah*. *Hazon Ish*, in his subsequent comments, seemingly has no difficulty in not equating response to a war of attrition with defensive action against an enemy engaged in formal battle which is deemed obligatory. *Hazon Ish* does, however, express ignorance of any possible consideration that might explain the Sages’ refusal to designate participation in such action as constituting the fulfillment of a *mitsvah*.

The Kapah edition of Rambam’s *Commentary on the Mishnah* contains an entirely different reading. According to that version, Rambam declares, “They disagree only with regard to a war against nations which wage war against [Israel] in order to weaken [those nations].” The situation described cannot be understood as one involving actual hostilities against Israel because, as stated by Me’iri, a war of defense constitutes a *milhemet mitsvah* even according to the Sages. Such defensive war is recognized by Rambam himself as constituting a *milhemet mitsvah* as indicated by his inclusion of war “to deliver Israel from an enemy who has attacked them” in the category of *milhamot mitsvah* in his codification of this concept in the *Mishneh Torah*. Hence the situation depicted as a *milhemet reshut* undertaken “to diminish the heathens so that they shall not march upon them” must involve circumstances in which the heathens have as yet not engaged in actual hostilities but whose aggressive intentions are announced or are readily apparent.¹⁹ The circumstances depicted in the Kapah version of the *Commentary on the Mishnah* are roughly the equivalent of a state of belligerence as distinct from a state of war.

Regardless of which text of Rambam’s *Commentary on the Mishnah* is accepted as authentic, it is clear that, contrary to *Lehem Mishneh*, war for the purpose of creating a climate of fear could not be sanctioned even as a *milhemet reshut*; nor, contrary to the position of *Shiyurei Korban*, would Rambam sanction even as a *milhemet reshut* military action undertaken simply to prevent a military build-up.

Me’iri, in his commentary on *Sotah* 43a, adopts a definition of war “to diminish the heathens” that is somewhat broader than that

formulated by Rambam. Me'iri defines war "to diminish the heathens so that they shall not march against them" as an action undertaken by Israel "against their enemies because they fear lest [their enemies] attack or when it is known that the [enemies] are preparing themselves for attack." Me'iri's definition encompasses not only a declared state of belligerence but also a situation involving a military build-up or a situation in which it is known that the enemy is otherwise actively engaged in preparations for an attack. However, absent clear aggressive design on the part of the enemy, a military response does not qualify as a *milhemet reshut* and is illegitimate even according to R. Judah.

In summary it may be stated that six diverse definitions of the category of war "to diminish the heathens so that they shall not march against them" may be gleaned from the writings of rabbinic commentators:

1. According to a literal reading of the Ibn Tibbon translation of Rambam's *Commentary on the Mishnah* such military activity is sanctioned as a discretionary war against "those who kill them," i.e., if the enemy has actually been engaged in the taking of Jewish lives.
2. According to *Hazon Ish*, who understands Rambam to be referring to a situation in which "they kill [people of] Israel intermittently but do not engage in battle," only military response to a war of attrition is sanctioned as a discretionary war.
3. According to the Kapah edition of the *Commentary on the Mishnah* preemptive action is legitimate as a discretionary war only against "nations which wage war against [Israel]," i.e., against nations with regard to which a state of belligerence already exists.
4. According to Me'iri such war is discretionary when there is cogent reason "to fear lest [their enemies] attack or when it is known that the [enemies] are preparing themselves for attack," i.e., in response to a military build-up or when it is known that the enemy is otherwise actively engaged in preparations for attack.
5. According to *Shiyurei Korban* a preemptive strike is a legitimate form of discretionary war when directed against a potential aggressor in order to prevent the enemy from developing a military capability.

6. According to *Lehem Mishneh* military hostilities directed against any foreign power are justified as a form of discretionary war when designed to demonstrate military superiority in order to instill fear in potential aggressors.

In arriving at a normative halakhic ruling in light of these conflicting positions, consideration must be given to the fact that the last two definitions of war “to diminish the heathens,” both of which are extremely broad in nature, are opinions advanced by latter-day scholars that cannot be deemed authoritative when contradicted by the statements of authoritative early decisors such as Rambam and Me’iri.

It must be reiterated that even when sanctioned by Halakhah, preemptive war constitutes a *milhemet reshut*. Since a *milhemet reshut* is precluded in our day, a resolution of the conflict between the various authorities who seek to define the concept of a war “to diminish the heathens” is not a matter that demands normative resolution since, regardless of how the term is defined, no *milhemet reshut* may be waged in the absence of a king, Sanhedrin and the *urim ve-tumim*.²⁰ Military action in the guise of a *milhemet reshut* requires a sovereign at whose sole initiative such war may be undertaken,²¹ prior permission of a Sanhedrin²² and acquiescence of the *urim ve-tumim*. Moreover, puzzling as his position may be, Rambam, in his codification of the law in the *Mishneh Torah*, neglects to enumerate preemptive war as a form of *milhemet reshut* thereby apparently rendering such action illicit under all circumstances.

Accordingly, since discretionary war cannot be sanctioned in our day due to the absence of a Sanhedrin and *urim ve-tumim*, it might appear that a definitive decision with regard to the legitimate parameters of “war to diminish the heathens” is of no practical concern. This, however, is not entirely the case. We are confronted with two distinct categories of war, viz., war “to diminish the heathens” and war designed to “deliver Israel from an enemy.” Excluding wars of aggression, these categories appear to be dichotomous. Wars that are not to be categorized as designed “to diminish the heathens” would then be encompassed within the category of war “to deliver Israel from an enemy.” Military action categorized as designed “to deliver Israel from an enemy” constitutes a *milhemet mitsvah*. Thus, for example, according to the Kapah version of the *Commentary on*

