

SURVEY OF RECENT HALAKHIC PERIODICAL LITERATURE

PHYSICIANS' STRIKES

A lengthy strike on the part of medical practitioners in Israel during the spring and summer of 1983 ended with both sides agreeing to submit all disputes with regard to salary and hours of service to binding arbitration. However, the refusal of physicians to treat patients over an extended period of time raised serious questions concerning the ethical stance of the participants in the strike. Indeed, individual doctors were faced with the moral dilemma of allowing their patients to go untreated or of undermining the solidarity of the profession and incurring the professional and personal ire of colleagues. Many physicians sought halakhic guidance with regard to this issue. In a two-part article published in *Ha-Tsofeh*, 15 Sivan and 22 Sivan 5743, the former Chief Rabbi, Rabbi Shlomoh Goren, discloses the advice he gave physicians who consulted him and the halakhic reasoning upon which his counsel was based.

Jewish law, as recorded in *Shulhan Arukh*, *Hoshen Mishpat* 133:3 and *Shakh*, *Hoshen Mishpat* 333:14, grants workers the right to abrogate labor contracts unilaterally although, under certain conditions, a worker may be liable for consequential damages sustained by the employer. The Gemara, *Baba Metsi'a 7a*, categorizes compelling a worker to abide by his agreement as a form of involuntary servitude forbidden by Jewish law. Hence, a laborer may withdraw from his employment "even in the midst of the day." According to all authorities, a worker is under no obligation to perform any service subsequent to the expiration of the stipu-

lated period of employment, even though failure to accept a renewal of the contract will result in financial loss to the employer.

A physician is entitled to receive a fee for his services. Ramban, in his *Torat ha-Adam*, explains that although the physician is bound to treat the patient by virtue of divine command and, ordinarily, no compensation may be demanded for an act which constitutes the fulfillment of a *mitsvah*, the physician is nevertheless entitled to compensation for physical travail and for expenditure of time during which he might be gainfully employed in some other occupation. However, he may not charge a fee simply for sharing his knowledge and expertise with the patient. Although it is forbidden for the physician to demand an exorbitant fee, there is disagreement among early authorities with regard to whether an agreement to pay an inordinately high fee is actionable. Ramban rules that, although it is immoral for the physician to exact such a promise, the physician may nevertheless legally collect whatever sum has been stipulated.

During the early period of the strike, the physicians declined to report for duty at hospitals and government-sponsored medical facilities, but established their own clinics in which they treated patients on a fee per visit basis. Although this placed a financial burden upon patients deprived of the benefits of socialized medicine, Rabbi Goren finds nothing objectionable in this action taken by the doctors since all patients in need of medical attention were treated.

This course of action did not have the desired effect and did not lead to acquiescence by the government to the demands of the physicians. In Israel, with the exception of several small proprietary hospitals and four voluntary hospitals under private sponsorship (Hadassah, Shaare Zedek, Bikur Cholim and Laniado), all hospitals are government-operated. The government, however, establishes salary scales which are imposed upon voluntary hospitals as well. Since the government adamantly refused to accede to their demands, during the latter period of the strike the physicians declined to see patients even on a private basis.

Under Jewish law the treatment of a patient is not merely a matter of private contract but constitutes a religious obligation. Refusal to treat a patient in need of medical assistance is a clear violation of Jewish law. *Shulhan Arukh, Yoreh De'ah* 336:1, declares, "If the physician withholds his services it is considered as shedding blood." The obligation to render assistance in life-threatening situations is predicated upon the verse, "Nor shall you stand idly by the blood of your fellow" (Leviticus 19:16). A further obligation is predicated upon the scriptural exhortation with regard to restoration of lost property, "and you shall restore it to him" (Deuteronomy 22:2). On the basis of a pleonasm in the Hebrew text, the Gemara declares that this verse includes an obligation to restore a fellow man's body as well as his property. Hence, there is created an obligation to come to the aid of one's fellow man in a life-threatening situation. Every individual, insofar as he is able, is obligated to restore the health of a fellow man no less than he is obligated to restore his property.

A latter-day authority, R. Yehudah Leib Zirelson, *Teshuvot Atsei ha-Levanon*, no. 61, cogently argues that these obligations apply under non-life-threatening circumstances no less than in life-threatening situations. The verse "and you shall restore it to him" mandates not only the return of lost property but, *a fortiori*, preservation of life as well. The verse,

then, does not refer only to the return of objects of material value. Accordingly, declares *Atsei ha-Levanon*, restoration of health to a person suffering from an illness is assuredly included in the commandment "and you shall restore it to him."

Atsei ha-Levanon further demonstrates that failure to provide a medical remedy, when available, entails violation both of the commandment "you may not hide yourself" (Deuteronomy 22:3), which, in its biblical context, refers to a person who comes upon lost property belonging to another and of the admonition "nor shall you stand idly by the blood of your fellow" (Leviticus 19:16). *Sifra, Kedoshim* 41, declares that these commandments establish an obligation making it incumbent upon an individual to act, if he is capable of doing so, in order to prevent his fellow from sustaining a financial loss. This obligation is recorded by Rambam, *Hilkhot Rotse'ah* 1:13; *Sefer ha-Hinnukh*, no. 237; and *Shulhan Arukh, Hoshen Mishpat* 426:1. It similarly follows that a person is bound by the selfsame commandments to prevent loss or deterioration of health if he possesses the requisite knowledge and skill to be of assistance in providing medical care. Failure to do so, concludes *Atsei ha-Levanon*, would constitute transgression of these two negative commandments as well as of the positive commandment "and you shall restore it to him." Furthermore, Ramban, in *Torat ha-Adam*, observes that failure to render medical assistance entails abrogation of the positive commandment "And you shall love your neighbor as yourself." Thus, even in situations which pose no threat to life, a person in a position to do so is bound by no less than four separate *mitsvot* to render medical assistance.

When his services are requested by a patient a physician may not decline to treat the patient requesting his services even if other competent and equally qualified physicians are available to provide medical services. The Palestinian Talmud, *Nedarim* 4:3, declares, "Not by every person is an individual privileged to be cured." Medical diagnosis and treatment is an art

and the personal dynamic between doctor and patient may play a crucial role in any given case. The confidence which a patient has in his physician may itself be a crucial element in therapeutic efficacy. Accordingly, Halakhah provides, for example, that, when his services are specifically requested, a physician may violate *Shabbat* restrictions in travelling to reach a patient even though another physician may be available to treat the patient without the need for any violation of Sabbath laws. The identical considerations preclude refusal on the part of a physician to attend a patient because of the doctor's own personal or financial considerations.

The administration of Laniado hospital claims that, in accordance with halakhic norms, its staff provided a full complement of medical services during the entire period of the strike. [See *Laniado Hospital News*, Spring 1984, p. 1; *The Jewish Press*, June 24, 1983, p. 46; and *Yediot Aharonot*, June 28, 1983.] In declining to participate in strike action, the members of the medical staff of Laniado hospital complied with the halakhic ruling issued by the Klausenburger Rebbe, the spiritual leader of Kiryat Sanz, under whose aegis the hospital is administered. Rabbi Goren similarly counseled the doctors who consulted him that the dictates of Halakhah required them to return to duty. However, in light of the fact that the physician may charge a fee for his services, he advised that they announce in advance the fees demanded for their services. Rabbi Goren asserts that, under such circumstances, their demands would be actionable in accordance with the provisions of Halakhah.

Given the realities of the situation, the halakhic cogency of Rabbi Goren's advice with regard to financial compensation is not a pressing issue. Unfortunately, the striking physicians had no reason to believe that their employer, the Israeli government, would abide by the provisions of Jewish law in meeting the physicians' demands for compensation. Practically speaking, Rabbi Goren's advice

amounts to a ruling requiring the physicians to return to work without any guarantee of a settlement favorable to them.

Nevertheless, it should be noted that Rabbi Goren's statement to the effect that, if the physician stipulates his fee in advance, he may compel payment in full, is correct as a general principle only if the amount stipulated is consistent with the halakhic principle which provides that a physician is entitled to compensation solely for physical exertion and time expended. An inordinate fee is collectible only if there are other physicians available who are equally competent with regard to the treatment of the specific illness for which the physician's services are sought. Rema, *Yoreh De'ah* 336:3, emphasizes that the physician may legally, if not morally, collect any fees stipulated in advance because even though he acts in fulfillment of a *mitsvah*, his obligation with regard to the *mitsvah* is no greater than that of any other physician and hence he may plead that the obligation is not incumbent upon him specifically. This, of course, is not the case if the doctor in question is the sole physician in the city or if he is in any manner uniquely competent to treat the malady. Accordingly, *Teshuvot Radbaz*, III, no. 556, rules that all authorities are in agreement that, if no other physician equally competent to treat the illness is available, the doctor cannot collect the stipulated fee if it is exorbitant. A later authority, *Tsedah la-Derekh, ma'amar* 5, *klal* 2, chap. 2, counsels that standing upon one's rights in such circumstances may, at some future time, result in the doctor refusing to treat patients when he feels that the patient may not pay his fee. [Cf., R. Eliezer Waldenberg, *Ramat Rahel*, no. 25.]

There is, moreover, one additional consideration which Rabbi Goren overlooks. The physician who stipulates his fee in advance may collect the amount stipulated because acceptance of his services is to be construed as acquiescence to the terms stipulated. Such constructive acquiescence is inferred because the patient accepts the benefit conferred without

demur. However, in the Israeli dispute, the doctors sought compensation, not from the patients, but from the government, or from the hospitals which employ them. The government might counter with the argument that, since it receives no direct benefit from the physicians' services, failure to engage in a lockout does not constitute acquiescence. The hospitals would, of course, contend that the level of compensation is set by the government and they are not legally free to contract for any modification of the salary scale set by government authorities.

Moreover, the government (and the hospitals) might plead that, absent a formal undertaking to make the payments on behalf of the patients, the physicians have no claim whatsoever upon the government. In the unlikely event that the Israeli government would agree to submit the matter to a *din Torah* these conflicting claims would of necessity be adjudicated by the *Bet Din*.

One aspect of Rabbi Goren's ruling obligating the doctors to return to their posts requires further comment. A physician may indeed not refuse to provide treatment when treatment is required by the patient and requested of that particular physician. However, an individual physician might circumvent any obligation which might devolve upon him by removing himself from situations in which his aid might be sought. In fact, at one point during the strike, the government ordered the physicians to return to duty upon pain of penal sanctions. The physicians attempted to avoid accepting service of those orders by making themselves physically unavailable. In a similar manner, in order to avoid incurring any halakhic obligations, they might make themselves unavailable to their patients by going away on vacation or by otherwise removing themselves geographically from their patients. Although the lives of patients might be endangered by such a course of action, each individual physician might plead that, since other doctors are capable of caring for the patients, he is under no personal obligation to make his services

available. While, to be sure, such conduct would not merit approbation, it appears that the physician who acts in such manner would technically not be guilty of a halakhic infraction.

Nevertheless, there is a method by which society can assure that medical services are provided on behalf of its members. Physicians can indeed be compelled to make themselves available for the treatment of patients. Such obligations with regard to providing treatment is quite independent of any claims they may have with regard to compensation for services rendered. Rema, *Yoreh De'ah* 261:1, rules that a *mohel* may be compelled to circumcise a child without compensation if the father cannot pay the *mohel's* fee. R. Eleazar Fleckles, *Teshuvah me-Ahavah*, III, no. 408, in his comments on *Yoreh De'ah* 336:2, rules that the *Bet Din* may similarly compel a physician to treat an indigent patient without a fee. Rema explains that, in the absence of a father who is capable of fulfilling the precept, the *Bet Din* is obligated to circumcise the infant. This must be understood as meaning that society itself is obligated to discharge the responsibility of circumcising the child and does so through the *Bet Din* which in this regard serves in an administrative capacity. Similarly, although no individual member of society may be obligated to provide for the medical needs of needy patients, society itself does have such an obligation. Hence, the *Bet Din*, or the appropriate administrative agency, may compel a medical practitioner to make his services available. [Cf., *Ramat Rahel*, no. 24, sec. 3.] R. Elijah of Vilna, *Bi'ur ha-Gra*, *Yoreh De'ah* 261:7, declares that the *Bet Din* may direct the *mohel* to circumcise the child by virtue of its general power and obligation to compel performance of a *mitsvah*. The selfsame consideration would empower the *Bet Din* to direct a physician to provide medical care. Rabbi Waldenberg, *Ramat Rahel*, no. 24, sec. 6, quite logically states that when more than one qualified *mohel* is available, the *Bet Din* must apportion the burden of circumcising the children of indigent par-

ents among the various *mohalim*. The identical considerations would require that society assure that the burden of providing medical care be shared equitably by all physicians qualified to render such service. Hence the *Bet Din* might direct striking physicians to provide for the immediate needs of patients requiring medical attention. The *Bet Din* would then be duty-bound to call upon the services of all qualified physicians and to arrange that duty rosters be prepared in a fair and equitable manner. Physicians are, of course, duty-bound to obey the directives of the *Bet Din* in such matters. The obligation to render care in such manner is in no way contingent upon satisfaction of any monetary claims the physicians may have upon either society or their patients.

An interesting point regarding the level of services which must be provided is reflected in a letter addressed to the medical staff of Shaare Zedek Hospital signed by two leading rabbinic authorities and published in the Kislev 5744 issue of *Assia*. The signators, Rabbi Yitzchak Ya'akov Weiss and Rabbi Shlomoh Zalman Auerbach, report that it had come to their attention that the number of physicians available to treat patients fell below the number of physicians customarily on duty on *Shabbat*. Assuming that the *Shabbat* staff is the minimum necessary for purposes of *pikuah nefesh*, those authorities declared that the members of the medical staff are obligated to assure the presence of medical personnel "not fewer [in number] than on the holy Sabbath days." Citing *Shulhan Arukh, Yoreh De'ah* 336:1, Rabbi Weiss and Rabbi Auerbach

admonished that "a physician who withholds himself from healing is guilty of bloodshed." In a subsequent letter which also appears in *Assia*, the same authorities emphasize that a physician may not withhold his services even in a situation in which he is called upon to treat patients because his colleagues, in violation of Halakhah, have refused to do so.

It should, however, be noted that it is unlikely that minimum staffing could be maintained for any significant period of time without placing the lives of patients in jeopardy. Hence maintaining medical staff at the *Shabbat* level for longer than a brief period of time would not satisfy the requirements of Halakhah.

In the same letter Rabbis Weiss and Auerbach advised that physicians may not participate in a hunger strike in order to draw attention to their demands for two reasons: 1) Any course of action which is deleterious to health constitutes a form of "wounding" and is *ipso facto* forbidden. 2) Physical weakness induced by fasting would undoubtedly compromise the quality of care which patients would receive. A medical practitioner who provides inferior care, they assert, is also deemed to be a physician who "withholds himself from healing" and is "guilty of bloodshed."

Conversely, those physicians to whom medicine is a sacred calling who, conducting themselves in accordance with the norms of Halakhah, not only declined to participate in strike action but also shouldered the burden thrust upon them by absent colleagues, earned the reward vouchsafed to those who "preserve a life of Israel" and the esteem of all.

NUCLEAR WARFARE

There is certainly no indication that the nations of the world are, at present, desirous of abiding by Jewish teaching regarding nuclear warfare and the related issue of nuclear disarmament. There are, however, individuals, groups, and even governmental bodies, who have evidenced a

keen interest in the perspectives of Jewish tradition concerning this grave question. The teachings of religion certainly serve as a factor in molding social policy even in a secular society. Moreover, for Jews, whether or not Jewish teaching with regard to this or other issues is imple-

mented in practice, the formulation of the relevant Halakhah is in itself an imperative of the *mitsvah* of Torah study.

Halakhah, as it applies to Jews, recognizes that man has no right to make war against his fellow. Standard translations of the Bible render Exodus 15:3 as "The Lord is a man of war; the Lord is His name." Rashi, citing similar usages having the same connotation, renders the Hebrew term "*ish*" as "master." Thus the translation should read, "The Lord is the master of war; the Lord is His name." God is described as the master of war because only He may grant dispensation to engage in warfare. The very name of the Lord signifies that He alone exercises dominion over the universe. Only God as the Creator of mankind and proprietor of all life may grant permission for the taking of the lives of His creatures.

War is sanctioned only when commanded by God, i.e., when divine wisdom dictates that such a course of action is necessary for fulfillment of human destiny. Even a *milhemet reshut*, a permitted or "discretionary war," is discretionary only in the sense that it is initiated by man and does not serve to fulfill a divine commandment. But even a *milhemet reshut* requires the acquiescence of the *urim vatumim*. The message transmitted via the breastplate of the High Priest is a form of revelation granting divine authority for an act of aggression. Judaism sanctions violence only at the specific behest of the Deity. Human reason is far too prone to error to be entrusted with a determination that war is justified in the service of a higher cause. Such a determination can be made solely by God.

The teachings of Judaism with regard to non-Jews are somewhat more complex. Non-Jews are not held to the same standards of behavior as Jews. Although the Noachide Code, which embodies divine law as it is binding upon non-Jews, prohibits murder, it does not necessarily prohibit as an act of murder the taking of human life under any and all circumstances. It is quite clear that when confronted by a situation in which an indi-

vidual's life is threatened, all persons, non-Jews as well as Jews, have an absolute right to eliminate the aggressor in self-defense. "*Ha-ba le-horgekha hashkem le-horgo*—If [a person] comes to slay you, arise and slay him first" (*Sanhedrin* 72a) is a principle which applies to Noachides as well as to Jews. Accordingly, a defensive war would appear to require no further justification. The right of non-Jews to wage war under other circumstances is examined in the recently published second volume of this writer's *Contemporary Halakhic Problems*. There are, however, several further points having a direct bearing upon nuclear warfare which should be noted.

Acceptance of the premise that the principle of self-defense applies to Noachides as well as to Jews does not serve to justify any and all military action even if limited to wars of defense. War almost inevitably results in civilian casualties as well as the loss of combatants. Yet the taking of innocent lives certainly cannot be justified on the basis of the law of pursuit. The life of the pursuer is forfeit in order that the life of the intended victim be preserved. However, should it be impossible to eliminate the pursuer other than by also causing the death of an innocent bystander, the law of pursuit could not be invoked even by the intended victim,* much less so by a third party who is himself not personally endangered. Since the law of pursuit is designed to preserve the life of the innocent victim, it is only logical that it is forbidden to cause the death of a bystander in the process since to do so would only entail the loss of another innocent life. In such situations the talmudic principle "How do you know that your blood is sweeter than the blood of your fellow?" (*Sanhedrin* 74a) is fully applicable.

If war on the part of non-Jews is sanctioned solely on the basis of the law of pursuit, military action must perforce be restricted to situations in which loss of life is inflicted only upon armed aggressors or upon active participants in the war effort; military action resulting in casualties among the civilian populace would

constitute homicide, pure and simple. Following this line of reasoning there could certainly be no justification for military action intentionally designed to claim civilian lives. Thus, despite the resultant diminution of casualties among the armed forces, the nuclear bombing of Hiroshima and Nagasaki could not be justified on the basis of the law of pursuit. Justification of the use of atomic weapons simply as an act of war is contingent upon resolution of the question of whether or not non-Jews have been granted the right to engage in war. As noted earlier, that question has been discussed elsewhere.

There is one other avenue which should be explored as possible justification of military action which results in casualties among noncombatants. Jewish law, to be sure, recognizes a distinction between willful transgression (*mezid*) and inadvertent transgression (*shogeg*). The latter occasions no punishment at the hands of a human court but, in terms of heavenly law, requires penance and expiation. In the case of certain serious infractions, a sacrifice is required as atonement. Inadvertent transgression, or *shogeg*, is defined as ignorance of the prohibition itself or ignorance that the act performed is proscribed because of confusion with regard to a factual detail (e.g., knowledge that a certain act is forbidden on *Shabbat* but ignorance of the fact that it is the Sabbath day). Even minimal culpability as *shogeg* requires that the act itself and its consequences be fully intended. Performance of an act with intention to achieve an innocuous result, even when that act is performed in a manner which may well result in an unintended infraction, engenders no culpability even if the actual result is one which, were it intended, would be a forbidden act. Since the resultant act is unintended (*davar she-eino mitkaven*) no expiation is required. The source for this provision of Halakhah is the *Mishnah, Beitsah* 22b, which records a dispute between R. Judah and R. Simon with regard to culpability for such acts. The halakhah is in accordance with the permissive opinion of R. Simon. Thus, for

example, a bed, chair or couch may be dragged along a dirt floor provided that there is no intention to gouge a hole in the floor. The act is entirely permissible and the person acting in such manner incurs no liability even if a hole is dug inadvertently. Accordingly, it might perhaps be argued, a person intent upon killing a pursuer need not be constrained by the concern that his act may possibly cause the death of an innocent bystander since the result is unintended. A similar concept appears in other theological systems, perhaps as a result of the influence of Jewish law, and is known as the "double effect" theory.

This argument may be rebutted on a number of grounds. Although most authorities make no such distinction, R. Aha'i Ga'on, in his *She'iltot, she'ilta* 105, maintains that the concept of a *davar she-eino mitkaven* is applicable only with regard to possible violation of Sabbath restrictions, but that acts which might result in transgression of other prohibitions are forbidden even if the proscribed effect is unintended. *Tosafot, Shabbat* 110b, asserts that acts of such nature are forbidden whenever the possible result is a capital transgression.

Furthermore, an act is permitted even though the unintended effect is forbidden only when it is not a certainty that the proscribed effect will occur. When the forbidden effect will of necessity take place, the act is forbidden even though it is intended in order to effect an innocuous result. Thus, for example, a person may not sever the head of an animal on the Sabbath on the plea that he intends only to remove the head in order to feed it to a dog, but not to kill the animal. Such an act is known as a *pesik reisheih*. The rationale underlying this provision is that a necessary effect cannot be regarded as unintended. Accordingly, military action which of necessity will result in civilian casualties cannot be justified on the contention that the killing of innocent victims is unintended since the loss of those lives is the inescapable result of such action. According to most authorities, such acts

are forbidden even if no benefit is derived from the proscribed effect.

One point requires further clarification. There may be some question with regard to whether circumstances involving a *pesik reisheih* defeat the plea of *davar she-eino mitkaven* insofar as violation of the provisions of the Noachide Code by non-Jews is concerned. Such a distinction is found with regard to a somewhat related matter. In most circumstances, a Jew may not direct a non-Jew to perform an act which the Jew himself is forbidden to perform. Some authorities, however, permit a Jew to ask a non-Jew to perform an act which entails a *pesik reisheih*, i.e., the desired result for which the particular act is intended is entirely permissible but would be forbidden to the Jew only because it necessarily entails a concomitant result which is proscribed. [See *Magen Avraham, Orah Hayyim 277:7* and *Mishnah Berurah 253:31* and *277:15.*] Thus, for example, these authorities permit a Jew, on the Sabbath, to direct a non-Jew to remove a pot from among the burning coals in which it is embedded even though some coals are necessarily extinguished in the process. The rationale underlying this ruling is not entirely clear. If it is understood that this ruling is based on the principle that, for non-Jews, even a *pesik reisheih* is encompassed in the category of an unintended effect (*davar she-eino mitkaven*), the selfsame provisions would apply to the culpability of non-Jews with regard to the provisions of the Noachide Code. If so, insofar as non-Jews are concerned, any *davar she-eino mitkaven* would be permissible including acts which constitute a *pesik reisheih*. It should be noted, however, that many authorities forbid allowing a non-Jew to perform an act on the Sabbath on behalf of a Jew which involves a *pesik reisheih*. [See *Magen Avraham, Orah Hayyim 253:41*; *Mishnah Berurah 253:99–100*, *253:51* and *277:30*. Cf., R. Benjamin Silber, *Brit Olam 16:1* and accompanying note.] Moreover, the permissive ruling formulated by some authorities with regard to performance of an act involving

a *pesik reisheih* by a non-Jew may only reflect the view that the rabbinic prohibition against permitting a non-Jew to perform forbidden acts on behalf of a Jew is circumscribed in nature and is limited only to situations in which the Jew desires the forbidden effect which is accomplished on his behalf by the non-Jew. If so, there is no evidence that non-Jews are relieved of culpability with regard to unintended violations of the Noachide Code when such acts are committed in the form of a *pesik reisheih*.

It must be noted that, even according to the authorities who maintain that non-Jews may engage in wars of aggression, there are strong grounds for arguing that the devastation associated with nuclear warfare renders such warfare illicit. The Gemara, *Shevu'ot 35b*, declares, "A sovereign power which slays one sixth [of the populace] of the universe is not culpable." It is to be inferred that the death of one sixth of the inhabitants of the universe entails no culpability, but that slaying more than one sixth of the population of the universe does engender culpability. *Tosafot*, understanding the dictum as referring to the monarch of a Jewish state, indicates that the Gemara here imposes a constraint upon a *milhemet reshut* or discretionary war. The sovereign may not initiate discretionary war if it is to be anticipated that an inordinate number of people will perish as a result of hostilities. According to *Tosafot's* analysis, a similar restriction does not apply to wars which are mandated by Scripture.

The various categories of *milhemet mitsvah* certainly do not apply to non-Jews who are not the recipients of any specific scriptural commandments concerning war. According to the most permissive view, non-Jews are merely permitted to engage in military activity but, for non-Jews, warfare cannot be deemed obligatory under any circumstances. Accordingly, limitations upon warfare undertaken as a *milhemet reshut* would assuredly apply to war undertaken by non-Jews. Hence, according to *Tosafot*, non-Jews are not entitled to engage in

war which is likely to result in the annihilation of more than one sixth of the population of the world. This restriction applies even to wars of defense in which not only the aggressors are destroyed but the lives of a large number of innocent victims are claimed as well. The nature of nuclear warfare is such that, in all likelihood, more than one sixth of the world's population would be destroyed in a nuclear holocaust.

A careful distinction must be drawn between abjuration of nuclear warfare and unilateral disarmament. Although nuclear retaliation may not be consistent with halakhic norms, the *threat* of retaliation is an entirely legitimate means of discouraging aggression. A wise man would do well not to resist a mugger and surrender his wallet without protest. Yet only a fool would carry a placard on his shoulder proclaiming that message and announcing to all and sundry that he may be accosted with impunity. Nuclear arms prudently deployed may well serve as a deterrent even though a moral government would eschew their use.

NOTE

* This is certainly the case with regard to a Jew who is pursued by a person intent upon taking his life. In such circumstances the intended victim may not save his own life at the expense of the life of an innocent third party. The general rule that all prohibitions are suspended in face of danger does not apply to the three cardinal sins, viz., homicide, idolatry and certain forms of sexual licentiousness. Hence, the intended victim may not take the life of his pursuer if it is impossible to do so other than by taking the

life of an innocent party at the same time. There are however, some authorities, including R. Shmu'el Jaffe-Ashkenazi (Maharash Jaffe), *Yefeh To'ar*, (Furth 5452), Genesis 44:5, (cited by *Parashat Derakhim, derush 2*), who maintain that a gentile may transgress any prohibition, including the three cardinal sins, in order to save his life. According to Maharash Jaffe, defensive military action designed to eliminate an aggressor would be justified on grounds of self-defense even when such action necessarily results in the loss of civilian lives. According to this authority, such action would be permissible in situations in which it is impossible to kill the aggressor without also taking the lives of innocent noncombatants, provided that the life of the individual undertaking such action is endangered. See also, R. Shlomoh Algazi, *Shama Shlomoh* (Amsterdam, 5470), p. 15b; *Shenot Hayyim*, p. 36b; R. Barzilai Baruch Ya'avets, *Leshon Arumim* (Izmir, 5516), p. 7; and R. Abraham Samuel Meyuchas, *Sedei ha-Arets*, I, 55. The view of Maharash Jaffe is, however, rejected by numerous later authorities. R. Judah Rosanes, *Parashat Derakhim, loc. cit.*, concedes that a Noachide may commit acts of idolatry and sexual licentiousness in order to escape danger since the biblical verses banning such actions even in the face of *force majeure* are addressed only to Jews and are not part of the Noachide Code. However, the prohibition against homicide under such circumstances is not based upon a biblical command but upon the *a priori* consideration "How do you know that your blood is sweeter than the blood of your fellow?" (*Sanhedrin 74a*). As an *a priori* concept, argues *Parashat Derakhim*, this principle is binding upon Noachides no less than upon Jews. A similar view is expressed by the same authority in his *Mishneh la-Melekh, Hilkhot Melakhim 10:2*, as well as by R. Joseph Babad, *Minhat Hinnukh*, no. 296, and in a note appended by a grandson of R. Issac Schorr to the latter's *Teshuvot Koah Shor*, no. 20, p. 35a.

HANUKKAH LIGHTS FOR TRAVELLERS

The majority of commandments, both biblical and rabbinic, are in the nature of personal obligations which devolve upon an individual wherever he may find himself. Of course, the observance of some of the commandments is restricted to the Land of Israel, particularly in the case of

agricultural *mitsvot* pertaining to the produce of the land; others are contingent upon the existence of the Temple. A few, e.g., *mezuzah* and the requirement of a *ma'akeh*, or protective barrier, around a roof obviously cannot be fulfilled unless one occupies a dwelling or other structure.

The homeless are perforce exempt from such *mitsvot*.

The obligation concerning the kindling of Hanukkah lights, would, at first glance, appear to belong to the category of personal obligations. Other than the obvious inconvenience in fulfilling this *mitsvah* which would undoubtedly be experienced by those who have no domicile, there appears to be no intrinsic reason why maintenance of a home should constitute a condition of this obligation. Yet at least two early authorities apparently maintain that a person who has no domicile is exempt from this *mitsvah*. The Gemara, *Shabbat* 23a, speaks of an individual who gazes upon already burning lights but does not participate in the kindling itself. The Gemara declares that such an "observer" is nevertheless obligated to pronounce the benediction "who has performed miracles for our fathers in those days at this season." Rashi, troubled by the fact that, ostensibly, all persons are required to kindle Hanukkah lights, states that the Gemara's reference is to one who has as yet not kindled the lights in his own home or to a person "who is situated on a ship." Rashi clearly implies that a traveller, i.e., a person finding himself on a riverboat, need not kindle the Hanukkah lights but must pronounce "the observer's benediction" (*birkat ha-ro'eh*) if he sees the lights kindled by others in their homes. Similarly, *Tosafot*, *Sukkah* 46a, states that the blessing "who has performed miracles" was ordained primarily because of people "who do not possess homes" and hence "it is not within their power" to perform the kindling ceremony.

Actually, the phraseology employed by *Tosafot* is somewhat ambiguous. R. Zevi Pesach Frank, *Mikra'ei Kodesh, Hannukah-Purim*, no. 18, understands the phrase, "it is not within their power to fulfill the *mitsvah*" (*ein be-yadam lekayyem ha-mitsvah*) as meaning that such persons are entirely exempt from the commandment. The phrase, however, readily admits of another interpretation, viz., that these individuals may be incapable of kindling lights for reasons which

are entirely pragmatic in nature, e.g., without benefit of shelter, it may not be possible for them to kindle a light which will remain burning for the requisite period of time. According to this interpretation, such persons are not at all halakhically exempt from the *mitsvah* but are prevented from discharging their obligation by virtue of *force majeure*. Hence, were it possible to overcome such impediments, the obligation would be fully incumbent upon them. The latter interpretation of *Tosafot* is espoused by R. Benjamin Silver, *Az Nidberu*, VII, no. 67. Rabbi Silber also argues (albeit unconvincingly) that Rashi's comments must be understood in a like manner. According to his understanding, Rashi does not intend to state that a passenger on a boat is exempt from the *mitsvah* but only that a passenger who has embarked on a voyage is likely to lack the necessary provisions for kindling Hanukkah lights. In disagreement with Rabbi Frank, Rabbi Silber maintains that even a homeless person or a person "finding himself in a desert" is obligated to kindle Hanukkah lights.

Rabbi Gedalia Rabinowitz of Chicago has drawn this writer's attention to the comments of Rabbenu Nissim, *Shabbat* 23a, which support the view that a domicile is not a necessary condition of the obligation. Explaining why a guest in another person's home is obligated to kindle the Hanukkah lights, Rabbenu Nissim writes, ". . . do not say that the law pertaining to the Hanukkah lamp is identical to the law of *mezuzah*, i.e., that whosoever has no house is exempt from the *mezuzah*." Quite evidently, Rabbenu Nissim's view is that the *mitsvah* of kindling Hanukkah lights constitutes a personal obligation which is not contingent upon occupation of a domicile.

Fortunately, this question does not frequently arise in situations involving homeless persons. However, the question does arise with great frequency in cases of individuals who find themselves travelling throughout the night by car, train or airplane. In a note appended to *Mikra'ei*

Kodesh, Rabbi Frank's grandson, R. Joseph Cohen, reports that a similar question was posed by soldiers in the Israeli armed forces who found themselves on military maneuvers during Hanukkah.

Among latter-day authorities, the first to address this question is R. Shalom Mordechai Schwadron, *Teshuvot Maharsham*, IV, no. 146. *Maharsham* somewhat tentatively opines that passengers on a train must kindle Hanukkah lights. *Maharsham* affirms that in the absence of occupancy of a dwelling no obligation exists, but argues that a train car used for eating and sleeping constitutes a "dwelling." He distinguishes Rashi's comment with regard to a passenger on a ship by stating the Rashi refers only to an open boat lacking walls and a roof.

Rabbi Frank's discussion of this problem focuses upon the definition of a dwelling. Drawing upon the rulings of *Arukh ha-Shulhan*, *Yoreh De'ah* 286:26, and *Mishnah Berurah* 366:13 regarding *mezuzah* and *eruvei hatserot*, Rabbi Frank distinguishes between what these authorities term "temporary" dwellings versus "permanent" dwellings. *Arukh ha-Shulhan* and *Mishnah Berurah* maintain that ships divided into staterooms or compartments are "dwellings" requiring *mezuzot* and *eruvei hatserot*. In actuality, it appears that it is not permanence per se which is the controlling factor but the fact that staterooms provide privacy and clearly demarcated areas for the exclusive use of each passenger. Privacy and the right to exclude others are deemed to be the distinguishing characteristics of a "dwelling." Rabbi Frank maintains that, *mutatis mutandis*, the same criteria should apply with regard to the definition of a "dwelling" for purposes of Hanukkah lights. Thus, a passenger occupying a stateroom on a ship or compartment on a train would be required to kindle Hanukkah lights, while a passenger on a

ferryboat, an airplane passenger or a person occupying a coach seat on a train or bus would be exempt. This position seems to be at variance with that of *Maharsham*. *Maharsham* apparently maintains that the essential attribute of a "dwelling" is protection against the elements and, since he fails to distinguish between private compartments and public coaches, *Maharsham* apparently maintains that all persons travelling by such conveyances are obliged to kindle Hanukkah lights.

R. Abraham Yafe-Shlesinger, *Teshuvot Be'er Sarim*, II, nos. 5-6, similarly rules that airplane passengers are obligated to kindle Hanukkah lights. Rabbi Yafe-Schlesinger suggests that they request permission to use the airplane galley for this purpose and that in order to minimize inconvenience and commotion that they light only a single candle.

This opinion is endorsed by Rabbi Yafe-Schlesinger's father-in-law, Rabbi Betzael Stern, *Be-Tsel ha-Hokhmah*, IV, no. 127. Rabbi Stern also suggests that a passenger may provide himself with a glass in which he may fully enclose the candle and place the glass upon the folding tray provided for the convenience of airplane passengers. In the event that flight attendants insist that the flame be extinguished, Rabbi Stern advises that the passenger inform the attendant that he is not permitted to extinguish the candle but, if absolutely necessary, the attendant should himself or herself quench the flame. Such a situation, argues Rabbi Stern, is comparable to kindling the Hanukkah candle and the candle subsequently becoming extinguished of its own accord. In such circumstances the *mitzvah* has been fulfilled and the candle need not be rekindled (*kavtah eino zakuk lah*). Of course, as Rabbi Stern himself freely concedes, use of the airplane galley, if permitted, is certainly preferable.