

“Rise Up and Kill Him First”: On Modern Attempts to Create a Jewish Ethics of War*

ADAM AFTERMAN & GEDALIAH AFTERMAN
Tel Aviv University/The Jewish People Policy Institute
Jerusalem, Israel

THE DEBATE within Judaism regarding the ethics and conduct of war has always been a marginal one. The Jewish people, certainly since the second-century rebellion of Bar Kochba, were victims of war rather than agents of war. Without a state and an army, Jews, with a Diaspora mentality, did not have the privilege or the need to create articulated theories of ethics of war. Indeed, discussions of this issue throughout the centuries were almost purely academic, usually introduced as part of rabbinical interpretation of biblical law.

While issues of justification and conduct of war have been debated in Judaism, these were, in light of the state of the exiled Jewish People, theoretical and hermeneutical debates rather than prescriptive debates.¹ Indeed, up until modern times, one can hardly find an attempt to articulate a category of banned or forbidden war within the framework of Judaism.² The

* From the Talmudic saying “if someone comes to kill you, rise up and kill him first” (Babylonian Talmud, tractate Sanhedrin 72:a), which became the main principle of the war of self-defense, regarded by many as the only obligatory war today according to Jewish law.

¹ Some would argue that as a general rule the rabbinical debates did not create any structured or systemized discussion on any matter; the issue of ethics of war was no exception in that regard. Regardless of whether this approach is correct, it is clear that the amount of halachic effort put into this subject is marginal in comparison with other legal matters debated.

² See, M. Walzer, “War and Peace in the Jewish Tradition,” in *The Ethics of War and Peace: Religious and Secular Perspectives*, ed. T. Nardin (Princeton, NJ: Princeton

omission of a forbidden war category, however, should not lead one to conclude that the Rabbis denied such a category (that is, that they were permissive of all forms of warfare) but rather that, because of the limited relevance of the subject to their reality, their discussions were only partial and nonsystematic.³ Even the more theoretical discussions of these matters were not systematic but centered on one or two chapters from the Book of Deuteronomy. The Rabbis, with the exception of the medieval rabbinical authority Maimonides (1138?–1204), did not attempt to reflect systematically on the subject in order to create an articulated system of norms, but rather touched on this topic as part of their interest in the biblical laws.

Discussions within Judaism regarding the conduct of war can be broadly divided into two categories. The first aspect of the debate focused on the reasons or justifications for going to war, that is, the circumstances which allow, indeed at times compel, one to launch war (*jus ad bellum*). The second aspect of the debate outlines proper conduct of a war once it had commenced (*jus in bello*). Discussions regarding the more practical questions of *jus in bello* were first introduced in one section of the Book of Deuteronomy and revisited much later in modern times in response to new circumstances demanding a more practical approach to the questions of conduct of war. The rabbinical discussions, meanwhile, focused primarily on the *jus ad bellum*, differentiating between a religious or holy war commanded directly by God, and a “regular” political war. Discussions among rabbinical authorities from the Middle Ages such as Maimonides (1135–1204) and Nachmanides (1194–1270), and their varying perceptions of norms of war, introduce yet another layer of interpretation.

Early discussions of the issue of war and its conduct in Judaism all refer to wars that either have occurred in the past (or mythical past) or will occur in some theoretical future.⁴ These debates, therefore, as Michael

University Press, 1996), 95–114. M. Walzer, “The Idea of Holy War in Ancient Israel,” *Journal of Religious Ethics* 20.2 (1992): 215–28. For an important response to this claim, see A. Ravitzky, “Prohibited Wars in the Jewish Tradition,” in *The Ethics of War and Peace*, 115–27.

³ An interesting but not normative discussion of this issue can be found in a debate about fighting on Shabbat. The Jews fighting the Greeks, and later the Romans, faced complicated dilemmas as to whether fighting is forbidden on Shabbat. Fighting on Shabbat was permitted after the Greeks took advantage of the Shabbat to launch an attack, but even then only in self-defense. This, in turn, allowed the Romans, much later, to take advantage of the Shabbat not for direct combat with the Jews but rather for other warfare maneuvers that were not considered direct fighting (and thus the Jews were forbidden to react). See: 1 Maccabees 2:29–41; Josephus, *Antiquities*, 12:272–77; 14:63–65.

⁴ The Deuteronomy chapters (20, 23) were written centuries after the actual or imagined wars described; the same pertains to the rabbinical discussions and

Walzer has argued,⁵ should not be seen as prescriptive or as outlining actual policy for conducting warfare, nor, indeed, as an accurate description of the historical events in question, but rather as having an academic or hermeneutical role. Likewise, the discussions regarding the legal procedures of conducting war can be considered part of an imagined and perhaps utopian world.

Biblical and Rabbinical Discussions

The Hebrew Bible includes a few short sections in which codes of war are discussed. These discussions, in turn, are divided into two categories:⁶ the first is a code regarding a special type of war, commanded directly by God, targeting specific enemies; the second code concerns wars commanded not by God but rather by a human authority engaged in a political war aimed at serving his own interests. The Bible refrains from providing a special code for wars of defense, and from introducing the category of forbidden war.

The first code of war, regarding war commanded directly by God, concerns the conquering of the Promised Land as a religious duty. The People of Israel are commanded to launch a war of total extermination against the Seven Nations who occupied the Land of Israel.⁷ It should be noted that the Bible itself casts doubt on whether this kind of total war actually took place.⁸ To be sure, the Rabbis were subsequently quick to

categories referring to national institutions such as the king, the Sanhedrin, etc.: these institutions had all disappeared long before the time of the rabbinical discussions. The attempt of the Rabbis was first to analyze the biblical text in a way similar to their attempt to analyze many other theoretical issues. Later attempts should be seen as the analysis of both the biblical and the rabbinical commentaries, done in an academic fashion. An interesting exception to this is found in the Palestinian Talmud, where the Rabbis are critical of the Bar Kochba rebellion against the Roman empire, indicating explicitly that he was acting against God's will (see *Palestinian Talmud* [PT], Tractate Ta'anit, 60b–d, The Academy of Hebrew Language edition [Jerusalem, 2001], 733–34). One may therefore conclude that it is very rare to find a debate or discussion in Jewish sources regarding the actual concrete and real conduct of war up until modern Israel. See Waltzer, "War and Peace in the Jewish Tradition," 95–96.

⁵ Ibid.

⁶ For a general survey of the topic of war in the Hebrew Bible, see S. Niditch, *War in the Hebrew Bible: A Study in the Ethics of Violence* (New York: Oxford University Press, 1993); P. R. Davies, "The Biblical and Qumranic Concepts of War," in *The Bible and the Dead Sea Scrolls*, ed. J. H. Charlesworth (N. Richland Hills, TX: BIBAL Press, 2000), 275–306.

⁷ Deuteronomy 20:17.

⁸ This is indicated in 1 Kings 9:20–21 and 2 Chronicles 8:7–8. See also R. Kimelman, "The Laws of War and Their Limits," 233.

rule that the historic Seven Nations could no longer be identified,⁹ thus eliminating any practical role for this decree in the future.¹⁰

A similar type of war is commanded by God against the nation of Amalek, regardless of its geographic whereabouts.¹¹ The war to obliterate the Amalekites is another war of annihilation commanded by God.¹² This extreme decree, we are told, is punishment for Amalek's terrible attacks against the People of Israel while they were fleeing from Egypt.¹³ Like in the case of the Seven Nations, the fact that Amalekites are no longer traceable has emptied this category of any practical relevance in modern times.¹⁴

The second biblical code of war applies to wars initiated against all enemies other than the Seven Nations and Amalek. For this type of war, initiated by a political rather than a divine authority, a different code of behavior is stipulated. This code, found in Deuteronomy 20, is the most detailed biblical discussion of norms of warfare. The text contains a detailed list of principles relating to behavior in times of war. The first section of chapter 20 presents a list of those who should be exempt from being conscripted and taking part in war, including the cowardly, those lacking faith in God, and those who have other commitments to keep, such as a new wife, a new house, or the maintenance of a newly planted vineyard.¹⁵

The text then focuses on the conduct of war itself: Any besieged city should be made an offer of peace. If the offer of peace is rejected, the city's men are to be killed, and the women and children are to be captured. The city is to be looted. The fighters are forbidden to destroy the fruit trees, as they are defenseless in the face of the attacking force.¹⁶

⁹ See Mishna Yadayim 4:4.

¹⁰ Although this position is without doubt the prevailing opinion in Judaism, there have been, as we have shown elsewhere, recent attempts by religious extremists such as Meir Kahane to revive the concept of the war against the Seven Nations and apply it to the contemporary political reality by equating the "Seven Nations" to current-day Palestinians. For more on this issue see Gedaliah Afterman, *Understanding the Theology of Israel's Extreme Religious Right: "The Chosen People" and "The Land Of Israel" from the Bible to the "Expulsion from Gush Katif"* (Melbourne: University of Melbourne, 2007), 134–61; E. Horowitz, *Reckless Rites: Purim and the Legacy of Jewish Violence* (Princeton, NJ: Princeton University Press, 2006), 107–46.

¹¹ See: Exodus 17:8–16; Deuteronomy 25:17–19; 1 Samuel 30:1–16.

¹² See: Deuteronomy 25:17–19

¹³ See Exodus 20. There has been much discussion of the term *Zinev*.

¹⁴ 1 Samuel 15. Avi Sagi, "The Punishment of Amalek in Jewish Tradition: Coping with the Moral Problem," *Harvard Theological Review* 87.3 (1994): 323–46.

¹⁵ Deuteronomy 20:1–10. See also N. Solomon, "Judaism and the Ethics of War," *International Review of the Red Cross* 87 (2005): 296.

¹⁶ Deuteronomy 20:19–20.

The text distinguishes between cases of normal war, to which the above principles apply, and the war commanded by God against the Seven Nations, which is to be conducted under much harsher terms.¹⁷ The harsh treatment of the Seven Nations, however, is not justified solely by the fact it was commanded directly by God; rather God justifies this unforgiving treatment by arguing that if not annihilated, they will defile the People of Israel through their practice of idolatry.¹⁸

Mishnaic and Talmudic debates later distinguished between three categories of war:

1. *Obligatory war*—a slightly expanded interpretation of the divinely commanded wars of the Bible.
2. *Optional war*—political wars initiated by the king that are nevertheless to be authorized by the Sanhedrin, the authoritative religious council which existed presumably in the time of the Temple. In addition, this authorization requires the stamp of the “*Urim ve Tumim*,” an oracular device in the Temple that transmitted God’s will and approval. If the Bible does not put much faith in the king, the Rabbis make sure that under no circumstances can the king independently wage his own wars without the approval of the Rabbis and the priest. Participation in such a war is not a religious duty, and the Rabbis provide plenty of pretexts for those who do not care to participate.
3. *Preventive war*—war of self-defense.

The Rabbis accepted the biblical category of obligatory war, while arguing that the main target of such a war, the Seven Nations, was no longer traceable. In addition, the Rabbis slightly expand the category of Joshua’s biblical conquest to include future defense of the Land of Israel. In other words, it seems that the Rabbis understood the concept of “obligatory war” as being closely related to the commandment of the conquest of the Land of Israel, rather than being focused on the no-longer-existent biblical Seven Nations.

The Rabbis also add a category of “defensive war” omitted from the biblical discussions. Such a war is classified under the category of obligatory war based on the principle of self-defense as a religious obligation. The Rabbis crystallize this religious principle in the famous saying “If someone comes to kill you, rise up and kill him first.”¹⁹

¹⁷ Deuteronomy 20:15–18. For the original commitment to the People of Israel see Genesis 18–21.

¹⁸ Deuteronomy 20:18.

¹⁹ Babylonian Talmud, tractate Sanhedrin 72:a.

As in the cases of the wars against the Seven Nations and against Amalek, the rabbinical category of optional, “permitted” war or political war, was, already at the time of development, without any practical relevance. While conceding that a political leader may be permitted to launch war under some circumstances, the Rabbis conditioned the launch of such war on the approval of the Sanhedrin. The fact that both the Jewish monarchy and the Sanhedrin were no longer in existence at the time of writing and that, in addition, the procedure required seeking the oracle’s approval using a device long lost, in a temple long destroyed, leads one to conclude that this too was no more than a theoretical category.

The lack of practical relevance of Jewish debates on the issue of war is even more striking when it comes to the debates of the twelfth-century rabbinical halachic authority, Maimonides.²⁰ Maimonides as a child fled Andalusia with his family, seeking refuge in the Middle East and North Africa; he finally settled in Egypt, where he became a community leader.²¹ He experienced not only the destruction of Jewish communities in Spain but also the vulnerability and helplessness of the Jewish communities in the Middle East, especially in Yemen.²² Maimonides wrote extensively on the laws of war as part of his magisterial halachic codification.²³

This state of affairs changed, however, with the emergence of Jewish nationalism and the establishment of the modern State of Israel. The emergence of Zionism—and with it Jewish nationhood becoming first likely and then a reality—saw individual scholars draw upon the sporadic, theoretical and hermeneutical debates of the previous two millennia of Jewish thought, in an attempt to establish more practical guidelines regarding war and its conduct. Others, meanwhile, have attempted to provide practical answers to concrete and specific dilemmas as they arose. Such efforts inten-

²⁰ The term *Halacha* usually refers to the literary corpus of rabbinic legal texts, or to the overall system of Jewish religious law. A halachic authority is a rabbi who published his own commentary on the Jewish codex of laws.

²¹ Sarah Stroumsa, *Maimonides in His World: Portrait of a Mediterranean Thinker* (Princeton, NJ : Princeton University Press, 2009).

²² *Crisis and Leadership: Epistles of Maimonides*, texts translated and notes by A. Halkin, discussions by D. Hartman (Philadelphia: Jewish Publication Society of America, 1985).

²³ Interestingly, as we will see, some of these intellectual debates, despite their completely non-practical nature at the time of writing, would under very different circumstances come to be seen as authoritative and prescriptive texts; see Josef Stern, “Maimonides on Amalek, Self-corrective Mechanisms, and the War against Idolatry,” in *Judaism and Modernity: The Religious Philosophy of David Hartman*, ed. Jonathan W. Malino (Aldershot, Hampshire: Ashgate, 2004), 359–92.

sified following the establishment of the State of Israel and the Israel Defence Forces (IDF).²⁴

As we will see, contemporary attempts by some to create a “Jewish” code, and attempts by others to offer halachic solutions to specific challenges which emerge in the context of warfare and ethics of war, are neither homogenous nor complete. Indeed, contemporary debates often present opposing conclusions and advocate differing paths of action. Furthermore, the growing volume of religious debates on the ethics of war, and their attempts to provide an halachic basis for the conduct of war and for other modern phenomena such as the fight against terrorism, asymmetrical warfare, and combat operations amongst civilian populations, should be seen as part of the traditional halachic discourse, but not necessarily as authoritative. It should also be remembered that the current halachic debates on warfare and ethics of war are largely confined to circles of religious Zionists (members of the ultra-orthodox community are generally exempt from military service in Israel), and those represent only a relatively small portion of the overall religiously observant community.²⁵

These halachic discussions should be generally seen as separate from other contemporary attempts undertaken by secular institutions, such as the IDF’s creation of its own code of ethics. With the exception of the more institutionalized efforts by Rabbi Shlomo Goren²⁶ as the Chief Rabbi of the IDF to incorporate some halachic elements in the military policies, the contemporary debates do not directly influence military policy or conduct. Although it is true that a complex relationship exists in modern Israel between religion and state, the state is not religious, nor is its army.²⁷

²⁴ For a more detailed survey of the ethics of war in the history of Jewish thought, and a collection of relevant texts, see our “The Ethics of War in Judaism,” in *The Ethics of War in Religion: A Sourcebook* (New York: Cambridge University Press [forthcoming]).

²⁵ See Stuart Cohen, “Between the Book and the Sword: The Formation of Law of Military and War in Israel 1948–2004,” *Iyunim Be’tekumat Israel* 15 (2005): 239–74. See also Stuart A. Cohen, *The Scroll or the Sword? Dilemmas of Religion and Military Service in Israel* (Amsterdam: Harwood Academic Publishers, 1997); idem, “Dilemmas of Military Service in Israel: The Religious Dimension,” *Torah u-Madda Journal* 12 (2004): 1–23; idem, “‘Unlicensed’ War in Jewish Tradition: Sources, Consequences and Implications,” *Journal of Military Ethics* 4.3 (2005): 198–213. It should be further remembered that such discussions are seen as irrelevant by the majority of Israelis, who define themselves as non-observant.

²⁶ See further details and discussion next to the callout for note 40 below.

²⁷ This link between religion and state has to do mainly with issues such as marriage, divorce, and funerals. A separate question is the status of the rabbis who serve in the army providing religious services. See further: Cohen, *The Scroll or the Sword?*

Discussions prior to the Establishment of the State of Israel

The shift that came about in modern times in Jewish attitudes toward ethics of war should be viewed as part of a broader reaction within the Orthodox camp to the emergence of Zionism and the establishment of the State of Israel. These dramatic developments provided a formidable theological challenge to religious scholars, who attempted to analyze the new reality with halachic concepts.

The new reality also brought with it more practical halachic debates as well as calls for—and some attempts to—develop a code of ethics for the conduct of war. These discussions, it should be noted, were conducted by individual rabbis, internally amongst religious scholars with varying levels of authority, both within their respective communities and more broadly.

Broadly speaking, attitudes amongst Orthodox Jews toward the essentially anti-religious Zionist ideology and the establishment of a secular state can be divided into two views. The majority view, led by the ultra-orthodox community, was vehemently opposed to Zionism and the establishment of a Jewish state. According to this conservative, “passive” view, Jewish sovereignty can be established only as part of an all-encompassing messianic process of redemption. This view holds that redemption is exclusively in the realm of the divine, and humans should not interfere or “hasten” that process by re-establishing a Jewish sovereign state in the Holy Land. Such acts are seen as a blatant interference in the messianic process.²⁸ Thus, Jews should not use active power or build institutions of organized power, even for self-defense—they should instead rely on God’s providence.

Other Orthodox Jews held a more pragmatic view, believing that the process of redemption was a gradual process that advanced slowly toward the end goal of salvation. According to this view, the process of redemption would commence with the establishment of the State of Israel, despite its secular nature. Serving and advancing of the State is therefore a religious duty that directly influences the process of redemption.

All modern attempts to create a new halachic code of ethics of war share one basic assumption: that halachic debates throughout the centuries regarding the norms of war, while insightful, do not provide adequate guidance for practical implementation.²⁹ Parties differ, however, in the conclusions they each derive from this assumption.

²⁸ For a detailed survey of the arguments of those in the ultra-orthodox community fiercely opposed to Zionism, see A. Ravitzky, *Messianism, Zionism, and Jewish Religious Radicalism*, trans. Michael Swirsky and Jonathan Chipman (Chicago: University of Chicago Press, 1996): 40–78.

²⁹ For a detailed outline of this matter, see Arye Edrei, “Law, Interpretation, and Ideology: The Renewal of the Jewish Laws of War in the State of Israel,” *Cardozo*

According to the conservative ultra-orthodox position, the fact that adequate norms of war do not exist in the halachic debate in Judaism signifies that Jews should not be involved in or initiate war until the time of redemption, when Jewish sovereignty is reinstalled by God. Given the lack of halachic guidance on this matter, proponents of this view argue that the Jewish people should not initiate any acts of war, and by extension, not establish institutions capable of waging war (such as an army or a state) until the time of redemption.

Other scholars within the ultra-orthodox establishment of the time, such as Rabbi Avraham Yeshaya Karelitz³⁰ and Rabbi Chaim Hirschensohn,³¹ however, worked to find allowances for the practical needs that came with establishing a Jewish presence in Palestine. Responding to the challenges faced by the Jewish settlements in Palestine at the time, Karelitz, in his book *Orach Hayim* (1911), argues that the category of self-defense, the only category of war which could be viewed as a “commanded” or obligatory war in modern times, should be expanded to include pre-emptive actions against groups that plan to carry out attacks against Jewish towns and villages:

Maimonides, Ch. 5 of The Laws of Kings, art. 1, writes that included in [the category of] a “divinely commanded war,” is helping Israel from the hand of an enemy that has come upon them, that is, that has already come upon them, omitted the rule of war regarding [preventive war against] Samaritans that have not yet come [upon them]. And he interpreted [the

Law Review 28.1 (2006): 198–208. Noam Zohar, “Morality and War: A Critique of Bleich’s Oracular Halakha,” in *Commandment and Community: New Essays in Jewish Legal and Political Philosophy*, ed. Daniel H. Frank (Albany: State University of New York Press, 1995), 245–58; Noam Zohar, “Can a War Be Morally ‘Optional’?” *Journal of Political Philosophy* 4.3 (1996): 229–41; Aviad Hacohen, “Law and Morality in Wartime,” *Justice* 44 (2007): 4–9.

³⁰ Avraham Yeshaya Karelitz (1878–1953), popularly known by his literary name Chazon Ish, was a Belarusian-born rabbi who later became a leader of the ultra-orthodox community in Palestine (later Israel), where his final twenty years, from 1933 to 1953, were spent. Although Karelitz never held an official position, he became recognized as a worldwide authority on matters relating to Jewish law.

³¹ Rabbi Chaim Hirschensohn (1857–1935) was born in the city of Sefad in Galilee. After a period in Jerusalem where he worked with Eliezer Ben Yehudah to revive the Hebrew language, Hirschensohn was appointed in 1904 as the chief Rabbi of Hoboken, New Jersey, where he remained until his death. Though Hirschensohn wrote on many subjects, including the relationship between Judaism and democracy, the status of women, and conflicts between traditional Judaism and modern scholarship and science, he is best known for *Malki Ba-Kodesh*, a six-volume work he published between 1919 and 1928, in which he attempted to create a halachic corpus for a future Jewish state.

concept of] “optional war” as David’s war to expand the borders of Israel, and in Ch. 7, art. 5, he wrote about those exempted [from conscription], that is, during an “optional war.” In a “divinely commanded war,” even a groom from his chamber and a bride from her canopy [are required to assist]. And he did not expound on the nature of a “divinely commanded war,” and on the nature of an “optional [war],” and he relied on what he wrote here [in 5:1]. And even though one may conclude from the wording: “helping Israel from the hand of an enemy *that has come upon them* [our emphasis]” that the precise meaning is “that has already come upon them,” in any case from the wording ‘that David’s war to expand [borders] is an “optional war,”’ you could conclude that preventive war against the Samaritans that have not come yet is a “divinely commanded war.”³²

In reference to the custom among the ultra-orthodox community of avoiding engaging in wars (in the Diaspora) based on their categorization as political and therefore non-religiously binding, Karetitz argues that any war, even if originally initiated as an optional political war, that results in danger to the People of Israel becomes a commanded war and that, in any event, the exemptions cited in Deuteronomy in the case of an “optional war” do not apply when the exempted are needed to win the war or to save the lives of others:

It seems that the Mishna’s teaching that in a “divinely commanded war,” even a groom [is taken] from his chamber does not refer to a time when their help is needed for victory in the war, since it is obvious that for the sake of saving a life and saving the people, all are obligated. But rather to a case when, though only a certain number [of soldiers] are needed (and most of their wars were such that there was only capacity for a particular number of soldiers), it was permissible to take a groom from his chamber, since those meriting exemption have no such rights in a “divinely commanded war,” while in an “optional war,” they are not exempt except when victory for Israel is not dependent on them when the number needed by the army is reached without them. But if they are needed, they must come to the succor of their brothers, and then the war becomes a “divinely commanded war.” But that is [only] if the “optional war” is already underway . . . after an “optional war” has commenced with a particular number of forces, if they see that additional soldiers are necessary, then those that we are commanded to exempt are not drafted as long as the requisite number is fulfilled without them. . . . But if they are needed for victory in the war, even a groom sets out from his chamber, even though it was originally an “optional war.”³³

³² Karetitz, *Orach Chayim*, ed. Rabbi Shmuel Grinman (Bnei Brak, Israel: 1994), 332.

³³ Karetitz, *Orach Chayim*, 333.

In his book *Malki Bakodesh*, Rabbi Chaim Hirschensohn puts forward a different argument. According to Hirschensohn, although a pre-emptive attack does not fall under the category of self-defense and is not therefore religiously compulsory, it is permitted in Jewish law:

We see from this that Rava's [a leading Tanaïtic scholar] opinion is that it is inconceivable that the Sages believed that it is imperative that Israel embark on a war in the case of "non-Jews who have not ['yet'] come upon them," and that even a groom from his chamber and bride from her canopy would be obligated to join on its behalf. . . . Such a matter could not possibly be conceived of as an obligatory war for which a groom must leave his chamber and a bride her canopy. And yet, it is not prohibited, and the King is authorized to call [persons] up for a war when such a fear is aroused in him. Here the intention of the word "optional" is to make a distinction from [a] prohibited [war], lest one reason that since war itself is murder of others and danger to oneself that it not be an option at all. For this reason the Sages took care to inform us that it is optional, i.e. that it is permissible since such is the way of the world, and it is the nature of the individual and the nation to fear and to entertain political thoughts against the increasing power of a neighbouring nation, and as long as the nations have not beaten their swords into plowshare and their spears into pruning hooks, Israel has the option, when it sees a nation in its midst taking, and it fears that the nation will rise up against it, it has the option of taking the first step and declaring war against them.³⁴

Following from the general halachic discussion above, Hirschensohn seeks to halachically legitimize the Jewish Legion (five battalions of Jewish volunteers established by the British Army in 1914–15 as part of their war against the Ottoman Empire, which Zionists saw as an opportunity to promote the idea of a Jewish homeland in Palestine) and their participation in the war as part of the British Army:

Indeed, everything that we have written until now relating to the Jewish Legion is according to their preliminary concept, i.e. those members of our people in America who classified it as an optional war. We discussed its halachic foundation in the law of optional war, and due to this conceptualization, they sought rabbinic approval to remove it from the category of a prohibited war, which some mistakenly thought it to be, as we explained. However, if we consider its true foundation, it is in fact an "obligatory war," but in any case, it still does not require a groom to leave his chamber and a bride her canopy. However, those of the nation who volunteer are upholding the commandment of an obligatory war.³⁵

³⁴ From C. Hirschensohn's *Malki Ba-Kodesh* (Jerusalem: Bar Ilan University, Shechter Institute for Jewish Studies and the Shalom Hartman Institute, 2007), 143–44.

³⁵ *Ibid.*, 156.

The writings of Karelitz and of Hirschensohn should be considered in the context of the debate raging within the Orthodox community at the time about the validity of Zionism. As supporters of the Zionist enterprise, they were very much a minority within their own communities, and their rulings were aimed not only at addressing the halachic issues at hand but also at providing justification for their more general ideological framework. In this regard, Hirschensohn offers an interesting argument about the validity of the commandment of conquering the Land of Israel in this time and not only in the time of redemption:

The basis of the matter is what Nachmanides wrote regarding the fourth of the positive commandments that he believed Maimonides of blessed memory to have forgotten to enumerate. . . . To paraphrase his words, the commandment of conquering Eretz Israel is a commandment that is effective for all generations, and every commandment that applies to all generations must be counted among the commandments, and this is why he believed that Maimonides of blessed memory forgot to enumerate it based on error and oversight, which every mortal creature is likely to commit. And the Gaon [R. Isaac de Leon] of blessed memory, author of the *Scroll of Esther* [commentary on Nachmanides' critique of *Sefer ha-Mitzvot*], who took upon himself to substantiate all of Nachmanides' reservations regarding Maimonides, said, "I believe that the reason he did not include it was that the commandment of inheriting and settling the land was only practiced in the days of Moses and Joshua and David, as long as they were not exiled. But after they were exiled from their land, this commandment ceased to be in practice for all generations until the time that the Messiah comes. . . ." "And [de Leon claims that] what Nachmanides said in the name of the Sages, that conquest of the land is a 'divinely commanded war'—applies to when we are no longer subordinated by the nations. . . . And my master this brilliant rabbi [de Leon] should forgive me: [but it is] because of his own shortcoming regarding respect for settling in Eretz Israel [he did not live there!] that he erred in an obvious case . . . in his desire to explain why Maimonides of blessed memory did not include this commandment in thinking that it is not a commandment applicable to all generations and thus not numbered among the commandments as explained in the Book of Commandments, under "principle [root] 3."³⁶

Discussions since the Establishment of the State of Israel

Whereas these early debates prior to the establishment of the State of Israel focused on the general issue of whether or not war was halachically permissible in modern times, the focus following the establishment of the state was more pragmatic. Religious scholars attempted to use halachic

³⁶ Malki *Ba-Kodesh*, chap. 7, 157–58.

categories in order to provide solutions to the substantial challenges which faced the young state. The two main approaches found amongst modern religious Zionist thinkers can be defined as “exclusive” and “inclusive.” Those advocating an exclusive approach argue that the establishment of the State of Israel calls for the development of new halachic categories, including those relating to the norms of war, in order to provide answers to the emerging reality of Jewish sovereignty. Scholars such as Rabbi Shlomo Goren and Professor Yeshayahu Leibowitz³⁷ argue that this process of development and interpretation should be done from within, and on the basis of, the existent halachic debates. This ethical construct, they argue, should be distinctly and exclusively “Jewish.” This approach led Rabbi Goren, the chief Military Rabbi of the IDF for twenty years and subsequently Israel’s chief Rabbi, to attempt to establish a halachic code for the operation of the IDF, including issues of norms of war.

The “inclusive” approach, led by Rabbi Shaul Yisraeli, a leading rabbi in the religious Zionist movement, understood the lack of a developed doctrine of ethics and conduct of war within Judaism to suggest that this issue should be dealt with in accordance with *dina de malchutah dina* internationally accepted norms. Using the halachic concept “the law of the king is your law,” Rabbi Yisraeli argued that this widely accepted principle, usually applied to Jewish communities in the Diaspora, did not apply only to the individual Jew but, on the matter of the conduct of war, should apply to the Jewish state as well.

As we will see, both theoretical approaches have been used by rabbis when analyzing military events and issues related to norms of war and proper ethical conduct. Both in the 1950s and more recently, with less ambitious attempts to provide halachic solutions to dilemmas arising from events such as the first Palestinian *intifada*, the second Lebanon war and the second *intifada*, such discussions have often led to contradictory advice and conclusions.

One prominent example of the diverging approaches and opinions can be found in the way both Leibowitz and Rabbi Yisraeli approached the Kibiyeh incident (1953) in the early years of the State. Israel Defence

³⁷ Yeshayahu Leibowitz (?1903–94) was a leading Israeli philosopher and scientist known for his outspoken, often controversial opinions on Judaism, ethics, religion, and politics. Leibowitz, an ultra-orthodox Jew, also held controversial views on the subject of halacha. He argued that the sole purpose of religious commandments was to obey God, and not to receive any kind of reward in this world or that to come. He maintained that the reasons for religious commandments were beyond human understanding, as well as irrelevant, and any attempt to attribute emotional significance to the performance of commandments was misguided and akin to idolatry.

Force soldiers, acting in response to several deadly attacks against Israeli civilians, carried out a reprisal operation against the village from which the perpetrators of the attacks originated, leaving more than fifty inhabitants of the village dead. In an article titled "After Kibiyeh" (1953–54), Leibowitz argues that, even if the events could be justified halachically, they were clearly unjustifiable morally. Leibowitz argues that war (such as the 1948 war of independence) in itself was a natural and at times necessary measure, despite the carnage which is inevitably caused on both sides; the problem was the way war was conducted. More generally, he highlights the moral implications of the restored Jewish sovereignty, and the implications that such atrocities could have for its future.

Kibiyeh, its causes, implications, and the action itself are part of the great test to which we as a nation are put as a result of national liberation, political independence, and our military power—for we were bearers of a culture which, for many generations, derived certain spiritual benefits from conditions of exile, foreign rule, and political impotence. . . . In our own eyes, and, to some extent in those of others as well, we appeared to have gained control over one of the terrible drives to which human nature is subject, and to abhor the atrocities to which it impels all human societies—impulse to communal murder. While congratulating ourselves upon this, we ignored, or attempted to ignore, that in our historical situation such mass-murder was not one of the means at our disposal for self-defence or for the attainment of collective aspirations. From the standpoint of both moral vocation and religious action, exilic existence enabled us to evade the decisive test.

. . . In declaring our will to live as a real historic nation—not a meta-historical and metaphysical one—we took upon ourselves the functions of national life we had shunned when we were not bound by the tasks and concerts of normal national existence. By the logic of history and of moral evaluation, our war of independence was a necessary consequence of our two-thousand year exile. Only one prepared to justify historically, religiously, or morally the continuation of the exilic existence could refuse to take upon himself the moral responsibility for using the sword to restore freedom.

Therefore, in our religious-moral stocktaking, we neither justify the bloodshed of the war (in which our blood was spilled no less than that of our enemies) nor do we apologize for it. The problematic issues concern the manner of conducting that war, which goes on to this very day, and what is to be done after this war will be over . . .

We can, indeed, justify the action of Kibiyeh before "the world" . . . but let us not try to do so. Let us rather recognize its distressing nature.³⁸

³⁸ Yeshayahu Leibowitz, "After Kibiyeh (1953–54)," in *Judaism, Human Values and the Jewish State*, ed. Eliezer Goldman (Cambridge: Harvard University Press, 1992), 185–86.

Leibowitz finds a biblical parallel to the Kibiyeh incident with the story of Shekhem and Dinah (Genesis 34), in which the sons of Jacob, Simeon and Levi, avenged the rape of their sister by killing the town's males:

The sons of Jacob did not act as they did out of pure wickedness and malice. They had a decisive justification: "should one deal with our sister as with a harlot?!" The Torah, which narrates the actions of Simeon and Levi in Shekhem, adds to the description of the atrocity only three words (in the Hebrew text) in which apparently it conveyed the moral judgment of their behavior: "and came upon the city unawares, and slew all the males". "The sons of Jacob came upon the slain, and spoiled the city, *because they had defiled their sister*" (Gen. 34:25, 27). Nevertheless, because of this action, two tribes in Israel were cursed for generations by their father Jacob.³⁹

Although there are good reasons and ethical justifications for the Shekhem-Kibiyeh action, there is also an ethical postulate which is not itself a matter of rationalization and which calls forth a curse upon all these justified and valid considerations. The Shekhem operation and the curse of Jacob when he told his children what would befall them in the "end of days" is an example of the frightening problematic ethical reality: there may well be actions which can be vindicated and even justified—and are nevertheless accursed.

Citation of this example from the Torah does not reflect belief in the uniqueness of the "morality of Judaism". It does not imply that the action is forbidden for us as Jews. It is intended to indicate that the action is forbidden *per se*.⁴⁰

With impressive insight, Leibowitz who would become a prominent critic of Israeli Government policies following the 1967 Six-Day War and in particular of the Settlement enterprise, concludes the essay by arguing further that what had led to the mindset which allowed Jewish youths to carry out such atrocities was the application of "the religious category of holiness to social, national, and political values and interests. . . . Country, state, and nation impose pressing obligations and tasks which are sometimes very difficult. They do not, on that account, acquire sanctity."⁴¹

In contrast to Leibowitz, Rabbi Yisraeli, in a lengthy and detailed article titled "The Kibiyeh Incident in Light of Jewish Law," presented a different approach and indeed reached very different conclusions. Yisraeli argues that the events at Kibiyeh ought to be evaluated in accordance with the international laws of war rather than criminal law. Yisraeli argues

³⁹ See Gn 49:5–7—Ed.

⁴⁰ Leibowitz, "After Kibiyeh," 187–90.

⁴¹ See *ibid*.

that, in accordance with Jewish law, the newly established State of Israel should use international law as the basis for its norms regarding war. Wars, he argues, are based on an agreement and norms in society which allow for killing without trial and that a warring side would expect the other side to respond in kind. Indeed, the use of force is an accepted instrument for solving disputes.

According to Yisraeli, the establishment of the sovereign State of Israel and its position as a member of the international community dictated that it act in accord with the international norms of war. The current international convention permitted war and as a consequence the State of Israel was to operate within the accepted convention.⁴² As noted earlier, Yisraeli used the halachic principle of *dina de malchuta dina* (the law of the king is your law) to argue that, like the individual Jews in the Diaspora, who were obliged to comply with the laws of the state in which they were living, the State of Israel had an obligation to comply with international laws and conventions in general and on the issue of war in particular. Yisraeli notes that, should there be an international agreement in the future banning war, the State of Israel would be bound by this, but given current international conventions permitting acts of war, the modern wars of the State of Israel are “permitted wars”:

In this way, war is permitted as long as it is conducted in accordance with the standards accepted by the nations of the world. With regard to Kibiyeh as well, we must examine whether such operations are carried out and accepted among the nations of the world. If so, we can view it as an agreement among the relevant parties that effectively eliminates the issue of murder.⁴³

Yisraeli continues to argue that the Kibiyeh incident not only falls under the “permitted war” category but in fact is a “commanded war.”

We learn from the above that there is a place for acts of retribution and vengeance against the enemies of Israel, and this operation falls under the category of *Commanded War*. Any harm afflicted upon such attackers, their sympathizers and children, is deserved punishment for their sins. There is no obligation to refrain from reprisal operations for fear

⁴² See Shaul Yisraeli, “The Kibiyeh Incident in Light of Jewish Law,” *Hatorah v’hamedinah* 5–6 (1953): 106.

⁴³ Yisraeli, “Takrit Kibiyeh Leor Hahalacha,” 110. Translation from Edrei, “Law, Interpretation, and Ideology,” 214; Robert Eisen, “War, Revenge, and Jewish Ethics: Rabbi Shaul Yisraeli’s essay on Kibiyeh revisited,” *AJS Review* 36.1 (2012): 141–63.

that innocents may be harmed, as we are not responsible. They are the cause and we bear no responsibility.⁴⁴

The most systematic effort to formulate a halachic platform to provide answers to issues related to the military and the conduct of war to date was undertaken by Rabbi Shlomo Goren (1917–94) in his three-volume book *Meshiv Milchama* (1983). Goren, a leading Religious Zionist rabbi, founded and served as the first head of the Military Rabbinate of the IDF and later served as Chief Rabbi of Israel from 1973 to 1983.

As mentioned previously, while acknowledging that the previous debates in Jewish history were insufficient for confronting the challenges raised by modern nationhood, Goren, like Leibowitz, believed the new ethical code of war should be derived from Judaism.⁴⁵ Nevertheless, as we will see, Goren took care to ensure that some of the biblical decrees are perceived as irrelevant for modern times.

Goren begins his debate on the laws of war in his *Meshiv Milchama* by highlighting the importance of the perseveration of human life:

There is no doubt that the preservation of human life is the highest principle in the Torah, the Halacha and the ethical teachings of the Prophets, this is not limited to the preservation of Jewish lives but rather to all humans created in the image of God . . .⁴⁶

Goren goes on to apply the general principle of the sanctity of life to actual situations encountered during combat. Importantly, Goren emphasizes that one should not learn from nor emulate the behavior of Israel in the biblical wars in conducting wars today:

It is forbidden to harm the civilian population, we should not learn from the wars of ancient days.

Despite the unequivocal commandment of fighting in the Torah, we are commanded to have mercy even on our enemies and refrain from killing them even during times of war, unless in acts of self defence or if this necessary to secure a conquest and victory. It is forbidden to harm the non-combatant population and is, of course, forbidden to harm women and children that are not participating in the fighting.

⁴⁴ Yisraeli, "Takrit Kibiyeh Leor Hahalacha," 113; compare to the translation which appears in Edrei, "Law, Interpretation, and Ideology," 215.

⁴⁵ For a detailed analysis of Goren's background and thought see: Arye Edrei, "Divine Spirit and Physical Power: Rabbi Shlomo Goren and the Military Ethic of the Israel Defence Forces," *Theoretical Inquiries in Law* 7.1 (2006): 255–97.

⁴⁶ Shlomo Goren, "The Ethics of War in Light of the Halacha," in *Meshiv Milchama* (Jerusalem: Idra Raba, 1983), I:14, 38.

This applies for all wars with the exception of the ‘commanded wars’ of ancient times on which we were specifically commanded “you should not spare any soul”. The Torah commanded such harsh treatment of these enemies due to their harsh treatment of others. But we should not deduce, God forbid, from these wars on other wars or on the wars of modern times, as we have seen God has mercy also on idol worshipers and does not rejoice in their demise and is pained by their loss. We are commanded to follow His ways and pity his creatures . . .

Goren confronts a mishnaic saying “[even] the best amongst the idol worshippers should be killed in times of war” which appears to condone the killing of innocents at times of war:

. . . It is clear this applies only in times of war and only when the people in question pose a direct threat to us . . . the intention of the saying was not, heaven forbid, to imply that it is permitted to kill them when they are not participating in the fighting and do not pose a threat to us . . . There is neither justification nor permission [in this saying] to kill even in times of war, those who are not actively engaged in war against us and even our enemies when they do not constitute a direct threat to us.

Goren finds the Talmudic and Mishnaic sources more relevant to modern times in their debates regarding issues such as the treatment of prisoners of war and of enemy fatalities:

The ethics of war of any military in the world is demonstrated primarily by two categories: (a) the treatment of war prisoners; (b) the treatment of enemy fatalities. The contrast between the behaviour of the People of Israel’s army and the other armies at the time, regarding both these issues, are outlined in the Bible and the Talmud . . . there is clear evidence in the scriptures that the People of Israel treated prisoners of war, including those of foreign armies, mercifully . . . This behaviour was well known among the nations of the world which were neighbours of the People of Israel . . .

As for our treatment of enemy fatalities, we have clear evidence for the high level of humanity and righteousness that was prevalent among the Army of Israel in ancient times. As it says in Samuel 2 (8;13) *And David made himself a name when he returned from killing eighteen thousand Syrians in the Valley of Salt*. And Rashi explained there: *And David made himself a name*—this was because David buried the enemy soldiers he killed at Adom and created a good name for the People of Israel, who are known to bury their enemies. . . . As we are loyal to the sanctified heritage and righteousness of the army of Israel in ancient times, we have established during my service in the IDF special burial units whose role it is to identify and bury the remains of enemy fatalities in times of

war. This is also in line with our earlier comment that the verse *For in the image of God He made man* (Genesis 9:6) applies to all humans without difference between nations or races.⁴⁷

As in the case of Leibowitz over the Kibiyeh incident, Goren's approach toward the ethics of war led him to a public disagreement with Rabbi Yisraeli over the IDF's siege of Beirut (1982). In an article published in the *Hatzofe* newspaper targeting the religious Zionist community in Israel, Rabbi Goren, at the time the Chief Rabbi of Israel, argued that the siege was prohibited in accordance with the Halacha, as the IDF was required to leave an escape route to allow the terrorists of the city to seek refuge (both Goren and Yisraeli agreed on the need to allow the civilian population to flee). Rabbi Goren's article drew an angry response from Rabbi Yisraeli.⁴⁸

The halachic injunction about the need to allow for an escape route when placing a city under siege is based on interpretations of a verse in Numbers (31:7) describing the People of Israel's war against the Midianites: "they warred against Midian as God had commanded." The Rabbinic interpretation of this verse understood "as God had commanded" to mean that they left them an escape route in order to escape.⁴⁹ This was later codified by Maimonides in his *Laws of Kings*:

When besieging a city in order to capture it, you should not surround it on all four sides, but only on three sides, allowing an escape path for anyone who wishes to save his life . . .⁵⁰

Rabbi Goren argued that this injunction was not only of relevance to modern-day wars but that it was to be implemented literally. Rabbi Goren had categorized the wars of Israel generally, and the Lebanon war specifically, as falling under the category of commanded or obligatory wars; further, he argued that Maimonides had intended for this to cover commanded wars as well, and thus it was applicable to the wars of the State of Israel and the IDF. Goren bases his understanding that this principle is applicable to obligatory wars on two arguments: first, that this law derived

⁴⁷ Goren, *Meshiv Milchama*, II: 38.

⁴⁸ Goren's article was originally published in *Hatzofe* on August 6, 1982. Rabbi Yisraeli's response was published in the same newspaper on September 17, 1982. Both were republished in Goren's *Meshiv Milchama*. We have used an expanded version of Yisraeli's response published in *Havat Binyamin* by Rabbi S. Yisraeli, (Cfar Darom: Machon Hatorah vehaaretz, 1992); also see Edrei, "Divine Spirit and Physical Power."

⁴⁹ See Sifre Debei Rav, *Numbers*, Sec 157. 210.

⁵⁰ Maimonides, *Laws of Kings*, Chapter 5, 6:7.

from the biblical war with Midian, which was an obligatory war; second, from the fact that Maimonides had placed this ruling in proximity to his ruling, based on Deuteronomy,⁵¹ on the need for the side laying siege to call for peace, which applies to both obligatory and permissible wars.⁵²

Goren also cites and strongly rejects an argument put forward by Rabbi Meir Simcha of Dvinsk (1843–1926) in his *Meshech Hochma Commentary on the Torah*, which attempted to explain an apparent disagreement between Maimonides and Nachmanides on this issue, arguing that Maimonides' omission of the need to leave an escape route for fighters during a siege as a separate commandment in his halachic code led one to conclude that his comments on the issue were more of a recommendation, having to do with military tactics, than a commandment related to ethics of war. Goren argues that it would be unacceptable even to consider that the commandments of the Torah could be focused on military tactics.

Rabbi Yisraeli argued in a subsequent article of response that the view of Nachmanides, who argued based on the phrase “When besieging a city *in order to capture it*,” that Maimonides only meant for this commandment to be applicable to offensive, that is, permissible and not defensive wars, was the correct one. According to Yisraeli, since the two biblical categories of commanded war, war against Amalek and the wars against the Seven Nations, were wars of annihilation and therefore would by definition not allow for fighters to escape, it could be concluded that this was the case also for the third category of obligatory war, a war of self-defense aimed at saving the People of Israel from an oppressor. Given that the Lebanon war was a defensive war and that the siege specifically targeted terrorists who attacked Israel, Yisraeli argued that they should not be allowed a path of escape. In contrast to Goren, Yisraeli adopts the interpretation of Rabbi Meir Simcha of Dvinsk relating to the apparent disagreement between Maimonides and Nachmanides on this issue. Rabbi Yisraeli concludes:

1. The terrorists who are actively focused on harming Jews in the Land of Israel and elsewhere without discrimination at any time are pursuers (*Rodef*) under the halacha and should therefore be killed . . .
2. The war against such terrorists in order to amputate their murderous hands which are bloodied with the blood of the innocent, is a commanded obligatory war, codified by Maimonides under the cate-

⁵¹ Deuteronomy 20:10.

⁵² Maimonides, *Laws of Kings*, Chapter 5, 6:1.

gory of saving the People of Israel from an oppressor, and does not require the permission of the Sanhedrin.

3. Maimonides' halachic ruling on this issue was agreed upon by all the rabbinical authorities in the Middle Ages.
4. In an obligatory war, the decision on whether to allow the besieged an escape path is to be determined by the military commanders and the government of the day [as this is a matter of military tactics].
5. All this is relevant only to terrorists. The civilian population which is not involved in the fighting does not fall under these rules and should be allowed to escape the siege unimpeded.⁵³

Though the teaching of Rabbi Goren and to a lesser extent Rabbi Yisraeli played some role in the formation of military doctrine, the tendency in later years was for a growing number of rabbis (usually not military rabbis) to express opinion and make halachic rulings about military issues and conduct. This phenomenon has been compounded by the tendency of serving soldiers to consult the rabbis of their community or *hesder* (a program which combines Judaism study with military service) rather than the official military rabbis. These opinions and rulings tend to be more specific in nature and may be followed by a small group of students of the specific rabbi in question, if at all. In many cases, other rabbis issue contradicting opinions and halachic rulings on similar issues.⁵⁴

An example of a relatively comprehensive attempt to deal with the challenges of modern asymmetric warfare and terrorism can be found in *Questions and Answers from the First Intifada* by Rabbi Shlomo Aviner, head of the Ateret Cohanim yeshiva in Jerusalem and rabbi of the settlement of Beit El. The book collected answers Rabbi Aviner had written in response to questions received from soldiers and civilians at the height of the first Palestinian uprising and is meant to provide guidance for similar situations in the future. The book deals not only with the actions of the military as a whole but with treatment of militants and civilian rioters and behavior of civilians under attack; also with whether or not the military is allowed

⁵³ Havat Binyamin Yisraeli, *The Beirut Siege in Light of the Halacha*, Chapter 15, section 17, pp. 119. See also the detailed and interesting study of the debate between Goren and Yisraeli on this issue in Arye Edrei, "Divine Spirit and Physical Power," 287–92.

⁵⁴ Indeed, the problem of contradictory advice on military-related issues has led the Chief Rabbi of the IDF to issue a public call to non-military rabbis to refrain from issuing halachic advice on military issues to students who are serving soldiers; see Stuart Cohen, *The Book and the Sword*, 250, note 26.

to act against a civilian population in the name of deterrence or collective punishment.

Does the Torah Teach Us How to Act against Rioters?

Maimonides points out that Joshua, in his day, sent three epistles to the inhabitants of Eretz Israel: "Joshua, before entering Eretz Israel, sent three epistles. The first stated: "Anyone who wishes to take flight [from the oncoming army] should take flight." He sent another: "Anyone who wishes to make peace should make peace." He sent another: "Anyone who wishes to make war should do so."⁵⁵

What is told of Joshua in the Bible still has value as divine [word]. Initially, Joshua announced: If you are intending to flee, we will not pursue you. This is what the Gergashites did: "The Gergashite cleared out, trusting in the Holy One."⁵⁶

In his second epistle he wrote: "We need to enter this land and to set it up under our governance. If you desire to live with us in peace, you may remain therein. This land is ours, it is under our rule. If you decide to remain in it, you may, but the one condition for this is that you accept our governance."⁵⁷

Therefore, even today, if the Ishmaelites are not busy murdering us and acting as our foes, they may remain under our governance. But if they act as our foes through all kinds of violent disturbances, we will be unable to leave them among us, as it is written: "And if you do not dispossess the inhabitants of the land from before you, it will come about that those of them you leave will become stings in your eyes and thorns in your sides, and they will be foes to you on the land in which you dwell" (Num. 33:55).⁵⁸

Aviner goes on to explore the way in which civilians should respond when being attacked by stone throwers, based on the Talmudic verse *when someone tries to kill you, rise up and kill him first*.⁵⁹

When must I arise? After he threw a stone or a Molotov cocktail at me, or before—am I permitted to pursue and kill him?

The Shulhan Arukh ruled thus: "One who pursues a fellow to kill him, and the pursuer has been warned and continues to pursue him, even if he is a minor, all of Israel is commanded to save him [the potential victim], by injuring one of the pursuer's limbs; and if they cannot aim and save [the potential victim] without killing the pursuer, they should

⁵⁵ Maimonides, *Laws of Kings*, 6:5.

⁵⁶ JT Shevi'it 6a.

⁵⁷ See Maimonides, *Laws of Kings*, 6:1.

⁵⁸ Aviner, *Questions and Answers*, 9.

⁵⁹ BT tract San. 72a.

kill him even though he has not yet killed.”⁶⁰ From this we conclude that it is forbidden to kill an attacker who tries to kill you unless there is no other way to save oneself or your fellow.

If he already threw the stone, it is not permissible to kill him, but of course he must be caught and brought to trial. However, in most cases, one who threw one will continue to throw additional times and therefore—ostensibly—there is cause for killing him after he threw once, in order to save others from future occasions. . . . Yet, of course, this is not a matter that can be carried out by an individual, since at the present he himself is not in danger. In all likelihood, there is indeed a future danger to others, and still, it is a matter that the army and police need to address and decide what should be done.⁶¹

On the issue of carrying out acts of deterrence in the midst of enemy population, Aviner argues that the army is not only allowed to do so but is indeed obligated to do so as part of its role as a defender of the People of Israel.⁶²

Of course: If it is possible to arrange the matter with subtlety and pleasantness—that is surely fine; but if not, it is obligatory to employ punishment and deterrence, as in the words of Maimonides: “[It is] unsustainable without punishments and laws, and thus unsustainable without stationing judges dispersed in each and every city . . . and unsustainable without a king, who should inspire fear and take varied preventative measures, and strengthen the hand of the judges and vest them with authority.”⁶³

Based on Maimonides, Aviner goes on to argue that the following four criteria should be considered when determining the extent of deterrence activities:

1. *Greatness of the crime.* The greater the crime, the heavier the penalty.
2. *Frequency of the occurrence of the crime.* The more often the crime is committed, the heavier the penalty necessary. And if it is rare, a slight penalty is sufficient.
3. *Strength of incitement.* The more that the crime incites the person because he has a great desire to commit it, or because great pressure is enacted upon him to commit it, the heavier the penalty must be, in order to serve as a deterrent.

⁶⁰ Shulhan Arukh, *Hoshen Mishpat*, 425a.

⁶¹ Aviner, *Questions and Answers*, 13.

⁶² Aviner, *Questions and Answers*, 17.

⁶³ Aviner quotes here from Maimonides, *Guide for the Perplexed*, 3:41.

4. *Ease with which the action can be committed [in secret]*. If it is easy to carry out the crime without being caught, only a harsh and threatening punishment can prevent it from recurring.⁶⁴

Asked whether such treatment does not contradict the halachic notion of compassion, Aviner again draws on Maimonides to argue that when punishment is necessary, avoiding it is tantamount to punishing the undeserving innocent population.⁶⁵

Another interesting attempt to re-examine the ethics of war in Judaism in light of emerging challenges came in an article titled *Questions on the Ethics of War* by Rabbi Yuval Sherlo,⁶⁶ the head of the Petah Tikva yeshiva and a pragmatist religious Zionist Rabbi. The article was written in the aftermath of *Operation Defensive Shield*, a large-scale military operation conducted by the IDF in 2002, at the height of the second *intifada*. The operation, the largest military operation in the West Bank since the 1967 Six-Day War, was aimed at stopping the increasing civilian deaths in Israel from Palestinian terrorist attacks, especially suicide bombings, and it resulted in the death and injury of many Palestinians as well as considerable damage to property.

Concerned by voices within the religious community at the time (which argued that when fighting occurs in the midst of civilians the focus should be entirely on ensuring the safety of the soldiers, even at the price of harming innocent civilians), Sherlo tried to present a more balanced approach to the issue. Like many before him, Sherlo conceded that the debates on this issue throughout the history of Judaism were insufficient for dealing with the challenges at hand:

Operation “Defensive Shield” led to the resurfacing of a discussion on the Jewish laws of war . . . questions pertaining to the Jewish collective in terms of the way war itself is conducted. For many generations, we were denied the privilege of clarifying these questions, and therefore, the Torah offers little guidance. . . .

One of the main topics that arose for discussion during this war was the question of war ethics. . . . The question of whether war against those who seek our demise is at all ethical is entirely not negotiable. It is a matter of simple justice, divine morality, and in effect, the Torah precept of delivering Israel from the hand of the enemy.

⁶⁴ Aviner, *Questions and Answers*, 18; Aviner refers the reader to Maimonides, *Guide*, 3:41.

⁶⁵ Aviner, *Questions and Answers*, 18 referring to Maimonides, *Guide*, 3:39.

⁶⁶ Yuval Sherlo, “Questions on the Ethics of War,” *Tzohar* 11 (2003): 97–104.

The question on which the discussion focuses is whether we are obligated to fulfil additional [ethical] foundations, beyond our will and obligation to achieve victory in war. . . .

Sherlo seems to combine both the exclusive and the inclusive attitude, arguing that, despite the apparent widespread hypocrisy within the international law system and the lack of objectivity within the international community, in particular with regard to Israel, international conventions do maintain some validity from an halachic perspective:

The source of the obligations of conduct today is in the legal agreements that the nations of the world formally took upon themselves. . . . The international judicial institutions are also unfair and politically tainted, and serve as a tool for the achievement of political aims rather than as an arm of justice. However, our vision of repairing the world—*tikkun olam*—in the Kingdom of G-d obligates us to ask the question at the theoretical level, and not to abdicate responsibility for fear of being condemned by the nations of the world. It is imperative that we ask these questions internally and consider: Is it the Torah's intent that our message to the nations be a recognition of the ethical boundaries during war, and that not everything is permissible; or is the thrust of our message to the world that if indeed you come in the name of truth and justice, you must not enact limitations during war against wickedness and evil, and the army waging combat is not required to restrain itself from doing anything in order to achieve victory—mainly it must not refrain from actions that would prevent it from endangering itself.

Sherlo raises a number of relevant scenarios which present themselves in modern asymmetrical warfare, such as combatants operating within, and hiding behind, civilian populations, and asks:

The common aspect to all of the questions is that on one side of the balance is certainly the endangerment of soldiers' lives, and the question we are asking is whether there is another side to the balance that must be considered, and if sometimes soldiers lives must even be endangered in order to avoid killing, or is it that the other side of the balance contains nothing, and we must fight G-d's war, no holds barred?

While noting that the biblical and rabbinical texts are generally in line with the harsher approach, Sherlo puts forward four halachic sources as a basis for advocating a more balanced approach:

1. *The status of natural morality.* Sherlo rejects arguments by some that the so-called natural morality is not relevant either to modern times

or to Judaism. He argues, rather that the Torah itself in fact recognized natural morality.

2. *Prohibition against killing a person.* Sherlo argues that the categorical prohibition against the shedding of blood, commanded by God when Noah disembarked from the ark, as well as the Ten Commandments' categorical prohibition on murder, are absolute commands that do not distinguish between men and women, Jew and non-Jew. These prohibitions against killing mandate caution in war, not to kill too much.
3. *Prohibition on sealing a sieged city from all sides.* Like Goren before him, Sherlo uses the argument between Maimonides and Nachmanides above to conclude that this commandment's purpose is at the very least to teach us that even during war we should treat our enemies with mercy.
4. *The desecration of the name of God.* Based on a Talmudic discussion (Tract Yebamot 79:1) about the story in the second book of Samuel (21) in which King David handed over seven of King Saul's sons to the Gibeonites—as punishment for the harsh treatment the Gibeonites had suffered at the hands of King Saul—despite the forfeit of their lives, in order to avoid the desecration of the name of God. Sherlo argues that this story could lead one to question whether or not the need to protect one's own life trumps the need to avoid the desecration of the name of God. Indeed, one should be careful in the treatment of others, as the desecration of God's name is a consequence of the actions of the People of Israel.⁶⁷
5. *The issue of saving oneself by use of others' property.* Sherlo alludes to some commentators who argue that one is not allowed to save himself if this means damaging the property of another.⁶⁸ Sherlo argues that this could be expanded to situation of combat to mean that innocent civilians cannot be harmed even if terrorist are hiding amongst them.

Sherlo concludes that, contrary to “the feeling among the public that the Halachic position uniformly does not allow for the endangerment of

⁶⁷ See Sherlo, *Questions on the Ethics of War*, 102–3.

⁶⁸ The majority view is that damaging another's property is prohibited unless this is needed in order to save one's life. In such a case, compensation should be paid for the damage. The minority view cited by Sherlo argues that the prohibition on damaging another's property stands even in case of danger to one's life.

soldiers at all, not even a scratch, to avoid harming innocents who are not involved in combat,” this issue was not clear cut and required serious consideration and debate.⁶⁹

Similar issues are discussed in a more recent essay published in the *Military Rabbinate Journal* by a serving military rabbi, Major Rabbi Samuel Dov Rosenberg, titled “Ethics, battle and dealing with the enemy and his civil environment from the view of halachic law.”

Following a survey of biblical and rabbinical views on the different categories of war, Rabbi Rosenberg proceeds to present the halachic reasoning for defining the contemporary wars of Israel as commanded or obligatory wars:

Rabbi Herzog, who was the First Chief Rabbi of the State of Israel, determined with certainty at the time of the outbreak of the War of Independence, that the war coming upon us is a “divinely commanded war” (Rabbi Yitzhak Ha-Levy Herzog in his article about the establishment of the State and its wars, *Tehumin* 4:19), obligatory beyond any doubt, both in the opinion of Maimonides who states that “helping Israel from the hand of an enemy that has come upon them” is a “divinely commanded war,” since the goal of our Arab neighbours is to leave no memory or remnant of the Jews in Israel, and to remove us by force and destroy us. Also, of course, in the opinion of Nachmanides, who emphasizes that the commandment to conquer Eretz Israel applies to every generation, since it is a commandment from the Torah. . . .⁷⁰

After the War of Independence as well, when Israel’s boundaries had already been determined, the eternal struggle against the enemies who attack and harm us continued, and therefore, every war based on the conquest of the Land is a “divinely commanded war.”⁷¹

Likewise, an offensive—and not just a defensive—war, is included in the category “divinely commanded war,” when the enemy intends to attack in the future.⁷²

⁶⁹ Sherlo was subsequently attacked by Rabbi Yisrael Rosen for being too apologetic in his approach and for forcing an interpretation on the text that does not exist there, in order to “beautify” the halacha and Jewish tradition by trying to adjust it to modern ethical conventions. See Yisrael Rosen, “Unhalachic Apologetics (a response to Rabbi Yuval Sherlo),” *Tzohar* 12 (2003): 135–39.

⁷⁰ See Rabbi Shlomo Yosef Zevin, “Ha-Milhamah,” in *Le-or Ha-halakha*, 65.

⁷¹ Rabbi Shaul Yisraeli, “Peulot Tagmul Le-Or Ha-halakha,” in *Tzomet Ha-Torah ve-Ha-Medinah*, Part 3, 253. R. Rabbi Katriel Fishel Tchorsh wrote the same in his article “Milhemet Reshut Mitzvah o Hova?” in *ibid.*, 243.

⁷² Samuel Dov Rosenberg, “Ethics, Battle and Dealing with the Enemy and His Civil Environment from the View of Halachic Law,” *Machniech* 2 (2008): 303, referring to Responsa *Heikhal Yitzhak*, “Orekh Hayyim,” 37, as well as Rabbi Shaul Yisraeli, in *Tzomet Ha-Torah ve-Ha-Medinah*, Part 3, 253.

Rosenberg also discussed the issue of harming the civilian population during combat.

According to guidelines set by the Torah, one cannot apply the rule “When someone tries to kill you, rise up and kill him first” to a population of tens of thousands, even if situated in an environment hostile to us, and even if they view us as an occupier, since it is a small minority that is harming us and seeks to kill us.⁷³ Even in a “divinely commanded war,” with the exception of those places where the Torah instructed us “You shall let no breathing creature live” (Deut. 20:16), we are commanded to have mercy and not to kill a civilian population, and certainly one must not harm women and children, except when, for self-defense, it is necessary, and for purposes of conquest and victory.⁷⁴

On the other hand, when there is actual and apparent danger in the eyes of the combatant, there is a strong and sound basis for war requiring that every action must be carried out such that no soldier or civilian on the combatants’ side be harmed, and in this situation one must not compare the number of our soldiers likely to be harmed with civilians of the Israel-hating enemy who are likely to pay the price of this war with their lives.⁷⁵

Nevertheless, as Rabbi Yisraeli argued in the case of Kibiyeh, Rabbi Rosenberg argues here that civilians who provide cover for fighters are “taking their lives in their own hands” and that if they are harmed in the course of battle, the hands of the soldiers are “clean.”⁷⁶

Rosenberg ends his lengthy article by listing a number of conclusions (see the list below) regarding the halachic status of the wars of Israel today, and the way they should be conducted. Starting with the determination that the wars of Israel today fall under the category of “commanded wars,” Rosenberg proceeds to rule on more specific issues, such as whether or not it is permitted to destroy the house of a suspected terrorist in battle, and the treatment of civilians during combat situations in populated areas. While the readership of this publication among IDF soldiers would likely be limited, given that it was published by the IDF itself, this article was written as a guide to be drawn upon in actual combat situations:

⁷³ Rabbi Hayyim David HaLevi, “*Ha-ba le-horgekha, hashkem le-horgo* be-hayyenu ha-tziboriyyim,” *Tehumin*, 1: 343.

⁷⁴ Rabbi Shlomo Goren, *Meshiv Milhama*, I:14.

⁷⁵ Samuel Dov Rosenberg, “Ethics, Battle and Dealing with the Enemy,” 306–7, referring to Rabbi Abraham Shapira, “*Milhama ve-Musar*,” *Tehumin* 4:182.

⁷⁶ R. Shlomo Aviner, *Responsa on the Intifada*, 24.

1. In the opinion of Maimonides, coming to the aid of Israel against a pursuer is defined as a “divinely commanded war.” It seems also that Nachmanides maintains that every war for the conquest of Eretz Israel in every generation is a “divinely commanded war.”
2. The halachic authority of the government to declare and launch a “divinely commanded war” is identical to that of a king.
3. It is not relevant to consider killing during war at the level of the individual, since the obligation to preserve life from any danger is waived during wartime for the needs of the nation.
4. The rabbis of Eretz Israel determined during the War of Independence, with total certainty, that our war was a “divinely commanded war.”
5. Ongoing war as well, which is more complex than a circumscribed war, as well as offensive operations, are included in the rubric of a “divinely commanded war.”
6. The prohibition against holding an enemy city under siege from all directions does not apply in a “divinely commanded war,” in the opinion of most of the medieval sages (Rishonim).
7. The prohibition against destroying fruit trees during a siege against the enemy applies to destruction that would serve no purpose or destruction as an end in itself.
8. It is fitting and proper that, while deliberating over a decision as to whether to go to war, the component of emotional harm and the devaluation of human life be considered.
9. Despite this, it can be reckoned that during a “divinely commanded war,” when the combatants are convinced of the righteousness and the religious obligation that they are upholding, their emotional health and ethical standing will not be compromised.
10. The Laws of the Pursuer (*dinei rodef*) cannot be applied to a hostile population numbering in the tens of thousands.
11. There is nothing preventing harming the house of a terrorist, even if his neighbor will be harmed by destruction of the building.
12. When a terrorist’s neighbor helps him or even ignores his neighbour’s activity, he is not considered innocent and he is taking his life into his own hands.

13. Civilians situated near terrorists and who do not move away from them are endangering their lives, and our forces have no responsibility to avoid harming them due to their proximity to civilians.
14. A soldier who senses actual life danger during his operational activity will do all that is necessary to protect himself from harm, and will not be deterred by fear of harming civilians on the enemy side.
15. During combat against terrorists in a populated area, it is proper to warn unagitated civilians in the area to distance themselves from the place of combat activity.⁷⁷

As we have seen, contemporary attempts to establish a halachic platform for issues of ethics or conduct of war have produced a variety of opinions, not only, in regard to the respective roles of the halacha and international conventions in establishing a contemporary Jewish ethics of war, but also in the differing conclusions they derive at times from identical Jewish sources. Following the more encompassing efforts by Rabbi Goren and Yisraeli and others to create a wide-ranging halachic platform through which the issues of military and war could be formed and addressed, more recent efforts have been more focused and tend to come in response to a certain incident or event.

The ongoing challenge of applying a Judaism-based ethics of war to practical circumstances is evidenced by the fact that Rabbi Yisraeli had used the “inclusive” approach of drawing on international conventions of war to expand what he saw as Judaism’s too restrictive approach to war, inadequate for the reality faced by the modern state of Israel, and by the fact that Rabbi Goren, a proponent of the “exclusive” approach, used hermeneutic flexibility to dismiss the more extreme decrees of the Bible while applying others literally. The Jewish hermeneutic tradition, which allows for differing and often conflicting interpretations for the same sources, and the lack of a contemporary halachic authority on these issues, mean that the issue of norms of war in Judaism remains unsettled.

It could be argued that some of the scholars under discussion, whether proponents of the “inclusive” or of the “exclusive” approach, had approached Jewish texts or international norms selectively, with a pre-established ethical or political view. It is important to stress that these debates represent the private opinions of these particular rabbis, and, with the exception of the writings of Rabbi Goren, the views expressed are aimed at creating a certain intellectual atmosphere for their students rather than directly shape the orders and procedures of the IDF. Indeed,

⁷⁷ Samuel Dov Rosenberg, “Ethics, Battle and Dealing with the Enemy,” 307–8.

the IDF ethical code was authored not by rabbis but by internationally acclaimed ethicists. With the growing weight of the religious soldiers in the IDF, however, the potential influence of such debates and commentaries on individual soldiers on the ground should not be discounted.⁷⁸ Another challenge which has emerged in recent years is the potential for a clash between some rabbis and the military and state authorities. This was particularly evident in the buildup to the Israeli disengagement from the Gaza Strip and the Northern West Bank in 2005, when some leading religious Zionist rabbis issued halachic decrees calling on soldiers to refuse to carry out military orders to evacuate Jewish settlements. Nevertheless, experience from those events has shown that the soldiers, almost without exception, followed the orders of the military rather than those of the rabbis.⁷⁹

N-V

⁷⁸ See on this Stuart Cohen, "The Scroll or the Sword? Tensions between Judaism and Military Service in Israel," in *Democratic Societies and Their Armed Forces; Israel in Comparative Context*, ed. Stuart A. Cohen (London: Frank Cass, 2000), 272–73.

⁷⁹ See Gedaliah Afterman, *Understanding the Theology of Israel's Extreme Religious Right*, 248–52.