

The Bounds of Wartime Military Conduct in Jewish Law: An Expansive Conception

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HERBERT BERMAN

Distinguished attorney, Jewish leader, and noted philanthropist, Herbert Berman worked tirelessly for a broad array of Jewish and civic causes throughout his life. A man of great spirit, his wise counsel was eagerly sought by clients, colleagues, community leaders, and government institutions. Each of the many causes he championed throughout the world benefited from his tenacious advocacy as well as his superb professional skills, generosity, honesty, and outspokenness.

A graduate of New York University and Harvard Law School, Herbert Berman was the senior attorney at the distinguished firm of Tenzer, Greenblatt, Fallon, and Kaplan. Yet, it was his altruistic work that was his greatest love next to his family. He sat on the boards of innumerable institutions, including the Board of Higher Education and Board of Trustees of the City University of New York, as well as on the University's Construction Fund. He was also a member of the Executive Committee of the CUNY School of Law at Queens College and a Trustee of the Queens Library Foundation.

With an unwavering devotion, Herbert Berman dedicated himself to Jewish causes. Above all, he was a leader in the field of Jewish education. He served on the Global Board of Trustees of Bar-Ilan University, from which he received an honorary doctorate. He was a member of the board of the Rabbi Yitzhak Elhanan Theological Seminary of Yeshiva University and of the Open University of Israel. He provided invaluable counsel to the AMIT network of educational institutions in Israel, an organization that his wife Daisy served as president.

Herbert Berman's commitment to justice for the Jewish people led to his work with the Conference of Material Claims against Germany, the World Jewish Congress, the World Jewish Restitution Organization, the Memorial Foundation for Jewish Culture, and the North American Conference for Ethiopian Jewry. He served as an officer of the Union of Orthodox Jewish Congregations and the Synagogue Council of America, as well as working for the America-Israel Friendship League, Bnai Zion, and many other notable organizations.

Herbert Berman guided the establishment and growth of the Center for Jewish Studies at Queens College for over two decades. As chair of the Center's Advisory Board, he helped develop one of the outstanding programs in the country for Jewish scholarship, particularly for the study of the role of Jewish thought in American culture. His outstanding leadership and critical financial support were an inspiration to the faculty and students in the program. The Center greatly misses his vibrancy, his infectious enthusiasm, and his inimitable style. In his name, and with the support of his beloved wife Daisy, and his children Sara, Debra, and Nathaniel, the Center established the Herbert Berman Memorial Lecture, which it publishes and distributes widely to scholars and the broader community, as well as to local and national libraries.

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Foreword

With arresting scholarship and penetrating analysis, Michael Broyde addresses a vital intellectual and religious issue of compelling theoretical interest but of even greater practical moment: the approach of halakhah, Jewish law, to war. His superb essay illuminates the legal and ethical dimensions of the Jewish tradition's stance on war, and brings to light the complex moral ambiguities inherent in Jewish battlefield ethics.

Professor Broyde's inquiry deals with normative Jewish law, that is, the post-biblical legal tradition that emerged at a time when Divine intent was neither clear nor apparent. His paper reviews the halakhic positions that justify non-Jewish and Jewish nations in starting a war, delineates the categories of Obligatory vs. Authorized Wars, and then engages many of the gripping ethical questions that inevitably arise once a particular war has commenced, including: ethics in the army; the ethical imperatives of peace treaties; nuclear war and the deterrence by bluffing; and perhaps the most difficult question, what may or may not be done in war to enemy combatants and civilians. He concludes with personal reflections on halakhah and war in our day and age.

Demonstrating encyclopedic legal knowledge, rigorous conceptual precision, and heightened sensitivity to the subtle nuances of halakhic/ethical norms, Professor Broyde concludes that

the Jewish tradition has within it a moral license that permits war (and killing), which differs from the usual rules of self-defense for individuals. In many situations, this license is extensive and permits almost all kinds of behavior once war has begun. However, the permissibility to "wage war" is quite limited in the Jewish tradition, and the requirement that one always seek a just peace is part and parcel of the process that one must exercise to initiate a legitimate war. The love of peace and the pursuit of peace, as well as the responsibility to eradicate evil, all co-exist in the Jewish tradition, each in its place and to be used in the proper time.

To our great regret, this subject matter is all too immediately relevant to modern Jewish experience; may we soon see the day when it is rendered of academic interest only!

This publication is based on the Herbert Berman Memorial Lecture delivered by Professor Broyde on November 3, 2004. The Center for Jewish

Studies is pleased to make his presentation available to a wider audience.

On behalf of the Center, I express my deep gratitude to Daisy Berman and family for underwriting the Herbert Berman Memorial Lecture and its publication, and for the family's abiding and generous support of the Center and its activities.

Professor Benny Kraut
Director, Center for Jewish Studies

The Bounds of Wartime Military Conduct in Jewish Law: An Expansive Conception

Michael J. Broyde*

Rabbi Jose the Galilean states:

“How meritorious is peace? Even in a time of war,
Jewish law requires that one initiate discussions of peace.”
(*Leviticus Rabbah*, *Tzav* §9)

I. Introduction

About ten years ago I wrote an article¹ on the halakhic issues raised by starting wars, fighting wars, and ending wars. Over the past five years, as I have spoken about the topic on various occasions,² the article has been updated, modified, and expanded, and it forms the basis of some sections of this article.

Also over the last five years, I have been privileged to serve as the *rosh kollel* (academic head) of the Atlanta Torah MiTzion Kollel, where I give a daily *shiur* (lecture) to its members. I have had numerous opportunities to speak with the Atlanta Torah MiTzion members about many different halakhic issues, and halakhot related to war is a regular topic of interest and discussion, as they are in Atlanta having only recently completed five years of combined army service and serious Torah study in the course of their *hesder* yeshiva experience.³

Yet year after year, presentations of my article never interested any of

* A modified version of this paper was presented at the 16th Orthodox Forum of Yeshiva University (2004) and will be published in its proceedings.

1 Michael Broyde, “Fighting for Peace: Battlefield Ethics, Peace Talks, Treaties and Pacifism in the Jewish Tradition,” in Patout Burns, ed., *War and its Discontents: Pacifism and Quietism in the Abrahamic Traditions* (Washington, 1996), 1–30.

2 See, e.g., Michael Broyde, “Battlefield Ethics in the Jewish Tradition,” *Proceedings of the 95th Annual Meeting of the American Society for International Law* (2001): 92–98.

3 It is worth noting that the *hesder* program is unique in the world (as far as I can determine) in that it combines religious training leading to ordination with combat service in the army (as opposed to, for example, Italy’s sponsorship of ordination programs to encourage army chaplains). While much has

these young men very much—they would listen politely (as such is *kavod ha-Torah*), but display no real enthusiasm for the theoretical topics put forward. What was of interest to these recent Israeli soldiers in halakhot of war? The answer is simple. As soldiers, they wanted more concrete guidance for dealing with practical issues of battlefield ethics; actually fighting a war as a private, sergeant, or captain confronted them with complex moral ambiguities of combat for which they felt inadequately prepared. In fact, upon examination, I found that many of these halakhic issues are poorly addressed. The standard works that deal with Jewish law in the army omit many of the overarching discussions about halakhah and war and provide no guidance at all as to basic, practical issues related to fighting a war!⁴

This article seeks to address these lacunae. It reviews Jewish law's attitude to war, an area of modern social behavior that "law" as an institution has shied away from regulating, and which "ethics" as a discipline has failed to successfully regulate. On the subject of war, as is true for other topics, the legal and ethical dimensions are freely combined in the Jewish tradition. It is worth noting, therefore, that unlike Jewish law's rules concerning "regular" war, regulations concerning biblical wars such as those against Amalek and the Seven Nations are not based normative ethical values, but were designed to be used solely in the initial period of Jewish conquest of the land of Israel or solely in circumstances where God's direct divine commandment to the Jewish nation was clear. Thus, "Jewish law" as used in this article refers to that time period when direct Divine direction in and interaction with the world is no longer apparent; it is methodologically improper to discuss Jewish ethics in the presence of the active Divine with any other system of ethics, since the active (acknowledged) presence of the Divine changes the ground rules for ethical norms.⁵ Normative Jewish law confines itself to a discussion of what to do when the active Divine presence is no longer immedi-

been written on the ideology of *hesder yeshivot* (See e.g., R. Aharon Lichtenstein, "The Ideology of Hesder," *Tradition* 19,3 (1981):199–217), I suspect that its unique military component derives directly from the Jewish law sources found in this paper—that it is a religious duty to serve in the armed forces in a time of *milhemet mitzvah*.

4 Thus both R. Yitshak Kofman's *ha-Tzava ka-Halakhah* (Jerusalem, 1992) and the more standard *Hilkhot Tzava* by R. Zekharyah Ben-Shelomoh (Ayalon, Israel, 1988) leave them out completely and focus exclusively on questions of ritual observance of Jewish law in the army setting. For an excellent review of *Hilkhot Tzava*, see Rabbi Dr. Michael S. Berger, *Tradition* 25,3 (1991): 98–100.

5 See generally, Rabbi Eleizer Berkovits, *Not in Heaven: The Nature and Function of Halakhah* (New York, 1983) for a discussion of the role of the Divine in Jewish law.

With regard to the Seven Nations, Maimonides states:

It is a positive commandment to vanquish the seven nations [that used to occupy Israel] since it says "you shall vanquish them." Anyone who has one of the members of that nation subservient

ately accessible in the world, and thus normative rules are in effect. This distinction, and the distinction between biblical Judaism and modern Jewish law, has been lost to some commentators.⁶

Our discussion begins with a review of the legal or ethical issues raised that can justify the *starting* of war (*jus ad bellum*). The issue of beginning a war is crucial for any discussion of the ethics of the battlefield itself in the Jewish tradition. As developed below, there are numerous different theories as to why and when it is morally permissible to start a war which will kill people. What theory one adopts to justify a war, and what category of “war” any particular military activity is placed in, significantly affects what type of conduct is legally or morally permissible on the battlefield (*jus in bello*).

The article continues by addressing various ethical issues raised by military activities in the order they would be encountered as hostilities advanced and then receded, including a discussion of the issues raised by peace treaties in the Jewish tradition and of what is halakhically permissible to do in war to enemy combatants and civilians. This latter concern, among the most vexing of all battlefield ethical issues, is precisely the kind of topic that my Israeli student-soldiers have been most interested in.

This essay demonstrates that the Jewish tradition has within it a moral license that permits war (and killing), which differs from the usual rules of self-defense for individuals. In many situations, this license is extensive and permits almost all kinds of behavior once war has begun. However, the permissibility to “wage war” is quite limited in the Jewish tradition, and the requirement that one always seek a just peace is part and parcel of the process that one must exercise to initiate a legitimate war. The love of peace and the pursuit of peace, as well as the responsibility to eradicate evil, all co-exist in the Jewish tradition, each in its place and to be used in its proper time.

to him and does not kill him violates the negative commandment, since it says “no life shall survive [from the seven nations].” *Their identity has since disappeared.* (*Hil. Melakhim* 5:4, emphasis added; Amalek is discussed in *Melakhim* 5:5.)

So too, Maimonides, based on a Talmudic source, states that in the wars against the nations of Ammon and Moab, Jewish law forbids the Jewish people from initiating peace discussions with them, although if they initiate such discussions Jewish law allows one to reciprocate (*Hil. Melakhim* 6:6; similar sentiments can be found in R. Eliezer of Metz, *Yerayim*, Mitzvah 250). Rabbi Joseph Karo, writing in the *Kesef Mishneh*, disagrees, and states that it is inappropriate to accept overtures of peace even when they are initiated by Ammon and Moab. On the unique imperative to vanquish Amalek, see R. Norman Lamm, “Amalek and the Seven Nations: A Case of Law vs. Morality,” in Lawrence Schiffman and Joel B. Wolowelsky, eds., *War and Peace: Proceedings of the 2004 Orthodox Forum* (forthcoming).

⁶ See e.g., Maj. Guy B. Roberts, “Note: Judaic Sources of and Views on the Laws of War,” *Naval Law Review* 37 (1988): 221.

II. Grounds for Starting War

A. Jewish Law's View of Secular Nations at War

Historically, Jews have been (and, to a great extent, still are) a people living in a Diaspora, foreigners in and, later, citizens of countries where Jewish law was not the ethical or legal touchstone of moral conduct by the government. Even as citizens of a host country, it is necessary for adherents to the Jewish legal tradition to develop a method for determining whether that nation's military activity is indeed permissible according to Jewish law. Should the host country's military activities be deemed a violation of Jewish law, Jewish law would prohibit one from assisting that nation in its unlawful military activity and certainly would prohibit serving in its armed forces and killing soldiers who are members of the opposing army.⁷

Two distinctly different rationales are extant to justify the use of military force. The first is the general principle of self-defense, whose rules are as applicable to the defense of a group of people as they are to the defense of a single person. The Talmud⁸ rules that a person is permitted to kill a pursuer to save his or her own life regardless of whether the person being pursued is a Jew or a non-Jew. While there is some dispute among modern Jewish law authorities as to whether Jewish law *mandates* or merely *permits* a non-Jew or bystander to take the life of one who is trying to kill another, nearly all authorities posit that such conduct is at the least permissible.⁹

7 For precisely such a determination in the context of the Vietnam War, see David Novak, "A Jewish View of War," in his *Law and Theology in Judaism* (New York, 1974), Vol. I, 125–135.

8 *Sanhedrin* 74a–b.

9 Jewish law compels a Jew to take the life of a pursuer (Jewish or otherwise) who is trying to take the life of a Jew; *Shulhan Arukh, Hoshen Mishpat* 425:1. *Minhat Hinukh* says that this is permissible but not mandatory for a non-Jew; see R. Joseph Babad, *Minhat Hinukh*, positive commandment 296. The source quoted for this statement is the Talmud in *Sanhedrin* (72b), which derives one of the dispensations to kill the pursuer from the verse in Genesis 9:6 ("One who sheds man's blood by man shall his blood be shed"). All commandments derived from this verse apply both to Jews and non-Jews since it was stated (at least) twice in the Torah, once before and once after the giving of the Law to the Jews. Tosafot (*Sanhedrin* 72b) posits that this verse only makes the non-Jew's killing of a pursuer permissible but not obligatory. Tosafot claims that it is Deuteronomy 22:27 ("The betrothed damsel cried and there was none to save her") that makes this action obligatory rather than optional, and that this verse has legal effect only on Jews.

R. Shelomoh Zevin argues with this position, claiming that it is an obligation; See R. Shelomoh Yosef Zevin, *Le-'Or Ha-Halakhah: Be'ayot U-Verurim* 2nd ed., (Tel Aviv, 1957), 150–157. Rabbi Zevin notes that the verses in Obadiah 1:11–13 chastise the kingdom of Edom for standing by silently while Israel was destroyed. Hence, he claims, it appears that all have an obligation to help. He also argues that the Talmud in *Sanhedrin* 72b was only referring to a home invader (literally, *ba ba-maheret*; according to Jewish law, one who enters a house to rob it when its owner is home presumably will kill the owner if interrupted. Thus the owner of the home may kill the invader during the burglary) and not a pursuer. Other modern commentaries also disagree with the *Minhat Hinukh*; for a summary of the discourse on this point, see R. Yehuda Shaviv, *Betzur Eviezer* (Tzomet, 1990), 96–99, who appears to conclude that most authorities are in agreement with R. Zevin's ruling; see also R. Yitzhak Schmelks, *Bet Yitzhak, Yoreh De'ah* II, 162 and *Novellae of R. Hayyim Soloveitchik on Maimonides, Hil. Rotzeah* 1:9.

For an excellent article on this topic, and on the general status of preemptive war in Jewish law, see

It is obvious that the laws of pursuit are equally applicable to a group of individuals or a nation as they are to a single person. Military action thus becomes permissible, or more likely obligatory, when it is defensive in nature, or undertaken to aid the victim of aggression. However, using the pursuer paradigm to analyze “war” leads one to conclude that all of the restrictions related to this rationale apply as well.¹⁰ War, if it is to exist legally as a morally sanctioned event, must permit some forms of killing other than those which are allowed through the self-defense rationale; the permissibility of the modern institution of “war” as a separate legal category by Jewish law standards cannot exist solely as a derivative of these self-defense rules.

There are a number of recent authorities who explicitly state that the institution of “war” is legally recognized as a distinct moral license (independent of the laws of pursuer and self-defense) to terminate life according to Jewish law, even for secular nations. Rabbi Naftali Zvi Yehudah Berlin,¹¹ argues that the very verse that prohibits murder permits war. He claims that the term “At the hand of man, his brother”¹² prohibits killing only when it is proper to behave in a brotherly manner, but *at times of war, killing that would otherwise be prohibited is permitted*. Indeed, such an opinion can also be found in the medieval Talmudic commentary of Tosafot.¹³ Rabbi Judah Loew (Maharal of Prague) in his commentary on Genesis 32 also states that war is permitted under Noahide Law. He claims that this is the justification for the actions of Simeon and Levi in the massacre of the inhabitants of Shechem. Furthermore, by this analysis even preemptive action, like the kind taken by Simeon and Levi, would be permitted. Also, Maharal at least implies that the killing of civilians who are not liable under the pursuer rationale is nonetheless permissible.¹⁴

Other authorities disagree. Rabbi Moses Sofer¹⁵ seemingly adopts a middle position and accepts that wars of aggression are never permitted to secular nations; however, he does appear to recognize the institution of “war” distinct from the pursuer rationale in the context of defensive wars. A number of

R. J. David Bleich, “Preemptive War in Jewish Law,” *Contemporary Halakhic Problems* III (Ktav, 1989), 251.

10 What precisely these restrictions are, will be explained *infra* section III, A.

11 R. Naftali Zvi Yehudah Berlin, *Ha'amek Davar*, Genesis 9:5.

12 Genesis 9:5; In Hebrew, “*Mi-yad ish ahiv.*”

13 Tosafot *Shevu'ot* 35b, s.v. *katla had.*

14 R. Shlomo Goren, “Combat Morality and the Halacha,” *Crossroads* 1 (1987): 211–231. It is worth noting that the dispute between Jacob on one side and Simeon and Levi on the other side as to the propriety of their conduct in Shechem is one of the few (maybe the only) incidents in the Torah where it is unclear who is ultimately correct. Rabbi Goren posits that Jacob was correct, and thus Maharal of Prague is wrong.

15 R. Moses Sofer, *Hatam Sofer, Yoreh De'ah* 1:19.

