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War and terrorism in Jewish law

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INTRODUCTION

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INTRODUCTION

Judaism, Christianity, and Islam on War

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War and rumbles of war have been with us from forever. They are a constant companion to human existence and play an important role in the history of Judaism, Christianity, and Islam. In order to place this volume into a broader perspective, we will begin with a summary view of war in the three religions which concern us most.

JUDAISM ON WARFARE

For Jews this begins with the biblical period on. Yet, after the destruction of the ancient Jewish state until the establishment of modern Israel, Jews were rarely active participants in warfare, although we often suffered terribly from its consequences. World wide peace was the distant Messianic goal and only limited efforts were made to tame the horrors of war or to place it into a theological framework. Ecclesiastes took a practical rather than idealistic view of war when it stated there is "a time for war and a time for peace," placing peace second (Ecc 3:8).

Wars were dispassionately reported as a divine or political instrument in the Bible along with minimal practical legislation on combat. After that there has been little discussion until the modern State of Israel.

THE BIBLICAL BACKGROUND

The biblical past presents a record of endless wars and conflict;¹ it is the history of a small embattled nation, not too different from that of modern Israel, in more or less constant strife. We see this even in cursory reading of Joshua, Judges, I and II Samuel, I and II Kings, I and II Chronicles. God is sometimes depicted as a warrior as in the Song at the Sea (Ex 15:3) and as warlike (Ex 17:16, Jud 5:13; Ps 24:8;). God also destroyed the instruments of war (Ps 76:4; Hos 1:7; 2:20) and brought an end to warfare (Is 2:4).

The limited biblical legislation governing combat was not discussed or expanded in the historical account or by the prophets. For example, there was no discussion of the idealistic legislation of Deuteronomy which permitted exemption from military service for those who had built a new house and not yet enjoyed it, planted a vineyard and not yet harvested it, become engaged, but were not yet married, and included anyone who was afraid (Deut 20:5 ff.). Before engaging the enemy, an opportunity to surrender had to be offered (Deut 20:10). There was a discussion of captives generally and of female captives whom a soldier wished to marry (Deut 21:10). A siege was not to destroy valuable trees (Deut 20:19 f.). War along with the treatment of the enemy was harsh, often cruel, and the reports contained only the facts without moral comment (Ex 17:9; Deut 7.16 ff.; 20:15 ff.; Josh 8:24 ff.; Josh 10.28 ff.; Jud 3:29; I Sam 27:9; I Sam 15:13 ff.; I Sam. 10:6 ff.; etc.). King Asa was reported to exclude any exemption from military service (I K 15:22) - the only biblical reference to the deuteronomic legislation. Mighty warriors were glorified at some length (I Chron 11:22 ff.) and detailed accounts of the army were given (I Chron 12:24 ff.; II Chron. 1:14 ff.). Warfare was taken for granted without comment (II Chron 13:2 ff.; 14:7; 17:12 ff.). Slaughter, taking of captives, and ransacking was simply recorded without comment (II Chron 28:6 ff). God was seen as a fighter (Ex 15:3 ff.), in Isaiah with its fierce imagery (Is 42:13 ff.) and later (II Chron. 32:21). The historical records of the Books of Chronicles, present a theology which lauds warfare.

Military service was taken for granted and the horrors of war were described as a necessity of what we would euphemistically call "nation building." The ideal of a peaceful world was presented by the prophets as a distant dream of the Messianic Age (Jer 65:25; Micah 4:3; Is. 2:4); though they spoke out against all violence (Is. 60.18; Jer. 23.3; Ezek. 45.9). We should remember that prophets close to various kings, usually supported the war about to be fought (I K 22.6 ff, etc.) though not always as we hear from the prophet Jehu (I K 16.7). The biblical tradition did not preserve their messages. As the later rabbinic traditions rejected warfare in order to avoid the total destruction of the Jewish people, they suppressed the Books of Maccabees and kept them out of the canon. The popular holiday of Hannukah instead placed its emphasis on an insignificant miracle rather than political victory.

RABBINIC AND PHILOSOPHICAL DISCUSSIONS

The subsequent halakhic and philosophical literature made only the most limited effort to provide a theoretical framework for war. Talmudic scholars, far removed from the realities of war, did not elaborate on it. No tractate of the Talmud nor any major section of this vast work dealt with this topic or with the effect of war on non-combatants who have always been the main sufferers. The basis of all subsequent discussion is found in the Mishnah and Talmud (Sotah 44b) as well as parallel statements in the Sifre. The discussion there distinguished between "commanded wars" (*Milhemet mitzvah*) which are obligatory (*hovah*) and "permitted wars" (*milhemet reshut*) which are not obligatory. All of this really centered around the divine command to conquer the land of Israel which had been promised to Abraham and his descendants. Conquering the land of Israel was a commanded war and therefore obligatory while the wars of David and later kings which expanded the territory were not obligatory even though they dealt with lands which could be included in the vague original divine promise and its later interpretations.² A section in Talmud Hor 12 a and b further described the role of the high priest in making the declaration of Deut 20:3-5.³

The exemptions from military service mentioned in Deuteronomy were understood to apply only to the latter kind of warfare. A further discussion of "discretionary war" appeared in Sanhedrin (M. San 2:4; 20a) which demanded that such wars needed the permission of the Great Sanhedrin composed of seventy-one members or perhaps could be simply undertaken by the king. The matter became further complicated by the discussion in Sanhedrin 16a and Berakhot 3b which stated that the king must also seek the advice of the *urim vetumin* – in other words divine approval given through the priests. These conditions made a "discretionary war" not even theoretically possible.

Considering the bulk of the Talmud, the limited discussion on these few pages demonstrates the scant halakhic interest in war during these centuries. There was no desire to elaborate on the biblical texts or to develop a full theological approach to warfare and all the problems which it brought.

Maimonides (1135–1204) used these discussions as the basis for his chapters on warfare in his *Mishneh Torah* (“Kings and War” - *Hilkhot Melakhim* 5:1 ff). It is the only discussion of war in the halakhic literature till recent Israeli efforts. It mixes theoretical and very practical considerations. The other halakhic codifications such as the *Tur* and *Shulhan Arukh* did not include warfare along with all discussion of the ancient Temple worship as they were purely theoretical and these codifiers concentrated on the practical. As Maimonides is the primary source for all later writers, I will summarize the contents of these brief chapters.

Maimonides removed the problems facing a *milhemet mitzvah* or *milhemet hovah* by declaring that the king could declare it and expanding his interpretation of a “commanded war” to include both expansive efforts and those which are purely defensive. Later commentaries continue this discussion, agreeing or disagreeing - which echoes debates about the problems of contemporary Israel.

Maimonides discussed limitations placed upon the ruler in his conduct of war (Kings and Wars 5:1-6). He could initiate such a war if it was a “commanded war” (*milhemet mitzvah*) without the permission of a court and force his people to support it, expropriate property, build roads, etc. This was not the case with an optional war for which he needed the support of the Sanhedrin. A religious war (*milhemet hovah*) involved the destruction of the seven nations who opposed Israel’s conquest (Deut 20:17) as well as their complete destruction; this included Amalek (Deut 25:19).

The next chapter (Kings and War 6) stated that a king could engage in an optional war only after making a peace offer to his opponent. If the terms were accepted and the people followed the seven Noahide commandments, paid tribute and accepted other conditions - some quite harsh, they would not be slain. These conditions did not apply to the conquest of the land of Israel, nor to Moab and Ammon.

When a city was besieged, the opportunity for flight had to be left (Nu 31:7) by surrounding it on only three of its four sides. The biblical injunction against cutting down fruit trees was to be observed and the water source also should not be damaged. All unnecessary

destruction of personal property, clothing or food was to be punished by the court.

The Jewish army could lay a siege three days before *shabbat* and could continue to fight even on *shabbat*. Those who fell in battle were to be buried on that spot. The soldiers in a military camp were permitted dubious food and were exempt from various ritual and *shabbat* regulations. The sanitation of the camp was to be observed (Deut 23:13 f.).

The role of the priest and the conditions of military service were also discussed (Kings and Wars Chapter 7), so that those who were excused (Deut 20:5-7) could leave. Afterwards the priest encouraged soldiers to fight well (Deut 20:3 ff.) or be dismissed so as not to affect their comrades. The legislation of those excused was expanded beyond the biblical statements to include talmudic discussions, so for instance, any kind of house, even a new barn exempted a soldier. On the other hand "faint hearted" was interpreted as physically unfit. These conditions only applied to "permissive wars" not to the conquest of the Land of Israel or defensive wars which were obligatory upon everyone. Fleeing soldiers were to have their legs broken.

In the last chapter of this section (Kings and Wars 8) Maimonides discussed conditions prevailing after victory. He permitted prohibited food including pork and wine. A soldier who engaged in sex with a captured woman was excused; it was understood as a concession to the evil impulse (*yetzer hara*). If he wished to marry her, she must convert without coercion and he had to wait three months before marrying her (Deut 21:11-12). If she did not convert, he had to free her.

The final chapters of this section (Kings and Wars 11 and 12) dealt with the Messianic Age of permanent peace. Maimonides did not deal with war in his philosophical work, *Moreh Nivukhim* (*Guide to the Perplexed*). When we look to Jewish philosophical writings from Philo (ca. 40) through Saadiah (882 – 942) to the twentieth century, we find nothing except the most incidental discussions of warfare.

There was no effort by any Jewish thinker to tame the effects of warfare or to place realistic restrictions on the warring parties. As Jews had no army or tradition of fighting and were not involved in military service or a party to such conflicts except incidentally, no theories developed. Even in periods of Jewish history when there was more contact with the surrounding intellectual world, the discussions of Christian and Islamic thinkers on warfare were not noticed by Jewish scholars. Wherever Jews lived, they prayed for their rulers and in times of war for the success of their armies. In modern times such prayers are found in all prayer books. Nowadays they often also include Israel and the Israeli conflicts.

Throughout this long history, no theories of pacifism were created.⁴ Although peace remains an ideal and continues to be mentioned often in public and private prayer as well as sermons. No theological, philosophical, or halakhic basis for pacifism developed. Within the Reform movements of the last two centuries some vague stirrings toward pacifism emerged but never with much of a following.

In the contemporary world efforts to create a Jewish system of military ethics continue to be made. Most try to base themselves on Maimonides as well as the various talmudic statements which dealt with self defense and the duty to save the life of one's neighbor. Those statements, however reflect non-military situations.⁵

As we approach this topic within this volume, we will see that warfare has remained on the periphery of Jewish religious discussion until the creation of the State of Israel. There the focus has been narrow and dealt with specific situations. There is no "just war" theory. As warfare affects Jews in the Diaspora and Israel we cannot avoid coming to terms with it or engaging in discussions with non-Jewish thinkers who have tried to work out a series of approaches through the centuries.

CHRISTIANITY ON WARFARE

As we view the issues of war in the context of two major world religions, the limits of Jewish discussions become even clearer. Islam and Christianity have spent considerable thought on the underlying questions as have other religions with which we have less contact.

The New Testament has some powerful statements which would oppose war. "All that take the sword shall perish with the sword" (Mt 26:52), "love your enemy" (Luke 6:28, 35). On the other hand military symbolism is used frequently "Do not think that I have come to bring peace to the world; no, I did not come to bring peace, but a sword" (Matt. 10:34). "He does not bear the sword in vain, for he is God's minister." (Rm 13:4) and military imagery "No man being a soldier of God, entangles himself in secular business" (2 Tim. 2:4).

CHURCH FATHERS

As early Christianity developed it had eschatological hopes and rejected any participation in war. The military imagery used by early Christians was understood as referring to the eschatological battles of the end of the world or inner battles of faith within an individual. Martyrdom found a foundation in the tale of the widow and her children of II Maccabees,⁶ so the war filled Books of the Maccabees were included in the canon. The Church Fathers, Tertullian and Origen opposed any participation in military forces. However, this changed after Christianity became the official religion of the Roman empire. The great Christian philosopher, Augustine (354–430), who based himself on Aristotle, could state "we make war so that we may live in peace."⁷ in his *City of God*, Augustine saw war as necessary to defend the "heavenly city." This was a "Just War." Furthermore wars were inevitable in the "earthly city" due to human failings. Just wars would eventually move humanity toward its peaceful destiny. Augustine and Ambrose of Milan (339–397) also called for military force against heretics.⁸

MIDDLE AGES AND RENAISSANCE

Efforts to halt irregular warfare which sprang up constantly led to the "Peace of God" introduced by bishop Guy of Anjou in 975 at the Council of Le Puy; it intended to help the peasantry and the Church. Another such effort called the "Truce of God" prohibited fighting on certain days and seasons, but this was never very successful.

The Christian theological position toward warfare became clearer through the systematic work of the Italian canon scholar,

Gratian in his *Decretum* (1140), a work which became basic to canon law. Through it the "Just War Theory" became understood as primarily based upon revealed law.⁹ His work listed protected classes of people which later included all non-combatants within Christendom except Jews and heretics.

Thomas Aquinas (1225–1274) considered wars justified when declared by the proper authority, when the cause was just, and when they advance the good. Wars which could be designated as holy became part of Christianity; the authority to declare such a war was vested in rulers and the pope. So Urban II proclaimed the First Crusade in 1095, as a holy war to defend the Church against Islam. Clergy were authorized to accompany the troops.

REFORMATION AND MODERN TIMES

The Reformation and the wars which it brought led to further definitions of "Just Wars" among Protestant thinkers, so Martin Luther (1483 – 1546) acknowledged the "Just War" theory as did John Calvin (1509 – 1564); both defended the rulers who acted upon it; the profession of soldier was considered legitimate despite all the bloodshed that it brought.¹⁰

The inhuman Spanish policies toward the American Indians aroused considerable anger and led to the idea of placing moral limits on warfare. This was worked out in a major way by Francisco de Vitoria (1483–1546). His writings and those of contemporaries led to efforts to limit the cruelties of warfare and conquest. In Holland Hugo Grotius (1583 – 1645) went further and rejected religious reasons for warfare and placed war into the context of natural law. He divided natural law into those which expressed the will of God and those which are the product of human reason. War may be a "necessary evil," but it had to be regulated. Moral laws applied to the state as well as individuals. Rational rather than religious impulses were to be determinative. Furthermore by emphasizing rules of warfare, a tradition of civilizing warfare began.¹¹ The enormous loss of life and destruction caused by the Thirty Year War encouraged this new line of reasoning. These thoughts were further developed by John Locke (1632 – 1704). As he lived through England's civil war, he understood war as part of the "fundamental law of Nature." That,

however, could be overcome by civil society and the civil contract through which government is created. This then defined the right to wage war.

In the more recent centuries although the "Just War" theories survive, more emphasis has been placed on rejecting war entirely. Reinhold Niebuhr (1892–1971), however opposed this as too idealistic as it meant shirking one's role in society and so supported World War II.¹² Pope Pious XII and Paul VI rejected aggressive war while John XXIII was a pacifist.

ISLAM ON WARFARE

Islam, from its very inception considered war as an instrument of its holy mission to convert all unbelievers. This is one of the meanings of the term *jihad*, which also includes the struggle for faith, good works, and proper speech. Mohamed participated in such wars with the unbelievers as recorded in the Qur'an (2:190-93; 4:91-93; 8:39-40; 9:13, 29 etc.) This warfare (*dar al-harb*) is obligatory and its goal is universal peace when Islam has prevailed religiously and politically. This became the ideal of Sunni Islam. While Shi'ite traditions limit *jihad* to defensive measures until the return of the hidden Imam. During such warfare, the fate of conquered people was clearly spelled out as for example by Abu Yusuf (798). Their lands and possession now belonged to the conqueror and they had a choice between conversion and death.¹³ Ibn Abi Zayd al-Qayrawani (996) went into additional detail as did others later.

MIDDLE AGES

The great philosopher, Averroes (1198) dealt with the legal obligation to participate in a war, the damage which may be afflicted on an enemy, and the possibility of a truce. He also discussed the aims of warfare and provided a masterful summary of legal obligations. Further details have been added through the centuries, so Ibn Taymiyya, whose writings are both general and legal dealt with specific situations.¹⁴ Al-Hilli (1277) dealt in great detail with the nature of tribute which may be imposed and the type of behavior expected from conquered subjects as well as the reasons for permitting a truce.¹⁵

The decision to wage war originally rested in the hands of the direct descendants of Muhammed. This worked until a rupture occurred after the murder of the third Caliph, 'Ali. The Battle of Karbala brought a final rupture with the Sunni following the caliph and the Shi'a waiting for the return of the hidden Imam. For the Sunnis religious and political authority are united; for Shi'ites it is divided; religious authority lies with the imam and only defensive *jihad* is possible.¹⁶

Originally decisions made about war and conquest were intended primarily to deal with polytheists; when many lands with monotheistic religions were rapidly conquered, concessions were made to people of the book, i.e. Jews, Christians, and Zoroastrians. Their followers were understood as monotheists of a less desirable form which could be tolerated in an otherwise all Islamic society. This also proved a useful way of integrating and using the skills of these minority groups, a necessity as the conquerors had not been prepared for the rapid conquest of so many lands. Such believers were relegated to second class citizenship and remitted a tributary tax for the privilege of existing under Islamic sovereignty.

Jihad carried missionary fervor from the Arabian desert into Asia and to the boundaries of Europe. It led to a millennia of bitter conflict in which Jews were generally bi-standers, suffered the outrages of war, and were then given subsidiary status in peace time. When the passions of *jihad* were exhausted, better conditions could emerge as in the Golden Age in Spain (1280–1340) and occasionally later. Within this framework war was, nevertheless, understood as basically evil. It was tolerated only in the service of bringing people to Islam. Holy war was one of the acts of piety enjoined upon Muslims; it followed faith, prayer, fasting, and pilgrimage, all essential acts of piety. War was permitted to be destructive force which included laying waste date palm groves, vineyards, etc.¹⁷

War as a holy enterprise whose goal was peace was justified by virtually all the great Islamic theologians, both Sunni and Shi'ite. As Islam is a judicial system different theories lead to different practical details. Religious and political leadership were theoretically united, however, practical adjustments were made throughout the centuries. The tensions created through differing decisions by various leaders

played an important role as most recently in the Iran vs. Iraq war as well as wars with the secular states of the West. The fervor of *jihad* has diminished in those Muslim countries which have become secularized.

The philosophical and theological approaches to warfare continue to be developed within various religious groups and sub-groups. Many Islamic leaders emphasize peaceful paths of bringing the world to Islam. A missionary zeal remains powerful among its followers. For some warfare remains very much on the Islamic agenda. On the other hand statements as the Cairo Declaration of Human Rights (1990) demonstrate some moderation, but only within the limits of Shariah.

I hope that the brief summaries provided in this introduction will place the place the essays in this volume into a broader context and lead to better understanding.

Notes

1. The German biblical scholar von Rad tried to organize the very different accounts into a system which is interesting, but problematic. D. Gerhard von Rad, *Der Heilige Krieg im alten Israel*, Goettingen, 1958.
2. Even a brief review of the boundaries presented in the various biblical books reveals enormous discrepancies. During my studies for the rabbinate at the Hebrew Union College I was almost tempted by a prize essay which demanded that these boundaries be investigated. A brief exploratory view of the topic revealed its complexity and I did not proceed further.
3. The following matters were found in other sections. Female prisoners could be married after following the biblical prescriptions (Jeb 48b). The prisoners of war became slaves (Git 38a). Booty taken (San 20b) was divided between the ruler and the soldiers. Soldiers were permitted to eat food found in the enemy's possession, even if it was normally ritually forbidden (Hul 17a).
4. Although there have been sermons on the subject; they dealt with a very specific conflict and did not attempt to formulate a broad Jewish approach to pacifism.

5. Nahum Rakover, *Otzar Hamishpat*, Jerusalem, Part 1, 1970, Part 2, 1990 for a detailed bibliography. *Tehumin* Vol. 4, 1983); Vol. 8 1988 with a series of essays; J. David Bleich, "Preemptive War in Jewish Tradition," *Contemporary Halakhic Problems* III, New York, 1989, "Nuclear Warfare," *Tradition*, Vol. 21:84 ff.; "Intafada and the Gulf War," *Contemporary Halakhic Problems* IV, 351 ff pp. 251 ff. Gerald Blidstein, "The Treatment of Hostile Civilian Populations," *Israel Studies* Vol. 1:2, 1996, pp. 27 ff.; Michael J. Broyde, "Military Ethics in Jewish Law," *Jewish Law Association Studies XIV* (ed. Elliot Dorff), London, 2007, pp. 1, ff.; Shlomo Goren, "Combat Morality and Halacha," *Crossroads*, 1987, Vol. 1:211 ff. 1987; *Meshiv Milkhamah*, Jerusalem, 1983-1994, 4 vols.
6. II Macc. 6:9 ff; Eleazar 6:18-31; Seven brothers and their mother 7:1-40.
7. Aristotle, *Politics*.
8. Ambrose, *On the Christian Faith*, 2.14. 136-143; Augustine, *Contra Faustum* 22.74-75.
9. Davis Brown, *The Sword, the Cross, and the Eagle*, New York, 2008.
10. Martin Luther, *Temporal Authority: To What Extent It Should be Obeyed*, 1523.
11. Hugo Grotius, *On the Law of War and Peace*, 1625.
12. Reinhold Niebuhr, "Must We Do Nothing?" *War in the Twentieth Century*, ed. Richard B. Miller, Louisville, 1992.
13. Abu Yusuf, "*Kitab al Kharaj*," *The Legacy of Jihad*, (ed. A. G. Bostom), Amherst, 2005, pp. 174 ff.
14. Ibid., 165 ff. Averroes, "*Bidayat al-Mudjtihad*;" Ibn Taymiyya, "*Al-Ssyasa ak-Shariyya*," *The Legacy of Jihad*, pp. 147 ff.
15. Al-Hilli, "*Shara'U 'L-Islam*," *The Legacy of Jihad*, pp 205 ff.
16. Majid Khadduri, "The Law of War: *The Legacy of Jihad*," (ed. E. G. Boston, pp. 305).
17. Ibid., p. 90.