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War and terrorism in Jewish law

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Pittsburgh, Pennsylvania, [2010]

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urn:nbn:de:kobv:517-vlib-10524

FIGHTING IN THE ISRAELI ARMY

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War marked the birth of Israel and fighting has been continuous through the decades. After two thousand years of self-imposed pacifism a vigorous militancy was born. It was necessity, not a fighting ideology which brought this about. Israel became an independent state on May 14, 1948 and established its military forces on the same day. David Ben-Gurion, the Defense minister formed this conscript army out of the paramilitary Hagganah, Palmach, and units of Irgun and Lehi. He had quietly developed a structure through 1947 as he knew that Arab attacks would come immediately, as they did. These defense forces actually began in 1907 as Bar Giora which, along with its successor organizations was intended to provide protection for the settlements against marauders. During World War I a Jewish Legion and a Zion Mule Corps assisted the British. A defense force was created in April 1920 during the first Arab riots; it was expanded in the 1936–1939 riots and eventually formed the basis of the Hagganah. The Israeli armed forces have fought a major war along with numerous small engagements in every decade since the creation of the State.

How was this new military entity to fit into the Jewish thought and the halakhah. No Jewish armed forces had existed for thousands of years and Jews fighting for other lands also represented a new experience as demonstrated in an earlier essay in this volume. The traditional halakhah provided virtually no guidance for the troops or the leadership of newly independent Israel.

If placed into a halalkhic setting, the entire struggle could be seen as *milhemet mitzvah* (mandatory commanded war), a struggle to defend the new state and its people – the land as provided by United Nations Resolution and expanded through the defeat of aggressive, attacking neighbors. When viewed through the lens of ancient biblical Israel the pattern, unfortunately has been very much the same. Although many of the modern settlers came from the sea, not from the desert, possession of the land was similarly contested and a cessation of hostilities never endured long.

The Messianic dream of a divinely established peaceful resolution to the struggles brought hope to war-torn biblical Israel. In the subsequent centuries when Jews lived in other lands or without freedom in the land of the Bible, it brought a vision of a wonderful future. This dream was sufficed during centuries of political powerlessness both within and outside the Land of Israel. Prophets and mystics hoped that God would fulfill the dream. Perhaps it would occur through a miraculous, sudden heavenly intervention in the affairs of the world. Others thought that a divine cataclysmic end of the world would destroy all evil and bring peace. A few understood themselves as Messianic ambassadors through whom the vision of a world perfectly at peace would be realized. All witnessed the horrors of warfare with helpless dismay. Each despaired of any human solution.

Contemporary Jews, however, refuse to despair; modern Jews, both religious and secular are less passive and want to take part in efforts toward peace and not simply wait. The creation of Israel along with two centuries of Jewish partnership in social revolutions in the diaspora testify to this optimistic impatience. Some have seen themselves as partners with God. This approach is less utopian and begins where we are; in the case of warfare, not the elimination of war, but mitigating its effects. Along with many others this has led to forming rules of warfare which attempt to control soldiers even in the midst of the fighting. Treaties among nations have limited the destructive effects of war and occupation on the general population. The mass slaughter of innocent bystanders around the world in the previous century have moved us in this direction. We know that civilian casualties in the wars of the twentieth and twenty-first centuries have vastly outnumbered military dead.

The Israeli armed forces had to begin anew, set standards, and provide guidelines. When viewed broadly, we see that they reflect the ethical basis of the halakhah. We can and should endorse the path set by Israel for its armed force. That path is simple and direct. As the millennia of traditional material was sparse, starting anew was appropriate.

The Israelis were creative just as traditional Judaism has always been inventive, as we have learned from modern historical

studies. Eventually those innovations were incorporated into the tradition and the talmudic scholars even discovered Scriptural bases for most of them. Modern Judaism has been equally inventive as the efforts of Reform and Conservative Judaism have demonstrated. These movements created new responses to unfulfilled needs of modern Jews. That is precisely what the Israeli armed forces have done.

Israel did not create entirely *de novo*, but followed other nations as it developed a code of conduct for its military forces. This code assures a level of humanity in the face of modern, impersonal combat. It forms the basis upon which a broader Jewish approach to warfare can be shaped. It does not ask some of the basic questions and leaves them to the philosophers while engaging the practical conduct of warfare.

This code of military conduct, similar to those of other nations is secular, but depends upon fundamental human feelings, often religious, to carry them into practice. That has been done successfully with the United States military code, which is also secular, but depends on military chaplains of all denominations to instil its ideas into the soldier's daily conduct. The code of military conduct of the State of Israel is a moral document and should take its place in Jewish ethical and halakhic discussions.

BACKGROUND

The Israeli military forces are the first Jewish military units under the command of a Jewish state in two thousand years. This military force differs in many ways from its distant predecessor. It is a conscript force with a small professional core, made up of men, who serve three years and women who serve twenty-one months with reserve training every year till the age of fifty-one. Emergency call-ups may and do occur at any time. The military services ultimately serve under the direction of the ministry created by the Parliament (*Kenesset*). The designation, Israeli Defense Forces (*Tzahal*) indicates its mission and limits.

Through the decades, these military forces have played a significant role in creating a cohesive nation. Israel formed itself

rapidly through blending its native born citizens with large numbers of immigrants from a wide range of countries and cultures. As each group's natural inclination was to remain separate, only the mandatory military service brought everyone together. This remains an important task in shaping a national identity.

Theoretically all young people serve in the military, however, men of the *haredi* (ultra Orthodox) community may defer military service while studying in a *yeshivah*; this has generally meant indefinitely and continues to be a source of great friction and animosity. This system of deferral was originally granted by Ben Gurion for what he understood to be a limited, small group, approximately four hundred men. The deferral now excludes tens of thousands, approximately 50,000, growing from about 7% of the eighteen-year-old cohort ten years ago, to some 14% today, and an anticipated 25% in twelve years. Women who claim a "religious life style" are also exempt from service. Efforts continue to be made to induce participation in military service through a special infantry unit, but with little effect. Similarly, efforts to recruit *haredi* men to alternative "National Service" have had meager results.

The *hesder* system has been more successful; it consists of a five year program with one year of religious studies, followed by two years of military service and two years of religious studies with the responsibility for active duty whenever emergencies demand it. This has, however, created a new challenge as shown by the recent debates whether rabbinic edicts supplant military commands, an intolerable situation for any army.¹

OBLIGATORY WAR *MILHEMET MITZVAH*

As the basic nature of the Israeli military forces is defensive, it fits into the classic definition of "mandatory war" (*mikhemet mitzvah*) performed at the command of the ruler; in our time a prime minister elected and beholden to the *knesset*. While the halakhic authorities debate this conclusion, most Israelis would agree with this classification although they may have little or no interest in a *halakhic* definition.

Milhemet reshut, a “permissive war” according to talmudic tradition required the assent of a court of twenty-three along with consultation of the *Urim* and *Tumim* has no modern parallel though the *knesset* could be considered as a substitute for a court of twenty-three. Maimonides following the Talmud, understood the limits of these abstract discussions.² The power of the ruler to defend the nation or to meet emergencies was unquestioned. All governments must possess room for discretion in their conduct especially of military and foreign affairs. *Milhemet reshut* provides that when redefined, if it is to serve a modern useful purpose.

It is in the category of *milhemet reshut* that has brought problems to the Israeli Defense Forces. Soldiers who served without protest in the defense of Israel, were unwilling to engage, in what they considered an offensive war, as with Lebanon in 2003. This continues to be debated in the *hesder yeshivot*, which may have unacceptable results. The Israeli soldier, like all citizens, of course has the opportunity to express his views through the ballot, but not on the field of combat.

MILITARY LAW AND CONDUCT

Israeli military law has largely followed international codes of conduct which have been incorporated into its system. These have been integrated along with specific Israeli legislation and Jewish traditions as interpreted by the Israeli courts and the military tribunals.

Jewish tradition provides virtually no details except the conscription statements of Deuteronomy along with the few others. These became the object of academic discourses unrelated to real life situations.³ This meant that every aspect of the soldier’s governance had to be created anew. Some standards for religious ritual and relationships with fellow soldiers have been developed by Israeli military chaplains under the guidance of Rabbi Goren, the chief chaplain. These provide guidance, not governance for the individual’s personal life. Clear and direct statements which deal with conduct during hostilities, the treatment of enemy personnel, dealing with civilians in hostile territories, etc. were needed and provided by the general code of conduct.

The code which was developed defines three core values for all IDF soldiers, as well as ten secondary values (the first is most important, and the others are sorted in Hebrew alphabetical order):

CORE VALUES

Defense of the State, its Citizens and its Residents – "The IDF's goal is to defend the existence of the State of Israel, its independence and the security of the citizens and residents of the state."

Love of the Homeland and Loyalty to the Country – "At the core of service in the IDF stand the love of the homeland and the commitment and devotion to the State of Israel—a democratic state that serves as a national home for the Jewish People – its citizens and residents."

Human Dignity – "The IDF and its soldiers are obligated to protect human dignity. Every human being is of value regardless of his or her origin, religion, nationality, gender, status or position."

OTHER VALUES

Tenacity of Purpose in Performing Missions and Drive to Victory
"The IDF servicemen and women will fight and conduct themselves with courage in the face of all dangers and obstacles; They will persevere in their missions resolutely and thoughtfully even to the point of endangering their lives."

Responsibility – "The IDF servicemen or women will see themselves as active participants in the defense of the state, its citizens and residents. They will carry out their duties at all times with initiative, involvement and diligence with common sense and within the framework of their authority, while prepared to bear responsibility for their conduct."

Credibility – "The IDF servicemen and women shall present things objectively, completely and precisely, in planning, performing and reporting. They will act in such a manner that their peers and commanders can rely upon them in performing their tasks."

Personal Example – "The IDF servicemen and women will comport

themselves as required of them, and will demand of themselves as they demand of others, out of recognition of their ability and responsibility within the military and without to serve as a deserving role model."

Human Life – "The IDF servicemen and women will act in a judicious and safe manner in all they do, out of recognition of the supreme value of human life. During combat they will endanger themselves and their comrades only to the extent required to carry out their mission."

Purity of Arms – "The soldier shall make use of his weaponry and power only for the fulfillment of the mission and solely to the extent required; he will maintain his humanity even in combat. The soldier shall not employ his weaponry and power in order to harm non-combatants or prisoners of war, and shall do all he can to avoid harming their lives, body, honor and property."

Professionalism – "The IDF servicemen and women will acquire the professional knowledge and skills required to perform their tasks, and will implement them while striving continuously to perfect their personal and collective achievements."

Discipline – "The IDF servicemen and women will strive to the best of their ability to fully and successfully complete all that is required of them according to orders and their spirit. IDF soldiers will be meticulous in giving only lawful orders, and shall refrain from obeying blatantly illegal orders."

Comradeship – "The IDF servicemen and women will act out of fraternity and devotion to their comrades, and will always go to their assistance when they need their help or depend on them, despite any danger or difficulty, even to the point of risking their lives."

Sense of Mission – "The IDF soldiers view their service in the IDF as a mission; They will be ready to give their all in order to defend the state, its citizens and residents. This is due to the fact that they are representatives of the IDF who act on the basis and in the framework of the authority given to them in accordance with IDF orders."⁴

As the military forces primarily deal with Palestinians, a special section of the code treat this matter.

CODE OF CONDUCT AGAINST MILITANTS AND PALESTINIAN CIVILIANS

In 2004 a team of professors, commanders and former judges, led by the holder of the Ethics chair at Tel Aviv University, Professor Asa Kasher, developed a code of conduct which emphasizes the right behavior in low intensity warfare against terrorists, where soldiers must operate within a civilian population. Reserve units and regular units alike are taught the following eleven rules of conduct, which are an addition to the more general *IDF Spirit*:

1. Military action can be taken only against military targets.
2. The use of force must be proportional.
3. Soldiers may only use weaponry they were issued by the IDF.
4. Anyone who surrenders cannot be attacked.
5. Only those who are properly trained can interrogate prisoners.
6. Soldiers must accord dignity and respect to the Palestinian population and those arrested.
7. Soldiers must give appropriate medical care, when conditions allow, to oneself and one's enemy.
8. Pillaging is absolutely and totally illegal.
9. Soldiers must show proper respect for religious and cultural sites and artifacts.
10. Soldiers must protect international aid workers, including their property and vehicles.
11. Soldiers must report all violations of this code.⁵

These codes of military conduct and their specific definitions generally follow those of other lands, adjusted for Israeli conditions. They provide the basis for conduct for twenty-first century warfare. They reflect broad international consensus. Rabbinic sources have been specifically excluded to avoid the internal religious conflicts of modern Israel.

This code provides a basis for proper conduct in practical field situations. It is intended for all Israeli soldiers no matter what their religious inclinations. Some will view it through the lens of the halakhah. Others may want to go further in the spirit of the ancient prophets. Still others will see it as a secular document of their society. It represents a voice of modern variegated Judaism.

This code moves in the appropriate direction and fills a vacuum in the traditional halakhah. The standards set by the IDF are based on general assumptions and fit into the Jewish framework. They are practical, enforceable and represent standards which parallel those of many other nations. The major distinction is that they continue to be tested on the battlefield as the Israeli Defense Forces have been more or less in continuous combat for seven decades. The standards may not reach the highest ideals, but they are adequate and as all standards need vigilant enforcement. We may well feel that they need modification and that will undoubtedly occur as new conditions are faced and as experience teaches, but they represent a good faith beginning.

The Israeli legislation and policies of the occupation and the numerous issues surrounding the West Bank lie beyond the scope of this paper.

The IDF represents a practical expression of Israeli defense policy. We would not expect it to provide a broader, general philosophy of war and peace. Such considerations involve the ultimate aims of all wars, the limits of defense, the conditions of pre-emptive war, and related matters. Each of these and related matters are basic to an understanding of war in an Israeli Jewish context.

The state of continual warfare and the need for defense as well as constant vigilance has muted discussions of the broader issues of

war and peace. They remain difficult to carry out in Israel, a land which has not known enough peace to be able to step away from the practical, immediate considerations. The ideal of peace remains, but so does warfare. Israel along with other nations which are part of the United Nations must continually seek ways of settling disputes outside the realm of active warfare.

Notes

1. Among other sources, some of those on the internet are most useful. My thanks to my friend and colleague, Uri Regev for leading me to these sources. [http://www.jpost.com/servlet/Satellite?cid=1261364566025&pagename=JPost/JPArticle/ShowFull;RLINK"http://www.ynetnews.com/articles/0,7340,L-3819361,00.html"](http://www.jpost.com/servlet/Satellite?cid=1261364566025&pagename=JPost/JPArticle/ShowFull;RLINK) <http://www.ynetnews.com/articles/0,7340,L-3819361,00.html>
2. Maimonides, in accordance with the Talmud gave extra-legal judicial authority to the courts (Yev 90b; *Mishneh Torah*, Mamrim 2:4) in unusual cases and to the ruler (San 49a 57a; *Mishneh Torah*, San 57a; Melakhim 3:8 and 10; 9:14). http://www.yutorah.org/_shurim/Succot-To-Go%205767.pdf – towards the end of the document. <http://www.jlaw.com/Articles/war1.html>
3. See the Introduction to this volume for a summary.
4. Wikipedia "Ethics - the IDF Spirit. IDF Spokesperson's Unit (<http://dover.odf.il/IDF/English/about/doctrine/ethics.htm>)" Along with other public sources have been used for the English translations.
5. Wikipedia, p. 13. No attempt has been made to list the numerous books, essays, and articles which have dealt with the legal discussions surrounding the occupation nor the restrictions placed upon the Palestinians.