

12 The law of obligatory war and Israeli reality

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Introduction: the definition of obligatory war

The classic Jewish texts on war were to a large degree formulated and codified in a time in which the Jewish people had no political independence and hence no ability to wage war.¹ To a great extent, therefore, the discussions of authorities on Jewish Law (*halakha*) regarding the wars of the State of Israel are the first application of those laws to the "real world."² This paper will show how the reality of the State influenced the interpretation of the classic categories which govern the Jewish laws of war. To the extent that this is true, it is an illustration of a development of *halakha* as a result of confrontation with new realities, in this case regarding public law.³

Defining a situation as subject to the laws of war (as opposed to a situation where the individual has the right to use force, such as saving a person from a pursuer) has a number of halakhic implications. First and foremost, such a definition empowers the legitimate political authority⁴ to draft soldiers, whereas if the situation is not defined as warfare, an individual cannot be coerced to risk his life to save a third person (or people) in a life-endangering situation.⁵ In addition, the blanket permit to wage war on the Sabbath (which entails activities otherwise forbidden) is more far-reaching than that which is extended to other life-saving actions.⁶

Talmudic and medieval *halakha* distinguished between obligatory war (*milhemet mitziva*) which does not require approval by the Sanhedrin, and optional, or authorized,⁷ war (*milhemet be'arstus*) which does (See Mishnah *Sotah* 8:7; *Sanhedrin* 1:5 and 2:4). Without authorization, engaging in a war which is not obligatory is considered a prohibited taking of human life.⁸

The category of the "optional war" has engendered analysis in some recent writings.⁹ Although the Talmud (BT *Sanhedrin* 16a) seems to suggest that economic need alone is sufficient motivation to initiate such a war, and Maimonides even categorizes it as a war waged by the king "to extend the borders of Israel and to enhance his greatness and prestige," Blydenstein and others have noted other Maimonidean texts which suggest that ultimately religious motivation is the only legitimate basis for a war waged by a Jewish king.¹⁰ Other rabbinic authorities, without ascribing such restrictions, have suggested that there are other limitations

on the possibility to declare such a war. Regardless of how the justifications for waging "optional war" are understood, the need for the consent of the Sanhedrin and the recourse to the oracle of *Urim ve-Tumim* make this question irrelevant to contemporary Jewish law. Any halakhic justification of war in the present day and age must be grounded in the definitions of obligatory war. Halakhic pronouncements relating to the wars of the State of Israel must therefore conform to the definitions of such wars.¹¹

What, in fact, are obligatory wars? The Code of Maimonides lists three types: the war against the seven nations that inhabited Canaan at the time of the Exodus, the war against the people of Amalek and a war "to deliver Israel from the enemy attacking them."¹² The first two types are wars are connected to specific commandments of the Torah,¹³ which are clearly not applicable today.¹⁴ This leaves us with the third category, which seems to be based on an extension of the principle of self-defense.¹⁵ The contemporary reality of the State of Israel has engendered situations which required elucidation and elaboration of this legal principle.

The War of Independence

The war known to Israelis as the War of Independence or the War of Liberation and to others as the War of 1948 is usually divided by historians into two stages. The first ensued after UN General Assembly Resolution 181 (which called for the partition of Palestine/Eretz Israel into a Jewish state and an Arab State) was passed on 29 November 1947. This was a civil war between the local Jewish and Arab communities as a result of Arab rejection of partition. After the termination of the British Mandate and the declaration of the State of Israel on 15 May 1948 the war expanded in the wake of an invasion by neighboring Arab states. The first stage of the war brought about what are probably the first instances of recourse to the laws of war in halakhic decisions.

In a responsum of Chief Rabbi Isaac Herzog to Rabbi Werner of Tiberias written before April 1948, he related to the defense of the isolated Jewish neighborhood of Kiryat Shmuel.¹⁶ First he analyzed the situation on the basis of the laws of individual self defense and concluded that if military experts think that there is an immediate danger of an attack it is permitted, if necessary, to build fortifications on the Sabbath. As an additional consideration Rabbi Herzog added that he saw the situation as war, in which it would be permitted even to initiate hostilities on Sabbath.

Why should this situation be defined as an obligatory war?

... [T]he UN has given us part of the Land of Israel, and if we do not defend it properly we will lose the opportunity and will not have a place of refuge for our brethren in the Diaspora in case of distress, God forbid, (we have had enough in our recent experience, which should be sufficient for the wise). In addition, if this opportunity is missed it will (God forbid) cause the multitudes of Israel to lose hope and in the course of time this will cause most of our people to leave our holy religion and to assimilate...¹⁷

The definition of the situation as obligatory war was dealt with again by Rabbi Herzog in a responsum dated 25 Adar Bet 5708 (5 April 1948) regarding military activity on the Sabbath to members of the Ezra Orthodox youth group in Jerusalem. The rabbi explained that if the situation is defined in the context of the regular laws of preservation of life, then there may be limits on the possibility of initiating hostilities on the Sabbath, whereas if this was an obligatory war of self-defense, no such limits would be in place. Rather than perceiving such initiation as preemption which would classify it as an "optional" war (and would be prohibited in the absence of a Sanhedrin), it was part of a war of self-defense because "they have already attacked us in order to destroy us and expel us from our holy land."¹⁸

Commenting on the second responsum (dated 27 Adar Sheini [7 April] two days after the letter was sent), Rabbi Meshulam Roth questioned the applicability of the category of obligatory war to offensive operations.¹⁹ He also raised doubts if the battles could be seen as obligatory according to the view of Nachmanides, who defined conquest of the land of Israel as obligatory war. This, because it was not clear that territory conquered beyond the borders of the UN partition plan would remain part of the Jewish state. Because of these reservations, Rabbi Roth concluded that it was not halakhically legitimate to draft soldiers for combat duty and that conscripts could only be assigned non-combat roles.²⁰

Rabbi Herzog responded that the notion of war as conquest was not his major consideration but rather that of the war of self-defense, which justifies conscription. Even regarding Jerusalem (which was not in the territory of the Jewish state according to the UN resolution), the goal of the Arabs was to cause the Jews to flee from the city and the aim of the battle against them is to insure a continued Jewish presence there, "which is akin to conquest of the land." This, says Rabbi Herzog, is necessary in order to insure the very existence of Judaism, adding that "a word to the wise is sufficient."²¹ In an article on the halakhic status of the War of Independence (published posthumously in 1983) Rabbi Herzog reiterated this understanding:

... I say that this war is a war of self-defense ... for Maimonides does not stipulate that it is only called an obligatory war if the enemy has come to destroy us, but if they wish to destroy or to expel us, it is not the case. It is indeed an obligatory war, because the Arab inhabitants of the land and their allies ... are attacking us, after we agreed to partition and did not attempt to conquer the land from them. Their intent is not to leave us a remnant in the land and instead to expel or destroy us ...

Note that we are not dealing with this from the perspective of the requirement incumbent on all to save Jewish lives. From that point of view, if the enemy tells us that if we surrender to them we will not be harmed, the requirement to [fight in order to] save Jewish lives is not applicable. But when we are in the land of Israel after we have been permitted to establish our own state, then defending it is obligatory war. However, if they do not attack us and we nevertheless wish to extend our borders, then it has the status of an optional war.

Besides all we have said, this is clearly saving of Israel from an enemy, for there are hundreds of thousands of homeless refugees whose lives are in danger ... this must be seen in the light of the obligation on the people of Israel ... to fight so that the gates of the land will be open in order to save their brethren ... In addition, this war is also for the future, for we know that there is a danger that there again could be an attempt to destroy part of the Jewish people, and if the Land of Israel was accessible during the destruction of that evil man, hundreds of thousands would be saved ... [W]e already know from experience that there is a clear danger of this, and especially in the Middle East, where it is clear that if, God forbid, the Arabs take over all the Land of Israel, they will attack all Jews under their rule ...²²

From Rabbi Herzog's justification it is clear that categorizing the situation as obligatory war was not self-evident. Why was this the case?

First, there probably was understandable reticence from using new halakhic tools. For Talmudists trained in a world without a Jewish state, when the Maimonidean depictions of war were thought of belonging to an undetermined (and perhaps eschatological) future, much like the laws of the Temple, the introduction of the halakhic category of war was a revolution in Jewish legal discourse and required specific justification.

Second, perceiving the situation as war was difficult not only for rabbis but for the Jewish population in general. A common perception saw the conflict as a continuation of the "evens" of the Arab rebellion of the 1930s and not in terms of a full scale war. David Ben-Gurion was one of the few who realized that this would be different.²³

There was a third difficulty in defining the situation as one of a war of self-defense, especially before 15 May 1948. The claim could be made that escalation of "disturbances" to war would be prevented if the Zionists would only forego the declaration of the state. This argument was made both by elements such as *Hadass*, which espoused a bi-national state²⁴ as well as by the extreme wing of the ultra-Orthodox anti-Zionists, known as *Natorei Karra*.²⁵ In order for a halakhist to justify the war, the concept of self-defense had to be refined and expanded. Rabbi Herzog used two arguments in this context. He first established that UN resolution 181 had "given" the Jews a state, and thus responding to violence aimed at preventing its establishment was self-defense. Second, the condition of the Jewish people, especially after the Holocaust, made the establishment of the state a *sine qua non* for the continued existence of the Jewish people. This was clearly an extension of the classic category of "self-defense" – as it were, Israel has to defend itself not only from the enemies at hand but from those that will inevitably arise, as can be learned from millennia of Jewish history.

Similar arguments appear in another contemporary document, an open letter attributed to Rabbi S.Y. Zevin calling on *yeshiva* students to enlist in the army.²⁶ Rabbi Zevin called on the students to leave their studies and participate in an obligatory war of self-defense. However, he added a stipulation:

I understand the spirit of the Natorei Karta who oppose a Jewish state and as a result consider the war as unnecessary. [They say that w]e must capitulate and that is the end of it . . . Fortunately, only a handful of people think so. All of the Jewish people . . . regardless of affiliation endorse and participate in this war of defense. All understand that there will be no prospect for the future of the Jewish community in the Land of Israel and for the remnants of the Jewish people in the Diaspora without an independent state in our land, which will absorb our brethren who are still bleeding and wandering around the nations . . . God himself knows . . . that we are not the attackers and we wish not war, we are not looking forward to battle and bloodshed . . .

Rabbi Zevin agrees that defining the situation as obligatory war is dependent on the assessment of the situation, which is influenced by larger considerations. He shares with Rabbi Herzog the definition of self defense as a war to defend the future of the Jewish people, even if at the moment the danger to Jewish lives could be deferred.

Rabbis Herzog and Zevin pointed to the UN resolution as the starting point of the war – the Arab rejection of partition defined the situation as one of self defense. However, for Rabbi Zvi Yehudah Kook the UN decision was not an event to be celebrated – indeed, the right to war was based on earlier events. In a celebrated speech given in May 1967, he recalled his reaction to the UN resolution:

... Nineteen years ago, in that famous evening in which we received the news of the agreement of the leaders of the nations for the establishment of the State of Israel, when everyone went to dance in the streets in rejoicing, I could not join the celebration. I sat alone in silence and could not resign myself to the awful news of the partition . . .²⁷

For him, a resolution dividing the sacred Land of Israel could not be the legal basis for the right of the Jews to their State. In an essay published shortly after the declaration of the state which called for conscription to the army as a religious obligation,²⁸ he noted two reasons for this imperative. First, the command to save life even at the risk of endangering one's own life is even more binding when the existence of the Jewish people in their land is at stake. A second claim is based on the Nachmanidean obligation to conquer the land. For Rabbi Kook, this obligation remained unfulfilled for hundreds of years because of the metaphorical "walls" preventing settlement of the land which were "felled" by "the public announcement of kings and ministers acknowledging our divine right over the land and the establishment of a mandate in order to prepare the way for our return [to the land] beginning with the formation of our army brigade at the end of the first world war . . ." The basis for the legitimacy of the state, therefore, was the Balfour Declaration and the San Remo Conference of 1920 which recognized "the historical connection of the Jewish people with Palestine." The UN resolution of November 1947 is left unmentioned in Rabbi Kook's description, as he was a

consistent and vocal opponent of partition. Therefore the war of 1948 was an obligatory war not because it defended the entity created by partition but because it implemented the commandment of the Torah to conquer the land. This was not the mainstream approach at the time, but it would become prominent as a result of circumstances twenty years hence.

Retaliatory raids as obligatory war

The question of the definition and extent of obligatory war is also treated in a well-known halakhic essay on the ethics of war by Rabbi Shaul Yisraeli, which was originally entitled "The Qibya Incident in the Light of the Halakha."²⁹ The attack by IDF units on 14–15 October 1953 on the village of Qibya just over the Jordanian border was retaliation for a terrorist attack at the Israeli village of Yehud in which a mother and two of her children were killed. The IDF operation left some 60 civilians including women and children dead.³⁰

Rabbi Yisraeli's essay begins with a note:

In Heshvan 5714 the criminal gangs carried out a brutal murder . . . It seemed that the gangs were organized and supported by the Arab population across the border . . . The attacked settlement decided not to continue to refrain from reacting before there would be more casualties, and one might attacked the Arab village Qibya, from where there was proof that the gangs received support of the local populace. The Arab village suffered casualties, including children and women. The "world" which had been indifferent to the murder of Jews, was "stunned" by the action at Qibya which was only retaliation, stemming from the anger of the border settlements and the inhabitants of the land in general. We are aware of the "morality" which typifies the behavior of the states which condemn us, we are not dependent on their protestations, and we will not learn from them values of justice. However, it is incumbent on us to clarify the proper response according to the Torah . . .³¹

The denial that the raid was carried out by the IDF is a repetition of the official version formulated by the Israeli Cabinet to try to ward off condemnation of Israel.³² It is clear that many, if not all Israelis realized that this was an untruth, even if they were not aware of all the details of the military action.³³

Rabbi Yisraeli's article has been often quoted and discussed in halakhic discussions of the status of non-combatants.³⁴ I wish to focus on his treatment of the categories of obligatory and optional wars.

As already pointed out by Edrei,³⁵ the essay begins with an extensive discussion of the laws of the pursuer (*rodef*) which apply to all individuals and only then enters into an analysis of the situation based on the laws of war. Interestingly enough, the rabbi does not raise one obvious possibility of defining the situation as one of obligatory war. The "border wars" of 1949–56 could easily be seen as the continuation of the War of Independence and any military activity could be seen as part of the larger war, which had already been established as a war of

self-defense.³⁶ Perhaps such an approach would not be appropriate in light of the Israeli view that the 1949 Armistice signified the end of the war (as opposed to the Arab claim that the war was continuous, with temporary pauses in belligerent actions).³⁷ Instead, the analysis of Rabbi Yisraeli offers three possibilities in the context of the definition of war: an innovative one based on the category of optional war, one expanding the traditional definition of self-defense to include preemption, and one based on a novel definition of obligatory war.

The first innovation is the suggestion that the very possibility for the nations of the world to legitimately wage war and to engage in the taking of human life is grounded in the notion of universal consent, from which we may conclude that forms of combat that are accepted within international norms are also permitted for a Jewish army, even when not included in the formal categories of obligatory war.

As long as the practice of war is accepted among the nations, it is not prohibited by Jewish law, and consequently an optional war is permitted also for Israel.³⁸ Therefore the conclusion is that even in our days it is possible to engage in belligerent action . . . as long as this is the common practice among the nations. Therefore it must be evaluated regarding the case at hand (that of Qibya and similar cases) if such a response is common and accepted among the nations, it should be seen as tacit agreement on the part of all concerned, and therefore it is not to be seen as prohibited.³⁹

The implementation of this definition is problematic. Edeci and Brody see the passage as denying the very existence of unique Jewish laws of war, and claim that a halakhic army is subject only to the norms of international law (Brody even suggesting that this explains the lack of discussions on military ethics in halakhic literature).⁴⁰ However, Blidstein and Gutel understand that the criterion would not be the dicta of international law, but rather the standards observed in practice by the international community.⁴¹ I would add that the attitude to the international community in the preface to the essay would tend to support the second reading. In addition, the claim that Rabbi Yisraeli denies categorically the existence of a halakhic approach to warfare is not supported by the rest of the essay as discussed below, which itself suggests that there are halakhic categories to be applied, whether or not they are congruent with international norms.⁴²

After raising the possibility of justifying the activity at Qibya on the basis of optional war, Rabbi Yisraeli offers another possible justification: defining the action as self-defense.⁴³ He discusses the attack in the context of preemption and says that even those rabbinic sources which do not include preemptive war as obligatory would certainly agree in this case, in which the enemy has already attacked and is simply enjoying a respite before the next attack.

However, Rabbi Yisraeli seems to think that this claim is not sufficiently substantiated to justify Qibya, and therefore he suggests another halakhic option. He introduces a radical interpretation of obligatory war, one based on revenge.

The justification for this type of war is derived from the commandment of the Torah to take revenge against Midian. Numbers 31:1-18 relates that Moses was commanded by God to take revenge on the Midianites and rebuked the commanders of the army who spared the women and children. Rabbi Yisraeli quotes the comment of Nahmanides on Numbers 31:6, which reconstructs a conversation between Moses and Pinehas, in which the latter thought that killing the males alone was in line with the God's commandments, while Moses was angry because there was a need to kill the women and children in order "to complete the retribution." Rabbi Yisraeli suggested that the war against the Midianites may be seen as establishing a different paradigm of obligatory war. This reading, which allows killing all of the enemy population, is clearly a broad extension of the war of self defense. Defining the war as one of revenge makes it possible to include intentional killing of noncombatants. Rabbi Yisraeli refrained from extrapolating a blanket permit for intentional killing of children (and added that there was no need to take care that the only casualties would be combatants), while he saw no reason to exclude the killing of adults – as this war is punitive and not limited to the parameters of self defense.⁴⁴

This last speculation illustrates how Rabbi Yisraeli was willing to entertain different and innovative interpretations of the halakhic definitions of war in order to justify the action at Qibya, which was clearly a case of warfare not contemplated in the classic sources.⁴⁵

After the Six Day War – the return of the war of conquest⁴⁶

The question of the obligatory war reappeared in halakhic writing regarding the debate within Israel regarding the status of the territories taken by Israel in 1967. Much of the internal Israeli polemic on the future of the territories has revolved around the question of whether withdrawal would help achieve peace or would conversely provoke further violence. If it could be established convincingly that relinquishing the territories would avoid war and thus prevent loss of life, it would seem that halakhah would mandate such a move.⁴⁷ In contrast to this position, some of the religious opponents of withdrawal have claimed that Jewish law categorically prohibits withdrawal from territory even if such a move would result in preservation of life.⁴⁸ This position is based on extending the definition of obligatory war to include wars to conquer the Land of Israel.

We have already mentioned that Rabbi Z.Y. Kook had defined the 1948 war as obligatory because of the command to conquer the land as expressed by Nahmanides.⁴⁹ Rabbi Herzog saw this as a legally inferior claim and preferred to speak of the war in terms of self defense. To the best of my knowledge in the years 1949-67 no one suggested that Israel was halakhically obligated to initiate a war of conquest. However, after 1967 the case was increasingly made if there is an obligation to wage war, it trumps the halakhic rule which gives the preservation of life precedence over any halakhic obligation. Therefore, even if refusal to relinquish territory causes loss of life, the obligatory war of conquest

prohibits such a withdrawal. An extensive exposition of this position was first made by Rabbi Y.M. Ehrenberg in a response to the National Religious Party ideologist S.Z. Shragai and has subsequently been explicated by many Religious Zionist rabbinic leaders.⁵⁰ Opponents of this ruling (which include proponents of withdrawal in addition to those opposed but on other grounds) have criticized this use of Nahmanides, whether challenging the interpretation of the opinion of the sage, or by suggesting that his opinion is not normative *halakha*.⁵¹

In fact, the halakhic positions about the status of a war of conquest as an obligatory war usually dovetail with philosophical and religious understandings regarding the Land of Israel and the State of Israel. As is well known, the disciples of Rabbi Z.Y. Kook, who emphasized the sanctity and integrity of the land as part of the messianic aspect of the Zionist enterprise, have been in the forefront of opposition to territorial concessions. Many of them justify their unqualified opposition to territorial concessions on a particular interpretation of obligatory war. Here again we see how halakhic decisions reflect an interplay of extralegal considerations and legal formulations. This phenomenon is especially fascinating in the case of obligatory war, a legal category which has emerged from obscurity to the forefront of public discourse.

Notes

1. For an example, the reference to the question of preemptive war in the Talmud and in subsequent rabbinic literature did not have any practical application at the time. For a summary of the literature on this topic, almost all of which dates before the establishment of the State of Israel see J.D. Bleich, "Preemptive War in Jewish Law," *Contemporary Halakhic Problems* vol. 3, New York: Ktav, 1989, pp. 251–292. In the subsequent notes, I have attempted to refer to writings in English, when available.
2. See S.A. Cohen, "The Quest for a Corpus of Jewish Military Ethics in Modern Israel," *Journal of Israeli History* 26, 2007, pp. 35–66.
3. For a classic example of a case study of such a dynamic regarding ritual law see J. Katz, *The 'Shabbos Gop': A Study in Halakhic Flexibility*, trans. Y. Lerner, Philadelphia: Jewish Publication Society, 1989.
4. The traditional sources all refer to a king as the legal authority. However, those halakhists who have attempted to apply the sources to modern reality have determined that in the absence of a king, the power to wage war reverts to the people, and any ruler accepted by popular consent has the halakhic status of a king. The *locus classicus* for this is Rabbi A.I.H. Kook, *Mishpat Cohen*, Jerusalem: Mossad Harav Kook, 1985, p. 337 (Hebrew).
5. See G.B. Levey, "Judaism and the Obligation to Die for the State," in M. Walzer (Ed.), *Law, Politics, and Morality in Judaism*, Princeton: Princeton University Press, 2006, pp. 182–208.
6. For a list of other halakhic implications of regarding a specific situation as war see Y. Kautzman, *The Army According to Halakha: Laws of War and of the Army*, Jerusalem: Kol Mevasser, 1994, pp. 2–5 (Hebrew).
7. This second definition is that defended by M. Brody, *The Bounds of Wartime Military Conduct in Jewish Law: An Explanatory Conception*, Herbert Berman Memorial Lecture 2004, Flushing, NY: Center for Jewish Studies, Queens College, CUNY, 2006, p. 14, n. 23.
8. See A. Ravitzky "Prohibited Wars" in Walzer (Ed.), *Law, Politics and Morality in Judaism*, pp. 173–174.

9. See N. Zohar, "Morality and War: A Critique of Bleich's Oracular Halakha," in D.H. Frank (Ed.), *Commandment and Community: New Essays in Jewish Legal and Political Philosophy*, Albany: SUNY Press, 1995, pp. 245–258 and the subsequent exchange with Bleich on pp. 259–267 and 269–273; idem, "Can a War Be Morally 'Optional'?" *Journal of Political Philosophy* 4, 1996, pp. 229–241; M. Walzer, "Commanded and Permitted Wars," in *Law, Politics and Morality in Judaism*, pp. 149–168.
10. *The Code of Maimonides, Book 14, the Book of Judges*, trans. A. Hershman, New Haven: Yale University Press, 1949, Kings and Wars, 5.1 p. 217. G.J. Bidstein, *Political Concepts in Maimonidean Halakha*, Ramat Gan: Bar-Ilan University Press, 2001, pp. 230–245 (Hebrew); While Bidstein describes the tension between the legal approach which offers mundane justifications for war and the ideal approach which emphasizes its spiritual goals (p. 236), Rabbi Y. Amital decisively claimed that "according to Maimonides all wars . . . have as their major goal the struggle for promoting the belief in the unity of God, to break the arms of the wicked and to fill the world with righteousness." See Y. Amital, "The Wars of Israel According to Maimonides," *Tehumin* 5, 1987, 461 (Hebrew). See also Ravitzky, "Prohibited Wars," pp. 172–173. I thank Professor Josef Stern of the University of Chicago for sharing a draft of his paper on "Maimonides and War."
11. The interface of politics and the definition of obligatory war in contemporary *halakha* has been noted by A. Klapper, "Warfare, Ethics and Jewish Law," *Mesorot: A Forum of Modern Orthodox Discourse* 6, 2006, p. 5, n.22–23. However, his statement there regarding the Sanhedrin is not accepted by all authorities.
12. *The Code of Maimonides, Book 14, the Book of Judges, Kings and Wars* 5.1. This is the translation of A. Hershman, New Haven: Yale University Press, 1949, which in some matters regarding war (such as translating *milhamet mitzva* as "a war for a religious cause") are unsatisfactory.
13. The commandments to wage war against the seven nations and against Amalek appear as positive commandments 187 and 188 in the enumeration of Maimonides. See *The Commandments: Sefer Ha-Mitzvot of Maimonides: Volume One: The Positive Commandments*, trans. C.B. Chavel, London and New York: Soncino, 1967, pp. 200–203.
14. There have been claims that implacable enemies of the Jewish people are equivalent to Amalek and that contemporary wars against them are equivalent to the war against that nation, including the Torah commandment to kill all members of that nation. It has been suggested in the name of Rabbi Moshe Soloveitchik that Maimonides did not specify that the people of Amalek no longer exist (as he did regarding the seven nations), because the category of Amalek is still in force, as a commandment to engage in war against any people that seeks to destroy the Jewish people. This notion appears in a Hebrew essay by his son, Rabbi Joseph B. Soloveitchik which has been translated twice into English. See *Faith and Destiny: From Holocaust to the State of Israel*, trans. L. Kaplan, Hoboken: Ktav, 2000, pp. 93–95 and *Kol Do'ei Dofek: Listen – My Beloved Knocks*, translated and annotated by D.Z. Gordon, Hoboken: Ktav, 2006, pp. 112–114. See also E. Horowitz, *Reckless Rites: Purim and the Legacy of Jewish Violence*, Princeton: Princeton University Press, 2006, pp. 144–146. This suggestion has been critically scrutinized by N. Lamm, "Amalek and the Seven Nations: A Case of Law vs. Morality," in L. Schiffman and J. Wolowelsky (Eds.), *War and Peace in the Jewish Tradition*, New York: Yeshiva University Press, 2007 pp. 201–238. I have elsewhere written that a careful reading of Rabbi Soloveitchik's statement does not confirm the notion of an identity between contemporary enemies of Israel and Amalek to the extent that such an identity would justify killing individual "Amalekites." See K. Neuman, "To Blot or to Blot Out," *Jerusalem Report*, July 10, 2006. In any case, these discussions are focused in the homiletical dimension and should not be seen as binding legal pronouncements. Even if not applicable in modern times, the moral difficulty of the commandment to blot out the memory of Amalek has elicited different responses in Jewish tradition.

- For one overview, see A. Sagi "The Punishment of Amalek in Jewish Tradition: Coping with the Moral Problem," *Harvard Theological Review* 8, 1994, pp. 323-346.
15. Surprisingly, the classic rabbinic literature does not feature extensive analyses of the legal justifications for the war of self-defense. I wish to thank Rabbi Yair Kalin of Yeshivat Har Etzion, who has discussed the question with me extensively and shared with me an unpublished paper of his on the topic. See also Klapper, "Warfare, Ethics and Jewish Law," p. 6.
16. The responsum was probably written in early March 1948 during a respite in the fighting in Tiberias. See N. Av, *The Battle for Tiberias*, Tel Aviv: Ministry of Defense, 1991, pp. 148-149 (Hebrew) who mentions Rabbi Werner as one of those who allowed the inhabitants to engage in fortification work on the Sabbath. The city fell to Jewish forces on April 18 after intensive fighting that started in mid-March. See B. Morris "Yosef Nahmani and the Arab Question in 1948," in *1948 and After* (rev. ed.), Oxford: Oxford University Press, 2004, pp. 171-180. It should be noted that already in 1938 Kiryat Shmuel had been attacked by Arabs and 5 inhabitants were killed (Av, *The Battle for Tiberias*, p. 26).
17. *Responsa Heichal Yitzhak Orach Hamim*, Jerusalem: Committee for the Publication of the Works of Rabbi Herzog, 1972, no. 31, pp. 71-73 (Hebrew). The quotation is on p. 73.
18. *Ibid.* no. 37, pp. 93-95. The quotation is from p. 94.
19. Roth was a renowned halakhist, who was sympathetic to the Zionist cause. Herzog had also sent him other rulings to comment on, such as his instructions to the defenders of Klar Etzion; *Heichal Yitzhak*, nos. 34-35.
20. The responsum was printed in Roth's *Kol Menasseh*, Jerusalem: Mossad Harav Kook, 1955, no. 47, pp. 124-125 (Hebrew). In the book of Rabbi Herzog's response, *Heichal Yitzhak*, it appears as no. 38 on p. 96 but the part doubting the status of the war as an obligatory one was not included, and the final paragraph quoted reads, "regarding all the other questions I agree to everything [you] wrote . . ." This deletion is despite the fact that no. 39 in *Heichal Yitzhak* contains the response of Rabbi Herzog to that claim. Perhaps the editors were somewhat embarrassed with the suggestion of Rabbi Roth that there would not be a draft to combat units.
21. *Heichal Yitzhak* no. 39, p. 99.
22. I. Herzog "On the Establishment of the State and Its Wars," *Tekumin* 4, 1983, pp. 21-23 (Hebrew).
23. On Ben-Gurion's view of the inevitability of war, see Yossi Goldstein's contribution in this volume.
24. See J. Heller, *From Brit Shalom to Ichud: Yiddish Leib Magness and the Struggle for a Bimational State in Palestine*, Jerusalem: Magnes, 2003 (Hebrew). Note the quote from Martin Buber on p. 378 blaming Israel for the outbreak of the war; T. Hernan, "Thud - A Peace Movement in a Test of Fire," in *State, Government and International Relations* 33, 1980, pp. 31-72, esp. p. 61ff (Hebrew). For a miscellany of quotes questioning the declaration of the State, see A. Ophir, "H-Hour," in A. Ophir (Ed.), *Flight to Kory-Eight: Critical Moments in the History of the State of Israel*, Tel Aviv and Jerusalem: Hakibutz Hameuchad, 1999, pp. 15-33 (Hebrew).
25. For some comments on the extreme ultra-Orthodox opposition to the establishment of the state see the final section of Isaac Hershkovitz' article in this volume. The ultra-Orthodox mainstream, represented by *Agnud Yisrael*, did not oppose the establishment of the state but did not take an active part in the run-up to it. One of its leaders, Rabbi Yitzhak Meir Levin, was one of the signatories of Israel's Declaration of Independence.
26. One of the rabbis [S.Y. Zevin] "On the Question of the Conscription of Yeshiva Students" in A. Shapira (Ed.), *Dvayf According to the Halacha*, Jerusalem: Torah and Labor Guardians, 1993, pp. 217-220 (Hebrew).

27. "The 19th Psalm of the State of Israel," in Z.Y. Kook, *In the Paths of Israel (L'Nitot Yisrael)*, Bet El: Me'Avnei Hamakom, 3rd printing, 2007, vol. 2, pp. 355-367 (Hebrew). The talk was first printed in the organ of the National Religious Party *Hatzofeh* a short time after the Six Day War.
28. *Regarding the Commandment of the Land*, n.p., Jerusalem, Iyar 5708 (May 1948). It was later printed in *In the Paths of Israel (L'Nitot Yisrael)*, vol. 1, pp. 168-183 (Hebrew). Regarding the circumstances of the publication of the booklet see S.Y. Cohen, "The Birth of the Booklet Regarding the Commandment of the Land," *Ibid.* vol. 2, pp. 611-612 (Hebrew).
29. The article was published first in *Hatza'ot P'Hametina [The Torch and the Stake]* 5-6 (5713-5714) which appeared in September 1954 and which was edited by Yisraeli himself. An expanded version was printed as chapter 16 in Yisraeli's book *Amud Ha-Tzinnit*, Tel Aviv: Moreshet, 1966, under the title of "Actions for the Security of the State in the Light of Halakha." The original (shorter) version (now under the title "Retaliatory Attacks in the Light of Halakha") appeared in *Bi'zmanet Hatzza'ot P'Hametina* vol. 3, Alon Shevut: Tzomet, 1991, pp. 253-289. One can only conjecture as to the reason for the changes in title which obscured the connection to a specific event, despite the fact that the reference to Qibya in the introduction remained in all the versions. After submitting this paper, Yitzhak Avri Roness, who is writing a doctoral dissertation on Rabbi Yisraeli, was kind enough to send me his article, "Halakha, Ideology and Interpretation - Rabbi Shaul Yisraeli on The Status of Defensive War," *Jewish Law Association Studies* 20, 2010, pp. 184-195. Roness covers much of the ground that I do (comparing Rabbi Yisraeli to his contemporaries) and concludes that this issue illustrates "how a halakhic authority's ideological worldview can influence his halakhic decisions" (p. 195).
30. See B. Morris, *Israel's Border Wars 1949-1956*, Oxford: Clarendon Press, 1999, pp. 257-276. In an article on the raid by S. Tever, "Who changed the General Command Order?" *Haaretz*, 9 September 1994, pp. b5-b6 (Hebrew), the author tries to discover who was responsible for the operational order which called for maximum taking of life without specifically excluding women or children.
31. Yisraeli, *Amud Ha-Tzinnit*, p. 162.
32. See State of Israel, *Documents on the Foreign Policy of Israel*, vol. 8, 1953, Ed. Y. Rosenthal, Jerusalem, 1995, pp. 774-776 (document 449). See also documents 432, 435, 444 and 446. In the official statement the raid was attributed to frontier settlers and attested that the Government of Israel deplored it: "if innocent blood was spilled." Note, however, the hints of poet Natan Alterman in his popular weekly "seventh column" in the newspaper *Davar* on 23 October 1953 in which he questioned why Israel is trying to defend a "murky" action which should have been publicly repudiated. See M. Naor, *The Eighth Column*, Tel Aviv: Hakibutz Hameuchad, 2006, pp. 294-295 (Hebrew). Note also the essay of Yeshayahu Leibowitz that the government (and the IDF) were responsible for the action. See Y. Leibowitz, "After Kibiyah," in E. Goldman (Ed.), *Judaism, Human Values, and the Jewish State*, Cambridge, MA: Harvard University Press, 1995, pp. 185-190.
33. A careful analysis of Rabbi Yisraeli's essay requires distinction between a) what actually happened in Qibya; b) what R. Yisraeli believed had happened; and c) what he wrote had happened. The fact that he claims that the laws of war are applicable indicate that indeed he knew that it had been an authorized military operation and not a spontaneous rogue attack. Compare Y. Blidstein, "The Treatment of Hostile Civilian Populations: The Contemporary Halachic Discussion in Israel," *Israel Studies* 1, 1996, pp. 27-44, n. 3, who writes that "at the time of writing the article and its first publication the rabbi believed that the raid was carried out by members of the settlements that had been attacked by terrorists and not by the army or any authorized governmental body." As already mentioned, the misrepresentation of the event was copied in all reprintings

- of the essay, before and after the death of Rabbi Yisraeli. In a correspondence with Rabbi Yisrael Shari, Rabbi Yisraeli's student and son-in-law, he pointed out that his mentor was "a rabbi and not a historian" and the events of Qibya were an opportunity to analyze the entire question of non-combatants in wartime.
34. See Bihdstein, "The Treatment of Hostile Civilian Populations."
35. A. Edrei, "Law, Interpretation and Ideology: The Renewal of the Jewish Laws of War in the State of Israel" *Cardozo Law Review* 28, 2006, pp. 187–227, n. 62.
36. Indeed, Rabbi Yitzhak Kaufman quotes a conversation with Rabbi Zvi Yehuda Kook that a halakhic state of war has existed from the War of Independence up to the present. See Y. Kaufman, *The Army According to Halacha: Laws of War and of the Army* (2nd ed.), Jerusalem: Kol Mevasser, 1994, pp. 5–7 and n. 8. (Hebrew.) That approach would allow viewing activities apart from the battlefield (such as espionage or activity to free hostages) as part of the war effort, with all this entails as far as the halakhic status of such actions. This is probably also the opinion of Rabbi Zevun, who wrote that the War of Independence, the Sinai War of 1956 and the Six Day War are all considered wars of self-defense: "They, our neighbors, who began with an attack on our borders in order to realize their announced aim: to destroy Israel, both the people and the state. This was the situation in all three wars, such is the situation today, and there is no better example of an obligatory war." S.Y. Zevun, "War in the Light of the Halacha," in *In the Light of the Halacha* (new ed.), Jerusalem: Bet Hillel, 2004, p. 88 (Hebrew).
37. See, for example, the different perceptions of the situation that ensued after the signing of the armistice agreements in M. Bar-On, "Status Quo Before or After? Israel's Security Policy 1949–1957," in his *Smoking Borders: Studies in the Early History of the State of Israel, 1948–1967*, Jerusalem: Yad Ben Zvi, 2001, pp. 131–165 esp. 150.
38. Though it is not clear if he is referring to the people of Israel, i.e. the Jews as a nation, or the State of Israel.
39. Yisraeli, *Amud Ha-Temini*, p. 196.
40. Edrei, "Law, Interpretation and Ideology," pp. 211–217; M. Brody, "Only the Good Die Young," *Memoir: A Form of Modern Orthodox Discourse* 6, 2006, pp. 1–2. Brody sees this as the normative halakhic position and refers to other writings where he has expounded on this point.
41. Bihdstein, "The Treatment of Hostile Civilian Populations," pp. 34–35; N. Gutel, "Combat in Areas Saturatred With Civilian Population," *Tehumin* 23, 2003, p. 40 (Hebrew).
42. To the best of my knowledge no other halakhist has made the claim attributed to Rabbi Yisraeli, that it legal to wage war if it is legitimated by international law, even when it cannot be defined within the rabbinic definitions of self-defense. Brody claims that the opinion that "the government of Israel is not bound to uphold the obligations of war imposed on a Jewish Kingdom, but merely must conduct itself in accordance with the international law norms" is implicitly held by many halakhic authorities. See *The Bounds of Wartime Military Conduct in Jewish Law*, pp. 12–13 and n. 20. However, to the best of my understanding, this refers to *jus in bello* (which governs behavior in war) and not the conditions necessary for engaging in war (*ius ad bellum*). The rabbinic authorities Brody refers to grant that a situation defined as self-defense exists, which legitimates the war as Obligatory, and only then do the international rules which govern *ius in bello* apply.
43. Note that in his halakhic discussion of the siege of Beirut during the first Lebanon War, Rabbi Yisraeli took for granted that if that war was not to be defined as an obligatory war, it could not be justified halakhically because "we have no permission to engage in such a war nowadays," because the king requires the agreement of the court of 71 i.e. The Sanhedrin, which does not exist in our time for waging Optional war." See S. Yisraeli "The Siege of Beirut in Light of the Halacha" in his *Haavot Binyamin* vol. 1, Ed. N. Gutel, Kfar Darom: The Institute for Torah and Land, 5752 [1992], pp. 11–119, esp. p. 116. Cf. Edrei, "Law, Interpretation and Ideology."

44. Yisraeli, *Amud Ha-Temini*, pp. 198–199. Note that this is the last justification suggested in the essay after which appears a summary of the conclusions. Gutel, "Combat in Areas Saturatred With Civilian Population," p. 40 agrees that the source for the innovation of the category of war of revenge is obscure, especially as Yisraeli himself did not justify the incorporation of all the elements of the war of Midian into contemporary jurisprudence. In another essay written decades later regarding the military operation to rescue hostages in Entebbe, Yisraeli made a somewhat different use of the Midianite precedent. He argued that the basis for the obligatory war to save Israel from its enemies is "sanctification of God's name." Since the intentional targeting of Jews (as carried out by the terrorists at Entebbe) is a desecration of God's name, the operation is deemed an obligatory war. See Yisraeli, "Operation Jonathan in the Light of Halacha," in *Haavot Binyamin*, pp. 126–133 esp. pp. 131–132 and Roness, "Halakha, Ideology and Interpretation."
45. I would accept the characterization of Yoske Ahituv who describes Rabbi Yisraeli as one who "endeavored in many different ways to find some halachic justification after the fact to the Qibya event." See "The Wars of Israel and the Sanctity of Life," in Y. Gafni and A. Ravitzky (Eds.), *Sanctity of Life and Martyrdom: Studies in Memory of Amiv Yaskin*, Jerusalem: Shazar Center, 1993, p. 270 (Hebrew).
46. The halakhic status of the 1967 war did not generate discussion. It was seen as a war of self-defense, regardless of who had fired the first shot, and irrespective of the question (which would subsequently be raised by historians) if an Arab attack was indeed imminent. The institution of a religious holiday to celebrate the victory was a reflection of that perception. See N. Rakover, *The Laws of Independence Day and Jerusalem Day*, Jerusalem: Ministry of Religions, 1973 (Hebrew).
47. It is not clear what proof of this would be sufficient from the point of view of Jewish law. In a famous pronouncement from 1967, the leader of the Modern Orthodox wing of American Jewry, Rabbi Joseph Baer Soloveitchik, insisted that any decision taken by the military and political leadership in Israel would be halakhically binding. For an English translation of the address (which was given in Yiddish) see www.ashdass.org/avodah/vol15/v15n040.shtm#10 (viewed 1 May 2010). On the other hand, former Chief Rabbi Ovadia Yosef, who has publicly stated many times that human life takes precedence over maintaining control over the entire Land of Israel, opposed the disengagement from Gaza in 2000 claiming that unilateral withdrawal would endanger Jewish lives.
48. In practice, most of the adherents of the position are confident that the conflict between the prohibition of withdrawal and the sanctity of life is only theoretical, and that territorial concessions will not bring peace but rather encourage further threats on Israel and its citizens.
49. The relevant text of Nahmanides is his list of commandments which, in his opinion, Maimonides had deleted from the list of 613 commandments. See C.D. Chavel, *The Book of Commandments of Maimonides with the Glosses of Nahmanides*, Jerusalem: Mossad Harav Kook, 1981, pp. 114–146 (Hebrew).
50. See Y.M. Ehrenberg, "The Prohibition of Transferring the Territories of the Land of Israel to non-Jews," *Tehumin* 10, 1899, pp. 26–33 (Hebrew); Ravitsky, "Prohibited Wars." A prominent proponent of the position which opposed withdrawal because of the command to wage wars of conquest is the late Chief Rabbi Avraham Shapiro. See E. Shochetman, *And He Established it for Jacob as a Law*, Jerusalem: Kol Mevasser, 1995, pp. 35–37 (Hebrew).
51. One distinguished authority who challenges the extension of obligatory war to include wars of conquest is Rabbi N. Rabbinovitch, "The Opinion of Nahmanides Regarding Conquest of the Land," *Tehumin* 4, 1986, pp. 302–306 (Hebrew). See also Ravitsky, *op. cit.*

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From the biblical world
to the present

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and Amnon Shapira**