RELIGIOUS AND SOCIAL ETHICAL PERSPECTIVE ON INTERNATIONAL LAW: THE MIDDLE EAST PEACE PROCESS

The panel was convened at 4:00 p.m. on Thursday, April 5, by its Chair, Geoffrey R. Watson, Professor of Law at The Catholic University of America, Columbus School of Law. Professor Watson introduced the panelists: Father Drew Christiansen, Senior Fellow at the Woodstock Theological Center at Georgetown University; Rabbi Michael Jay Broyde, Professor at Emory Law School and Academic Director of Emory's Law and Religion program; and Rashid Khalidi, Director of the Center for International Studies at the University of Chicago, where he is Professor of Middle Eastern history. This panel was cosponsored by the Interdisciplinary Program in Law and Religion of The Catholic University of America.

OVERVIEW AND REMARKS BY GEOFFREY R. WATSON,* CHAIR

The theme of this year's Annual Meeting was "The Visible College of International Law," and one of the sub-themes was "Outside Perceptions of the College." This panel sought to contribute to this sub-theme by presenting religious and social ethical perspectives on international law.

Father Christiansen opened the discussion by offering a range of interesting insights into the Catholic Church's teachings on various questions of international law. He began with some general remarks on Catholic thinking on international law. He distinguished "Catholic cosmopolitanism" from a more "state-centered" view of international law. He emphasized the Church's strong commitment to the protection of human rights, and he noted the Church's support for international institutions such as the United Nations. Father Christiansen then turned to the Middle East conflict. He stressed that the Church has supported various UN resolutions on the conflict; he stressed the Church's continuing interest in religious freedom in the region; he noted that the Church has been "particularly clear" about the need for adherence to the laws of war; and he remarked on the need to resolve the refugee question equitably. He closed by describing the Church's support for an "internationally guaranteed special statute" for Jerusalem.

Rabbi Broyde presented a trenchant analysis of "Jewish law and battlefield ethics." He began with a brief introduction to the sources of Jewish law. He then noted that Jewish law recognizes three different categories of armed conflict: His paper described these as "obligatory war, permissible war, and societal applications of the 'pursuer' rationale." He explained that the "license" to use force varies depending on the category of armed conflict at issue. Rabbi Broyde then explored the obligation in Jewish law to consider peaceful alternatives before resorting to force. He noted that this obligation was even more elaborate when military activity involves assaults on cities with civilian populations, and he stressed that Jewish law forbids the intentional killing of noncombatants. He also took the opportunity to contrast what he described as the "particularism" of Jewish law with what he described as the "universalism" of Catholic social teaching.

Professor Khalidi offered a more "social ethical" than religious perspective on international law. He began by noting that justice and equity are central principles of any system of social ethics. He went on to argue that the Middle East peace process has not yet produced "justice" for the Palestinian people. He asserted that self-determination is a central norm in modern international law, and he argued that the Oslo peace

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process has done a poor job of advancing Palestinian self-determination. He was critical of the U.S. posture in the peace process; he took the position that the peace process has favored what he described as the stronger party, Israel. He also critiqued what he described as the U.S. position that the Oslo Accords have in some measure superseded international law. Professor Khalidi emphasized the importance of UN resolutions as potential sources of law and as important codifications of natural rights.

The presentations were followed by a series of questions from the audience. Several questions provoked lively exchanges among the panelists. For example, Father Christiansen critiqued Rabbi Broyde's comparison of Jewish and Catholic approaches to law. Rabbi Broyde critiqued Professor Khalidi's reliance on UN resolutions as a source of moral authority. Professor Watson offered a somewhat more upbeat assessment of the peace process than that of Professor Khalidi. Professor Khalidi responded to a law student's question about the binding force of international law by noting that he is asked that question every time he speaks and by expressing hope that norms of international law do contribute to a resolution of the conflict in the Middle East.

AN OUTSIDER'S VIEW OF INTERNATIONAL LAW IN THE ISRAELI-PALESTINIAN CONFLICT: A ROMAN CATHOLIC PERSPECTIVE

by Drew Christiansen[*]

"What the international community brings together is not just states, but nations made up of men and women who weave a personal and collective history. It is their rights which must be defined and guaranteed."

Pope John Paul II, Address to the Diplomatic Corps, 1996

Catholic attitudes toward international law are rooted in the Church's teaching on peace and particularly in its teaching on political order. At its core, the Catholic commitment to international law rises out of the belief that the human race is one family under God. The Church views itself as "a kind of sacrament and instrument" not only of "union with God" but also of "the unity of humankind." Accordingly, support for international law is one of the ways in which the Church tries to contribute to solidarity among members of the human family.

CATHOLIC COSMOPOLITANISM

It is fair, I believe, to characterize contemporary, official Catholic thinking on political order as "cosmopolitan" in its attitude to international politics in contrast to "being state-centered." By this I mean, first, that for a variety of reasons—theological, historical, and political—the Church is universalist in its approach to world order. Second, Catholic social teaching assigns primacy to the rights of persons (and sometimes communities) over that of states. Indeed the goal of all political authority, in Catholic teaching, is to promote, defend, and safeguard the rights of persons.

Contemporary Catholic universalism has historic antecedents in the patristic adaptation of the Stoic notions of the *ius gentium* and the *ius naturale* to Christian thought, in the medieval universalism associated with the idea of Christiandom, and in the struggles of the Spanish scholastics to extend the protection of the just war to indigenous peoples

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in America and Asia. Current manifestations of this political cosmopolitanism can be found, inter alia, in the extension of the principle of the common good to global matters, to the assertion of the responsibility of political authority as such for human rights in general, and in the articulation of the right and the duty of humanitarian intervention.

Human Rights

While Catholic thought after the French Revolution was hostile to human rights, historians of political theory, such as Quentin Skinner and Brian Tierney, have demonstrated that early modern ideas about rights and freedom have sources in scholastic constitutionalism and canon law. The Catholic appropriation of modern human rights ideas came with Pope John XXIII's 1963 encyclical letter *Pacem in terris* (Peace on earth). Indeed, teaching on human rights may be the most successful component of the entire corpus of Catholic social teaching, when measured from the point of view of social and political impact. That teaching has given birth to numerous Catholic human rights centers in Latin America, Asia, and Africa; programs of action by national justice and peace commissions and episcopal conferences; and the mobilization of Catholics at the local, national, and international level in human rights campaigns.

One cannot emphasize sufficiently the impact of human rights and religious liberty on the diplomacy of the Holy See and the social justice advocacy of the wider church. The Helsinki Agreement became an important avenue for advancing religious liberty in Eastern Europe, and it continues to be relevant to issues in Europe both east and west. More recently, the diplomatic strategy of the Holy See in agreements with Israel, Jordan, and the Palestinians, has been anchored in the recognition of religious liberty and the rights of believers, and has sought to defend the Church's special interests only in that context. Indeed, the Fundamental Agreement with Israel revealed the Vatican strategy toward the Middle East region for the twenty-first century. Namely, the best way to advance the rights of Catholics is to secure religious liberty for all.

Civilian Immunity

In addition, while Church teaching on the use of force has moved under Pope John Paul II in the direction of nonviolence, the diplomacy of the Holy See and its public statements, as well as that of the bishops of the United States, still employ just-war modes of criticism of armed conflict with conscious attention to the strictures of international law including the Fourth Geneva Convention. As the incidence of civilian casualties (in relation to all casualties) has climbed in recent decades—they now exceed 90 percent—the principle of civilian immunity has grown in importance among Catholic commentators, both official and unofficial. As I shall note later, this norm has special bearing on Catholic views of terror, state terror, reprisals, and the preventative use of force in the Israeli-Palestinian conflict.

Another application of the principle of civilian immunity, if not explicitly of law, is the use of economic sanctions as a form of coercive diplomacy. From the moral point of view, the case of sanctions against Iraq is particularly problematic. As it has turned out, sanctions were used as a prelude to war, rather than as an alternative. Civilian infrastructure was bombed with the intention of aggravating the pain caused to civilians by the sanctions after the war, and the sanctions were kept in place and strictly applied even after the enormous cost to civilian life had long become evident. The primary responsibility for the suffering of the Iraqi people belongs, no doubt, to their own government. But, all the same, from the Catholic point of view, sanctions against Iraq represent a major test of the principle of civilian immunity in wartime and in conflicts short of war.

International Institutions

Finally, Catholic cosmopolitanism is evident in support of international institutions, particularly the UN system. It is likewise evident in the openness to the creation of new mechanisms to meet underserved dimensions of the universal common good. It is also found in deference to the "international community" as opposed to "big power" action in matters such as humanitarian intervention and sanctions. In the Israeli-Palestinian conflict, this deference to international law also appears in appeals to UN resolutions as a basis for resolving the conflict and in the proposal that a solution for Jerusalem will require "international guarantees."

THE MIDDLE EAST CONFLICT

Let me now approach the Israeli-Palestinian conflict in two stages: (1) the pertinence of international law to the conflict in general and (2) the relevance of international law to the definition and settlement of the status of Jerusalem.

The United Nations

While the Holy See has had particular interests in the Palestinian-Israeli conflict, especially the status of Jerusalem, securing equal rights for Christians and preserving the Christian presence in the region, it has generally premised its approach on the conflict on international law and UN resolutions. For twenty years, it adhered to the proposal for a special regime for Jerusalem under the so-called *"corpus separatum"* as envisioned by the 1947 UN partition plan until, under changed circumstances, after 1967 it made its own proposal for a "special statute" for Jerusalem. It has supported the land-for-peace formula based on Resolution 242, and it continues to regard the West Bank and Gaza, and particularly East Jerusalem, as illegally occupied territory under the laws of war and in keeping with the practice of nearly all nations. The Holy See's Permanent Observer status with the United Nations permits it to engage in behind-the-scenes negotiation on issues of concern to it. Thus, in the last few years, it succeeded in obtaining inclusion of the mainlines of its proposal for a "special statute" for Jerusalem incorporated in a General Assembly resolution.

What accounts for the Holy See's reliance on the United Nations? First, of course, is the Catholic cosmopolitanism that favors transnational mechanisms for addressing world problems. Second, the General Assembly provides an arena in which the Holy See can garner support for its positions, whether with historically Catholic countries or more recently with Muslim countries, where those positions are not supported by the great powers. Third, I would conjecture that the General Assembly is regarded in some matters as approximating something like a moral consensus of humankind, whereas the Security Council, the proper authority in matters of war and peace, represents the hegemonic interests of the great powers.

Finally, there is a conviction that the key UN resolutions (181, 194, 242, 338, etc.) constitute the framework for any negotiated settlement. These are not just guidelines or desiderata, nor are they moveable goal posts. They are, rather, the parameters for negotiation that may not be lightly set aside in the alleged interest of negotiation by the two parties involved. It is because of the disregard of UN resolutions in negotiations since Oslo that the Holy Father in his annual address to the diplomatic corps last January listed "contempt of international law" as one of the unacceptable dynamics of the present crisis in the Holy Land.

Pope John Paul II continued, "It is time to return to the principles of international legality, the banning of the acquisition of territory by force, the right of peoples to self-

determination, respect for the United Nations Organization, and the Geneva Conventions, to quote only the most important."

Defining Religious Freedom

One of the interesting and less controversial appeals to international law in the Holy See's diplomacy in the region is the article on religious freedom and liberty of conscience in the 1993 Fundamental Agreement with the State of Israel. That concordat made the "relevant United Nations documents" the point of reference for defining the key terms. The device saved the negotiators from trying to define terms afresh. It also won adherence of both parties to recognized international standards of conduct, an attainment either side could regard as a reassuring gain. While some observant Jews may have objected to the language about freedom of conscience as implying openness to conversion, the clause was none the less approved and ratified by the Israeli cabinet.

Laws of War

The laws of war represent a special area of concern for the Church. As I noted, civilian immunity has played a notable role in the Church's post-World War II teaching on the use of force. Thus, while Church officials routinely denounce terrorist acts by radical movements, Church statements have been particularly clear about the obligation of established political authorities to honor the laws of war. For several years, to take an example I know close up, the U.S. bishops issued denunciations of Hezbollah provocations in northern Israel and demanded the disarming of that militia. They have likewise been vocal in their criticism of Israel's retaliatory bombings of civilian targets in Lebanon. During the last months, the U.S. bishops' conference has critiqued Israeli use of heavy fire against Palestinian residential areas on the West Bank and in Gaza, particularly in the Bethlehem area.

Refugees

One area in which there seems to be some vagueness about the Holy See's reliance on international standards is the rights of Palestinian refugees. When Pope John Paul II visited the Deheisheh refugee camp a year ago, banners proclaimed the Palestinian adherence to the right of return and UN Resolution 194. The Holy Father, however, spoke only of the Palestinians right to homes of their own—a natural or basics rights appeal—and avoided invoking the "right of return" or specific UN resolutions.

The Church routinely advocated on behalf of the rights of refugees in all parts of the world. What accounts for the measured language in this case remains unclear. It could have been recognition of the practical limits on refugee return; it may have been a decision to allow space for negotiation. Motives aside, the Deheisheh talk stands as an exception to the usual practice of appealing to international law as the framework for negotiations in the Middle East.

The Future of Jerusalem

Finally, there is the future of Jerusalem. Since 1967, the Holy See has sought "an internationally guaranteed special statute" for Jerusalem. While historically the Holy See's interest was in protecting the holy places and access to them, in recent years, the accent of recent formulations of the proposal have fallen on (1) the universal religious significance of Jerusalem and (2) equality of rights for all believers and the three principal religious communities in the city. Respect for the holy places and free access come farther down the list of elements proposed for inclusion in the statute.

In February 2000, the Vatican-PLO Basic Agreement affirmed the support of both the signatories for such a statute. Though the language on the special statute was part of the preamble to the agreement, and so technically nonbinding, at the time it met with a storm of protest from Israeli authorities. Only months later, of course, during Camp David II and in the late Clinton round of negotiations in November and December, the Barak government indicated that international guarantees were possible for such an agreement and even that the United Nations might serve as its guarantor.

CONCLUSION

In conclusion, the general favor in which the Catholic Church holds international law is replicated in the approach of the Holy See and episcopal conferences to the Middle East conflict. In general, Catholic authorities are inclined to see international law as the prescribed framework for negotiation and the guarantee of equity in any negotiated settlement among unequal partners. In that sense, the law helps rectify the imbalance of power between the actors. In addition, in Church practice, the laws of war are invoked in protection of the innocent, particularly in defending civilians from direct attack.

The Church generally favors the involvement of the wider international community in facilitating the process, in providing legitimacy for new initiatives, and in securing guarantees for implementation. Finally, the evolution of Catholic social teaching on human rights and religious liberty has led to a universalizing of concerns such as the future of Jerusalem and the pursuit of religious liberty and human rights for all believers. The result is a diplomacy that is less Catholic (upper case), that is, concerned with narrow church interests, and more catholic (lower case), that is, universal in its concern for human welfare and well-being.

BATTLEFIELD ETHICS IN THE JEWISH TRADITION

by Michael J. Broyde[*]

Rabbi Jesse the Galilean states: "How meritorious is peace? Even in time of war Jewish law requires that one initiate discussions of peace." Leviticus Rabba §9

INTRODUCTION

Judaism is a system of law and ethics whose scope of regulation is designed to cover nearly every area of human action. Unlike many other religious legal systems, the mandate of Jewish law is limited only by the scope of human activity; no area of activity is free from direction—ethical, legal, or both. Unlike many secular legal systems, Jewish law and ethics do not, however, set their boundaries at merely determining what is legal or illegal; Jewish law also regulates that which is ethical.[1] Frequently, Jewish law will

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[1] Jewish law, or *halakhah*, is used herein to denote the entire subject matter of the Jewish legal system, including public, private, and ritual law. A brief historical review will familiarize the new reader of Jewish law with its history and development. The Pentateuch (the five books of Moses, the *Torah*) is the historical touchstone document of Jewish law and, according to Jewish legal theory, was revealed to Moses at Mount Sinai. The Prophets and Writings, the other two parts of the Hebrew Bible, were written over the next seven hundred years, and the Jewish canon was closed around the year 200 before the common era (B.C.E.). From the close of the canon until 250 of the common era (C.E.) is referred to as the era of the *Tannaim*, the redactors of Jewish law, whose period closed with the editing of the *Mishnah* by Rabbi Judah the Patriarch. The next five centuries was the epoch in which the two Talmuds (Babylonian and Jerusalem) were written and edited by scholars called *Amoraim* ("those who recount" Jewish law) and *Savoraim* ("those who ponder" Jewish law). The Babylonian Talmud is of greater legal significance than the Jerusalem Talmud and is a more complete work.

conclude that certain activity is completely legal but is not ethically correct. This article reviews Jewish law's attitude to one of the areas of modern social behavior that "law" as an institution has shied away from regulating, and which "ethics" as a discipline has failed to successfully regulate: war. In this area, as in many others, the legal and the ethical are freely combined in the Jewish tradition.

TYPE OF BATTLE

The initial question that needs to be addressed when discussing battlefield ethics is whether the rules for these situations differ from all other applications of Jewish ethics or whether "battlefield ethics" is merely a general application of the rules of Jewish ethics to the battlefield situation. This question is essentially a rephrasing of the question, What is the moral license according to the Jewish tradition that permits war to be waged? As I have explained elsewhere,[2] Jewish tradition categorizes "armed conflict" into three different categories: obligatory war, permissible war, and societal applications of the "pursuer" rationale.[3]

Each of these situations comes with different licenses. The easiest one to address is the final one: the pursuer rationale. Battlefield ethics based on the pursuer model are simply a generic application of the general field of Jewish ethics relating to stopping one who is an evildoer from killing an innocent person. While it is beyond the scope of this article to explain completely that detailed field of Jewish ethics, the touchstone rules of self-defense according to Jewish law are fourfold. Even when self-defense is mandatory or permissible and one may kill a person or group of people who are seeking to kill one who is innocent, one may not:

The post-Talmudic era is conventionally divided into three periods: (1) the era of the *Geonim*, scholars who lived in Babylonia until the mid-eleventh century; (2) the era of the *Rishonim* (the early authorities), who lived in North Africa, Spain, Franco-Germany, and Egypt until the end of the fourteenth century; and (3) the period of the *Aharonim* (the latter authorities), which encompasses all scholars of Jewish law from the fifteenth century up to this era. From the period of the mid-fourteenth century until the early seventeenth century, Jewish law underwent a period of codification, which led to the acceptance of the law code format of Rabbi Joseph Karo, called the *Shulhan Arukh*, as the basis for modern Jewish law. The *Shulhan Arukh* (and the *Arba'ah Turim* of Rabbi Jacob ben Asher, which preceded it) divided Jewish law into four separate areas: *Orah Hayyim* is devoted to daily, Sabbath, and holiday laws; *Even Ha-Ezer* addresses family law, including financial aspects; *Hoshen Mishpat* codifies financial law; and *Yoreh Deah* contains dietary laws as well as other miscellaneous legal matter. Many significant scholars—themselves as important as Rabbi Karo in status and authority—wrote annotations to his code that made the work and its surrounding comments the modern touchstone of Jewish law. The most recent complete edition of the *Shulhan Arukh* (Vilna, 1896) contains no less than 113 separate commentaries on the text of Rabbi Karo. In addition, hundreds of other volumes of commentary have been published as self-standing works, a process that continues to this very day. Besides the law codes and commentaries, for the last 1,200 years, Jewish law authorities have addressed specific questions of Jewish law in written *responsa* (in question and answer form). Collections of such *responsa* have been published, providing guidance not only to later authorities but to the community at large. Finally, since the establishment of the State of Israel in 1948, the rabbinical courts of Israel have published their written opinions deciding cases on a variety of matters. For a brief review of the methodology, structure, and history of Jewish law, *see* David Feldman, *The Structure of Jewish Law, in* CONTEMPORARY JEWISH ETHICS 21 pp. 21–38 (Menachem Marc Kellner ed., 1978).

[2] Michael Broyde, *Fighting for Peace: Battlefield Ethics, Peace Talks, Treaties and Pacifism in the Jewish Tradition, in* WAR AND ITS DISCONTENTS: PACIFISM AND QUIETISM IN ABRAHAMIC TRADITIONS 1 (J. Patout Burns ed., 1996).

[3] And prohibited wars. Perhaps the most pressing ethical dilemma is what to do in a situation where society is waging a prohibited war and severely penalizes (perhaps even executes) citizens who do not cooperate with the war effort. This question is beyond the scope of the paper, as the primary focus of such a paper would be the ethical liberalities one may take to protect ones own life, limb, or property in times of great duress; *See* LEOPOLD WINKLER, SHE'ELOT U-TESHUVOT LEVUSHE MORDEKHAI 2:174 (1978) (permitting Sabbath violation to avoid fighting in unjust wars). *But see* R. MEIR EISENSTADT, IMRAI EISH Y.D. 52 (1801).

— Kill an innocent[4] third party to save a life
— Compel a person to risk his life to save the life of another
— Kill the pursuer after his evil act is over as a form of punishment
— Use more force than minimally needed[5]

Thus, the rules of this type of "armed conflict" would resemble an activity by a police force rather than an activity by an army. Only the most genteel of modern armies can function in accordance with these rules.

On the other hand, the situations of both obligatory war and authorized war[6] are not merely global extrapolation of the principles of "self-defense" or "pursuer." There are ethical liberalities (and strictures) associated with the battlefield situation that have unique ethical and legal rules unrelated to other fields of Jewish law or ethics. They permit the killing of fellow human beings in situations where that action—but for the permissibility of war—would be murder. In order to understand what precisely is the "license to kill," it is necessary to explain the preliminary steps needed according to Jewish law to actually fight a battle after war has been properly declared. It is through an understanding of these requirements that one grasps the limits on the license to kill one's opponents in military action according to Jewish law. Indeed, nearly all of the preliminary requirements to a permissible war are designed to remove noncombatants, civilians, and others who do not wish to fight from the battlefield.

SEEKING PEACE PRIOR TO STARTING WAR

Two basic texts form Jewish law's understanding of the duties society must undertake before a battle may be fought. The Bible (Deuteronomy 20:10) states:

> When you approach a city to do battle with it you should call to it in peace. And if they respond in peace and they open the city to you, and all the people in the city shall pay taxes to you and be subservient. And if they do not make peace with you, you shall wage war with them and you may besiege them.

Thus the Bible clearly sets out the obligation to seek peace as a prelude to any military activity; absent the seeking of peace, the use of force in a war violates Jewish law. Although unstated in the text, it is apparent that while one need not engage in negotiations over the legitimacy of one's goals, one must explain what one is seeking through this military action and what military goals are (and are not) sought.[7] Before this seeking

[4] The question of who is "innocent" in this context is difficult to quantify precisely. One can be a pursuer in situations where the law does not label one a "murderer" in Jewish law; thus a minor (*Sanhedren* 74b) and, according to most authorities, an unintentional murderer both may be killed to prevent the loss of life of another. So too it would appear reasonable to derive from Maimonides' rule that one who directs the murder, even though he does not directly participate in it, is a murderer and may be killed. So too it appears that one who assists in the murder, even if he is not actually participating in it directly, is not "innocent"; see comments of *Maharal M'Prague*, 1857; JUDAH LOEW BEN BEZALAL on Genesis 32. From this Maharal, one could derive that any who encourage this activity fall within the rubric of one who is a combatant. Thus, typically all soldiers would be defined as combatants. It would appear difficult, however, to define "combatant" as opposed to "innocent" in all combat situations with a general rule; each military activity requires its own assessment of what is needed to wage this war and what is not. (For example, sometimes the role of medical personnel is to repair injured troops so that they can return to the front as soon as possible, and sometimes the role of medical personnel is to heal soldiers who are returning home so as to allow these soldiers a normal civilian life.)

[5] These rules are generic rules of Jewish law derived from different Talmudic sources and methodologically unrelated to "war" as an institution. For a discussion of these rules generally, and various applications, *see* JOSEPH KARO, *Choshen Mishpat*, SHULCHAN ARUCH §425 (1896).

[6] Two of the primary categories of Jewish war, as explained in Fighting for Peace, Broyde, *supra* note 3.

[7] *See* e.g. *Numbers* 21:21–24. Where the Jewish people clearly promised to limit their goals in return for a peaceful passage through the lands belonging to Sichon.

of peace, battle is prohibited. Rabbi Jesse Hagalili is quoted as stating, "How meritorious is peace? Even in a time of war one must initiate all activities with a request for peace."[8] This procedural requirement is quite significant: It prevents the escalation of hostilities and allows both sides to plan rationally the cost of war and the virtues of peace.

Rabbi Shlomo Yitzchaki (Rashi), in his commentary on the Bible, indicates that the obligation to seek peace prior to firing the first shot is limited to authorized wars. However, in obligatory or compulsory wars, there is no obligation to seek a peaceful solution. Indeed, such a position can be found in the Sifri, one of oldest of the midrashic source books of Jewish law.[9] Maimonides, in his classic code of Jewish law disagrees. He states:

> One does not wage war with anyone in the world until one seeks peace with him. This is true both of authorized and obligatory wars, as it says [in the Bible] "when you approach a city to wage war, you must first call out for peace." If they respond positively and accept the seven Noachide commandments, one may not kill any of them and they shall pay tribute. . . .[10]

Thus, according to Maimonides, the obligation to seek peace applies to all circumstances where war is to be waged. Such an approach is also agreed to in principle by Nachmanides.

It is clear, however, according to both schools of thought, that in authorized wars, one must initially seek a negotiated settlement of the cause of the war (although, it is crucial to add, Jewish law does not require that each side compromise its claim, so as to reach a peaceful solution).[11] Ancillary to this obligation is the need that the goal of the war be communicated to one's opponents. One must detail to one's enemies the basic goals of the war and what one seeks as a victory in this conflict.[12] This allows one's opponents to evaluate the costs of the war and to seek a rational peace. Peace must be genuinely sought before war may begin.

There is a fundamental secondary dispute present in this obligation. Maimonides requires that the peaceful surrender terms offered must include an acknowledgement of and agreement to follow the seven laws of Noah, which (Jewish law asserts) govern all members of the world and form the basic groundwork for moral behavior;[13] part and parcel of the peace must be the imposition of ethical values on the defeated society. Nachmanides does not list that requirement as being necessary for the "peaceful" cessation of hostilities.[14] He indicates that it is the military goals alone that determine whether peace terms are acceptable. According to Nachmanides, Jewish law would compel the "victor" to accept peace terms that include all the victors' demands except the imposition of ethical values in the defeated society. Maimonides would reject that

[8] *Leviticus Rabba*, Tzav §9 MIDRASH RABBAH (1980).

[9] Commenting on Levitucus Rabba Tzav §9. One could distinguish in this context between obligatory wars and commanded wars in this regard, and limit the license only to wars that are obligatory rather than merely commanded. It would appear that such a position is also accepted by Ravad; *see* RAVAD (Abrahan ben David), *Commentary on Laws of Kings* 6:1, *in* COMMENTARY ON MISHNEH TORAH (1809); RABBENU MEIR LEIBUSH BEN YECHIEL MICHEL MALBIM, Commentary on the Torah (1892).

[10] MAIMONIDES, *Laws of Kings* 6:1, *in* MISHNEH TORAH: THE LAWS OF KINGS AND THEIR WARS (1809) [hereinafter *Laws of Kings*].

[11] I would, however, note that such is clearly permissible as a function of prudent planing. Thus, the Jewish nation offered to avoid an authorized war with Emor if that nation would agree to a lesser violation of its sovereignty; *Numbers* 21:21.

[12] Of course, there is no obligation to do so with specificity as to detailed battle plans; however, a clear assertion of the goals of the war are needed.

[13] *Laws of Kings* 6:1. These seven commandments instruct people to acknowledge God; prohibit idol worship; prohibit murder; prohibit theft; prohibit incest and adultery; prohibit eating the flesh of still living animals; and command the enforcement of these (and perhaps others) laws. For a discussion of these laws in context, *see* YECHIEL MICHEL EPSTEIN, ARUCH HASHULCHAN HAATID, *Laws of Kings* 78–80 (Jerusalem, 1970).

[14] (RAMBAN) NACHMANIDES, COMMENTARY ON THE TORAH (1976), Deuteronomy 20:1. Of course, if after the surrender, a Jewish government were to rule that society, such a government would enforce these seven laws; however, it is not a condition of surrender according to Nachmanides.

rule and permit war in those circumstances purely to impose ethical value in a non-ethical society.[15]

Most likely, this disagreement is just one facet in the debate between Maimonides and most other authorities as to whether Jewish law requires the imposition of an ethical code on secular society. Elsewhere in Maimonides "Law of Kings,"[16] Maimonides explains that, in his opinion, there is a general obligation on all (Jews and Gentiles) to compel enforcement of these basic ethical rules even through force in all circumstances.[17] Nachmanides disagrees with this conception of the obligation and seems to understand that the obligation to enforce the seven laws is limited to the secular rulers of the nation, and is of a totally different scope.[18]

THE CIVILIAN, THE SIEGE,[19] AND STANDARD OF CONDUCT

The obligation to seek peace as explained above applies to battle between armies where no civilian population is involved. Jewish law requires an additional series of overtures for peace and surrender in situations where the military activity involves attacking cities populated by civilians. Maimonides states:

> Joshua, before he entered the land of Israel sent three letters to its inhabitants. The first one said that those that wish to flee [the oncoming army] should flee. The second one said that those that wish to make peace should make peace. The third letter said that those that want to fight a war should prepare to fight a war.[20]

Nor was the general obligation to warn the civilian population enough to fulfill the obligation: Maimonides codifies a number of specific rules of military ethics, all based on Talmudic sources. "When one surrounds a city to lay siege to it, it is prohibited to surround it from four sides; only three sides are permissible. One must leave a place for inhabitants to flee for all those who wish to abscond to save their lives."[21] Nachmanides elaborates on this obligation in a way that clearly explains the moral obligation by stating:

> God commanded us that when we lay siege to a city that we leave one of the sides without a siege so as to give them a place to flee to. *It is from this commandment that we learn to deal with compassion even with our enemies even at time of war*; in addition by giving our enemies a place to flee to, they will not charge at us with as much force.[22]

Nachmanides believes that this obligation is so basic as to require that it be one of the 613 basic biblical commandments in Jewish law. However, Nachmanides clearly limits this ethical obligation to authorized and not obligatory wars, and this is agreed to by most other authorities.[23]

[15] *Laws of Kings* 6:4.

[16] *Laws of Kings* 8:1–5.

[17] *See* also *Laws of Kings* 14:14 for a similar sentiment by Maimonides.

[18] For a general discussion of this, *see* YEHUDAH GERSHUNI (GRODNER), MISHPAT HA-MELUCHA 165–67 (1983). It is worth noting that a strong claim can be made that Tosaphot agrees with Nachmanides in this area; *see* "velo moredim" in TOSAPHOT, *Avoda Zara* 26b.

[19] Or naval blockade.

[20] *Laws of Kings* 6:5. Maimonides understands the Jerusalem Talmud's discussion of this topic to require three different letters. If one examines Shevit 6:1 closely one could conclude that one can send only one letter with all three texts; *see Aruch HaShulchan Laws of Kings* 75:6–7.

[21] Maimonides, *Laws of Kings* 6:7.

[22] Supplement to MAIMONIDES, BOOK OF COMMANDMENTS, Positive Commandment 4.

[23] *Id. See also* R. JOSEPH BABAD, MINCHAT HINUCH 527 (1987). Rabbi Gershuni indicates that the commandment is limited to compulsory wars rather than obligatory wars. His insight would seem correct; *Mishpatai Melucha* commenting on id. It is only in a situation where total victory is the aim that such conduct is not obligatory.

Essentially Jewish law completely rejects the notion of a "siege" as that term is understood by military tacticians and modern articulators of international law. Modern international law generally assumes that a situation in which "the commander of a besieged place expel[s] the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure to drive them back so as to hasten the surrender."[24] Secular law and morals allow using civilians as pawns in the siege. The Jewish tradition prohibited that and mandated that noncombatants who wished to flee must be allowed to flee the scene of the battle. I would add, however, that I do not understand Maimonides' words literally. It is not surrounding the city on all four sides that is prohibited—rather, it is the preventing of the outflow of civilians or soldiers who are seeking to flee. Of course, Jewish law would allow one to stop the inflow of supplies to a besieged city through this fourth side.[25]

This approach solves another difficult problem according to Jewish law: the role of the "innocent" civilian in combat. Since the Jewish tradition accepts that civilians (and soldiers who are surrendering) are always entitled to flee from the scene of the battle, it would logically follow that all who remain voluntarily are classified as combatants, since the opportunity to leave is continuously present. Particularly in combination with Joshua's practice of sending letters of warning in advance of combat, this legal approach limits greatly the role of the doctrine of "innocent civilian" in the Jewish tradition. Essentially, the Jewish tradition feels that innocent civilians should do their very best to remove themselves from the battlefield and those who remain are not so innocent. If one voluntarily stays in a city that is under siege, one has the status of a combatant.[26]

The unintentional and undesirable killing of involuntarily remaining innocent civilians seems to this author to be the one "killing" activity that is permissible in Jewish law in war situations that would not be permissible in the pursuer/self-defense situations. Just as Jewish law permits one to send one's own soldiers out to combat (without their consent) to be perhaps killed, Jewish law would allow the unintentional killing of innocent civilians as a necessary (but undesired by-product) of the moral license of war.[27]

[24] CHARLES C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES §656 (1922). For an additional article of this topic from the Jewish perspective, *see* Bradley Artson, *The Siege and the Civilian*, *in* 36 JUDAISM 54–65 (1987). A number of the points made by Rabbi Artson are incorporated into this article, although the theme of the purpose of the Jewish tradition in the two articles differ somewhat.

[25] *See* R. Yecheil Epstein, *Aruch HaShulchan HeAtid*, Laws of Kings 76:12.

[26] Although I have seen no modern Jewish law authorities who state this, I would apply this rule in modern combat situations to all civilians who remain voluntarily in the locale of the war in a way that facilitates combat. This author doubts if (for example) anyone who voluntarily remained in Berlin in World War II would be classified as an innocent civilian according to Jewish law.

[27] *See* Rabbi SHAUL YISRAELI, AMUD HAYEMINI 16:5 (1998), and R. JOSEPH BABAD, *supra* note 24, *Minchat Hinuch* Commandment 425 who discusses "death" in war in a way that perhaps indicates that this approach is correct. *See also* J. DAVID BLEICH, *Preemptive War in Jewish Law*, CONTEMPORARY HALAKHIC PROBLEMS 277 (1977) (Ktav, 1988) 3:251 at p. 277 who states, "To this writer's knowledge, there exists no discussion in classical rabbinical sources that takes cognizance of the likelihood of causing civilian casualties in the course of hostilities . . . ."

In many ways, this provides guidance into the ethical issues associated with a modern airplane (and long-range artillery) based war. Air warfare greatly expands the "kill zone" of combat and (at least in our current state of technology) tends to inevitably result in the death of civilians. The tactical aims of air warfare appear to be fourfold: to destroy specific enemy military targets; to destroy the economic base of the enemy's war-making capacity; to randomly terrorize civilian populations; and to retaliate for other atrocities by the enemy to one's own home base and thus deter such conduct in the future by the enemy.

The first of these goals is within the ambit of that which is permissible since civilian deaths are unintentional. The same would appear to be true about the second, providing that the targets are genuine economic targets related to the economic base needed to wage the war and the death of civilians are not directly desired. It would appear that the third goal is not legitimate absent the designation of "compulsory" or "obligatory" war. The final goal raises a whole series of issues beyond the scope of this article and could perhaps provide some sort of justification for certain types of conduct in combat that would otherwise be prohibited, although its detailed analysis in Jewish law is beyond the scope of this paper and relates to circumstances where retaliation or specific deterrence might permit that which is normally permitted; Rama, *Yoreh Deah* 334:6 in GLOSSES ON SHULCHAN ARUCH (1896) and Taz (*ad locum*) and *Minchat Chinuch*, Commandment 338.

The Jewish tradition mandated a number of other rules so as to prevent certain types of tactics that violated the norms of ethical behavior even in war. Maimonides recounts that it is prohibited to remove fruit trees so as to induce suffering, famine, and unnecessary waste in the camp of the enemy, and this is accepted as normative in Jewish law.[28] Maimonides, in his book of commandments,[29] explicitly links this to the deliberate intention to expose the enemy to undue suffering. Nachmanides adds that the removal of all trees is permissible if needed for the building of fortification: It is only when done to deliberately induce suffering that it is prohibited. Nachmanides too, however, understands the Jewish tradition as requiring one to have mercy on one's enemy as one would have mercy on one's own and not to engage in unduly cruel activity.[30] Even the greatest of scourges—rape of the female civilian population of the enemy—was regulated under Jewish law.[31]

SUMMARY

In sum, there clearly is a license to wage certain kinds of war and kill certain people in the Jewish tradition. However, in order to exercise this license, one must first seek peace. This peace must be sought prior to declaring war, prior to waging a battle, and prior to laying a siege. While war permits killing, it only permits the intentional killings of combatants. Innocent people must be given every opportunity to remove themselves from the field of combat.

[28] *Laws of Kings* 6:8. *See* R. Yehuda Shaviv, *Betzer Eviezer*, (Ztomet, 1990) at 120–21.

[29] Negative Commandment 57.

[30] In his supplement to Maimonides, Book of Commandments (Positive Commandment 6).

[31] The rules related to sexuality in combat are unique in Jewish law because the Talmud (*Kidushin* 21b) explicitly states that even that which is permissible was only allowed because of the moral weakness of men in combat. While the details of these regulations are beyond the scope of this paper (*see* SHLOMO YOSEF ZEVIN, LEOR HAHALACHA, pp. 52–54 (2d ed. 1956) for a detailed description of these various laws), it is clear that the Bible chose to permit (but discourage) in very narrow situations rape in wartime so as to inject some realistic notion of morality into what could otherwise be a completely immoral situation. The rules explicitly prohibited multiple rapes, encouraged marrying such women, and limited the time period where such rape was permitted to the immediate battlefield.

A number of liberalities in ritual law were also allowed, reflecting the unique aspects of war. Why these particular laws did not apply in wartime, but others did, is a topic beyond the scope of this paper.