

# LAW, INTERPRETATION, AND IDEOLOGY: THE RENEWAL OF THE JEWISH LAWS OF WAR IN THE STATE OF ISRAEL

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## INTRODUCTION

The Jewish legal system is a traditional system based on a process of ongoing interpretation and reinterpretation of classical Jewish sources. Although the development of Jewish law began within the context of a sovereign Jewish nation living in its own land, much of the development took place in a state of exile. As a result, for approximately two thousand years, the Jewish legal system focused on internal matters and ceased its deliberation of issues that related to the functions of state. The Zionist movement, and the subsequent rebirth of Jewish sovereignty with the establishment of the State of Israel in 1948, challenged Jewish legal authorities to deal with issues that had not been addressed for centuries. The lack of continued deliberation challenges the interpreter significantly, as he is required to overcome a lacuna of hundreds of years of relevant sources and deliberations. In response to this challenge, some jurists have relied on traditional exegetical methods while others have utilized innovative, and at times radical, methods of interpretation. In this paper, I will focus on the responses of a number of Jewish religious thinkers and rabbinic authorities who reflect several characteristic approaches to one of the particular challenges posed by the renewal of Jewish sovereignty, the conduct of war. In my analysis of their positions, I will pay attention to the impact of ideology on the legal rulings—i.e., how each personality's attitude towards Zionism affected his rulings on the permissibility and the limitations of the use of force in Jewish law.

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## I. RENEWED DELIBERATION ON THE USE OF MILITARY FORCE

A. *The Zionist Enterprise and Jewish Tradition:  
Challenges and Tensions*

The Zionist movement created a significant challenge to traditional Judaism. At first the challenge appeared to be only ideological-theological, but as the success of the Zionist movement grew, it became clear that it had far reaching practical and normative implications.<sup>1</sup> Traditional Jewish thought distinguished between an age of exile—contemporary times (*zman hazeh*)—and an anticipated age of redemption. The redemption—a return to the holy land and a renewal of its national and religious institutions—was understood as a future event that would not be the result of human initiative. In fact, it would be accurate to say that there are statements in Jewish tradition that could be interpreted as a prohibition of any action that would advance this future age. Rather, Jews were apparently required to wait patiently for the redemption that would be affected by divine intervention. The Zionist movement proposed a radical change in this way of thinking. It called on the Jews to take responsibility for their fate and sought to initiate a renewal of Jewish national sovereignty. The fundamental dilemma that arose in traditional circles was whether to support the idea of human initiative or to view it as antithetical to a divine process of redemption. In addition, even if human initiative might be viewed as appropriate, would it be fitting to participate in a process that was being led by Zionists, the majority of whom had abrogated religious practice? If so, what significance, in terms of Jewish thought, should be given to this process? Is it feasible that such a project could be part of the process of redemption? If so, how could it possibly be conducted on a human level, and more so by non-religious Jews? If not, then how might the collective return of the Jewish people to the Land of Israel divorced from the context of redemption be interpreted? Is it possible for the Jews to remain in a state of exile while establishing sovereignty in the Holy Land?

In the final analysis, a majority of rabbis opposed participation in the Zionist enterprise. However, a significant minority wished to

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<sup>1</sup> EHUD LUZ, PARALLELS MEET: RELIGION AND NATIONALISM IN THE EARLY ZIONIST MOVEMENT (1882-1904) (Lenn J. Schramm trans., Jewish Publ'n Soc'y 1988) (1985); AVIEZER RAVITZKY, MESSIANISM, ZIONISM, AND JEWISH RELIGIOUS RADICALISM (Michael Swirsky & Jonathan Chipman trans., Univ. of Chi. Press 1996) (1993); YOSEF SALMON, RELIGION AND ZIONISM: FIRST ENCOUNTERS (2002). Letters of the Rabbis for and against the Zionist idea were gathered in two books. Letters of support were collected in A. SLUTSKI, SHIVAT TZIYON (1891). Letters of opposition were collected in S.Z. LANDA & YOSEF RABINOVICH, OR LA-YESHARIM [LIGHT TO THE HONEST] (1900).

participate in the process. In order to deal with the aforementioned dilemmas, they were forced to reinterpret some of the traditional Jewish concepts.<sup>2</sup>

The religious leaders who wished to join the Zionist enterprise were prepared for theoretical changes, but they did not imagine at the beginning of the process the degree of change that would also be required on the *halakhic* (Jewish legal) level. In fact, the new social framework in the Land of Israel as compared to that of the Diaspora—changing from a minority group to the majority—as well as the acquisition of sovereignty and the resulting political character acquired by Jewish society for the first time in centuries, placed the normative Jewish legal system (*halakhah*) in a reality for which it was not equipped.

Throughout the ages, the Jewish community was forced by its host society to live separately, but also wished to be separated in order to maintain its Jewish identity.<sup>3</sup> The Jewish legal system was one of the

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<sup>2</sup> Reality was also reinterpreted, sometimes radically, in the theological works that were written in the wake of Zionism. Within religious Zionism, there are two different interpretations that define the religious significance of the Zionist enterprise. One tries to integrate Zionism into traditional concepts of redemption as an essential component of the messianic process. The innovation in this approach is its readiness to attribute religious significance to a human endeavor in which man becomes a partner in advancing the process of redemption, a rebellion against the traditional passive approach to redemption. This approach represents a radical change in the perception of redemption: from an event to a process, from a deterministic occurrence to a human process initiated by mankind in quest of redemption, and from a yearning to active promotion. The other stream of religious Zionism viewed the Zionist enterprise from a pragmatic perspective, as a necessary process for the preservation of the Jewish people in current times without a connection to redemption. This approach was also very innovative in its readiness to discuss and examine reality in terms other than the traditional categories of exile and redemption. See DOV SCHWARTZ, RELIGIOUS ZIONISM BETWEEN LOGIC AND MESSIANISM (1999) (Heb.) [sources not translated into English referred to hereinafter by “(Heb.)”]; RAVITZKY, *supra* note 1, at 79-144; SALMON, *supra* note 1, at xix-xxiii; JOSEPH WANEFSKY, RABBI ISAAC JACOB REINES: HIS LIFE AND THOUGHT (1970). The relationship between the Zionist idea in general and the messianic tendency in Judaism engaged many of the ideological and political leaders of secular Zionism as well as scholars of Zionism. See GIDEON SHIMONI, ZIONIST IDEOLOGY 145-51 (1995); EHUD LUZ, WRESTLING WITH AN ANGEL 103-04 (Michael Swirsky trans., 1998); see also S. Almog, *ha-Meshihuyut ke-etgar la-Tsiyonut [Messianism as a Challenge to Zionism]*, in MESSIANISM AND ESCHATOLOGY: A COLLECTION OF ESSAYS 433 (Zvi Baras ed., 1983) (Heb.); SALMON, *supra* note 1, at xix-xxiii. On the connection between secular Political Messianic Zionism and other modern secular Utopian Movements, see ANITA SHAPIRA, VISIONS IN CONFLICT 7-22 (1989) (Heb.).

<sup>3</sup> One of the conspicuous characteristics of the Jewish legal system is that it does not try to impose itself on the general society but only on those who are within its own community. The *halakhah* refrained from any pretense to expand its influence beyond its constituency, nor did it place any value or benefit in the adoption of its norms by those outside of the Jewish community. This fact reflected both a theological perspective and a social reality. Unlike Christianity or Islam, Judaism is not considered a missionary religion. Since modern times, gentiles who wanted to become Jewish had to go through a long process and embrace all of the commandments and rules that constitute Judaism. Not only does Judaism not try to force itself on those who are not Jewish, it is even considered to have a negative attitude to proselytism and demonstrates no desire to encourage it in any way. See 13 ENCYCLOPAEDIA JUDAICA 1182 (1972); Avi Sagi & Zvi

primary instruments through which the community maintained its isolation. The transition to becoming a sovereign majority that defined itself as a Jewish society created a new and challenging reality for the Jewish legal system, as I will discuss.

The fact that the *halakhah* developed for a long period of time in a reality in which the Jewish community constituted an isolated minority had far reaching implications for the nature of the system, both in terms of the content of its norms and in terms of the scope of the areas to which it related. With regard to content, the impact found expression in almost every branch of the *halakhah*. Even in ritual areas, which were always vibrant and were apparently unconnected to sovereignty, the new reality created problems. A good example is Sabbath observance, which is one of the most important areas of Jewish ritual law. In the Diaspora, Jews relied on non-Jews (“*shabbes goy*”)<sup>4</sup> to conduct aspects of agriculture and business that they themselves were not allowed to perform on the Sabbath. How would it be possible to conduct agriculture and business in a majority Jewish society without the help of individuals who were not subject to Jewish law?<sup>5</sup> Furthermore, the fact that the Diaspora Jewish community lived as a separate minority that did not wish to influence the general society allowed it to create norms that would not be suitable for a normative system designed to govern the conduct of the general public. Thus, the system could distinguish between Jews and non-Jews in terms of their respective roles in the legal structure.<sup>6</sup> For example, in difficult medical questions that arose as a result of modern medical technology, some rabbis were able to issue the rulings that they did because they knew that the responsibility

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Zohar, *Giyyur, Jewish Identity, and Modernization: An Analysis of Halakhic Sources*, 15 MOD. JUDAISM 49 (1995).

<sup>4</sup> JACOB KATZ, *THE “SHABBES GOY:” A STUDY IN HALAKHIC FLEXIBILITY* (Yoel Lender trans., 1989).

<sup>5</sup> See ELIEZER BERKOWITS, *NOT IN HEAVEN—THE NATURE AND FUNCTION OF THE HALAKHAH* 95-100 (1983). Another challenge that the revival of Jewish communal life in Israel posed to the *halakhah* was the renewed relevance of agricultural laws related only to the Land of Israel. One example is the sabbatical year, which prohibited tilling the land every seventh year. See LUZ, *supra* note 1, at 73-74:

The struggle between the Orthodox and the maskilim for the soul of the New Yishuv reached a crisis with the Sabbatical Year (shemittah) controversy of 1888-1889 . . . . More than any other agriculture law pertaining to Erez Yisrael, the Sabbatical Year symbolized the sanctity of the Land and the bond between the Torah, the Jewish People and the Land . . . . The main argument of the maskilim who sought a rabbinical dispensation was that refraining from agricultural labor during every seventh year would destroy the New Yishuv.

The compromise that was accepted and practiced in 1882 is still practiced until this day due to the ruling of the Chief Rabbi of Israel, Rabbi Kook, to “sell” the land to a non-Jew in the sabbatical year. Ironically, this solution is very similar to solutions that were utilized in the Diaspora. For that reason, this solution was attacked by some of the Zionist leaders and rabbis.

<sup>6</sup> See RABBI ISAAC HERZOG, *CONSTITUTION AND LAW IN THE JEWISH STATE ACCORDING TO THE HALAKHAH* (Itamar Verhaftig ed., 1999) (Heb.).

for maintaining the public health system did not fall on their shoulders, and that the civil law would issue a different ruling.<sup>7</sup> We should also mention that as an isolated normative system that seeks to maintain its unique character and its exclusivity, the *halakhah* included statements that degraded the governmental legal system and even prohibited its constituents from utilizing it.<sup>8</sup> Therefore, after the establishment of the State of Israel, an enormous question arose about how to relate to a Jewish governmental legal system that is not based on Jewish law. Would the *halakhah* be prepared to adopt and legitimate the laws of the state, or some of them, or would it continue to see the governmental legal system as hostile and competitive? In addition, the autonomous legal systems of Jewish communities were based not only on the classical Jewish codes of law, but also on the legislation of the local Jewish community. Would the *halakhah* be prepared to exchange “the community” for the legislative bodies of the state and to give *halakhic* status similar to that of community legislation to at least portions of the laws of the state, such as civil law?

The areas of Jewish law that were challenged in the new reality were more conspicuous in light of the simple fact that *halakhah* continued to develop and function as a living normative system only in those areas of life that the Jewish community conducted autonomously.<sup>9</sup> It did not deal with or develop those areas in which Jews were prevented from participating, such as the laws of state. Even in times and places where individual Jews were involved in government, it was clear that the law of the land would be the determining factor in government issues, and that the norms of Jewish law were irrelevant. Thus, the area of Jewish law relating to public issues was almost totally inactive for centuries and ceased its development.<sup>10</sup>

Jewish law was intended to be a normative system capable of addressing all areas of life. The anticipated messianic ideal would be differentiated by, among other characteristics, the fact that the Jews would be able to return to a life governed by their own normative system. One would think that the establishment of the State of Israel included that possibility. Yet, we must remember that the Jewish legal

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<sup>7</sup> See, e.g., RABBI SHLOMO GOREN, TORAT HA-REFUAH [JEWISH MEDICAL LAW] 79-83 (2001). Rabbi Goren claims that the Jewish legal prohibition to establish an organ bank is untenable in the State of Israel. He claims that this prohibition does not have force because it was applied to a minority society that did not have responsibility for the general public. Therefore, it does not have force in the State of Israel.

<sup>8</sup> 1 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 13 (Bernard Auerbach & Melvin J. Sykes trans., Jewish Publ'n Soc'y 1994) (1988).

<sup>9</sup> After the emancipation, the *halakhah* retreated significantly as a living system even in judgments on private matters. See 4 *id.* at 1582, 1586.

<sup>10</sup> Although public Jewish law was vibrant with regard to governance of the internal Jewish society, it is clear that most public law dealt with matters that were outside of the areas of autonomy such as foreign affairs, security, status of foreigners, etc. See 1 *id.* at 45, 55.

system functions without legislative bodies. Rather, interpretation is its primary instrument of legislation. *Halakhic* literature throughout the ages has been built on strands of interpretation, in which each strand represents an interpretation of the strand that preceded it.<sup>11</sup> The resulting problem is clear: How is it possible to revive Jewish law in those areas in which it did not express itself for centuries? The vibrancy of a law flows from its ongoing interpretation. Is it possible to revive a law that was not applicable in practice, and not even discussed in the study hall, for hundreds of years? To the degree that it is possible, it requires great exegetical creativity with regard both to the normative texts and with regard to the reality.

### B. *Reviving the Jewish Laws of War: A Case Study*

Clearly, the establishment of an army, including the use of arms and force, is one of the far-reaching changes in Jewish life resulting from the success of Zionism.<sup>12</sup> The image of the degraded Jew who is incapable of defending himself was central to the Jewish self-perception, as well as the Jewish reality, throughout the Middle Ages until the height of World War II. The new self-image of the Jew after the establishment of the State of Israel became the Jew who bears arms and is capable of defending himself.

One who wishes to reconstruct Jewish laws of war will quickly discover that, as in other areas, it was not addressed by the *halakhah* during the period of exile. Thus, the laws of war almost completely disappeared from the corpus and were certainly not part of the active Jewish tradition. There are no relevant rules or traditions of what is permissible and forbidden in times of war, or the legitimate methods and limitations of the use of force.

Furthermore, the fact that for generations, Jewish society never had the option of using force understandably made its mark on the ideological and psychological relationship of Jewish tradition to the use of force. Yeshayahu Leibowitz, one of the prominent religious intellectuals in Israel in the second-half of the twentieth century, described the problem in the introduction to his famous article, "After Kibiyah," as follows:

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<sup>11</sup> MOSHE HALBERTAL, *PEOPLE OF THE BOOK: CANON, MEANING, AND AUTHORITY* 55 (1997).

<sup>12</sup> See ANITA SHAPIRA, *LAND AND POWER: THE ZIONIST RESORT TO FORCE 1881-1948* (William Templer trans., 1992); LUZ, *supra* note 2. Even though it is obvious that Jews did fight in foreign armies, they fought as individuals bound to a military system that the *halakhah* did not feign to influence, unlike the State of Israel where an army of Jews was established in the Jewish State. See *The Bearing of Arms and Military Service of Jews from Ancient Rome to the Enlightenment—A Collection of Articles*, 41 JEWISH STUD. 51 (2002).

The great test to which we as a nation are put as a result of national liberation, political independence, and our military power—a society and culture that for many generations, derived certain spiritual benefits from conditions of exile, foreign rule, and political impotence. Our morality and conscience were conditioned by an unnatural, insulated existence in which we could cultivate values and a heritage that did not have to be tested in the crucible of reality. We viewed ourselves, and to a certain degree we were viewed by others, as a people who had controlled one of the most awful inclinations that ensnare the soul of man, and as those disgusted by the display of dreadful behavior found in every human society: the inclination to internecine murder.<sup>13</sup>

The reality of the lack of power not only led to a lack of norms but also created an ethos of opposition to the use of force, an idealization of the reality of powerlessness and a world of values in which the use of force was not an option in both a normative and an ethical sense. Thus, anyone wishing to establish Jewish laws governing the use of force would have to overcome both the psychological block against the use of force as well as the idealized perspective that was internalized in Jewish culture and tradition.<sup>14</sup>

An initial look at classical Jewish sources reflects a clear duality with regard to the fundamental relationship to the use of force. This duality begins with the tension that exists in the Bible regarding the use of force. On the one hand, force is viewed as a legitimate instrument. On the other hand, the use of force is restricted, and there are clear warnings about the dangers inherent in its use. Thus, the Bible discusses desirable wars, but in parallel expresses the prophetic vision that attacks belief in force and extols the ideal of world peace. Therefore, Joshua's conquest of the land of Canaan and King David's

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<sup>13</sup> Yeshayahu Leibowitz, *Aharei Kibiyah*, in YAHADUT AM YEHUDI U-MEDINAT YISRAEL 229-30 (Yeshayahu Leibowitz trans., 1976). For an English translation, see Yeshayahu Leibowitz, *After Kibiyeh*, in JUDAISM, HUMAN VALUES AND THE JEWISH STATE 185 (Eliezer Goldman ed., Eliezer Goldman et al. trans., 1992). The article first appeared in 1954. This article will be discussed in detail *infra*.

<sup>14</sup> The discussion of the parameters and limitations of the use of force in the wake of the Zionist enterprise and the establishment of the State of Israel was obviously not limited to religious thinkers and rabbis. This issue generated a vibrant debate among Zionist leaders and occupied a central position in public deliberations for many years. There were two reasons for the centrality of this issue: the lack of Jewish sources relating to the use of force, as discussed here, and the confidence of the early Zionists that their program would be well received without the necessity to use force. See Berl Katznelson, *Yehi Nishkeha Tahor* [*Your Weapons shall be Pure*] (Geneva 1939), in 9 KOL KITVEI BERL KATZNELSON [THE COMPLETE WORKS OF BERL KATZNELSON] 65 (1948) (addressing the 21st World Zionist Congress); LUZ, *supra* note 2; HILDA SCHATZBERG, RESISTANCE AND TRADITION IN MANDATORY PALESTINE (1985) (Heb.); ANITA SHAPIRA, BERL: THE BIOGRAPHY OF A SOCIALIST ZIONIST BERL KATZNELSON 1887-1944, at 277 (Haya Galai trans., Cambridge University Press 1984); SHAPIRA, *supra* note 12; J.L. Talmon, *The Six Day War in Historical Perspective*, in ISRAEL AMONG THE NATIONS 130 (1970).

wars for the conquest of the land were viewed in a positive light,<sup>15</sup> yet King David himself was considered unsuitable to build the Temple because his hands were defiled with the blood of his enemies.<sup>16</sup> A study of the various layers of the Bible reveals an approach that legitimates the use of force in specific circumstances but warns against the danger of the use of force, primarily a belief in reliance on force. Thus, the Torah warns in Deuteronomy:

Beware lest you forget the Lord thy God . . . and you say in your heart: "My power and the might of my hand have gotten me this wealth." But you shall remember the Lord your God, for it is He that gives you power to get wealth, that He may establish His covenant which He swore unto your fathers, as it is this day.<sup>17</sup>

The complexity of the Biblical position allows for the establishment of political sovereignty that includes an army, while calling for a large degree of discretion in utilizing the military and requiring that it not occupy a primary position in the society.

Nevertheless, we must keep in mind that in Jewish tradition, the authority of the Bible actually finds expression through the manner in which it is interpreted by the Rabbinic Sages. Rabbinic literature, known as the "Oral Law," is the canon of post-Biblical literature that emanated from the academies of the *tannaim* and *amoraim* in the first through the fifth centuries. In Rabbinic literature, the approach to war is completely different than in the Bible.<sup>18</sup> The tension seen in the Bible disappears, and war is regarded as an illegitimate phenomenon. While it is true that the Mishnah, the Talmud and subsequently the law codes recognize the concepts of a permissible war (*milhemet reshut*) and an obligatory war (*milhemet mitzvah*), these concepts always refer to the wars that occurred during the times of the Kingdom of Israel and are not considered relevant to contemporary times. Essentially, the positive connotation of war in the Bible takes on a completely different interpretation in Rabbinic literature. The Biblical war is now treated allegorically, relating not to military battle, but to the war of Torah

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<sup>15</sup> *Joshua* 4:12; 2 *Samuel* 6:18.

<sup>16</sup> 1 *Chronicles* 22:8 ("But the word of the Lord came to me, saying, Thou hast shed blood abundantly, and hast made great wars: thou shalt not build a house unto my name, because thou hast shed much blood upon the earth in my sight.").

<sup>17</sup> *Deuteronomy* 8:17-18; see also *Zechariah* 4:6 ("Not by might, nor by power, but by my spirit, saith the Lord of hosts."). There were parameters and limitations also with regard to the power of the King as reflected in laws of the King. *Deuteronomy* 17:14-20. His obligation to keep a Torah with him at all times certainly reflects this tension. See 3:1 YEHEZKAL KAUFMAN, HISTORY OF THE RELIGION OF ISRAEL 375 (1977); Shlomo Yosef Zevin, *ha-Milhamah [The War]*, in LE-OR HA-HALAKHAH [IN LIGHT OF THE HALAKHAH] 9 (1946).

<sup>18</sup> The *tannaitic* literature included the canon known as the *Mishnah*, which was compiled in 220 C.E. The writings of the *ammoraim* are collected in the Jerusalem Talmud, which was compiled approximately at the end of the fourth century, and the Babylonian Talmud, which was compiled approximately at the end of the fifth century.



(*milhamtah shel Torah*). The battle is the attempt of the scholars to convince each other of the correct interpretation of the Torah, and power is the ability of the scholars to distinguish, to refute, and to make legal determinations. Thus, for example, the description of King David as “a brave fighter and a man of war”<sup>19</sup> is explained in the Talmud as follows: “brave fighter—that he knows what to respond; man of war—that he knows how to give and take in the war of Torah.”<sup>20</sup> The hero of the battlefield is transformed into the hero of the study hall—the sharp scholar. Another image of the hero used by the sages is the person who controls his inclinations, who succeeds on the internal battlefield: “Who is strong? One who conquers his inclination, as it says: ‘He who is slow to anger is better than a strong man, and a master of his passions is better than the conqueror of a city.’”<sup>21</sup> Even the military events that took place in the Second Temple period are given a spiritual interpretation by the Sages. Thus, for example, Rabban Yochanan ben Zakkai, who fled the besieged city of Jerusalem and moved to the Roman southern town of Yavneh, is considered the hero by the Rabbis, rather than the residents of Jerusalem who rebelled against Rome.<sup>22</sup> Similarly, the military victories of the Maccabees are not mentioned at all in the Mishnah and the Talmud. Rather, the miracle of Chanukah that is emphasized in the Talmud is the miracle of the vial of oil that enabled the preservation of the purity of the Temple.

There is thus no doubt that Leibowitz’s characterization is sharply accurate. The archives of Jewish tradition are not empty and do not contain sufficient norms for the conduct of war, but they do include an anti-military ideology. Therefore, one who wishes to characterize the tradition as relevant to a period of Jewish sovereignty has a double task: to overcome the ideology and to create new laws relating to war. In subsequent sections, I will try to describe the rabbinic deliberations with

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<sup>19</sup> 1 *Samuel* 16:18

<sup>20</sup> BABYLONIAN TALMUD, TRACTATE SANHEDRIN 93b (Rabbi Dr. I. Epstein ed., Jacob Shachter & H. Freedman trans., 1987).

<sup>21</sup> MISHNAH AVOT 4:1; see Aviezer Ravitzky, *Peace*, in CONTEMPORARY JEWISH RELIGIOUS THOUGHT: ORIGINAL ESSAYS ON CRITICAL CONCEPTS, MOVEMENTS, AND BELIEFS 685 (Arthur A. Cohen & Paul Mendes-Flor eds., 1987); see also 3 CONTROVERSY AND DIALOGUE IN THE HALAKHIC SOURCES 28-33 (Hanina Ben-Menahem et al. eds., 1991) (Heb.); LUZ, *supra* note 2, at 215-17; Zevin, *supra* note 17. Important within this context are the articles of Ahad Ha’am that extol this worldview and denigrate the Zionist tendency to, on the contrary, view force as an ends rather than a means. See, e.g., Ahad Ha’am, *Flesh and Spirit*, in NATIONALISM AND THE JEWISH ETHIC: BASIC WRITINGS OF AHAD HA’AM 188 (Hans Kohn ed., Leon Simon trans., 1962).

<sup>22</sup> Similarly, the Sages who disagreed with Rabbi Akiva with regard to the Bar Kokhba rebellion were in the end justified by Rabbinic literature. There is much literature on this issue and on the revival of the myths of heroism in the Zionist era. See LUZ, *supra* note 2, at 52; Yael Zerubavel, *RECORDED ROOTS: COLLECTIVE MEMORY AND THE MAKING OF ISRAELI NATIONAL TRADITION* (1995). Perhaps this anti-military attitude might explain the Zionist policy of restraint in light of Arab attacks during the British mandate period. See SHAPIRA, *supra* note 12, at 235.

regard to whether it is necessary and possible to establish laws governing the use of force in contemporary times. I will not relate to the specific content of the laws of war except when it is important for clarifying the discussion of the primary question: Do we need to fill this void in Jewish law, and, if so, how can it be done?

### C. *A Theoretical Model*

From a theoretical perspective, there are a number of ways that one might deal with this lack in the normative system. One approach, which I will demonstrate *infra* was adopted by some of the legal authorities, is to see the lack of norms on the topic as an explicit legal position—i.e., that Jewish law did not develop a normative system dealing with the use of force because it is opposed to the use of force.

Another approach is to accept the gap and to argue that the law is indifferent to this issue. This “indifference” can be explained in two ways: One way would claim explicitly that the laws of war are beyond the bounds of Jewish law, and that it is not the place of rabbinic authorities or religious thinkers to deal with political and state issues which are not addressed by the *halakhah*.<sup>23</sup> Another way—adopted, as I will discuss *infra*, by Rabbi Yisraeli, one of the prominent Religious Zionist rabbis—is to turn outward, and to incorporate an external legal approach into Jewish law. A well-known precedent of this method is the *halakhic* principle “the law of the land is the law” (*dina demalkhuta dina*),<sup>24</sup> which I will explain *infra*. This principle has been part of the Jewish legal system since the third century. It does not involve the complete detachment of Jewish law, but rather a lack of pretension to create its own normative system.

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<sup>23</sup> ASHER COHEN, THE TALIT AND THE FLAG: RELIGIOUS ZIONIST AND THE CONCEPT OF A TORAH STATE 1947-1953, at 97 (1998) (Heb.); Benjamin Brown, *Polmus 'da-at Torah' ba-Zionut ha-datit be-Israel* [The Polemic About Torah Insight in Religious Zionism], in THE RELIGIOUS ZIONISM: AN ERA OF CHANGES, STUDIES IN MEMORY OF ZVULUN HAMMER 422 (Asher Cohen ed., 2004). A.E. Simon, a religious personality and a leading intellectual in the early years of the state, in his article, *Ha-im od Yehudim Anahnu* [Are We Still Jews], raised this as a suggestion for changing direction in the current situation, not as an interpretation of Judaism:

Judaism is in reality a catholic religion from an objective standpoint, but the current crisis calls for a subjective protestant approach . . . . This individualist approach is not a goal unto itself, i.e., it is not an interpretation of the essence of Judaism, but rather a troubling means that must be implemented because of the need.

See AKIBAH ERNST SIMON, HA-IM OD YEHUDIM ANAHNU [ARE WE STILL JEWS] 1 (1983) (Heb.). The original article was published in 1952. For a broader look at this issue in Jewish thought, see AVIEZER RAVITZKY, RELIGION AND STATE IN JEWISH PHILOSOPHY: MODELS OF UNITY, DIVISION, COLLISION AND SUBORDINATION (Uri Dromi ed., Rachel Yarden trans., 2002).

<sup>24</sup> See SHMUEL SHILO, DINA DE-MALKHUTA DINA [THE LAW OF THE STATE IS THE LAW] (1974) (Heb.); ELON, *supra* note 8, at 64.

A third possibility is to try to fill in the gap by creating a Jewish legal corpus regarding new areas that were not addressed previously by the *halakhah* because they were irrelevant during the exile, issues on which there is no ongoing discussion or tradition. The argument of the rabbinic leaders of Religious Zionism, who generally follow this approach, is that the *halakhah* was always able to adapt itself to new situations, that it contains the mechanisms to create and develop norms for every time and situation.<sup>25</sup> This approach raises issues regarding the appropriate sources that can be utilized to create this corpus and the suitable methods of interpretation that can be employed to establish a normative system.

From a theoretical perspective, there are two types of sources within Jewish law to address the laws of war. One possibility is to turn to *halakhic* sources dealing with the laws relating to the saving of life and the right of self-defense (*pikuah nefesh*). This approach would focus on the law of the pursuer (*rodef*), which deals with the right to harm a person who is pursuing another with the intent to kill him. The implication of turning to these sources is that it involves turning to criminal law in order to establish a normative system for the laws of war. As such, it reflects an assumption that war does not constitute an independent normative category. A significant number of rabbinic authorities have adopted this approach. From the standpoint of internal *halakhic* thought, this position is less radical and innovative because it continues an ongoing *halakhic* discussion that has dealt with such questions throughout the generations. The second option is to try to build a separate normative system relating to war. The discussion that follows reveals that several approaches have been suggested to identify a foundation for such a normative system. It also reveals the value of

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<sup>25</sup> On this ideology and the tensions that arose within religious Zionism during the early years of the state, see COHEN, *supra* note 23. See also ELIEZER GOLDMAN, EXPOSITION AND INQUIRIES—JEWISH THOUGHT IN PAST AND PRESENT 396 (Avi Sagi & Daniel Statman eds., 1996) (Heb.). With regard to the implementation of this idea in practical *halakhic* rulings, Chief Rabbis Isaac Herzog and Ben Zion Uziel stood out as successful rabbinic models. Rabbi Herzog's writings on this topic have been collected in HERZOG, *supra* note 6. On Rabbi Herzog, see Josef Ahituv, *Halakhic Vacillations of Rabbi Isaac Halevi Herzog During the Early Years of the State of Israel*, in THE CHALLENGE OF INDEPENDENCE—IDEOLOGICAL AND CULTURAL ASPECTS OF ISRAEL'S FIRST DECADE 199 (Mordechai Bar-On ed., 1999) (Heb.); Eliav Schohetman, *Rabbi Isaac Herzog's Theory of Torah and State*, 5 JEWISH L. ASS'N STUD. 113 (1991). See Rabbi Uziel's collection of rulings in PISKE\_UZIEL BI-SHE'ELOT HA-ZEMAN (1977) (Heb.); see also MARC D. ANGEL, LOVING TRUTH AND PEACE: THE GRAND RELIGIOUS WORLDVIEW OF RABBI BENZION UZIEL 218-27 (1999); Shalom Ratzabi, *Zionism, Judaism and Eretz Israel in the Thought of the Rishon le-Zion Rabbi Ben Zion Meir Hai Uziel*, 73 PE'AMIM 60, 60-83 (1997); Elimelech Westreich, *The Legal Activities of the Chief Rabbi During the Period of the British Mandate: A Response to the Zionist Challenge*, in A HUNDRED YEARS OF RELIGIOUS ZIONISM 83 (Avi Sagi & Dov Schwartz eds., 2003) (Heb.). Certainly other rabbis expressed opinions on religious rulings in the age of Jewish sovereignty. See, e.g., ROTH MESHULLAM, KOL MEVA'SER (1972) (Heb.); 1-3 A. WOLDENBERG, HILCHOT MEDINA (1956-1962) (Heb.); YEHUDA GERSHONI, KOL TSOFEKHA (1980) (Heb.).

distinguishing between the different approaches, for at times the distinctions reflect a very significant difference of opinion regarding the essence of the Zionist enterprise and the significance of the State of Israel in religious terms. These distinctions permit analysis of the connection between ideology and interpretation.

The latter approach was advocated by both Yeshayahu Leibowitz and Rabbi Shlomo Goren, whose positions will be analyzed in detail in Part III and Part V respectively. In his earlier thought, Leibowitz wanted to create a corpus of Jewish law for the new reality, but did not view himself as authorized to do so. For decades, he cried out to the rabbis to fulfill this obligation, which he saw as their religious responsibility.<sup>26</sup> Rabbi Goren, the founder of the Israeli military rabbinate, also contended that it was possible, even obligatory, to fill in the gap. As an expert legal authority and a military man, he took the initiative. He tried to build an actual Jewish legal corpus based on the normative *halakhic* system. As a military man, he objected vociferously to filling the gap in this area based on the principles of criminal law and sought to build a unique corpus of laws of war. Toward that end, Rabbi Goren utilized innovative methods of interpretation. He sought to reconnect the Biblical attitude toward power with the Rabbinic attitude, and to thus shape a corpus that would be relevant to modern times.

## II. THE CONSERVATIVE (*HAREDI*) POSITION: THE ILLEGITIMACY OF WAR

A significant portion of the Orthodox rabbinate fundamentally opposed the Zionist idea from its inception. From their religious perspective, it was forbidden to engage in any initiative that might hasten the messianic end of days. This opposition began at a point when nobody even considered the possibility that the realization of the Zionist program would require the use of force. The subsequent necessity for military action created an additional anchor for Orthodox rabbinic opposition to Zionism. Some of the rabbis saw the necessity for the use of force as categorical proof that the Zionist idea was fundamentally illegitimate from the perspective of Jewish tradition. Jewish law, according to this position, addresses all relevant areas of

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<sup>26</sup> In previous articles, he called explicitly for religious legislation. He wanted the rabbis to legislate new laws that would deal with everything related to running a state. Later on, Leibowitz changed his position to the other extreme, seeking a separation of religion and state. See Eliezer Goldman, *The State of Israel in the Test of Judaism According to Yeshayahu Leibowitz*, in GOLDMAN, *supra* note 25; Avi Sagi, 'Are We Still Jews?,' in FIFTY TO FORTY-EIGHT: CRITICAL MOMENTS IN THE HISTORY OF THE STATE OF ISRAEL 79-87 (1999) (Heb.). The article is a response to Simon's article with the same title. See *supra* note 23.

life for the Jews. The lack of laws of war in Jewish law is thus a most convincing proof that military action is not to be undertaken. Jewish law does not deal with laws of state and of war because it opposes the establishment of an independent Jewish state and the use of force for the purpose of gathering the exiled Jews before the advent of the messiah. Jewish tradition on these matters has been opposition to the use of force, a position that flows from the Talmud. It is therefore inappropriate for Jewish legal authorities to render decisions or participate in deliberations on these issues as it lends support to a process that is entirely in opposition to the central ethos of *halakhah*.<sup>27</sup>

In the 1930s, a radical group separated from *Agudat Yisrael*, the party that united the anti-Zionist *Haredi* Jews of the *Yishuv Ha-Yashan*<sup>28</sup> in Jerusalem. From their perspective, *Agudat Yisrael* cooperated too much with the Zionist institutions. The incident that precipitated this separation was the tax that was levied by the Jewish settlement authorities in 1938 to provide defense in light of the Arab riots that began in 1936. This radical group, who called themselves *Neturei Karta* (literally the watchmen of the city), first appeared at this time with a call to its followers not to pay the tax. The term “*neturei karta*” contains an important concealed message. It is taken from the story in the Jerusalem Talmud in which a Sage wanted to see the watchmen of the city (*neturei karta*), and when he was taken to the military watchmen of the city, he said: “These are the destroyers of the city, and not its watchmen. Who are the watchmen of the city? They are those who study Torah.”<sup>29</sup> In other words, personal security can only be acquired by means of Torah study, as accepted in Jewish tradition up until the Zionist period. The wars of the State of Israel, according to this position, are transgressions heaped upon transgression. The conduct of war and the bloodshed associated with it are added to the subversive sin inherent in the very establishment of the state. Rabbi Moshe Blau (1885-1946), one of the prominent leaders of *Agudat Yisrael* in Jerusalem during the decades preceding the establishment of the state, published an article in 1945 entitled “We Are Greatly Embarrassed.” The great embarrassment that gripped the author was

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<sup>27</sup> SALMON, *supra* note 1; RAVITZKY, *supra* note 1, at chs. 1-2, 4; Menachem Friedman, *The State of Israel as a Theological Dilemma*, in *THE ISRAELI STATE AND SOCIETY BOUNDARIES AND FRONTIERS* 165-215 (Baruch Kimmerling ed., 1989). In addition to this argument, there were two other fundamental issues that concerned many of the Orthodox rabbis. The first was that it is prohibited to rebel against the nations and to utilize force for settling the Land of Israel. See RAVITZKY, *supra* note 1, at 211. The second was the fact that the Zionist idea was promoted by Jews who had cast off the yoke of Torah observance, whom the rabbis viewed as “evil.”

<sup>28</sup> Literally the “old settlement,” referring to the Orthodox Jews who lived in the Old City of Jerusalem prior to the Zionist settlement activity. For more information on the founding of *Agudat Yisrael* in Poland and its ideology, see GERSHON BACON, *THE POLITIC OF TRADITION: AGUDAT YISRAEL IN POLAND, 1916-1939* (1996).

<sup>29</sup> JERUSALEM TALMUD, TRACTATE HAGIGAH 1:7.

related to Jewish acts of revenge against the Arabs. To the question of how Jewish youth had fallen to such a degree, he answered: “[It began] from the day that negation of the Torah and rebellion against religion became extolled, and from the day that the attempt was made to give our people nationalist values . . . .”<sup>30</sup> The conversion from religion to nationalism liberated the Zionist Jews from responsibility to the Jewish values that prohibit military activity.

Rabbi Yoel Teitelbaum (1888-1979), the Satmar Rebbe, the leader and spokesman of radical *Haredi* Orthodoxy after the Holocaust, wrote as follows in his anti-Zionist manifesto, *Va-Yoel Moshe*:

Their hands are also stained with bloodshed, and they are the reason for the great tragedy in which six million Jews were killed. From then until now, tens of thousands of Jews have been killed because of this impure idea of establishing a state by means of the sword and strength . . . . Also, the occupation of the Sinai [in 1956] that was extolled as a miracle only resulted in the deaths of many Jews who went against Torah opinion . . . . Anyone who brings about a war that endangers life against the opinion of the Torah is a murderer.<sup>31</sup>

In his book, *Al Ha-Geulah Ve-Al Ha-Temurah*, that was published after the Six-Day War, Rabbi Teitelbaum reiterated this theme in stronger terms:

And behold it is clear that the very entry into this war was forbidden. It is against our holy Torah to force the community of Israel to go out to war with the nations of the world, and to thus endanger the Jewish people. Anyone who transgresses this prohibition, and forces them to go to war, wantonly placing thousands and tens of thousands of Jews in danger of death and bloodshed in opposition to the opinion of the Torah, is a murder in the full sense of the word. The responsibility for Jewish blood is on his head.<sup>32</sup>

Thus, a Jew who goes out to war in contemporary times is a murderer. The argument against war came to expression conspicuously and eloquently in the speeches and writings of Rabbi Menachem Shach (c. 1898-2001), the head of the Ponivitz Yeshiva and the uncontested leader of Lithuanian *Haredi* orthodoxy for several decades. His

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<sup>30</sup> See MOSHE BLAU, *AL HOMOTAYIKH YERUSHALIYIM—PIRKE HAYAI* 162 (1946). The name of the book also indicates the ideology of the author. As he points out, the title is taken from Isaiah 62:6 (“I have set watchmen upon thy walls, O Jerusalem.”). It is as if to say, the true watchmen are the Jews who carry the torch of tradition, and not the newcomers who utilize physical strength.

<sup>31</sup> YOEL TEITELBAUM, *VA-YOEL MOSHE* 212 (1960) (Heb.).

<sup>32</sup> YOEL TEITELBAUM, *KUNTRES AL HA-GEULAH VE-AL HA-TEMURAH* [BOOKLET ABOUT THE REDEMPTION AND REWARD] (1967) (Heb.). This idea repeats itself often in the book. For example, Teitelbaum writes, “Who could imagine or think that our holy Torah would agree to spilling Jewish blood for the impure idea of their state.” *Id.* at 81. Rabbi Yaacov Weiss, the leader of the *haredi* community in Jerusalem in 1970-1989, quoted and agreed with these statements. See 10 RABBI YAACOV YITZCHAK WEISS, *RESPONSUM MINHAT YITZCHAK* § 10 (1996) (Heb.).

statements on this issue, primarily in the speeches and public deliberations that he presented in the *yeshiva*, were collected by his students in a book entitled *Be-Zot Ani Bote'ach* ("In this I am Confident").<sup>33</sup> Rabbi Shach does not deal with question of how to conduct oneself in war, but whether it is required or permissible to wage war at all. In his opinion, the very establishment of an army and the conduct of war is a very negative situation and unnatural for Jews. He holds that there is no difference between the exile and the redemption other than the reign of the messiah. Therefore, since the messiah has not come, we are still in a state of exile. In exile, it is forbidden for Jews to make use of force. Zionism and the establishment of the state were, in his opinion, a dangerous delusion, a delusion of our ability to survive by the sword.<sup>34</sup> At a gathering of educators immediately after the Six-Day War, Rabbi Shach said the following words:

In these actions that took place, the Jews deviated completely from the behavior and the path that we followed all the days of our exile. The Jews have now become players and deciders in the controversies among the nations. Until now, we were a sheep among seventy wolves, but we did not decide the quarrels between the wolves. And now the sheep has become a player and a decider among the wolves. Was not the uniqueness of the community of Israel from the time that it became a people the fact that "they are a nation that dwells in isolation, and is not considered among the nations" (Numbers 23:9), . . . . This is not the behavior of the community of Israel . . . . Since we are still in exile and have not been redeemed, we certainly must behave as the community of Israel is required to behave in exile . . . .<sup>35</sup>

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<sup>33</sup> The book was published in several editions. The quotes below are from ELIAZAR MENAHEM MAN SHAKH, *BA-ZOT ANI BOTE'AH: IGROT U-MA'AMARIM AL TEKUFAT HA-YAMIM U-ME'OROTEHA* [IN THIS I AM CONFIDENT] (2d ed. 1998) (Heb.). Again, the title of the book hints at the writer's ideology. The title is taken from Psalms 27:1-3 ("the Lord is the strength of my life; of whom shall I be afraid . . . though war should rise up against me, even then will I be confident"). On Rabbi Shakh, see Benjamin Brown, *Ha-Rav Shakh: Ha'arazat Ha-ru'ah* [*Rabbi Shakh: Admiration of the Spirit*], in *RELIGION AND NATIONALISM IN ISRAEL AND THE MIDDLE EAST* 278 (Neri Horowitz ed., 2002) (Heb.); see also AVISHAY BEN-HAIM, *THE MAN OF VISION-THE ULTRA ORTHODOX IDEOLOGY OF RABBI SHACH* (2004) (Heb.). For an earlier non-*haredi* thinker who held a pacifist ideology that was anchored in traditional Jewish sources, see AARON SAMUEL TAMARES, *PACIFISM AND TORAH* (Ehud Luz ed., 1992) (Heb.).

<sup>34</sup> Referring to the talmudic statement in TRACTATE PESAHIM, 113b ("There are four that are intolerable: those with shallow pride."), Rabbi Shach stated,

Is this pride not shallow, why is he so self-confident? For if America will end its support, his soul will already be like the dust. And how does he know that we will never again be led to slaughter? Are we not still in a terrible exile, surrounded by millions of enemies?

MENAHEM MAN SHAKH, *supra* note 33, at 38.

<sup>35</sup> MENAHEM MAN SHAKH, *supra* note 33, at 11. Given the atmosphere after the glorious victory of the Israeli army, it would apparently have taken great courage to speak in this manner even to the *Haredi* community.

According to Rabbi Shach, the use of force constitutes the creation of evil in the world, an act for which Jews will be punished. The very existence of war itself, the fact the enemies of the Jews rise up against them, must be understood as a punishment for their trust in power. In a speech that he delivered in the throes of the Yom Kippur War, Rabbi Shach claimed that the war was not a natural political conflict, but rather, as in the wars of the Bible, it was a punishment for the fact that the Jews had done evil in the eyes of God. This was the evil that the Jews did in this generation that brought about the Yom Kippur War:

The worst of all is the idolatrous belief in “my power and the strength of my hand” (Deuteronomy 8:17). The people have become used to trusting in the Israel Defense Force with the help of the United States, and in the power of ammunition . . . . This war [the Yom Kippur War] came without a doubt to shatter the idolatry of “my power and the strength of my hand.” This is measure for measure.<sup>36</sup>

The only act capable of neutralizing the damage caused by war is the study of Torah. Through his study, the Torah scholar expresses contempt for belief in power. Thus, overall, Torah scholars balance the damage caused by the negative effects of the belief in strength that gained credence among part of the Jewish people.

This reflects a consolidated worldview that Jews do not engage in war. The role of the Jews is to survive in the world in any way possible except by means of war. They must take their Torah with them everywhere and be sustained by it. Rabbi Shach believed that the ongoing cycle must be broken—i.e., the intoxicated faith in power that leads to war, the war that leads to acts of bloodshed and that subsequently causes the spiritual and moral destruction and impurity of mankind.<sup>37</sup>

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<sup>36</sup> *Id.* at 19.

<sup>37</sup> Rabbi Shach certainly wanted to strengthen his students at a time of imminent war and certainly of discomfort because of the fact that they were not participating in the struggle for existence through military service. Nevertheless, it is notable that Rabbi Shach does not suffice with statements about the value of Torah learning, nor does he view Torah students as partners who contribute to the battle by means of their Torah study. His position is much stronger and more radical, viewing war as illegitimate and as a punishment for the use of physical power. As such, the Torah student is not a partner in the defense of the people. He does much more than that. He is the only one that takes steps that could prevent the war. Compare his approach to that of Rabbi Moses Feinstein. See 2 RABBI MOSES FEINSTEIN, IGROT MOSHEH 78 (1959) (Heb.).



## III. YESHAYAHU LEIBOWITZ: REDISCOVERING THE ETHICS OF WAR

A. *Establishment of Laws in Dormant Areas as a Religious Obligation*

Yeshayahu Leibowitz (1903-1994), one of the prominent thinkers in contemporary Israel, was best known for his consistent ideological opposition to Israel's retention of lands that were captured in the Six-Day War. His earlier positions, from the 1930s until the middle of the 1950s, are imprinted somewhat less in the public memory. In those years, as mentioned *supra*, Leibowitz was the most vociferous thinker to demand that the religious Zionist rabbis deal directly and seriously, on the normative level, with the challenge posed by Jewish sovereignty with all of its implications. In his opinion, Jewish law was capable of responding to the realities of sovereignty, and it was imperative for the rabbis to do so through drastic legislative intervention. Leibowitz raised this argument aggressively for decades until he gave up and admitted his failure. In his original approach, the religious significance of the establishment of the state was the revival of the *halakhah*, the fact that it was necessary to derive answers and operative procedures from Jewish texts in many areas of public life that had not been previously addressed during the period of exile. The blossoming of a normative Jewish system that would bring to realization the great potential buried within it had, in Leibowitz's mind, a deep religious significance, and therefore placed responsibility upon the shoulders of the rabbinic leadership of the generation. Leibowitz saw in the lack of responsiveness of the rabbis to this challenge proof that they had not internalized the new reality and were still functioning as if they were in exile.<sup>38</sup> In a speech delivered in 1943 regarding modern religious education, Leibowitz made the following remarks: "The educational crisis relates to the fact that there is no instruction, *halakhic* decision, or guidance from the perspective of Jewish religion on all matters which today define a person's way of life."<sup>39</sup>

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<sup>38</sup> Some of Leibowitz's articles, in which he argued in favor of religious legislation, were included in his book. See YESHAYAHU LEIBOWITZ, TORAH U-MITSVOT BA-ZEMAN HA-ZEH (1954) (Heb.). Some were translated into English. See JUDAISM, HUMAN VALUES AND THE JEWISH STATE, *supra* note 13. The relevant articles that deal with religion and state are *The Social Order as a Religious Problem*, *id.* at 145, and *the Crisis of Religion in the State of Israel*. *Id.* at 158. See SIMON, *supra* note 23 (dealing frontally with Leibowitz's position); see also YESHAYAHU LEIBOWITZ—HIS WORLD AND PHILOSOPHY 179 (Avi Sagi ed., 1995) (Heb.); Haim Marantz, *Bearing Witness: Morality and Religion in the Thought of Yeshayahu Leibowitz*, JUDAISM, Winter 1997, at 35; David Biale, *Homage to Yeshayahu Leibowitz*, *Israeli Public Intellectual*, 22 RELIGIOUS STUD. REV. 309, 309-12 (1996).

<sup>39</sup> Yeshayahu Leibowitz delivered a lecture in 1943, *Education for a Torah State*, that is included in his book. YESHAYAHU LEIBOWITZ, TORAH U-MITSVOT BA-ZEMAN HA-ZEH 58 (1954) (Heb.). In light of the changes in Leibowitz's position, this article was revised and

Leibowitz claimed that as a result of the reality in which the Jewish people “were torn away from independent political, social, national, and economic life, halting not only the complete application of the Torah, but also the struggle to apply it within a societal context, its educational strength was undermined.”<sup>40</sup> This led him to his understanding of the religious-spiritual significance of Zionism:

It is an innovation in the very conception of religion. In Religious Zionism, religion takes on a different meaning that was not accepted by our fathers and Rabbis. . . . According to our approach, religion extends to areas and problems that were not recognized or felt to be within the domain of Torah. We are not adding anything to religion, but have given religiosity a different form and the laws of the Torah a different significance.<sup>41</sup>

The effort to achieve a “Torah state” requires preparation and work on the part of the *halakhic* authorities who are compelled to present the Jewish legal position on public issues. Leibowitz saw in this proposition the essence of the importance of the establishment of the Jewish state for Jewish religion. This ideal could only be realized through a concerted, systematic, and on-going effort on the part of the Jewish legal authorities. Years earlier, Leibowitz had written the following: “We should not seek the blame for this situation in the Torah, but in our historical situation, which does not enable us to activate the tremendous forces hidden in the Torah. In this situation we must redeem the Torah by our own efforts.”<sup>42</sup>

Leibowitz’s approach is characterized by viewing the Zionist enterprise from a religious-spiritual perspective. He tried to cast the Zionist enterprise in a context that related not only to the Jewish people “breaking into” the process of history, but to a “breaking out” of Judaism itself to all of the normative areas that it was careful not to address during the years of exile.

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republished in 1975 in his book, *Yahadut, am Yehudi, u-Medinat Yisrael*. See Sagi, *supra* note 26. The primary change in Leibowitz’s ideology related to the relationship between religion and state. At first he held, like Rabbi Yitzchak Breuer, that Israel must be a Torah state with all of its implications. He understood that there would be no alternative to making changes to the *halakhah* in order to make it functional for a sovereign Jewish State. Subsequently, Leibowitz understood that the connection in practice became destructive because of the deep bond that it established between holiness and the state, the army, and most importantly, the land. At that point, he began to argue for the complete separation of religion and state in all areas of life. Although we have defined this change as a change in ideology, it could be viewed as a recognition of the reality and not necessarily a change in ideology.

<sup>40</sup> LEIBOWITZ, *supra* note 39, at 59.

<sup>41</sup> *Id.* at 62.

<sup>42</sup> ARYEI FISHMAN, JUDAISM AND MODERNIZATION ON THE RELIGIOUS KIBBUTZ 75 (1992) (citing Leibowitz).

B. *Cultural Zionism and Religious Zionism*

Before returning to the way in which Leibowitz specifically dealt with the issue of war, I will examine some of the opinions that influenced him from secular Zionism and from Orthodox anti-Zionism in Germany.

Asher Ginsberg (Ahad Ha'am, 1857-1927), one of the sharpest opponents of Herzl and Political Zionism, was the founder of the movement called "Spiritual Zionism." In contrast to the "Political Zionism" of Herzl and Nordau, which had as its primary goal the establishment of a political entity to ensure the existence of the Jewish people, Ahad Ha'am's opinion was that the essence of Zionism should be spiritual, with the goal of fostering the blossoming and rebirth of Jewish culture. In the article, which he wrote after the First Zionist Congress, entitled "The Jewish State and the Jewish Problem," Ahad Ha'am wrote: "The secret of the survival of our people, as I tried to demonstrate elsewhere, is what the prophets of old taught—to value only the power of the spirit and not to worship physical strength."<sup>43</sup>

The secret of the survival of the Jewish people during the years of exile, lacking a political context, is embedded in the spirit of the people. There is, therefore, great danger in the political Zionist approach that seeks to change the very heart of the Jewish people to something that is foreign, to change the state from a means to an end. In the aforementioned article, Ahad Ha'am presents a fundamental and harsh attack against the influential speech that was given by Max Nordau at the opening of the congress. This debate is an excellent source for clarifying and sharpening the differences between the two movements regarding the essence of their Zionist approaches. Nordau argued that the entire Jewish world is in trouble, and that the problem of the Jews of Eastern Europe is physical, the constant struggle for basic physical needs. The problem of the Jews of Western Europe, however, is moral. They cannot benefit from their complete rights. In other words, they are disappointed with the emancipation and the failure of the Jews to truly become integrated in the higher Western European society.<sup>44</sup> Ahad Ha'am criticized, one might even say mocked, the position of Nordau on two counts. He claimed that Nordau's argument was for the Jewish State to be a vehicle for the assimilation of the Jews of Western Europe as a group and thus to achieve what they had failed to achieve—to assimilate as individuals:

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<sup>43</sup> Ahad Ha'am, *Medinat ha-Yehudim ve-Tsarat ha-Yehudim* [*The Jewish State and the Jewish Problem*], in KOL KITVEI AHAD HA'AM [THE COMPLETE WORKS OF AHAD HA'AM] (1947) (Heb.) (author's translation). The article was first published in 1898.

<sup>44</sup> See Max Nordau, *Speech to the First Zionist Congress (1897)*, in THE ZIONIST IDEA: A HISTORICAL ANALYSIS AND READER 235, 235-41 (Arthur Hertzberg ed., 1997).

The Western Jew, after leaving the Ghetto and seeking to attach himself to the people of the country in which he lives, is unhappy because his hope of an open-armed welcome has been disappointed. He returns reluctantly to his own people, and tries to find within the Jewish community that life for which he yearns . . . . So in his trouble he turns to the land of his ancestors, and pictures to himself how good it would be if a Jewish State were established there, a state arranged and organized after the pattern of other states. Then he could live fully among his own people and find at home all that he now sees outside, dangled before his eyes, but out of reach.<sup>45</sup>

The idea of Political Zionism was to establish a state that would be devoid of signs of Jewish culture and would adopt all of the conventions and the way of life of the nations: "a state arranged and organized after the pattern of other states." In short, the state would fulfill the dream of assimilation of the Western European Jews.

In contrast are the Jews of Eastern Europe, whom Ahad Ha'am describes with great empathy. In truth, their problem is also a moral one, not physical as Nordau had thought. Yet, their moral problem is based on a different goal:

Not only did the Jews leave the ghetto, but Judaism exited as well. The Jews achieved this only in specific countries as a kindness from the nations. But Judaism exited, or is in the process of exiting, of its own accord in any place that it comes into contact with modern culture. This contact with modern culture overturns the defenses of Judaism from within, so that Judaism can no longer remain isolated and live a life of separatism. The spirit of our people strives for development; it wants to absorb those elements of general culture that reach it from the outside, to digest them and make them a part of it, as it has done before at different periods of its history. But the conditions of its life in exile are not suitable.<sup>46</sup>

The encounter between Judaism and the modern world requires Jewish culture to respond, to confront the challenge, and to develop as it had done in similar situations in its history. Toward that end, Judaism is in need of a homeland. The principle desire of Zionism, according to this approach, is the establishment of a home for Jewish culture, which strives to develop but is unable to do so in exile. A Jewish state that is not connected to this idea, and simply constitutes a state for the Jews, lacks hope, meaning, and potential:

But a political conception that is not based on any national culture is capable of turning the heart of the people from its spiritual strength, and creating within it a tendency to seek "honor" through physical strength and political control. In this manner, the thread that connects it to its past will be broken, and its historical foundation

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<sup>45</sup> Ha'am, *supra* note 43, at 137.

<sup>46</sup> *Id.*

will be undermined.<sup>47</sup>

The core of Ahad Ha'am's approach is reminiscent of that of Rabbi Shach on the one hand and Leibowitz on the other. According to all three, physical strength and political existence cannot serve as the basis of Jewish existence. The practical conclusions of all three, however, are very different. According to Ahad Ha'am, it is imperative to create an elite in Israel that will strive to revitalize, advance, and develop Jewish culture in the modern world. In contrast, Rabbi Schach concludes that Judaism is not in need of revitalization or development. On the contrary, it is in need of isolation from the modern world so that it may continue to exist as it has existed until now. At the same time, Leibowitz also concludes that the Jewish people are in need of a sovereign state so that Jewish law can be revitalized and applied to all areas of life. He, however, does not accept Ahad Ha'am's concept of "Jewish culture," because in his opinion *halakhah* is the essence of Jewish culture:

Judaism is embodied by Torah and commandments (*mitzvot*). If this criterion is nullified, the historic identity of the Jewish people is nullified, for it was never defined by any of the criteria by which modern nations are defined . . . . There is no reason or justification to artificially create a new nation, defined as a nation from a formal nationalistic standpoint, but lacking specific content. If we no longer feel ourselves to be Jews in the empirical historical conception, because we negated the content of this concept, then why should we try at all to be Jewish? It would be better for us to be cosmopolitan and to assimilate in various sectors of humanity. . . . For what purpose should we establish and sustain a state if the state does not exist within the context of specific content?<sup>48</sup>

This important distinction between the "Cultural Zionism" of Ahad Ha'am and the "Halakhic Zionism" of Leibowitz places Leibowitz in an additional dialogue with the national (*haredi*) thought of Dr. Yitzhak Breuer (1883-1946). Breuer, a product of the German school of Rabbi Samson Rafael Hirsch, was one of the leaders of *Agudat Yisrael* before World War II. He tried to advance the idea of the "Torah State." Breuer claimed enthusiastically that he was a Jewish nationalist, and that there is only significance to a Jewish nation and to Jewish identity if it exists within the normative context of the laws of the Torah. According to this principle, Breuer argued that in light of their rejection of the yoke of the normative Jewish system, the Zionists must be seen as a new nation, and not the historic people of Israel. Therefore, it would be inappropriate to give to them the Jewish state that is destined for the historic people of Israel. He envisioned the establishment of a

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<sup>47</sup> *Id.* at 138

<sup>48</sup> YAHADUT AM YEHUDI U-MEDINAT YISRAEL, *supra* note 13, at 266.

Jewish state in Israel in the spirit of the original nation, the historic people of Israel, i.e., those faithful to the laws of the Torah, which constitutes the only fundamental component of Jewish identity.<sup>49</sup> Leibowitz, like Ahad Ha'am, saw the purpose of the Jewish state to be the flowering of Jewish culture. However, he concurred with Yitzhak Breuer that the concepts "Jewish culture" and "Jewish identity" are manifested only in the laws of the *halakhah*. The concept "*halakhah*," however, was different for Leibowitz than it was for Breuer, and in this regard he returned to the goal of Zionism expressed by Ahad Ha'am. According to Leibowitz, the Torah is not only "what was," but primarily "what will be." The Torah must blossom, develop, and bring its potential to reality—a normative system for the management of all aspects of life, including sovereign existence.

### C. *Law and Morality in the Conduct of War*

One of the last articles that Leibowitz wrote before changing his position was the article "After Kibiyah," mentioned *supra*, which dealt with the ethics of war.<sup>50</sup> This article was published in the aftermath of the public debate that arose following the controversial military action by the Israeli army in October 1953 in the village of Kibiyah, located in territory that was then in the control of the Kingdom of Jordan. The action came as a response to terrorist attacks staged from Jordanian territory, resulting in the death of a mother and her two children. The action caused loss of life of innocent civilians, and as a result, there was both public outcry in Israel and piercing international criticism of Israel. Many arguments that are so familiar in the context of the discussion of the war on terror today arose in the public debate at the time—i.e., what are the limits of the right of self defense; does the fact that terrorists kill innocent civilians and afterwards hide within supportive civilian populations permit attacking those civilians; is it possible to fight terror without harming innocent people, etc.<sup>51</sup> Leibowitz posits that the issue

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<sup>49</sup> See ISAAC BREUER, CONCEPTS OF JUDAISM 82 (Jacob S. Levinger ed., Miriam Halevy & A.T. Shrock trans., 1974); see also ISAAC BREUER, NAHLIEL (1982) (Heb.); ISAAC BREUER, DARKI (Michael Schwartz trans., 1988). For further research about Dr. Breuer, see Eliezer Schweid, *Torah State in the Thought of Isaac Breuer*, in ISAAC BREUER: THE MAN AND HIS THOUGHT 125 (Rivka Horwitz ed., 1988) (Heb.). Jacob Katz refers to an oral debate where Dr. Breuer admitted that it would not be possible to maintain a state according to the "Shulhan Arukh." See JACOB KATZ, A TIME FOR INQUIRY—A TIME FOR REFLECTION: A HISTORICAL ESSAY ON ISRAEL THROUGH THE AGES 179 (1999) (Heb.).

<sup>50</sup> Leibowitz, *After Kibiyeh*, *supra* note 13.

<sup>51</sup> See SHABTAI TEVET, MOSHE DAYAN 211 (1972) (Heb.).

is not the justification of war itself, which might be seen as a necessary evil,<sup>52</sup> but the manner in which war is to be conducted (*Jus in Bello*):

This moral problem did not arise in connection with the war we conducted for our liberation and national restoration. . . . Only one prepared to justify historically, religiously, or morally the continuation of the exilic existence could refuse to take upon him the moral responsibility for using the sword to restore freedom. Therefore, in our religious-moral stocktaking, we neither justify the bloodshed of the war (in which our blood was spilled more than that of our enemies) nor do we apologize for it. The problematic issues concern the manner of conducting that war, which goes on to this very day . . . .<sup>53</sup>

A number of rabbinic writings composed just prior to and following the establishment of the State of Israel dealt with the laws of war. Leibowitz's final statement on the manner in which war should be conducted expresses the degree to which these rabbinic writings had missed the essential point. They attempted naively to return to ancient sources such as the Biblical description of the military camp, or to the Biblical laws of war, and to continue the deliberation at the exact point that it had terminated. They did not take into account that centuries had passed and that the reality had drastically changed. Leibowitz attempted to internalize the changes, to relate to contemporary reality, and to deal with the real and difficult challenges of military ethics. Toward that end, he turned to Jewish sources and his religious worldview. There is no question that his discussion of the issues is not complete, and perhaps does not even reflect a consistent approach, but it is undoubtedly interesting because of its pioneering quality and its creativity.

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<sup>52</sup> In fact, he also denigrates the *Haredi* position mentioned above:

Attachment to the *Galut* (Diaspora) and the opposition of many of the best representatives of Judaism to political redemption within historic reality was, in no small measure, a form of escapism reflecting the unconscious fear of such a test—fear of the loss of religious-moral superiority, which is easy to maintain in the absence of temptation and easy to lose in other circumstances.

YAHADUT AM YEHUDI U-MEDINAT YISRAEL, *supra* note 13, at 230. One of the changes—although not one of the most important ones—that Leibowitz introduced in the article before its republication in his book, *Torah u-Mitsvot ba-Zeman ha-Zeh*, was his derision of the left, as represented by *Brit Shalom*, for their opposition to use of force:

It is very easy—and therefore hardly worthwhile—to express moral reservation about acts of violence and slaughter when one bears no responsibility for defending the community in whose cause such acts are perpetrated. Before the establishment of the state, the community included some adherents of 'purist morality' who immigrated to Palestine against the wishes of the Arabs and conducted their lives here under the protection of the British bayonets and the arms of the Hagganah [Jewish self-defense organization], but considered that the right of other Jews to immigrate depended on the consent of the Arabs.

*Id.*

<sup>53</sup> YAHADUT AM YEHUDI U-MEDINAT YISRAEL, *supra* note 13, at 231.

Leibowitz wrote that we could certainly claim that the United States killed one hundred thousand people, most of them innocent women and children, with one bomb on one day in order to end the World War. How much more so are we justified in our actions, engaged as we are in a daily struggle “that has turned into a continuous nightmare of dread of violence and murder.”<sup>54</sup> Nevertheless, he asserted that we should never make such a claim and thus adopt the values that are accepted by other nations in their wars. Leibowitz opened his article with the question of whether we are able to act in accordance with our own values. His point of departure is our particular system of military ethics and our religious duty to conduct a moral deliberation on questions of war. Thus, it may be that according to international standards of military practice, the Kibiyah operation was justified, but that fact is not enough:

It is therefore possible to justify this action, but let us not try to do so. Let us rather recognize its distressing nature. There is an instructive precedent for Kibiyeh: the story of Shekhem and Dinah. [Genesis 34]. The sons of Jacob did not act as they did out of pure wickedness and malice. They had a decisive justification: “Should one deal with our sister as with a harlot?” . . . [Genesis 34:31]. Nevertheless, because of this action, their father Jacob cursed the two tribes for generations.<sup>55</sup>

Leibowitz was not willing to accept international standards, claiming that Jewish tradition must provide the rules for such situations based on its unique worldview. The act of Shimon and Levi, in which they avenged the rape of their sister by killing the men of Shekhem, and Jacob’s reaction to it constitute a Biblical precedent for the claim that even a justified act might be accursed and unethical, especially in war. Leibowitz claimed, based on Maimonides, that Shimon and Levi were justified in what they did. Yet, in spite of this justification, their father Jacob cursed them harshly for generations.<sup>56</sup> From this he derived the

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<sup>54</sup> *Id.* at 232.

<sup>55</sup> *Id.*

<sup>56</sup> See Genesis 49:5-7. Apparently, Leibowitz accepts Maimonides’ interpretation of the incident of Dinah. See MAIMONIDES (RAMBAM), MISHNEH TORAH [THE CODE OF MAIMONIDES], *The Book of Judges, Laws of Kings and Wars [Hilchot Melahim]* 9:14. Maimonides established that the brothers acted in accordance with the law—that the men of Shechem were guilty of death because they had not prosecuted the perpetrator in accordance with the Noahide law requiring the establishment of a court system. Nevertheless, Maimonides does not state anywhere that the act was immoral. Nachmanides directly refuted the position of Maimonides. In his opinion, Jacob called the act “violence” and cursed his sons because there was no justification for the act that they perpetrated. See NACHMANIDES (RAMBAN), COMMENTARY ON THE TORAH; Genesis 34:13, 49:5; see also Yaacov Blidstein, *Maase Shehem [The Story of Shekhem]*, 1 ET VA-DA’AT [PEN AND KNOWLEDGE] (1997) (Heb.). For further expansion see Gerald J. Blidstein, *The State and the Legitimate Use of Force and Coercion in Modern Halakhic Thought*, in JEWIS AND VIOLENCE: IMAGES, IDEOLOGIES, REALITIES 3 (Peter Y. Medding ed., 2002).



principle that in war, the fact that an action is formally justifiable by law is not the complete picture. The act must be examined on an additional level, that of the ethics of war. Leibowitz concluded his article with the dramatic declaration: "Let us not establish our third commonwealth on the foundation of the curse of our father Jacob!"<sup>57</sup>

A number of months later, Leibowitz expanded his article and essentially changed its message and its emphasis. In the new article, he claimed that the society was confronting a "clear religious problem" expressed in the question: "What produced this generation of youth that is capable of perpetrating such a dreadful act?"<sup>58</sup> He responded: "This act is the result of the application of religious categories of holiness to societal, national, and political matters and values."<sup>59</sup> In the later article, he suggested that, if so, there are two principles that can lead to the proper conduct of war: (1) the recognition that there are ethical values that go beyond what is permissible or forbidden according to the law; and (2) the eradication of any religious significance to war. He claimed that these two principles are learned from Jewish tradition itself.<sup>60</sup>

Before beginning the discussion of Rabbi Goren, who followed in the spirit of Leibowitz, I will examine the position of Rabbi Shaul Yisraeli, who opposed it.

#### IV. RABBI SHAUL YISRAELI: TURNING TO INTERNATIONAL LAW

Rabbi Shaul Yisraeli (1909-1995) also published an article that analyses the Kibiyah action in light of Jewish law, in which he expressed a position regarding war that is completely in opposition to that of Leibowitz.<sup>61</sup> At the time, Rabbi Yisraeli was already one of the

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<sup>57</sup> This sentence appeared in the original newspaper article but was dropped from the later version of the article. Instead, the judgmental paragraph about Israel Defense Force soldiers that executed the operation was included, which will be discussed immediately. D. Ohana rightfully found in this article a foundation for Leibowitz's Zionist Spirit. See David Ohana, *The Zionism of Yeshayahu Leibowitz*, 8 KIVUNIM 161 (1995) (Heb.).

<sup>58</sup> YAHADUT AM YEHUDI U-MEDINAT YISRAEL, *supra* note 13, at 233.

<sup>59</sup> *Id.* at 233.

<sup>60</sup> There is no doubt that the transition from the first version to the second version of the article reflects a change in Leibowitz's thought. As mentioned *infra*, the first article is engrossed in the discussion of a Torah state, while the additions represent the first sparks of his later thought in which he advocated a separation between religion and state, as well as opposition to both the occupation of lands captured in 1967 and to the sanctification of national symbols. See Ohana, *supra* note 57.

<sup>61</sup> Shaul Israeli, *Takrit Kibiyeh le-Or ha-Halakha* [The Kibiyah Incident in Light of Jewish Law], in 5-6 HA-TORAH VE-HA-MEDINA [THE TORAH AND THE STATE] 71-113 (1954) (Heb.). The article was re-published in SHAUL ISRAELI, AMUD HA-YEMINI 168-205 (1961) (Heb.) [hereinafter ISRAELI, AMUD HA-YEMINI] (references according to this edition). In reference to this article, see Aviezer Ravitzky, *Prohibited Wars in the Jewish Tradition*, in THE ETHICS OF

well-known rabbis of the Religious Zionist community. In later years, he became a member of the Chief Rabbinical Council, one of the heads of Yeshivat Mercaz Harav Kook, and one of the most important and influential *halakhic* authorities of the Religious Zionist community.

Rabbi Yisraeli's article was a systematic and challenging legal article, one of the most important published on the topic of war and Jewish law. Rabbi Yisraeli's breadth with regard to his outstanding command of the *halakhic* sources, the sharpness of his analysis, and the extent of his creativity are all expressed in this article. The article is essentially dedicated to Leibowitz's challenge regarding the establishment of Jewish laws of war. His conclusions are surprising and important: in the military situation of the State of Israel, Jewish law obligates the adoption of standards of war that are agreed upon by the combatants. Therefore, in his opinion, there is no place for Leibowitz's demand that the *halakhah* produce norms that it does not address and does not want to include.

In the beginning of his article, Rabbi Yisraeli examines the Kibiyah action, and any other military action, within the context of criminal law and the right to self-defense. He concludes that based on criminal law, such an action is completely forbidden since the right to self-defense does not allow one to harm anyone other than the actual attacker himself. Rabbi Yisraeli suggests, however, that a military situation must be considered within the context of different legal categories that address war as a unique phenomenon.<sup>62</sup> His argument is

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WAR AND PEACE—RELIGIOUS AND SECULAR PERSPECTIVES 115, 119 (Terry Nardin ed., 1996); see also Gerald J. Blidstein, *The Treatment of Hostile Civilian Populations: The Contemporary Halakhic Discussion in Israel*, ISRAEL STUD., Fall 1996, at 27, 27-44.

<sup>62</sup> In the first four chapters of the article, Rabbi Yisraeli discusses the problem from the perspective of criminal law. In the first two chapters (Chapter 1: "Agency for a Transgression Among the Sons of Noah With Regard to Murder and Other Transgressions;" Chapter 2: "The Law for Sons of Noah Who Refrain from Prosecuting the Guilty"), he discusses whether, according to the Noahide laws, it is possible to hold a civilian population from which terrorists operate accountable for murder, either by virtue of the fact that through their support of terrorism the terrorists become their agents (Chapter 1), or by virtue of the fact that they have not brought the terrorists to justice (Chapter 2). Each instance relates to one of the Noahide laws. From both perspectives, Rabbi Yisraeli comes to the conclusion that the population cannot be held accountable from a *halakhic* perspective. In the third and fourth chapters, Rabbi Yisraeli also deals with the issue from the perspective of criminal law based on the right of self defense, the law of the pursuer (*rodef*) (Chapter 3: "The Law of the Pursuer With Regard to a Population That Aids Murderers;" Chapter 4: "Harming Innocent People in an Attack Designed to Eradicate Cells of Murderers and Those Who Help Them"). His conclusion is that even if part of the population can be considered pursuers by virtue of their support of terrorism, and the fact that their support will lead to more murder in the future, there are still many (particularly little children) who cannot be considered pursuers. Thus, the law of the pursuer cannot justify the action of the Israel Defense Force in Kibiyah. At this juncture, Rabbi Yisraeli makes a transition to a consideration of the issue from the perspective of military law. Chapter 5 is entitled "Acts of Defense and Reprisal as Military Actions." In his introduction to this chapter, Rabbi Yisraeli clearly distinguishes between the category of criminal law and the category of war that demands a unique set of norms. He concludes that an action such as the Kibiyah action is forbidden according to

that the very acceptance of the right to conduct war includes a tacit agreement to define legal standards that differ from the standards of criminal law. It is implicit that in war people die without trial, and that innocent people die. Rabbi Yisraeli argues that the very fact that Jewish law distinguishes between obligatory war (*milhemet hovah*) and permissible war (*milhemet reshut*) indicates that it recognizes war as a separate legal category.<sup>63</sup> The readiness of Jewish law to deal with the concept of war and its outcomes flows from a recognition of the realities of human nature, adopting war as a means to solve conflicts. As a result, the parameters of what is permissible and forbidden in the conduct of war are based on agreement. One who initiates an armed conflict essentially declares his agreement that the other combatant or combatants will respond in kind.

Rabbi Yisraeli's conclusion, that according to Jewish law the State of Israel is governed by international agreement in matters of war, implies that Israel should not adopt different standards in foreign affairs than those accepted by the nations of the world. This position is revolutionary and has far reaching implications. He argues that from the time that Israel became a sovereign state, Jewish law required it to function within the parameters of international standards. It should be noted that Rabbi Yisraeli published his article in 1954, at the time that the concept of international law in matters of war was just emerging in the wake of World War II. Rabbi Yisraeli was cognizant of this fact and referred to it specifically in his writings. In his opinion, if the nations of the world were to conclude a covenant opposing war, Israel would be obliged to adhere to that covenant. The current situation however is the opposite—war is accepted by all nations and, therefore, the Jewish State is bound to that agreement according to Jewish law.

Rabbi Yisraeli's innovation regarding the *halakhic* validity of international agreement regarding war is based on the talmudic concept "the law of the land is the law" (*dina demalkhutah dina*).<sup>64</sup> This principal, which was already established at the beginning of the talmudic period, grants *halakhic* validity to laws that are legislated by the government of the state in which Jews live. Among the number of rationales suggested in *halakhic* literature throughout the ages for this rule, Rabbi Yisraeli adopted the rationale based on the principle of

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the standards of criminal law but certainly permitted according to the accepted standards of war. See ISRAELI, AMUD HA-YEMINI, *supra* note 61.

<sup>63</sup> *Mishnah Sotah* 8:7; *Mishnah Sanhedrin* 1:5; MAIMONIDES, *supra* note 56, at *halakhah* 5; see J. David Bleich, *Preemptive War in Jewish Law*, 21(1) TRADITION 3 (1983); Noam J. Zohar, *Morality and War: A Critique of Bleich's Oracular Halakhah*, in COMMANDMENT AND COMMUNITY: NEW ESSAYS IN JEWISH LEGAL AND POLITICAL PHILOSOPHY 245 (Daniel H. Frank ed., 1995).

<sup>64</sup> SHMUEL SHILO, DINA DE-MALKHUTA DINA (Jerusalem Academic Press 1974).

agreement.<sup>65</sup> He concludes that just as the principle applies to individual Jews who live in a state and agree to abide by its laws, so too it applies to the Jewish State itself:

The foundation of *dina demalkhutah dina* relates not only to what transpires within a state, but also to international matters as is the accepted custom. . . . One of the manifestations of *dina demalkhutah dina* is war and military conquest. Just as there is *dina demalkhutah* within a country, so too there is accepted international practice. Therefore, military conquest must be conducted according to this practice, for only then is it valid by virtue of *dina demalkhutah dina*.<sup>66</sup>

What is the “law of the land” that applies here? Rabbi Yisraeli surprisingly identifies it as recognized international law: “We understand from this that a war that is conducted according to accepted international standards is permissible according to the Torah by virtue of the principle *dina demalkhutah dina*.”<sup>67</sup>

The *halakhic* principle “*dina demalkhutah dina*” was given a new interpretation appropriate to the reality of renewed sovereignty. This principle is dictated by the logical premise that the Jewish legal system governs internal interactions between Jews, but it cannot be expected to govern interactions between Jews and non-Jews. The law of “*dina demalkhutah dina*” empowers. Just as an individual Jew who lives among the nations is obligated by the laws of the state in which he lives, so too the Jewish State is obligated by the global standards of international law and agreements by virtue of which it exists as a sovereign state. Essentially the “the law of the country” evolved into “the law of the countries.”

On the contrary, he advanced this innovation in order to argue that the Israel Defense Force should act in a certain manner because of the fact that the combatants of the State of Israel act in that way:

In this way, war is permitted as long as it is conducted in accordance with the standards accepted by the nations of the world. With regard to Kibiyah as well, we must examine whether such reactions are carried out and accepted among the nations of the world. If so, we can view it as an agreement among the relevant parties that effectively eliminates the issue of murder.<sup>68</sup>

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<sup>65</sup> See SHMUEL BEN-MEIR (RASHBAM), COMMENTARY OF RASHBAM TO BABYLONIAN TALMUD, BABA BATRA 54B (section beginning with, “Has not Samuel laid down that the law of the Government is law.”); MAIMONIDES, *supra* note 56, *The Book of Torts* [*Hilkhot Gezela ve-Aveda*] 5:18. For a comprehensive discussion of the rationales for this law raised by the *Rishonim*, see SHILO, *supra* note 24, at 59.

<sup>66</sup> ISRAELI, AMUD HA-YEMINI, *supra* note 61, at 192.

<sup>67</sup> *Id.* at 193.

<sup>68</sup> *Id.* at 202.

Rabbi Yisraeli's response to the question of the Jewish attitude to war is clear on the theoretical level—the *halakhah* recognizes the legitimacy of any war that is conducted according to the accepted practice among the nations.<sup>69</sup> Rabbi Yisraeli's response represents the opposite of the position taken by Leibowitz, which demanded that Israel adopt Jewish values in the conduct of war rather than learning from accepted international practice. In his original article, Leibowitz wrote:

We can, indeed, justify the action of Kibiyah before “the world.” Its spokesmen and leaders admonish us for having adopted the methods of “reprisal”—cruel mass punishment of innocent people for the crimes of others in order to prevent their recurrence, a method which has been condemned by the conscience of the world. We could argue that we have not behaved differently than did the Americans, with the tacit agreement of the British, in deploying the atomic bomb . . . . It is therefore possible to justify this action, but let us not try to do so. Let us rather recognize its distressing nature . . . .<sup>70</sup>

In direct contradiction to Leibowitz, Rabbi Yisraeli argued that there is no place for particular Jewish values in wars against external enemies. His goal was to come to the defense of the Israeli soldiers, arguing that there was no place for condemnation or rebuke. Thus, for example, he concluded his long article with the following comment:

There is a place for acts of retribution and revenge against the oppressors of Israel . . . . Those who are unruly are responsible for any damage that comes to them, their sympathizers, or their children. They must bear their sin. There is no obligation to refrain from reprisal for fear that it might harm innocent people, for we did not cause it. They are the cause and we are innocent.<sup>71</sup>

It seems that Rabbi Yisraeli never repeated this argument explicitly in his later writings, in which he dealt to a greater extent with issues of state in general and war in particular. Yet, as I will discuss *infra* with regard to the siege of Beirut, there is no question that Rabbi Yisraeli was consistent in his thinking that, at least in modern times, Jewish law does not include its own laws of war. To the degree that *halakhah* allows the conduct of war, it must be conducted according to internationally accepted standards, or at least the accepted standards of the combatants.

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<sup>69</sup> See also Ravitzky, *supra* note 61, at 120. The next stage in the argument of Rabbi Yisraeli is that this agreement even overrides the prohibition of murder.

<sup>70</sup> YAHADUT AM YEHUDI U-MEDINAT YISRAEL, *supra* note 13, at 231-32.

<sup>71</sup> ISRAELI, AMUD HA-YEMINI, *supra* note 61, at 205; see Blidstein, *supra* note 61. Blidstein is correct in his characterization of Rabbi Yisraeli as a militant *halakhic* authority on matters relating to war and the use of force. There is no doubt that his legal decisions, and perhaps to a greater extent his unequivocal rhetoric, exerted a large influence on the Rabbis and legal authorities in the broader Religious Zionist circles. Yet, this was not the primary impact of his innovative position.

Rabbi Yisraeli continues by discussing the concept of obligatory war and characterizes the wars of Israel as obligatory wars under the *halakhic* category of “saving Israel from the hand of the oppressor.”<sup>72</sup> Nevertheless, even in an obligatory war, the *halakhah* only relates to the permit to go out to war, while the manner in which the war is to be conducted is determined by accepted practice in such wars. Thus, if the nature of a particular war requires causing injury to innocent civilians, the permit to engage in the war includes the understood acceptance and legitimization of that fact.

As indicated *supra*, Yeshayahu Leibowitz was the spokesman for an ideology that had two main arguments. The first argument was the necessity of internalizing the change and the new reality of Jewish life brought on by the renewal of Jewish sovereignty. The second argument was that Jewish Law is the primary, if not the only, component of Jewish culture. Thus, Leibowitz’s ideology posited that Jewish Law must adjust itself and respond to the new reality. Rabbi Yisraeli’s fascinating innovation was that, while adopting Leibowitz’s primary arguments, he arrived at the opposite conclusion. His novel argument flows from a demarcation of the limits of the applicability of *halakhah* based on an internalization of the new reality. While Jews lived in exile among the nations of the world, the authority of Jewish law extended only within the context of internal relations between Jews. It did not feign to extend to relations between Jews and non-Jews, nor could it. The fact that Jews now lived in a state of their own among the family of nations necessitated a new demarcation of the limits of the applicability of Jewish law. The application of this principle in the age of Jewish sovereignty led Rabbi Yisraeli to the conclusion that *halakhah* should not feign to govern relations between the Jewish State and the other nations.

It is understood that Rabbi Yisraeli did not view the adoption of the military ethic of the enemy as an ideal, but rather as a necessity dictated by reality. His claim that Jewish ethics is not designed to govern the foreign affairs of the State of Israel flows from the fact that otherwise, it would be impossible to maintain the existence of the state. Rabbi Yisraeli believed that there was a dangerous delusion in the aspiration to conduct wars according to independent Jewish ethics. A war conducted according to different standards than those of the enemy is a war that is destined to fail and to bring a catastrophe upon Israel. The siege of Beirut, which will be discussed *infra*, is an excellent example. For this reason, Rabbi Yisraeli placed limitations on the use

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<sup>72</sup> MAIMONIDES, *supra* note 56, at *halakhah* 5:1. According to this *halakhah* there are three categories that justify going to war: “It includes the war against the seven nations, that against Amalek, and a war to deliver Israel from the enemy attacking him.” *Id.* Only the third category is relevant at this time since the nations mentioned in the first two have vanished from the world.

of force in situations where it is not required. Nevertheless, in a war against terror, he held that the killing of innocent civilians was at times necessary. As such, a prohibition of such attacks would deem the struggle against terrorism ineffective, allowing terrorists to operate from within civilian populations. At the same time, he prohibited harming children in situations where it could be prevented as well as strictly retaliatory actions that served no deterrent function.

## V. RABBI SHLOMO GOREN: DERIVING NEW LAWS OF WAR

### A. *Judaism and Zionism*

Rabbi Shlomo Goren (1917-1994) founded the Rabbinate of the Israel Defense Forces immediately after the establishment of the State of Israel and served as its head for approximately two decades. Subsequently, Rabbi Goren served as the Chief Rabbi of Tel Aviv and then as the Chief Rabbi of the State of Israel. The scope of his literary work is broad, and many of his publications deal with military laws according to Jewish law. In his writings, he dealt with the many sides of military law from the operation of a military camp according to *halakhah* to laws of military engagement that are the focus of this article.<sup>73</sup> Rabbi Goren saw his role in a much broader light than that of the traditional military rabbi. He sought to infuse the fabric of the evolving Jewish army with the spirit of Jewish law and ethics. The role of the military rabbis who served in armies in Europe during the modern period was to help Jewish soldiers who wished to maintain a Jewish lifestyle under military conditions. Even in Israel, many of the military rabbis perceived their role similarly. Rabbi Goren believed, however, that the era of Jewish sovereignty demanded a new definition of the role of the military rabbi. In his opinion, the rabbi in the new reality had to relate to the army rather than to the individual soldier. Therefore, he

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<sup>73</sup> In spite of the richness and innovativeness of Rabbi Goren's writings, they have been largely ignored by scholars. See Aryei Edrei, *Spirit and Power: Rabbi Shlomo Goren and the Military Ethics of the Israel Defense Force*, 7 THEORETICAL INQUIRIES IN THE L. 255 (2006). Some of his writings that relate to the topic at hand have been edited and included in the following books: SHLOMO GOREN, MISHNAT HA-MEDINAH: A HALAKHIC HISTORIC RESEARCH ON THE MOST IMPORTANT SUBJECTS SINCE THE ESTABLISHMENT OF ISRAEL (1999) (Heb.) [hereinafter GOREN, MISHNAT HA-MEDINAH]; 1-4 SHLOMO GOREN, MESHIV MILHAMAH: QUESTIONS AND ANSWERS IN MATTERS OF ARMY, WAR AND SECURITY (1982-1983) (Heb.) [hereinafter GOREN, MESHIV MILHAMAH]; SHLOMO GOREN, TORAT HA-MEDINAH: A HALAKHIC HISTORIC RESEARCH ON THE MOST IMPORTANT SUBJECTS SINCE THE ESTABLISHMENT OF ISRAEL (1996) (Heb.) [hereinafter GOREN, TORAT HA-MEDINAH]. Most of his works have not been translated into English. See Shlomo Goren, *Combat Morality and the Halacha*, in CROSSROADS: HALACHA AND THE MODERN WORLD 211-31 (Ezra Rosenfeld ed., Rav Ezra Bick trans., 1987).

aspired to write a codex of the laws of war according to Jewish law that would fill in one of the gaps in the existing codes of Jewish law such as the *Shulhan Arukh*.<sup>74</sup> In the introduction to his book *Meshiv Milhamah*, which deals with military law, Rabbi Goren declares his objective clearly: "This book is intended to be a *Shulhan Arukh* for the military."<sup>75</sup>

Rabbi Goren rejected the idea of *halakhic* indifference to any area of life, just as he rejected Rabbi Yisraeli's proposal that Jewish law adopt the laws and values of other nations. Rather, as a normative system, *halakhah* is able and required to relate to all areas of life. In essence, Rabbi Goren responded to the challenge voiced by Yeshayahu Leibowitz decades before and expressed by many Religious Zionist leaders—the need for laws of state. Naturally, Rabbi Goren focused on the issue that was closest to his heart, the laws of the army and of war. The source of his pretension to create new laws was his religious Zionist ideology. According to that ideology, he believed that the significance of the Jewish State is directly related to the degree to which it reflects *halakhah*. In a public debate in 1966 that dealt with spiritual perspectives on the Jewish people and the State of Israel,<sup>76</sup> Rabbi Goren stated:

Rav Saadia Gaon . . . said: "Our Nation cannot be called a nation, but by its law," meaning that the Jewish People can be considered a nation only in as much as it is loyal to the Torah . . . . The Jewish People did not create the Torah of Israel. The People exist as a result of their keeping the Torah. It was born out of the metaphysical need to implement the values which are represented by the message of the Torah, the ethics of the Prophets and the vision of mankind . . . .<sup>77</sup>

For me, Jewish education is education for practice, for Judaism is manifested in the fulfillment of commandments. There is no Judaism that is just embedded in the heart. I don't believe in Judaism that is felt in the heart. There is a Christianity that is embedded in the heart . . . .<sup>78</sup>

Unlike other nations, Jewish nationalism is defined by its law rather than by territory or other sociological categories. Jewish law and its commandments are the essence of the Jewish experience. As such,

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<sup>74</sup> The *Shulhan Arukh*, written by Rabbi Josef Caro in the 16th century, is considered to be the authoritative code of Jewish Law.

<sup>75</sup> 1 GOREN, *MESHIV MILHAMAH*, *supra* note 73, at 10-12.

<sup>76</sup> *Symposium: Jewry and Judaism in the Modern World*, in FORUM FOR JEWISH THOUGHT, Sept. 5, 1966. The speakers were former Prime Minister David Ben Gurion (the head of the World Zionist Congress), Dr. Nahum Goldman, and Rabbi Shlomo Goren. The subject of the debate was "Jewry and Judaism in the Modern World—the Jewish People, the Jewish State, the Jewish Law . . . and their Inter-Relationship." A complete discussion of this important debate and the positions of Rabbi Goren are found in my article on Rabbi Goren. See Edrei, *supra* note 73.

<sup>77</sup> See FORUM FOR JEWISH THOUGHT, *supra* note 76, at 17 (author's translation).

<sup>78</sup> *Id.* at 23.



there is only ethical and practical significance to the State of Israel as a Jewish state to the degree that it functions according to the Torah. It is for this reason that Rabbi Goren was drawn to create a corpus of laws relating to the army and issues of security. He saw this as his mission and destiny that was timely at this turning point in the history of the people. Yet, how can a corpus be written in an area that was never before addressed?

### B. *Power and Spirit*

In the introduction to his primary book on the subject, Rabbi Goren informs us of the heart of the problem:

This book of rulings is different . . . than all other books of responsa. On the topics of this book we do not have an ongoing tradition of rulings from generation to generation. There is nothing parallel in the *Shulhan Arukh*, or in other codes of law.<sup>79</sup>

Indeed, Rabbi Goren contends that although the Jewish law is a traditional spiral system in which each layer is built upon the previous one, it has the ability to deal with situations that have no precedent and require a high degree of creativity. Jewish law includes mechanisms that allow for flexibility and the ability to relate to unprecedented situations:

In the laws of the Torah it states: “And you shall live by them.” The Torah was given for life. There is room to delve into the sources in order to reveal creative ideas and derive innovative interpretations. I believe and am convinced that it is possible to solve the problems of the generations according to the Torah. For our Torah is not frozen in its context. The Written Torah and the Oral Torah are eternal, and have the strength to stand up to the difficulties of the generations . . . . There is a saying in the Jerusalem Talmud [Sanhedrin 4:2]: “If the Torah had been given in a clear and explicit fashion, we could not live by it. Why was it not? So that it could be interpreted either as the forty-nine aspects of impurity or the forty-nine aspects of purity.” In other words, if the Torah had been given as a set code—this you can do and this you can’t do—we would not be able to live by it. But it was given in a flexible fashion . . . . In this generation, we need the great scholars of Torah and Jewish law to take a “state approach” to issues and to relate positively to the historical turning point for the Jewish people represented by the establishment of the state.<sup>80</sup>

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<sup>79</sup> 1 GOREN, *MESHIV MILHAMAH*, *supra* note 73, at 10.

<sup>80</sup> FORUM FOR JEWISH THOUGHT, *supra* note 76, at 23.

The individual capable of dealing with the creative rulings and interpretations required to meet this challenge would be a person who identifies ideologically both with Zionism and with the approach that sees the need to reformulate Jewish law in order to be compatible with the new reality of sovereignty, a person with a positive perspective on this historical turning point. A rabbi of this nature could rehabilitate Jewish laws in areas that it is lacking, and formulate a corpus—a “*Shulhan Arukh*,” in Rabbi Goren’s words—on the subject of war and the use of force.

In fact, Rabbi Goren not only wanted to create a normative system, but he also felt the need to define the ideological relationship to the use of force—i.e., to redefine the ideology and Jewish values relating to the use of force—to the military and to war. Goren wanted to revise the exegesis reflected in the talmudic allegorical interpretations of the Biblical approach to war. A significant number of his articles attempt to redefine the relationship between power and spirit in Jewish thought. He contended that Jewish tradition should not be viewed negatively because it praised the spirit at the expense of physical power, nor should it be understood as taking a stance in opposition to the use of force. On the contrary, in his opinion, power is a necessary element of life, but it must be a means and not an end—it must be controlled and restrained by the spirit. The spirit that was used as an excuse to attack Jewish tradition as irrelevant at the time of the renewal of Jewish sovereignty became, in Rabbi Goren’s hands, a source of glory for the tradition that sought to deeply implant an ethic to guide the use of force.

Rabbi Goren was certainly aware that the legitimacy of the use of force disappeared in Rabbinic literature. Nevertheless, he claimed that this happened due to the historical conditions imposed by the exile. As mentioned *supra*, Biblical law is applied in the manner that it was interpreted by the Sages. In Rabbi Goren’s opinion, however, it is necessary to take into account the historical circumstances in which Rabbinic literature took shape. Therefore, he took upon himself the liberty to return to the simple meaning of the Biblical texts and to ignore some of the allegorical exegesis through which Biblical wars were reinterpreted in Rabbinic literature. Rabbi Goren turned as well to post-Biblical literature from the Second Temple period, such as *The Books of the Maccabees*. These works were not utilized at all as normative sources and were therefore not even considered legitimate in *halakhic* rulings. In practice, he embarked on a process that redefined the parameters of the canon. He implies that the canon of the Rabbis was a canon from the period of the exile and suggests the need, in the period of Jewish sovereignty, to broaden the canon and return to earlier sources from historical periods in which Jews exercised political power. This process enabled Goren to return to the Biblical and Maccabean wars,

and to view them as legitimate sources for the creation of a new Jewish legal and ethical code for the contemporary wars of Israel. In this way, he sought to revive the relevance of the traditions, negating both the *haredi* anti-Zionist arguments on the right and the arguments of those on the left who opposed the integration of Jewish values in issues of state. This process enabled him to say the following words that reflect his view on the reinterpretation of traditional sources:

Even the humanitarian view of Judaism regarding the essence of heroism does not come to negate the physical heroism that is accepted as a value in our worldview, but rather to establish an order of priorities . . . . As we see in *Avot De-Rabbi Nathan*, “Who is the mightiest of the mighty?—One who controls his inclination, as it says: ‘Forbearance is better than might.’” We learn that this definition does not come to negate physical heroism, but to define the mightiest of the mighty. From here, we learn that there are two levels of heroism. The lower level is physical heroism, and the higher level is spiritual heroism.<sup>81</sup>

As mentioned *supra*, Leibowitz viewed the Biblical story of the rape of Dinah as a potential corner stone upon which to build ethical principles of war. It is, therefore, of interest to examine Rabbi Goren’s interpretation of the same story. There is a sharp debate among medieval commentators as to how the story should be understood. Maimonides (1135-1204) held that Shimon and Levi acted in accordance with the law when they killed the men of Shechem. In his opinion, the men of the city were culpable because they did not prevent the rape *a priori* and did not prosecute the perpetrator after the fact. Nachmanides (1194-1270), in contrast, very harshly criticized the action. In his opinion, Jacob cursed his sons, who perpetrated the massacre, because there was no justification for the action. The act of the brothers was considered “violence” and was cursed by Jacob because they killed innocent people. Not only were they innocent, but they were righteous in that they had circumcised themselves and taken on the laws of God that were in force at the time.<sup>82</sup> Rabbi Goren proposed an alternative interpretation of the story that sought to harmonize the approaches of Maimonides and Nachmanides. In his opinion, Maimonides is speaking about law, and Nachmanides is speaking about ethics, on the extralegal level. Indeed, Rabbi Goren concludes, it is impossible to conduct a war based solely on law. War must be conducted on the ethical level as well. In other words, while it

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<sup>81</sup> Shlomo Goren, *ha-Gvura be-Mishnat ha-Yahadut* [Might in Jewish Thought], 120 MAHANAYIM 7, 9 (1979) (Heb.).

<sup>82</sup> See *supra* note 56. In Jewish tradition, there are other interpretations of this story, such as that of Judah Loew ben Bezalel (the Maharal of Prague, 1525-1609), who claims that during a time of war it is impossible to differentiate between the guilty and the innocent. Maimonides justifies the action of Shimon and Levi by assigning guilt to the men of the city.

may not be possible to prosecute Shimon and Levi for what they did, it was prohibited for them to do it. Rabbi Goren wanted this ideology to guide the Israel Defense Force. The harmony that Rabbi Goren created in the interpretations of Maimonides and Nachmanides reflects the greater harmony that he sought to create between the Biblical and Rabbinic perspectives on the use of force, a harmony between the legitimacy of the use of force and the spirit that must guide it.

The analyses of Leibowitz and Goren to this story are similar, yet there is an important difference between them. With regard to the question “what produced this generation of youth,” Leibowitz answered in the later version of his article that it was the result of attributing the concept of holiness to war. In contrast, Goren responded that it happened because they did not apply Jewish concepts of holiness to war.

### C. *The Siege of Beirut*

In 1982, during the war known as “Peace for Galilee,” the Israel Defense Force placed the city of Beirut under siege in order to trap thousands of terrorists who had fled there from southern Lebanon. During the siege, Rabbi Goren, who then served as the Chief Rabbi of Israel, published a newspaper article in which he claimed that the siege of Beirut was prohibited by Jewish law, which requires the army to leave one side of the city open in order to allow an escape route for any individual who wishes to flee. Rabbi Shaul Yisraeli published a very sharp response claiming that the siege was legal according to Jewish law.<sup>83</sup> The controversy between them is based on their understandings of the relevance of the following law that was codified by Maimonides:

When besieging a city in order to capture it, you should not surround it on all four sides, but only on three sides, allowing an escape path for anyone who wishes to save his life, as it says: “And they warred against Midian as God had commanded Moshe.”—Based on tradition, they learned that thus He had commanded him.<sup>84</sup>

As I have pointed out elsewhere,<sup>85</sup> Rabbi Goren could have taken an exegetical approach that would have led to the conclusion that this particular law applies only to permissible wars but not to wars of

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<sup>83</sup> The articles were republished in GOREN, *TORAT HA-MEDINAH*, *supra* note 73, at 402-23 and in SHAUL ISRAELI, *HAVAT BINYAMIN* 111-19 (1992) (Heb.), which includes Goren’s article and Israeli’s reply.

<sup>84</sup> MAIMONIDES, *supra* note 56, at 6:7. The source of Maimonides’ law is *Midrash* on the Biblical war with Midian in SIFRI BA-MIDBAR § 257, at 210 (Horowitz ed. 1992) (Heb.); see MICHEL WALTZER, *JUST AND UNJUST WARS* (1977).

<sup>85</sup> See Edrei, *supra* note 73.

defense.<sup>86</sup> He claims, however, that it does apply to obligatory wars, including wars of defense. I believe that Rabbi Goren viewed this law as a paradigm for the integration of power and spirit that he considered the essence of the *halakhic* approach to war. It was therefore very important to him from an ideological standpoint to apply this law to the contemporary wars of the State of Israel. He based his argument formally on the fact that Maimonides cited this law in the chapter of his book that deals with the obligation to call for peace prior to waging war: “One may not wage war against anyone in the world before calling on him to make peace, both a permissible war and an obligatory war, as it says: “When you approach a city to make war against it, you shall call out to it for peace . . . .”<sup>87</sup>

Rabbi Goren argued that just as the commandment regarding the “call for peace” clearly applies to both permissible and obligatory wars, so too the commandment to leave the fourth side open applies to both. The primary reason for the call for peace relates to the essential principle of the importance of peace (*gadol hashalom*),<sup>88</sup> a principle that should apply as well to the law to leave the fourth side open. Rabbi Goren finds support for this assumption in the fact that Maimonides codified the two laws in the same chapter, and saw in both of them the obligation to seek peace and to have pity on the life of the enemy, even at times of war.<sup>89</sup> “The power and the spirit” about which Rabbi Goren

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<sup>86</sup> NACHMANIDES, COMMENTS ON MAIMONIDES’ SEFER HAMITZVOT, *Mitzvah* 5 established that this law is “a commandment for the generations for all permissible wars.” This fact would have enabled Rabbi Goren to say that the law is not relevant to contemporary wars, since all of the contemporary wars of Israel are obligatory wars. As mentioned, Jewish law distinguishes between “permissible war” and “obligatory war.” One category of an obligatory war is “to save Israel from the hand of an oppressor.” See MAIMONIDES, *supra* note 56, at 5:1. Rabbi Goren argued in many places that the contemporary wars of Israel are wars of defense against oppressors and thus categorized as obligatory wars. Nevertheless, Rabbi Goren stubbornly held that the law of the fourth side was relevant to the wars of the Israel Defense Force, contrary to the interpretation of Nachmanides, which implies that the law is in force only for permissible wars. The language of Maimonides in the stated law—“when you approach a city to make war against it”—can be interpreted to refer to a permissible war, as permissible wars are defined as wars “to expand the borders of Israel.” See *id.* Rabbi Yisraeli explained his argument against Rabbi Goren by distinguishing between a war to “to save Israel from the hand of an oppressor” and the other categories of obligatory wars. See *id.* In the other categories, the law of the fourth side did not apply since the essence of the commandment was to destroy the enemy. If so, it makes sense that it applies as well to the remaining category. He concludes that Maimonides established the law of the fourth side only for permissible wars.

<sup>87</sup> MAIMONIDES, *supra* note 56, at 5:2; see *Deuteronomy* 20:6.

<sup>88</sup> See SIFRI BA-MIDBAR, *supra* note 84, § 42, at 46.

<sup>89</sup> Further on, Rabbi Goren quoted R. Meir Simcha of Dvinsk (1843-1926), the author of the *Meshech Hokhmah Commentary on the Torah*, who discussed this law and the question of why Maimonides did not list it as a separate commandment. His conclusion was that the reason for leaving an escape route during a siege was essentially a tactical issue, i.e., that leaving an opening to escape reduced the motivation of the enemy to engage in battle. Rabbi Goren strongly challenged this explanation, arguing that we should not even consider the possibility that the commandments of the Torah relate to military tactics rather than to military ethics. Indeed, *Sefer ha-Hinukh*, commandment 527, included the commandment to call for peace as a separate

spoke, and the clear hierarchy that he sought to establish between them, acquired relevant significance in this practical application of the law.

We might conjecture that the historical source of the law to leave the fourth side open flowed from the deep-seated collective memory of the difficult conditions that faced the besieged residents of Jerusalem during the time of the Roman siege.<sup>90</sup> Against this backdrop, the Midrash posits that the Jews have a different military ethic. Indeed, Waltzer in his classic work, *Just and Unjust Wars*, wrote about this law as follows:

The only justifiable practice, I think, is indicated in the Talmudic law of siege, summed up by the philosopher Maimonides in the twelfth century (whose version is cited by Grotius in the seventeenth century): "When siege is laid to a city for the purpose of capture, it may not be surrounded on all four sides, but only on three, in order to give an opportunity for escape to those who would flee to save their lives . . . ." But this seems hopelessly naive. How is it possible to "surround" a city on three sides? Such a sentence, it might be said, could only appear in the literature of a people who had neither a state nor an army of their own.<sup>91</sup>

It is clear from a tactical standpoint that there is no logic to besieging a city and leaving one side open, as the enemies that flee by means of the fourth side can return to attack. If so, what did the Sages gain through their decree. This is exactly the logic of the argument of Rabbi Yisraeli who sharply attacked Rabbi Goren for his position. Even though Rabbi Yisraeli does not mention the principle of the "law of the nations" that he established in his article in the 1950s, he is consistent in his line of thinking that dictates that contemporary wars must be fought in accordance with military logic and ethical norms that are accepted by the enemy. Otherwise, there is no possibility to be victorious in battle.

The law that requires leaving one side open, which can be criticized for military logic and demands a very high ethical standard with regard to treatment of the enemy, epitomizes Goren's approach. Goren insists on maintaining this norm as it strengthens and supports his

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commandment from the commandment to leave the fourth side open. It is logical to conclude that Maimonides saw them as one commandment and therefore did not list them separately.

<sup>90</sup> See Josephus Flavius, *The Wars of the Jews*, in *THE WORKS OF JOSEPHUS* bk. VI. ch XIV, 721 (Tho. Lodge trans., 1602) ("The restraint of liberty to pass out of the city took from the Jews all hope of safety, and the famine now increasing consumed whole households and families; and the houses were full of dead women and infants; and the streets filled with dead bodies of old men. And young men, swollen like dead men's shadows, walked in the market place and fell down dead where it happened. And now the multitude of dead bodies was so great that they that were alive could not bury them; nor cared they for burying them, being now uncertain what should betide themselves."); see also WALTZER, *supra* note 84, at 161. See more description in Flavius, *supra*, at 720, 723.

<sup>91</sup> WALTZER, *supra* note 84, at 161.

claim regarding the merger of power and spirit in Jewish tradition. When pressed as to how it would be possible to be victorious in such a war, Rabbi Goren answered: “We do not understand the secrets of God,”<sup>92</sup> or in other words, the God who gave the law will save us. These final words lead to the conclusion that the argument between these rabbis is not only an argument regarding the interpretation of text, but also an argument about the interpretation of reality.

### CONCLUSION

Jewish law, as a traditional legal system, is naturally based on continuing development—the interpretation of sources followed by interpretation of the interpretation. A new reality that was not dealt with previously presents a challenge to such a system. The challenge that the establishment of the State of Israel presented to the world of Jewish law flowed primarily from the need to render rulings in areas that were not discussed throughout the middle ages. The laws of war are a prime example of this phenomenon. All of the positions examined dealt with the question of how to overcome the lack of clear sources that could be interpreted in order to give solutions to problems raised by the new reality. The interesting fact demonstrated in this Article is the obvious relationship between Jewish legal interpretation and ideology. The positions of each of the religious personalities discussed were influenced by their perspectives on the Zionist enterprise. All agreed that the rabbinic approach to the use of force was a product of the exile, and that it could not suffice as a normative system for a sovereign Jewish reality.

The *Haredi* position, essentially conservative, saw the *halakhic* lacuna as the ultimate proof that the Zionist process was in opposition to Jewish law. It held that the validity of the rabbinic approach remained in force until the messianic redemption. As such, Jewish sovereignty itself is undesirable and cannot serve as a catalyst for changes in Jewish law and ethics. In contrast, the other three thinkers studied took a clear Religious Zionist approach that views the establishment of the Jewish state as a positive process that also has religious significance. Yeshayahu Leibowitz, Rabbi Yisraeli, and Rabbi Goren all contended that the Jewish state must function according to Jewish law. Yet, their common points of departure led them to opposing viewpoints.

For Rabbi Yisraeli, the establishment and preservation of Jewish sovereignty was a primary value that led him to a militant position. The

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<sup>92</sup> GOREN, TORAT HA-MEDINAH, *supra* note 73, at 419. The source of the expression is in the JERUSALEM TALMUD, TRACTATE BERAKHOT 10:1.

priority that he gave to the preservation of the state and the protection of its soldiers and citizens forced him to view the anti-militaristic Rabbinic ethos as irrelevant. As such, he did not try to reinterpret these Rabbinic sources, but rather deemed them invalid for the new reality of sovereignty. Yet, he fascinatingly justified his approach by means of a new interpretation of a well established law from the middle ages—"the law of the land is the law." While in the period of exile this law applied to Jews as individuals in their relations with non-Jews, in the period of Jewish sovereignty, Rabbi Yisraeli reinterpreted the law to apply to relations between the Jewish State and other nations. In this inspired process of interpretation, he limited the purview of Jewish law to exclude foreign relations of the State of Israel, based on the internal exegetical process of the *halakhah* itself.

Yeshayahu Leibowitz and Rabbi Goren, in contrast, advocated filling the *halakhic* lacuna by creating a normative codex of laws of war for the new era of Jewish sovereignty. Not only were they not prepared to deem the Rabbinic standards for war irrelevant, but they believed that their incorporation in the new codex was essential to the creation of a particularly Jewish military ethic for the Israel Defense Force. Their common ideology dictated that the unique essence of the State of Israel is as a "Torah state"—that it must conduct itself in all areas according to Jewish law and ethics. Therefore, Leibowitz and Goren sought to utilize the instruments inherent within the Jewish legal process to revise the *halakhah* in order to address the military issues previously not addressed.

In spite of the aforementioned similarities between Leibowitz and Goren, their ultimate parting of the ways reflected a deep division in their Religious Zionist ideologies. Rabbi Goren undoubtedly saw the establishment of the State of Israel as a Divine messianic redemptive process. Therefore, he attributed categories of holiness to the state and its institutions. For example, in 1953, he labeled the army "a divine force to realize the vision of the prophets."<sup>93</sup> He therefore strove with all of his energy to apply utopian laws that were designed for the messianic period to the contemporary reality, laws that at times defied rationality. For this reason, he was unable to accept Rabbi Yisraeli's approach that adopted gentile standards for the Jewish army. Rather, Rabbi Goren reinterpreted Jewish sources relating to war in an attempt to harmonize the legal and ethical standards that, in his opinion, represented the uniqueness of the Jewish approach. This enabled him to create an innovative approach that integrated the legitimacy of warfare with the prophetic vision of peace.

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<sup>93</sup> S. Goren, *Heshbono Shel Olam*, 15 MAHANAYIM 4 (1953) (Heb.).



The holiness that Rabbi Goren attributed to the Israeli military was viewed by Leibowitz as extremely dangerous. He did not share Goren's messianic understanding of Zionism. Rather, the religious significance that Leibowitz attributed to the Zionist enterprise was the opportunity for Jewish law to develop and flourish in areas that it had ceased to address centuries earlier. He hoped that the Jews would take responsibility for the creation of a society based on a renewed Jewish law that reflected the freedom inherent in Jewish sovereignty. Leibowitz was frustrated by the results of this effort in practice. His interpretation of this reality led him to the conclusion that the messianism inherent in many of the Zionist approaches prevented the fulfillment of his dream. By attributing holiness to the state institutions and sanctifying their actions, Jewish values were subordinated to the institutions. This conclusion ultimately led Leibowitz to advocate the complete separation of religion and state.

I have noted the relationship between the ideologies and rulings of the personalities whose positions I have analyzed. It might appear, as such, that their rulings are contrived—that they flow from their ideological perspectives and are superimposed on the classical sources. This, however, is not the case. As a sacred text, the Torah was designed to be viewed from different perspectives, to be interpreted in a manner that makes it relevant to different situations and different generations. It follows that the Jewish legal authority is required to interpret both the text and the reality that it is called upon to address. Such interpretation is legitimate, and even obligatory. Through serious attention to both aspects, Jewish scholars throughout the generations have ensured the eternal relevance of Torah values and Jewish law.