



1) Deuteronomy – Chapter 20

When you approach a city to attack it, make its people an offer of peace. If they accept...all the people in it shall be subject to forced labor and shall work for you. If they refuse to make peace and they engage you in battle, lay siege to that city. When Hashem delivers it into your hand, put to the sword all the men in it...

2) Deuteronomy Rabbah - 14

R. Samuel bar Nahmani said: What did Joshua do? He published an edict in every place he came to conquer, writing in it: Whoever desires to make peace, let him make peace; whoever desires to leave, let him leave; and whoever desires to make war, let him make war."

3) Quoted in Aviezer Ravitsky, "Prohibited Wars' In Jewish Religious Law". *Meorot. Shevat* 5767 (2007)

R. Nahum Rabinowitz [head of the yeshiva in Ma`aleh Adumim], is an outstanding proponent of the view that ...warfare on our part is not permitted unless enemies threaten or attack us" (that is, unless the war is preventive or defensive). Accordingly, [he writes that] nothing in Nahmanides' writings can provide "an anchor for the view that warfare was permitted for the sake of conquering the Land. Worst of all, such an interpretation tends to treat the shedding of blood lightly. That disregard [for human life] undermines the very basis of society and threatens the entire project of [the State of Israel as] the beginning of the Redemption."

Combatants vs. Civilians

4) Anthony F. Lang, "Civilians and War: Dilemmas in Law and Morality," November 13, 2002 Carnegie Council for Ethics in International Affairs.

Rules for distinguishing between civilians and soldiers during armed conflict have been around since the medieval period, but the debate surrounding recent civilian deaths in Afghanistan (when the U.S. military mistakenly strafed a wedding party) and the Gaza Strip (when the Israeli Air Force dropped a one-ton bomb in a civilian neighborhood, killing its intended target but also nine children) suggest that, while legal principles exist that govern these areas, the moral debate is far from over. Killing those not directly involved in terrorism or military actions strikes us as morally wrong, and even morally repellent. But some now argue that certain conflicts make the "rules" less relevant to the conduct of military campaigns. The fact that terrorists do not adhere to the rules governing civilians, i.e., they have no compunction about targeting civilians, means that those engaged in the protection of those communities do not need to adhere to the rules governing the status of civilians. Do the "rules" not apply in these cases, and more fundamentally, what are they? Most cultures have always kept warriors and non-warriors separate, but it was not until the medieval period that specific rules were developed for distinguishing between civilians and soldiers...After the American Civil War and the wars of Europe in the 19th century, political leaders sought to concretize the distinctions between civilians and soldiers in the Hague Peace Conferences of 1899 and 1907. While 19th century wars did lead to some attempts to better protect civilians...war and statecraft in Europe during this period continued to value state interests over broader humanitarian concerns. These rules were fundamentally challenged by World War I and especially World War II. During these conflicts, especially the latter, civilians were abused on a much greater scale and more methodically than ever before. As a result, civilians also engaged in much more active resistance to the occupation of their lands than in the past. These two developments led many to believe that new rules



were necessary once again. The new rules that resulted, especially those applying to civilians, were created by the Geneva Conventions of 1949 and the additional protocols of 1977...These conventions have become the governing law in relation to how individuals should be treated in wartime. The laws today focus on a concept called "discrimination," or the ability to discriminate between civilians and non-civilians when it comes to the use of force. After making this determination, a number of principles can be applied to evaluate how civilians should be treated, all of which can be found in the relevant legal documents. But while the legal principles appear clear, the problem, as in all law, is their interpretation and relevance for different types of conflicts. The challenges fall into three broad areas.

1. The first can be found in the classic restatement of just war, Michael Walzer's *Just and Unjust Wars*. In that work, where Walzer provides one of the most comprehensive overviews of the elements of the just war tradition, he concludes that there may well exist a theoretical tension at the heart of the just war tradition:

"The greater the justice of my cause, the more rules I can violate for the sake of the cause - though some rules are always inviolable. The same argument can be put in terms of outcomes: the greater the injustice likely to result from my defeat, the more rules I can violate in order to avoid defeat - though some rules, and so on."⁴

Walzer suggests some ways to get around this dilemma but acknowledges that it is a moral dilemma that cuts at the heart of the tradition. Indeed, we can see it reflected in both the U.S. and Israeli responses to the accusations that they have killed innocents. In both cases, officials have argued that their cause makes the rules difficult to follow. While they seek to obey them, they will occasionally invoke the justness of their cause as a justification for overriding the rules governing who can be killed in combat.

2. A second challenge arises from the shift in the 1949 conventions to give more rights to those resisting occupation. In World War II, French partisan forces who were dressed as farmers would attack German soldiers out on patrols. Similar examples can be found in the U.S. war in Vietnam and in the current conflict between Palestinians and Israelis. If an entire society is engaged in a war against an oppressor, is it possible to define some as warriors and some as civilians? But if it is the case that whole societies support a cause, should the occupiers not be allowed to undertake reprisal actions that punish a whole society? Again, the cases of the recent attacks make this relevant. In the Israeli case, while not all Palestinians have been engaged in suicide bombings, many support these. The Israelis are now proposing to punish family members of suicide bombers, a tactics further challenge to the principles governing those under occupation.
3. Finally, new developments in weapons technology have raised some troubling questions. In the past 10 years, technology has led to the creation of "smart weapons" that allows military commanders to better pinpoint targets. Ironically, this development, which should lead militaries better wage war directly against other military targets, has led to military commanders targeting civilian areas because they believe they can avoid civilian casualties. In fact, however, this lessening of the threshold of what areas can be targeted has created the unfortunate outcome of militaries using weapons in situations that are highly populated by civilians. In both the Oruzgan and Gaza Strip examples, the military commanders believed that their weapons would hit only the military target. In both cases, they were wrong.



What do these challenges mean for our evaluations of military operations in the future?

Who is a Civilian? The Extremism of *Torat Hamelekh*

5) R. Yitzchak Shapira and R. Yosef Elitzur, *Torat Hamelekh*, 2010

The “do not murder” prohibition refers only to a Jew who kills a Jew, and not to a Jew who kills a gentile, even if that gentile is one of the righteous among the nations... It is explained in the *Yerushalmi* that when a [Jewish child] is in danger of his life, and people tell him ‘kill this particular gentile or you will be killed’ – is permitted to kill the gentile to save himself...Rashi and Rambam say that the law of requiring to die rather than commit the crime is only valid in case of a Jew against another Jew, not in the case of a Jew against a stranger living among them...It is clear from these statements that when the choice is between losing the life of a stranger living among them and losing the life of a Jewish child – the simple decision is to permit [the killing]. To save the life of a gentile, one does not violate Shabbat. A [gentile’s] life is not like the value of the life of a Jewish child, so it may be used for the purpose of saving the life of a child of Israel. An enemy soldier in the corps of intelligence, logistics, and so forth aids the army that fights against us. A soldier in the enemy’s medical corps is also considered a *rodef*, as without the medical corps the army will be weaker; and the medical corps also encourages and strengthens the fighters, and helps them kill us. A civilian who supports fighters is also consider *Rodef*, and may be killed... Anyone who helps the army of the evil people in any way, strengthens the murderers and is considered to be a *Rodef*...Therefore, every citizen in the kingdom that is against us, who encourages the warriors or expresses satisfaction about their actions, is considered a *Rodef* and his killing is permissible. When discussing the killing of babies and children...there is an opinion that it is right to hurt infants if it is clear that they will grow up to harm us. In a war of righteous against evil people, we assume that the evil will eventually hurt us all, if we let it raise its head. This theory also permits intentional hurting of babies and of innocent people, if this is necessary for the war against the evil people. For example: If hurting the children of an evil king will put great pressure on him that would prevent him from acting in an evil manner - they can be hurt (even without the theory that it is evident that they will be evil when they grow up.) Sometimes one does evil deeds that are meant to create a correct balance of fear... and in accordance with this calculus, infants are not killed for their evil, but... reality has chosen them to be the ones whose killing will save [many lives] and prevent evil doing later on.

The Ethical Debate around the IDF

6) Prof. Asa Kasher- “The Ethics of Protective Edge”. *The Jewish Review of Books*, Fall 2014

Israel, like every other state, upholds the right and duty of self-defense. [A] fundamental principle of the IDF in particular is the duty to respect human dignity. This means that people may never be treated as mere objects or instruments. Their liberty can be restricted only when there is a compelling justification for doing so...Nonetheless, no state has or should shoulder as much responsibility for the safety of enemy civilians as it does for its own people. During war or in the course of any other military activity, the principle of self-defense is what establishes the *ends* in question, namely an effective defense of the people and their state, while the second principle imposes restrictions on the *means* used in pursuit of those ends. The latter principle requires ceaseless efforts to diminish or “alleviate the calamities of war.” To grasp the nature of the change that has taken place in the character of war and its end-state, at least for Israel, compare the consequences of the Six-Day War with



the consequences of the Second Lebanon War. In 1967, our enemies' military forces were essentially destroyed. In Lebanon, on the other hand, we significantly diminished the military force of Hezbollah, but it could and actually did continue launching rockets at northern Israel for a time. In the "new" wars of recent decades, victory has been replaced by the ideal of successfully accomplishing given missions. The missions of Operation Protective Edge were defined in the course of the fighting as the elimination of the threat to Israel created by the Hamas offensive tunnels and the reduction if not elimination of the threat that Hamas' rockets pose to most parts of Israel. States have usually accepted the principle of distinction between civilians and combatants for obvious reasons: "You don't attack my non-combatant citizens and I won't attack yours." But what should be our attitude toward the principle of distinction when such reciprocity has disappeared? And how does one deal with an enemy that has eliminated any trace of the distinction between combatants and non-combatants, except for the purposes of propaganda? Hamas attacks Israelis indiscriminately and does so from residential areas and even from mosques, hospitals, and schools. It produces ammunition on a university campus and stores its rockets in mosques and UNRWA schools. Its commanders and their command-and-control system often operate out of the basement of a hospital, and its fighters do not fight in uniform (except, when useful, the IDF uniform). Hamas unscrupulously violates every norm in the book. How should Israel respond?

7) Elliott Malamet

The doctrine of double effect (DDE) says that if doing something morally good has a morally bad side-effect it is ethically permissible providing the bad side-effect wasn't intended. This is true even if one foresaw that the bad effect would probably happen. The doctrine is often invoked to explain the permissibility of an action that causes a serious harm, such as the death of a human being, as a side effect of promoting some good end. According to the principle of double effect, sometimes it is permissible to cause a harm as a side effect (or "double effect") of bringing about a good result even though it would not be permissible to cause such a harm as a means to bringing about the same good end.

8) David Luban - "Risk Taking and Force Protection" in Reading Walzer, 2013. See also Michael Walzer, Just and Unjust Wars, 1977.

In military affairs, the DDE takes the form of exonerating soldiers for the unintended bad consequences—chiefly, damage to civilians and civilian objects—of otherwise-permitted violence. Soldiers cannot target civilians, but they can target military objectives even when they know that civilians will inevitably suffer harm, provided that the civilian harm isn't disproportionate to the military advantage. Under the right conditions the DDE exonerates soldiers (morally and legally) for unintended civilian harm, even when the soldiers see it coming. Professor Michael Walzer [Institute of Advanced Study, {Princeton}] argues that merely not intending [in a general sense] civilian harm isn't good enough: soldiers must intend not to harm civilians. The former seemingly allows soldiers to purchase blamelessness on the cheap, simply by narrowing their intentions. Knowing that an attack will hit both military and civilian objects, the soldier must take care to intend only to hit the military target, not the civilians. That seems like an absurd and dishonest mental game. How do you avoid war crimes? Close your eyes, take a deep breath, concentrate hard, and refocus your intentions. Then go ahead and do what you were about to do anyway. Intending not to harm civilians, as Walzer explains it, requires action and not thought alone. Soldiers must take precautions, including risky precautions if necessary, to safeguard civilians. He illustrates with a World War I case where a soldier (Frank Richards) was tasked with opening cellar doors in France and throwing hand grenades into the cellars in case



German soldiers were there. Richards worried that civilians might be hiding in the cellars, and decided to call out a warning before he threw in the grenades, so that civilians could evacuate. Otherwise, Richards thought, he might be committing “innocent murder.” Of course, if there were German soldiers hidden in the cellar, they could come out shooting when they heard the warning—so Richards was taking on extra personal risk to spare civilians. In Walzer’s view Frank Richards “was surely doing the right thing when he shouted his warning. He was acting as a moral man ought to act; his is not an example of fighting heroically, above and beyond the call of duty, but simply of fighting well. It is what we expect of soldiers.”

9) Asa Kasher and Amos Yadlin, “Assassination and Preventive Killing,” SAIS Review 25 (Winter-Spring 2005)

In 2005, Asa Kasher and Amos Yadlin published an article in which they asserted a difference between civilians who are a state’s own nationals or under the “effective control” of the state, and civilians who are not. Kasher and Yadlin argue that soldiers must take risks to spare the former, but not the latter. In their formulation, minimizing injury to the former is a higher moral priority to a military than minimizing casualties to its own troops; but minimizing casualties to its own troops—force protection for short— is a higher priority than minimizing casualties to enemy civilians not under the military’s effective control...The state has an obligation to protect its own citizens and those in occupied territories; it has no such responsibilities to other civilians. And its soldiers *are* its citizens.

10) “Israel: Civilians and Combatants,” New York Review of Books, May 14, 2009

Avishai Margalit and Michael Walzer respond that the nationality of civilians is irrelevant; the sole relevant distinction is that between combatants and non-combatants. They argue their case through a series of hypotheticals. Suppose Hezbollah fighters succeed in capturing a kibbutz filled with Israeli citizens, and the Israeli Defense Forces (IDF) must recapture it. Troops must take precautions to minimize civilian casualties, and that might mean assuming personal risks; that is what we expect of soldiers. But what if the hostages are not Israelis but pro-Israel U.S. Jews who have come to the kibbutz to support Israel? Under Kasher and Yadlin’s formula, IDF troops would not need to take the extra risks, but that seems like an intuitively wrong result, premising the difference on nothing but an accident of nationality. Intuitively, the IDF should take the same risks in both cases. If that conclusion is right, consider a hypothetical in which the U.S. Jews are not sympathizers but protestors against Israeli policies. The sole difference between this and the previous hypothetical is the ideological beliefs of the U.S. non-combatants; and, presumably, these must not matter to the military. So the third case must be treated on a par with the first and second.

11) Luban –Ibid

The laws of war provide no direct answer to these questions—they never explicitly address the question of how much risk soldiers must assume to minimize “collateral” civilian casualties. International humanitarian law requires soldiers to do everything feasible to avoid unintended civilian casualties, but it never defines “feasible.” It represents the question of how much risk soldiers must take to spare civilians in less direct terms, namely what weight force protection carries as a “concrete and direct military advantage” of an operation. The more weight force protection carries, the more unintended civilian casualties will be permissible under a proportionality test. Force protection cannot have absolute weight, however, and soldiers cannot do anything it takes to minimize risks to themselves; if force protection had absolute weight, what would be the point of a proportionality requirement? In Gary Solis’s words, “an attacker with superior arms would be free to



annihilate all opposition with overwhelming firepower and call any civilian casualties collateral." It follows that soldiers cannot offload all the risks of warfare onto civilians. The law does not quantify how much risk soldiers can transfer to civilians.

12) Prof. Asa Kasher, Ibid

In applying the ethical distinction between combatant and non-combatant, Israel faces two major problems. There is the difficulty posed by Hamas' overall approach to war [described by Bill Clinton]: "Hamas was perfectly well aware of what would happen if they started raining rockets into Israel. . . . They have a strategy designed to force Israel to kill their own civilians so that the rest of the world will condemn them." What is Israel supposed to do in this situation? Does the presence of large numbers of non-combatants in the vicinity of a building that is directly involved in terrorist assaults on Israelis render that building immune to Israeli attack? The answer must be and is, no. Israel cannot forfeit its ability to protect its citizens against attacks simply because terrorists hide behind non-combatants. If it did so, it would be giving up any right to self-defense. The IDF uses a variety of clear warning methods designed to remove non-combatants from the scene of battle, including distribution of leaflets, personal phone calls, and the use of "roof-knocking" non-explosive missiles as a final warning shot. One must bear in mind that most of the IDF combatants, in particular in the army and navy, are conscripts. As citizens in military uniform, they are entitled to ask the state, as well as the IDF and its commanders, whether they are being placed in greater jeopardy to save the lives of enemy non-combatants who have been repeatedly warned to leave the scene of battle. No war has ever been fought without collateral damage. The requirement of the Just War doctrine is that the opposing forces do their utmost to avoid it. Israel does so, while Hamas' strategy aims at the death of *both* Israeli and Palestinian non-combatants. There are those who have argued that the IDF should strive just as hard to avoid collateral damage in Gaza as it (or Israeli internal security forces) would in, say, Tel Aviv. As Amos Yadlin and I have argued before in an exchange with Michael Walzer and Avishai Margalit, this is not a reasonable demand. First of all, Israel, like every state, has a primary duty to protect its own people's lives that is different than the responsibility it has to enemy non-combatants. Moreover, enemy territory such as Gaza is not under its effective control. Israel is bound...to minimize the loss of life. No state owes more than that to [already] warned enemy citizens located in the vicinity of terrorists, and no democratic state would erase the distinction between military ethics and police ethics in this way. A demand to act in Gaza the same way we act in Tel Aviv would be tantamount to asking Israel to relinquish the duty of self-defense. It must be emphasized in conclusion that it is also the moral duty of a democracy to pursue peace. Peace is, as it were, the ultimate Iron Dome, the best protection for combatants and non-combatants on both sides of the border from the calamities of war.

The Moral Problem of Civilians

13) Michael Walzer, "Just and Unjust War in the 21st Century." Council on Foreign Relations – The Religion and Foreign Policy Workshop May 23, 2017

There are no certainties in politics or morality. All our calls are judgment calls. But when we make judgment calls, we have to give reasons to other people. And it's very important what kind of reasons we can give. And there are criteria that are widely accepted which we are required to appeal to. So even though we act without certainty and often in ignorance, we nonetheless have to act with reasons, and we have to be able to defend our actions to other people, first of all to our fellow citizens, and then to everyone else. Now, it's the maxim of General Sherman: War is hell, therefore, get it



over with as quickly as possible; any means that end the war are therefore justified. And much of just war theory is an argument against that claim. It's an argument that there are certain constraints on how we fight which are I want to say unbreakable, although I have argued that in what Winston Churchill calls supreme emergency, the moral rules may have to be broken. But that's one of the hardest questions in just war theory and in all morality: Do you do justice even if the heavens fall, or do you do justice until the heavens are about to fall, and then you do whatever you have to do to stop the heavens from falling? The German philosopher Habermas called the Kosovo intervention illegal but morally necessary. Now, illegal because it was not authorized by the U.N. Morally necessary because he believed, and I think he was probably right, that it avoided a massacre of very large numbers of people, and it stopped the creation of a new refugee crisis. I think when you confront a massacre...whoever can should stop the killing. The examples that I think are most interesting are the Vietnamese shutting down the killing fields in Cambodia, the Indians stopping the terror in East Pakistan, now Bangladesh, and the Tanzanians invading Uganda and overthrowing the murderous regime of Idi Amin. Those are three examples of interventions that the U.N. would never have approved of. And in each case, I think they were justified.

14) Matt Peterson, "Is Obama's Drone War Moral?" www.theatlantic.com August 18, 2016

Is Barack Obama's drone war moral? There are two parts to this question: First, can targeted killings outside of conflict zones ever be justified? Second, is the structure that Obama has put in place over the years actually upholding those standards? The answer to the first question, according to philosophers of war, is yes, and the standards for "moral" killing allow for more civilian casualties than one might expect. The answer to the second question is harder. The secrecy surrounding the program makes it difficult for outsiders to assess the morality of targeted killings, [and] means the government is failing to uphold its basic moral duties to the public and the people it is targeting. When Obama has made the moral case for the drone war, he has claimed to uphold the highest standards in defending the nation's security. "That means taking strikes only when we face a continuing, imminent threat, and only where there is ... near certainty of no civilian casualties," he told an audience at West Point in 2014. Last month [July 2016], the administration gave its first self-evaluation of how well it had succeeded, claiming to have killed at most 116 civilians in drone strikes outside of war zones, compared with up to 2,581 "combatants." (Independent estimates put the number of civilian casualties far higher.) But what do these numbers really signify? The standards Obama articulated track reasonably well with the traditional requirements laid out by moral philosophers for carrying out violence in self-defense. To be morally justified, defensive killing must be necessary, meaning only people who pose serious threats can be targeted, and taking a life (as opposed to arresting the threatening party) must be the only possible means to end those threats. The defender must strictly distinguish between combatants and innocent bystanders, intentionally targeting only combatants, and must keep any damage to those bystanders in careful proportion to the initial threat. Obama's drone program is not an automatic moral failure if it kills civilians along with terrorists...Even if they do target the right people, their missiles may also kill innocent bystanders. Obama's claim that the targeted killing program goes out of its way to minimize harm to civilians has been heavily contested. But military ethicists have long acknowledged that civilian deaths are permissible if they are kept in careful proportion to the lives saved by a particular operation. "Suppose there's a terrorist who we know has killed a number of people in the past, and is clearly planning or preparing for other operations, so we can predict that killing him will save the lives of hundreds of people," says Jeff McMahan [philosopher at Oxford]. "And if we kill him, we'll kill 15 innocent people, and there's no other way to eliminate his



causal contribution [to the deaths of hundreds]. Then it looks like it's going to be proportionate." In other words, Obama's drone program is not an automatic moral failure if it kills civilians along with terrorists. In releasing data on civilian casualties this summer, the Obama administration had an opportunity to make the case that its targeted killing program is proportionate. Instead, the data shows where the ideal moral case breaks down as it meets reality. Assuming the accuracy of the statistics the government released in July—which are low compared to other counts—473 strikes killed from 64 to 116 civilians and 2,372 to 2,581 "combatants," or as many as 40 terrorists for each civilian. But that kind of calculus is morally meaningless. It would in principle be acceptable for all 116 civilians to have died in a single strike that killed only one terrorist, if that strike prevented an attack on the scale of September 11. On the other hand, even the low end of 64 civilian deaths may have all been unjustified, if those individuals were killed in the process of targeting someone who posed only a minor threat to other innocents.

Esther and the Killing of Innocents

15) Esther – Chapter 9

On the thirteenth day of the twelfth month, the month of Adar, the edict commanded by the king was to be carried out. On this day the enemies of the Jews had hoped to overpower them, but now the tables were turned and the Jews got the upper hand over those who hated them. The Jews assembled in their cities in all the provinces of King Ahashverosh to attack those determined to destroy them...The Jews struck down all their enemies with the sword, killing and destroying them, and they did what they pleased to those who hated them. In the citadel of Shushan, the Jews killed and destroyed five hundred men...But they did not lay their hands on the plunder Meanwhile, the remainder of the Jews who were in the king's provinces also assembled to protect themselves and get relief from their enemies. They killed seventy-five thousand of them but did not lay their hands on the plunder. This happened on the thirteenth day of the month of Adar, and on the fourteenth they rested and made it a day of feasting and joy.

16) Yoram Hazony, The Dawn, 1994

While seeking to stress the fact that the Jews are being given permission to "organize and defend themselves", the wording of the missive which Mordechai dispatches is hardly defensive. Being copied straight out of the first letter composed by Haman, it grants the Jews permission (i) "to annihilate, to kill, and to destroy" their enemies, (ii) to slaughter their children and women, and (iii) to seize their property. Neither the assault on the families of would-be assailants nor the clause concerning property has anything to do with defense in any obvious sense, nor does the brutal hyperbole of annihilation, killing and destroying immediately seem to have much in common with this purpose.....

One cannot be a good person or a good Jew in our own age--or in the period of the rabbis, either, for that matter--and "understand" genocide. Being good is today very closely allied with the revulsion we have learned towards the killing of children, the aged, and other non-combatants in war, and it is very clear that our own moral sensibilities are in this sense "higher" than those which drove the wars of liquidation in *Joshua* and *Samuel*, and even the Jews' war in *Esther*...Purity requires that man renounce power; but morality requires that man have power in order to pursue right. This is true on the individual level, in which one can only give to others if one has what to give. But it is even more true when one considers moralities of scale, which require vast amounts of political power, economic power, military power. Without power, there is no police force capable of defending the innocent, no court capable of doing justice, no army capable of wresting peace from the



aggressor...Mordechai's war is a war of morality...because any other choice in his time and place would have been folly. Thus if one were to ask why so many men had to die on the day of the fighting, if the results were by then practically assured, the answer is that this is the way of politics. Without decisive action against his enemy, Mordechai would have guaranteed himself a reputation of mildness - a reputation which would have breathed new life into the anti-Semitism of the empire