

### Operation Cast Lead – Week Three Ethics During War – The Difficulty, The Challenge, and the Responsibility

Among the questions that were asked from our educators, community leaders, and shlichim:

Especially with regards to protecting non-combatants, what are some of the Jewish sources that may help understand issues of ethics during war?

#### 1. Clarifying the Problem

*We are attempting to incorporate moral obligations in a pathological situation. A person gets up in the morning, brushes their teeth, drinks their coffee, and goes out to kill another human being. Such is the situation of war and it must invoke from within our very being a moral tremor.*

*Supreme Court Justice Mishael Cheshin in an interview with Ilana Dayan on Israeli Army Radio (morning, 8-1-09)<sup>1</sup>*



Supreme Court Justice *Mishael Cheshin*, in the quotation above, captures the extreme difficulty of a conception of ethics during wartime, and of behavior dictated by that moral conception. At the same time, Cheshin stands firm that even in war time the moral voice must be taken into account.

A case drawn from Jewish sources that echoes Cheshin's concern can be found in connection with Jacob and Esau. After years apart, and after Jacob, as a result of deceit, received from Isaac the blessing meant for Esau, messengers come to Jacob bearing news of Esau's imminent arrival.

*The messengers returned to Jacob, saying, 'We came to your brother Esau, and furthermore he is coming to meet you, and four hundred men are with him.' Then Jacob was greatly afraid and distressed...*  
*Genesis 32:6-7*

*וישבו המלאכים אל יעקב לאמר : באנו אל אחיך אל עשו וגם הלך לקראתך וארבע מאות איש עמו. ויירא יעקב מאד ויצר לו...  
בראשית מ"ג, ז-ח*

R. Shabtai Bass (1641-1718) in *Siftei Khahkamim*, following from commentators like Rashi, and even earlier from *Breshit Rabbah* 75, writes:

"and Jacob was greatly afraid and was distressed" (Gen. 32:7, when he heard that Esau was coming together with 400 men). Yet one might argue that Jacob surely should have no misgivings about killing Esau, for it states explicitly, "If someone comes to kill you, forestall him by killing him first." Nonetheless, Jacob did, indeed have misgivings,

<sup>1</sup> I hope that the translation of Supreme Court Justice Mishael is faithful to the spirit of his words.

fearing that he might kill some of Esau's men who were not intent on killing Jacob (for only Esau had this intention) but merely fighting against Jacob's men. And even though Esau's men were pursuing Jacob's men, and every person has the right to to save the life of the pursued at the cost of the life of the pursuer, nonetheless that provision applies which states: 'if the pursued could have been saved by maiming a limb of the pursuer, but instead the rescuer killed the pursuer, the rescuer is liable to capital punishment on that account.' Hence Jacob rightly feared in case that in the confusion of battle, he kill some of Esau's men when he might have restrained them by merely injuring them.

## 2. The Context

The task of any country's army is to protect its citizens, to protect itself, and to avoid injuring civilians while doing battle with the enemy. After having targeted Israeli civilian targets for years, and after having invested in developing longer range missiles at the expense of its people's welfare, it would seem that Hamas, in this sense, is no army.

The Israel Defense Force (IDF) is an army. Within Israel and without, there has been an ongoing argument about the way the following three priorities of the IDF - a) protecting Israeli civilians, b) protecting Israeli soldiers, and c) protecting Gaza civilians – should be ordered.

Each of these responsibilities need be part of planning and operations. However, defining the ways in which these responsibilities find expression in both planning and operations is no easy task. Based on lessons drawn from Israel's Second Lebanon War, [Haaretz](#) reported that the IDF is taking a more aggressive posture. Such a posture reflects the IDF's sense that it's primary ethical responsibilities are towards Israel's civilian population under the hail of terrorist rockets, and towards Israel's soldiers fighting against that threat in an area with a large and extremely dense civilian population exploited by the Hamas. The ethical position in favor of a more aggressive posture during the IDF ground operation is also connected with political considerations:



*Following the trauma of the war in Lebanon in 2006, the army realized that heavy IDF casualties would erode public (and especially political) support for the war and limit its ability to achieve its goals. Therefore, it is using aggressive tactics to save soldiers' lives. [Amos Harel and Avi Issacharoff, Haaretz, 7 January 2009](#)*

With that said, the IDF, like any army, needs to relate seriously in planning and in operations to all three circles of responsibility; including towards non-combatants.

## 3. Is a Code of Ethics Possible?

The [IDF Code of Ethics](#) states:

*The IDF servicemen and women will use their weapons and force only for the purpose of their mission, only to the necessary extent and will maintain their humanity even during combat. IDF soldiers will not use their weapons and force to harm human beings who are not combatants or prisoners of war, and will do all in their power to avoid causing harm to their lives, bodies, dignity and property.*

[Moshe Halbertal](#) follows in the footsteps of Siftei KHakhamim in his lecture on the IDF ethical code. Halbertal relates to the above principle – and most importantly the clause 'only to the necessary extent and will maintain their humanity even during combat...' – to the Talmudic principle mentioned by Siftei Khakhamim. Based on his reading of the Talmudic principle, Halbertal contends that there is a need to discern with vigilance between the legitimate use of deadly force and the obligation to restrict the use of force to measures proportionate to: (a) the successful completion of the given mission, (b) to the immediate threat to the soldier and his comrades, (c) and to maintaining 'their humanity even during combat.'

The [Kahan Commission Report](#), in dealing with the Phalangist massacre of Palestinian civilians in Sabra and Shatila (Beirut, 16-18 September 1982) expands on the above:

*The circumstances of combat require the combatants to be tough - which means to give priority to sticking to the objective and being willing to make sacrifices - in order to attain the objectives assigned to them, even under the most difficult conditions. But the end never justifies the means, and basic ethical and human values must be maintained in the use of arms.*

Halbertal continues and exemplifies the [argument for proportionality](#), and the restrictive use of force with the following:

*Ethical conduct of war requires from us to refrain from targeting civilians, all the more within an asymmetrical conflict. Therefore, targeting a combatant, while risking the lives of non-combatants when your own soldiers or civilians are not under an immediate threat, is ethically prohibited.*

*For instance, we may not target a terrorist who is driving a taxi with innocent non-combatants, even granting that killing him is justified. One might say we are targeting the terrorist, and that we do not bear any responsibility toward the others traveling with him. If the terrorist is not posing a clear and present danger and there is a good chance for capturing him at a later opportunity, we may not act as long as we are risking the lives of non-combatants.*



Halbertal, a leading Israeli public intellectual, is part of a wider public debate within the IDF, between Israel decision makers, and within the Israeli public regarding what constitutes ethical behavior in combat situations. While these issues are already complex in cases regarding conventional warfare, dilemmas of ethics during battle are complicated even more so in the war against terrorism. The terrorist, the Hamas in the case of 'Operation Cast Lead', seeks as a strategic option to blur the border between terrorist and non-combatant. Concealing weapons caches, disguising military bases, and deploying weapons [from within civilian neighborhoods](#) – from schools, hospitals, and/or houses of prayer – are all part of the terrorists' assumption that the armies of democratic states will attempt to operationally differentiate between combatants and civilians, and that mounting civilian

casualties will increase public pressure to curtail military action. The terrorist acts to provoke the army into behavior that erodes the basic human rights that the democratic state fights to defend.

In the case of the IDF, there is no doubt that in comparison with civilian deaths in the American campaign in Afghanistan or in the NATO air strikes in Kosovo, there has been an Israeli attempt to minimize injury to the Palestinian civilian population of Gaza. International law, with great regret recognizes that especially in the war against terror that civilian death is likely. The [International Criminal Court at the Hague](#), in a response regarding the American campaign in Iraq:

*Under [international humanitarian law](#) and the [Rome Statute](#), the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur. A crime occurs if there is an intentional attack directed against civilians (principle of distinction) (Article 8(2)(b)(i)) or an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage (principle of proportionality) (Article 8(2)(b)(iv)).*

#### **4. A Lesson from the 1<sup>st</sup> Lebanon War (1982-1985)**

A final concern, voiced within the Israeli experience, about an earlier war on another border can be taken from the final report of the [Kahan Commission](#). The Kahan Commission found that although IDF forces played no active role in the Phalangist massacre, that the Jewish experience demanded recognition of Israel's indirect responsibility. Because Israel was the military force controlling the Beirut neighborhoods that included Sabra and Shatila, the Kahan Commission ruled that Israel was responsible for the safety of non-combatants in the area. Simply said, the Kahan Commission report refused to accept any claim that ignorance was an excuse for inaction.

*When we are dealing with the issue of indirect responsibility, it should also not be forgotten that the Jews in various lands of exile, and also in the Land of Israel when it was under foreign rule, suffered greatly from pogroms perpetrated by various hooligans; and the danger of disturbances against Jews in various lands, it seems evident, has not yet passed. The Jewish public's stand has always been that the responsibility for such deeds falls not only on those who rioted and committed the atrocities, but also on those who were responsible for safety and public order, who could have prevented the disturbances and did not fulfill their obligations in this respect. It is true that the regimes of various countries, among them even enlightened countries, have side-stepped such responsibility on more than one occasion and have not established inquiry commissions to investigate the issue of indirect responsibility, such as that about which we are speaking; but the development of ethical norms in the public world requires that the approach to this issue be universally shared, and that the responsibility be placed not just on the perpetrators, but also on those who could and should have prevented the commission of those deeds which must be condemned.*

## 5. Closing

The sources brought above from Chief Justice Cheshin, from Jewish tradition, from the IDF Code of Ethics, and from the Kahan Commission Report are not necessarily descriptions of the ways that human beings always behave, but rather are examples of voices from within the Jewish and Israeli experiences that aspire to raise human activity from instinctive responses to the level of careful action based on discernment of both the circumstances of the given reality and of ethical judgments that we are called upon to consider. Especially in circumstances of war, when life and death are on the line, the responsibilities of policy makers, of commanders, of soldiers, and of the general public to carefully weigh the necessity, and the proportionality of the employment of violence need be a central concern. Like the call of Chief Justice Cheshin quoted above, and in the spirit of Jacob our Father:



***Such is the situation of war and it must invoke from within our very being a moral tremor.***

## In English

### [Critical Currents: War, Human Rights And Democracy](#)

Naomi Hazan

Jpost.com (8 January 2009)

<http://www.jpost.com/servlet/Satellite?cid=1231167315685&pagename=JPost%2FJPArticle%2FShowFull>

### [Ethics of War, Peace, & Terrorism](#)

Multimedia Resources on the Ethics of War, Peace, & Terrorism

Laurence H. Hindman, Ed.

University of San Diego

<http://ethics.sandiego.edu/Applied/Military/index.asp#PageCite>

### [Hijacked by the war in Gaza](#)

Rochelle Singer

Haaretz (12 January 2009)

<http://www.haaretz.com/hasen/spages/1053915.html>

### [IDF Investigation Shows Errant Mortar Hit UN Building In Gaza](#)

Amos Harel

Haaretz (11 January 2009)

<http://www.haaretz.com/hasen/spages/1054284.html>

### [In Praise Of Harsh Response](#)

Ophir Falk

ynetnews.com (8 January 2009)

<http://www.ynetnews.com/articles/0,7340,L-3653093,00.html>

### [In Search Of Moral Clarity](#)

Dan Kosky

ynetnews.com (11 January 2009)

<http://www.ynetnews.com/articles/0,7340,L-3654345,00.html>

### [The Gaza War and Proportionality](#)

Michael Walzer

Dissent (8 January 2009)

<http://www.dissentmagazine.org/online.php?id=191>

### [The Foulest Fight](#)

David Horovitz

Jpost.com (9 January 2009)

<http://www.jpost.com/servlet/Satellite?cid=1231424897296&pagename=JPost%2FJPArticle%2FShowFull>

### [War](#)

Brian Orend

The Stanford Encyclopedia of Philosophy (last revised July 2005).

<http://plato.stanford.edu/entries/war/>

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