



ON QUASHING ANTI-GOVERNMENT DISSENT IN YESHA COMMUNITIES PERSPECTIVES OF NATIONAL LAW, INTERNATIONAL LAW AND JEWISH LAW

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In recent months, Israel's Minister of Defense, Ehud Barak, has issued several administrative expulsion orders. The point of these orders, of course, has been to quash anti-government dissent in various Jewish communities in Yesha (Judea and Samaria). In issuing these orders, the IDF generally works together with ISA (Israel Security Agency) or "*Shin Bet*". My understanding is that the designated recipients are not always informed as to the precise reason for the orders, nor have they any effective right of appeal. Additionally, and significantly (especially in a Jewish society that claims to be a democracy), the expulsion orders are incontestably the product of an already-fallen government.

Still committed to policies of national auto-destruction, the interim "caretaker" government in Jerusalem – dutifully following the surrender scripts that evolved from Rabin's original codification of "Oslo" – now invokes the same mantras of IDF military "discipline", "command" and "loyalty". Naturally, Israel's soldiers must *normally* carry out orders, and must respect proper lines of command authority. But what should be expected of them when matters are *abnormal*? How normal should it appear to any thinking Jew that Israel's leaders are still requiring the citizenry to be complicit in national dismemberment? As was already convincingly expressed back in August 2007, by Gary Cooperberg, in his *Voice From Hebron*:

...a sharp distinction must be made between orders given in an operation of battle with our enemies, and a political order which has nothing to do with defending the nation and which may conflict with moral and ethical standards.

Gary's point here is more "moderate" than my own. My position, informed *inter alia* by the jurisprudential view of international law, is that for several years IDF Jewish eviction orders

have been *genuinely injurious to Israel's national survival and also to world security as a whole*.

Years ago, when then Prime Minister Sharon first began to implement his intrinsically-flawed ideas for “disengagement”, a good friend of mine in Israel, a hard-fighting veteran of all-too-many wars, summarized his views of the newest Jewish capitulation as “irrational, fatally dangerous, unjust, immoral, illegal and disgustingly inhumane”. Forced upon Israel by “blatantly undemocratic means”, he continued analytically, its underlying cause is “auto-anti-Semitism”. Ironically, of course, because the association of surrender with Sharon was so out-of-character, the Sharon government’s edict to evict fellow Jews was nonetheless a *de facto* expression of “auto-anti-Semitism”. It was, therefore, not only the corollary right of each individual Israeli soldier to reject disengagement, but his absolutely *sacred duty*.

Nothing fundamental has changed. On the contrary, to the extent that disgraced Prime Minister Olmert very consciously coupled his plans for additional territorial surrender on behalf of the “Road Map” with assorted mass freeings of terrorists – and also with extensive arming of one terrorist faction (*Fatah*) against another (*Hamas*) – the Jewish soldier’s obligation to resist Israel’s self-destruction remains clear and fixed. This legal and *Halachic* argument is all the more true today, because *Fatah* and *Hamas* have both the documented intention and capability to initiate mass-destruction terrorism. *In this connection, however correct his intentions; US President-elect Barack Obama will not rescue Israel.*

The essence of any government rests upon a credible assurance of protection. By definition, there is always a solemn “pact” that exists between citizens and governments concerning this existential assurance, and right now the Israeli government is manifestly determined to violate its part of the bargain. Understood with particular respect to the imperiled Jewish state in 2008, it must be acknowledged that any IDF military orders that would plausibly undermine Israel’s statehood are *inherently* lacking in moral and legal authority. These orders *must*, therefore, be strenuously opposed.

Israel’s soldiers have no right or obligation to follow orders that are *prima facie* contrary to Jewish survival. Naturally we can’t expect that each soldier will have the right to determine for himself in each case whether a particular order falls into this category, but the degree of danger that would accompany further Jewish expulsions from Judea/Samaria is manifest *beyond a reasonable doubt*. If we should also consider the very pertinent (and plainly ironic) Nuremberg Judgment and associated Nuremberg Principles, it will become clearer still that the obligation to disobey military orders that are contrary to *any democratic state’s* survival is *generic* and *universal*. This precise obligation has become synonymous with the very meaning of “Nuremberg”. Hence, Israel’s obligations here are binding both according to direct obligation, and also by extrapolation from more general jurisprudence.

When Ariel Sharon first began to implement “disengagement”, Israelis began to inquire: *Will military refusals to participate in the expulsion of Jews cause the IDF to weaken or even to disintegrate?* “On the contrary,” wrote Moshe Feiglin,

it will strengthen it (IDF) morally and establish its right of existence. Real conscientious refusal will not lead to a situation in which everyone does, as he likes. The soldiers who are refusing are the outstanding ones, who wish to serve and make sacrifices for the nation and the country.

Moshe was correct, of course, but the unambiguously persuasive Jewish argument against complicity in Jewish deportations and hence for certain forms of civil disobedience, can also be grounded in fundamental international law. Ultimately, all international law is drawn from the idea of a Higher Law – an idea that was born of all places in *ancient Israel*. The specific

right to civil disobedience is well established in all democratic legal theory. Moreover, this right can become an outright *obligation* whenever a particular government's policies run counter to the authoritative and codified Nuremberg Principles of 1946.

Let me now address more specifically *Jewish Law*. From its very beginnings, this body of rules and principles has been viewed as an expression of God's will. Biblically, the law is referred to as the "word of God", never of humankind. God is the sole authentic legislator, and righteousness lies in observance of His law. The absence of righteousness places at risks the lives and well being of both the individual and the entire community.

For ancient Israel, law was always the revealed will of God. All transgressions of the law were consequently offenses against God. The idea that human legislators might make law independently of God's will would have been unthinkable. Indeed, as God was the only legislator, the sole function of human authorities was to *discover* the law and to ensure its proper application. According to Talmud: "Whatever a competent scholar will yet derive from the Law, that was already given to Moses on Mount Sinai."

PART TWO

In the Jewish tradition, the principle of a Higher Law is not only well established; it is the very foundation of all legal order. Whenever the law of the state stands in marked contrast to this principle, the secular law is rendered altogether null and void. In certain circumstances, such contrast positively *mandates* opposition to the law of the state. Here, what is generally known, as “civil disobedience” is not only lawful, but also genuinely *law enforcing*.

Exactly what sorts of circumstances are we describing? Above all, they are circumstances that place at existential risk the very survival of the state. In such circumstances, which were in fact already identified in the widely disseminated *Halachic Opinion* issued in 1995 by Prominent Rabbis in Eretz Yisroel Concerning Territorial Compromise, the matter is one of *Pikuach Nefesh*. Hence, it *demand*s certain appropriate forms of resistance. Israel cannot endure meaningfully without Judea and Samaria. As the Torah is a “Torah Chaim”, a Torah of life, Jewish authorities in the State of Israel are “forbidden, under any circumstance”, to transfer Jewish land to Arab authorities.

The writer Hillel Halkin, fearing that the state of the Jews might one day be ruled by Hebrew-speaking Gentiles (a fear already widespread among American Zionist thinkers like Maurice Samuel and Ludwig Lewisohn) once wrote:

I do not believe that a polity of Israelis who are not culturally Jews, whose roots in this land go no deeper than 30 years and no wider than the boundaries of an arid nation-state, has a future in the Middle East for very long. In one way or another...it will be blown away like chaff as though it never were, leaving neither Jews nor Israelis behind it.

And in a more recent essay the same writer observed that the actual hatred of Judaism of a very large portion of Israeli intellectuals, including those who now create a theoretical legitimacy for current government policies, has become a hatred of Zionism.

Halkin’s fears were well founded. They remain well founded today. Under the disastrous Rabin/Peres governments, Israel began to be transformed not only into a polity that was more and more detached from cultural Judaism, but also into one that positively undermined both Judaism and Zionism. That transformation now continues full-speed-ahead under a legally fallen government.

The right of sovereignty, in all states, rests upon an assurance of protection. Where a state can no longer offer such elementary assurance – indeed, where it deliberately *surrenders* such a basic promise – the critical rationale of citizen obligation must also disappear. “The obligation of subjects to the sovereign,” said the English philosopher Thomas Hobbes in the 17th century, “is understood to last as long, and no longer, than the power lasteth by which he is able to protect them.”

Hobbes knew what he was talking about. Can the current government of Israel protect its citizens? Clearly, Israelis have already experienced the Oslo and Road Map “peace process” as a terror process. If Judea/Samaria are transformed into part of “Palestine”, the peace process will also once again become a *war* process. Here, finally deprived of its essential strategic depth, Israel will become an irresistible object for aggression by certain enemy states and their surrogates. In view of what is already known about enemy state nuclearization, and about ballistic missile developments in these states, the war and terror process could even be ignited against Israel by unconventional assaults of various kinds.

It is precisely with these sobering points in mind that Israeli opponents of a self-annihilatory peace process must now prepare to engage in civil disobedience. Although the government still instructs them that a “Two-State Solution” is possible, Palestinian maps certainly suggest

otherwise. There, the Arab “Phased Plan” of 1974, spawned in Cairo and unambiguously genocidal, is codified into an open cartography of disappearance for the Jewish state. Surely Israel still faces a distinct machinery of destruction, and it is up to each and every Israeli to “*stop the machine*” while there is still time.

To “stop the machine”. This aptly phrased metaphor is taken directly from Henry David Thoreau’s classical explorations of civil disobedience. In his famous essay on the subject, the American transcendentalist spoke persuasively of such essential opposition as an act of “counter friction”. Confronted with dreadful harms of the sort now suffered and anticipated by so many Israelis, harms generated by the incessant and illusory Peace Process, he would urge, as he once did about policy deformations in this country: “Let your life be a counter-friction to stop the machine. What I have to do is to see, at any rate, that I do not lend myself to the wrong which I condemn.”

This is what Israel’s thousands of protestors shall seek, *not* to lend themselves to the manifest wrongs of the planned government surrenders. Among these wrongs are the government’s corollary legitimization of a terrorist organization, and its shameful unwillingness to punish terrorist crimes. Indeed, not only are Israel and the so-called Palestinian Authority still abandoning all pertinent jurisprudential obligations to seek out and prosecute terrorists, they are both still releasing known terrorists from their respective jails.

Israel’s pertinent agreements with the PA/*Fatah* contravene the binding obligation to punish acts that are crimes under international law. Known formally as *Nullum crimen sine poena*, “No crime without a punishment,” this requirement points unambiguously to the multiple acts of killing and torture ordered directly by PA officials over many years. To not only ignore this requirement, but also to actually legitimize the criminality by making Abbas a “partner” (Israel’s first honored Palestinian “partner” was honored Nobel laureate Yasir Arafat) is an openly egregious violation of Principle I of the Nuremberg Principles. ***This means that Israel’s citizens who now continue to support and sustain the Road Map are in violation of international law (and therefore of Israel’s national law as well, which necessarily incorporates international law), while those who oppose this path to self-destruction within the proper bounds of civil disobedience are in support of both forms of law.***

These informed views of law and civil disobedience in Israel, however counterintuitive or disturbing they may seem, warrant a broader public understanding. Now embarked upon policies that threaten Israel’s very existence while they simultaneously undermine authoritative expectations of justice, the Jerusalem government should fully expect to be confronted with mounting protests. Were it not so confronted, citizens of Israel would have already consented to their own codified disintegration.

International law, which is based upon a variety of higher law foundations, including Jewish Law, forms part of the law of *all* nations. This is the case whether or not the incorporation of international law into national law is explicit, as it is in the Supremacy Clause (Article VI) of the United States Constitution. The government of Israel is bound by settled norms of international law concerning punishment of terrorist crimes and physical survival of the state. Where this government fails to abide by these rules, as is very much the case today, civil disobedience is not only permissible, it is *required*.

We began with a look at the Jewish Law bases of higher law and civil disobedience. Jewish law rests always upon two principles: the overriding sovereignty of God and the derivative sacredness of the individual person. Both principles, intertwined and interdependent, underlie the reasoned argument for civil disobedience in Israel. From the sacredness of the person, which stems from each individual’s resemblance to divinity, flows the freedom to choose.

The failure to exercise this freedom, which is evident wherever a response to political authority is merely automatic, represents a betrayal of individual legal responsibility.

What are the likely costs of such a betrayal? Above all, as we have already noted, they include increased loss of life and expanded human suffering. Failing to exercise their *obligations* as free citizens, Israelis who stand by passively as the government proceeds with a terror process/war process are undeniably complicit in the deadly consequences of their betrayal.

Where it is necessary, civil disobedience in Israel can save lives. This path does display the highest imperatives of free citizens in a free society. To the extent that it can stop and even reverse the Road Map, it can reduce the number of Israelis who would die or be maimed at the hands of Arab terrorists and also those who would perish as a result of newly probable aggressions by certain Arab/Islamic states. There is, then, a potentially concrete benefit to civil disobedience in Israel. This is by no means a merely abstract matter of theory and jurisprudence. It is, rather, a distinctly flesh and blood matter of national self-defense and survival.

In utilitarian terms, we are speaking of calculations that would compare the two essential options – civil disobedience vs. no civil disobedience – according to expected costs and benefits. Here it should be apparent to all that the Road Map, which represents a proper-sounding exchange of critical Israeli lands for unsupportable diplomatic promises (*Land For Nothing*), offers absolutely no benefits and altogether unsustainable costs. The calculation should be easy enough to compute.

It is true, of course, that certain acts of civil disobedience could represent technical infractions under Israeli statutes or Basic Law, but such infractions are *necessary* in order to support vastly more important principles of Israeli law and Jewish justice. In the United States, a traditional common law defense known as “necessity” (which has also been incorporated into certain criminal codes) permits conduct that would otherwise constitute an offense if the accused believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct. Transported to the Israeli context, where the greater public and private injury occasioned by the Road Map might include terrorism, war crimes, crimes against peace, crimes against humanity and genocide, a necessity-type defense could be appropriate and compelling. This is the case even if Israeli law recognizes no clear form of “necessity” because this law *must recognize* the higher-law principle from which the necessity defense derives. Indeed, insofar as the origins of the higher-law principle lie in ancient Jewish law, the argument for civil disobedience in Israel based upon some notion of “necessity” is *especially* persuasive.

PART THREE

Jewish Law is democratic in the sense that it belongs to all of the people, a principle reflected in the Talmudic position that each individual can approach God in prayer without priestly intercessions. Hence, a fundamental goal of Jewish law must always be to encourage *initiative*, to act purposefully on behalf of rescuing and improving both state and society. When this criterion is applied to expected instances of civil disobedience in Israel, it is apparent that the protesting opponents of the Road Map, more than any other citizens of Israel, shall be acting according to law.

In Claude Lanzmann's monumental documentary, *SHOAH*, one of the surviving leaders of the Warsaw Ghetto uprising remarks: "If you could lick my heart, it would poison you." Sadly, the time may still come – if Jerusalem is permitted to continue following Washington's cartography – that surviving Israelis will someday express similar sentiments. In fact, it is precisely to prevent such an unforgivable repetition of Jewish history that hundreds or thousands of Israelis may soon need to embark upon wider civil disobedience and larger-scale military refusals. After all, what would be the point of sacralizing IDF "superior orders" at the expense of Israel's physical continuance?

The Road Map to Peace in the Middle East still being forced upon Israel by the United States, Russia, the European Community and the United Nations calls for the incremental surrender of Judea and Samaria that are indispensable to Israel's organic survival as a Jewish state. This one-sided piece of diplomatic cartography would open up the entire country to expanded terrorism (including mega-terrorism involving chemical, biological or even nuclear weapons) and to authentically genocidal wars of aggression launched by one or several enemy states. Moreover, in the obvious aftermath of what has happened in Gaza, these pieces of Jewish land carved from the still-living body of Israel would also quickly become a staging area for terrorism against various cities in Europe and the United States. ***It follows that the Road Map could bring chaos and catastrophe not only to Tel-Aviv, and Hebron, but also to New York, Washington, Paris and London.***

Israel's government is assuredly under no moral or legal obligation to proceed with the Road Map. Steady promises from Washington of billions in new military assistance is certainly nothing to sneeze at, but even such a staggering infusion of American money could never offset the existential security risks of additional "disengagements" or "realignments". ***So long as Jewish soldiers actually believe it is their obligation to evict fellow Jews from their homes in Judea/Samaria, not even trillions could save Israel from itself.***

America's third president, Thomas Jefferson, already understood what has obviously eluded every Israeli Prime Minister from Rabin to Olmert (and arguably even from Begin, who began the post-1967 land surrenders with his departures from Sinai). Writing in 1793, in his *Opinion on the French Treaties*, Jefferson stated: "The nation itself, bound necessarily to whatever its preservation and safety require, cannot enter into engagements contrary to its indispensable obligations."

In the years just before the Civil War, thousands of Americans organized an Underground Railroad to help those fleeing from slavery. At the time, those who participated in this heroic movement were judged lawbreakers by the Federal government, and were imprisoned, usually under the Fugitive Slave Act. Today, however, it is generally recognized that the true lawbreakers of that period were actually those who had sustained the system of slavery, and that every individual act to actively oppose this system had been law enforcing. Similar patterns of recognition should now emerge in regard to IDF refusals to follow manifestly anti-Israel orders.

Through the centuries, distinguished legal theorists (e.g., Bodin, Hobbes, Leibniz) have understood that security is always the first obligation of the state. Where the state can no longer provide even the most elementary security, its leaders can no longer expect obedience. Where the state *actively avoids* the provision of basic security, as is still the case today in Israel, all citizens have a distinct obligation to resist relevant state policies. In fact, as the government's idea of "peace" could lead even to another Jewish genocide (let us recall that, jurisprudentially, war and genocide are not mutually exclusive), this strenuous obligation could arguably go beyond more gentle forms of civil disobedience and military refusals to substantially more vigorous expressions of lawful opposition. ***International law is not a suicide pact, nor is Israel's Basic law or Jewish Law.***

"If you could lick my heart, it would poison you." We must never again hear such a tormented remark from the victim of yet another Jewish tragedy – especially from the self-inflicted disappearance of Israel in presumed "compliance" with military orders. Strategically, the correlation of forces is increasingly stacked against Israel, and it will soon take far more than operational ingenuity to save the Jewish state from its recalcitrant enemies.

We Jews have enough trouble from others. We should not now also have to worry about saving the Jewish state from itself.

Finally, some mention must be made of interpenetrations with American politics. The incoming Obama administration will almost certainly wish to proceed with the "Peace Process". Although entirely well intentioned in this regard (it is simply wrong to assume that Barack Obama is in any way "anti-Israel"), the new president will still not be helping Israel by reaffirming long-standing chants for a "Two State Solution".

A special danger here will be the American Jewish Establishment. Anxious to please the new president, and predictably visceral is supporting all US presidential policies for the Middle East, these large Jewish organizations and lobbies will thus follow Jerusalem's lead on international diplomacy and negotiations. They will adopt this position irrespective of any independent analysis, or the obvious history of "Oslo/Road Map". It is altogether likely, therefore, that this Establishment will automatically side with the Israeli government in supporting blanket condemnations of Jewish civil disobedience. If this should happen, individual Jews in the United States who also care about Israel should avoid making the same mistake. Let them recall, in this matter, that during the Holocaust, the American Jewish Establishment largely refused to "rock the boat".

Memory is always the heart of redemption. We are all obligated, as Jews, to remember and honor the souls of the six million, of the *Kedoshim*. To meet this sacred expectation, we must never separate ourselves from the fate of our fellow Jews in Israel. If necessary, this means that we must even stand opposed to the Jewish Establishment in the United States.

The forms of Jewish nationalism exhibited by coming waves of civil disobedience in Israel will play a role beyond Israel's own physical survival. The redemption of Israel is essential to the redemption of all humanity. Jewish nationalism is much more than a highly valued national security position. As goes Israel, so will go our entire world. Those who continue to honorably disobey policies of "*Land For Nothing*" will be acting not only to preserve the Jewish state, but also to sustain our entire imperiled world.

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