ARIEL CENTER FOR POLICY RESEARCH
(ACPR)

ACPR Policy Paper No. 158

PRESERVING THE LAND AND PEOPLE OF ISRAEL IN THE FACE OF "DISENGAGEMENT": OBLIGATIONS OF HIGHER LAW, INTERNATIONAL LAW AND TORAH LAW

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Preface

The Ariel Center for Policy Research (ACPR) presents in this policy paper a combination of two unique essays on the Israeli Government's Disengagement Plan. The first essay is the work of Professor Louis René Beres, a political scientist who is also an expert in international law. The second essay is based on the extraordinary erudition of one of the twentieth-century's greatest Talmudic scholars and Torah philosophers, the late Rabbi Dr. Chaim Zimmerman. This second essay has been condensed and annotated by Professor Paul Eidelberg, a political scientist who studied with Rav Chaim for many years. The combination of these two essays provides the most comprehensive and deeply informed critique of the Disengagement Plan, a critique comprehensible and meaningful to all Jews (secular or religious) as well as to all others who recognize God's eternal and immutable promise of Israel to the Jewish people.

The Disengagement Plan entails the uprooting of some 10,000 Jews from their homes in Gaza and Northern Samaria, and the turning over of this Jewish land to Israel's enemies. "Disengagement" was the central issue of Israel's January 2003 national election. In that election, the Labor Party, the author of disengagement, was overwhelmingly defeated by the Plan's opponents, the Likud. Nevertheless, less than a year later, Likud Prime Minister Ariel Sharon made disengagement the centerpiece of his national policy and forced it though the Knesset despite its having been clearly rejected not only by the electorate but also by a referendum he initiated in his own party.

The Disengagement Plan has divided the nation to the extent of arousing fear of a civil war. Religious as well as non-religious Jews oppose this plan. Israeli professors of law and attorneys have shown that the plan violates domestic and international law. Professor Beres will comment instructively on the legal aspects of the issue and will also show, in a scintillating display of scholarship, how disengagement violates the Higher Law doctrine of Western civilization, which originates in the Bible of Israel. However, to fully appreciate how and why the Disengagement Plan violates Jewish law, (*Halacha*), the masterful erudition of the late Rabbi Dr. Chaim Zimmerman is necessary. The ACPR trusts that secular and religious readers will be enlightened by both of the essays in this policy paper, and that this essential fusion of perspectives will remind Israelis of their true obligations, as Jews and as citizens of the most persistently endangered state on planet Earth.

Arieh Stav
Director, ACPR
March 2005 / Adar II 5765

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Selected Works of Dr. Chaim Zimmerman:

Binyan Halacha (Construction of the Law): A Treatise that Resolves Apparent Contradictions Between the RAMBAM (Maimonides) and the *Gemara* (Hebrew);

Agan Ha`Sahar: A Treatise on Various Astronomic Problems in Jewish Law with Particular Reference to the International Date Line in Relation to the Sabbath and Other Holidays (Hebrew);

Torah L'Yisrael: Essays on the State, Society, and Redemption of Israel (Hebrew and English).

English Works:

Torah and Reason: A Treatise on the Validity of Torah in the Modern Scientific World;

Torah and Existence: A Treatise on the Torah as the Only Comprehensive Clarification of Reality and Truth.

Confronting "Disengagement": Israel, Civil Disobedience and the Higher Law

Louis René Beres

Soon – because of his planned disengagement from Jewish lands in Gaza and Samaria – Prime Minister Sharon will encounter widespread civil disobedience and civil resistance[1] in Israel. Accompanying such civilian opposition may also be substantial military refusals to carry out eviction/resettlement orders against Jewish "settlers". Significantly, all of these rejections of Sharon's policy of surrender will represent far more than random expressions of anger and protest. Rather, they will stem purposefully and properly from the ancient Jewish tradition of a Higher Law.[2]

This vital Jewish tradition is authoritatively codified within the constitutional foundations of all modern democracies, especially those of the United States, and in contemporary international law.[3] As will be revealed in the following discussion, Prime Minister Sharon's intended policy of overcoming disobedience and resistance in Israel, an essential disobedience that is being spawned by the dangerous consequences of disengagement,[4] the earlier Oslo agreements[5] and the larger "Peace Process"[6] (which is currently renamed the "Road Map"), will be harshly destructive of Israel's security. It will also be starkly injurious to the overriding expectations and associated protections of Higher Law.

I

The principle of a Higher Law is not just "any principle". It is one of the enduring and canonic principles in the history of the United States.[7] Codified in both the Declaration of Independence and in the Constitution,[8] it rests upon the acceptance of certain notions of right and justice that obtain because of their own obvious merit. Such notions, as the celebrated Blackstone declared, are nothing less than "the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover so far as they are necessary for the conduct of human actions."[9]

When Jefferson set to work to draft the Declaration he drew freely upon Aristotle, Cicero, Grotius, Vattel, Pufendorf, Burlamaqui, and Locke's **Second Treatise of Government**.[10] Asserting the right of revolution whenever government becomes destructive of "certain unalienable rights",[11] the Declaration of Independence posits a natural order in the world whose laws are external to all human will and which are discoverable through human reason.[12] Although, by the eighteenth century, God had withdrawn from immediate contact with humankind and had been transformed into Final Cause or Prime Mover of the universe, "nature" provided an appropriate substitute.[13] Reflecting the decisive influence of Isaac Newton, whose **Principia** was first published in 1686, all of creation could now be taken as an expression of divine will.[14] Hence, the only way to know God's will was to discover the law of nature; Locke and Jefferson had deified nature and denatured God.[15]

What, exactly, was this law of nature? It was, as Jefferson learned from Locke, the law of reason: According to Locke's second treatise:

> The state of nature has a law to govern it, which obliges every one: and **reason, which is that law**, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions...

> In transgressing the law of nature, the offender declares himself to live by another rule than that of **reason and common equity, which is that measure God has set to the actions of men**...
>
> A criminal, who having renounced **reason, the common rule and measure God hath given to mankind**, hath, by the unjust violence and slaughter he hath committed on one, declared war against all mankind.[16]

As reason is the only sure guide to what God has given to humankind, reason is the only foundation of true law. This Lockean and Jeffersonian idea of a transcendent or Higher Law is expressed not only in the Declaration of Independence, but also in the Constitution.[17] The Ninth Amendment, in stipulating that "the enumeration of certain rights in this Constitution shall not prejudice other rights not so enumerated,"[18] reflects the belief in a law superior to the will of human governance. And this belief runs continuously from ancient times, **especially Jewish Law**,[19] to the present moment.

The Fragments of Heraclitus attest the antiquity of the idea of a Higher Law: "For all human laws are nourished by one, which is divine. For it governs as far as it will, and is sufficient for all, and more than enough."[20] Such Heraclitean *dicta*, offered somewhere around 500 BCE, entered into later Stoic philosophy, and described one universal and rational law.

In 442 BCE, Sophocles elucidated the idea of true law as an act of discovery, challenging the superiority of human rule-making in **Antigone**.[21] Exploring the essential conflict between claims of the state and of the individual conscience, this drama has since been taken to represent the incontestable supremacy of a Higher Law over man-made law. Later, in the nineteenth century, Thoreau, noting that men live with "too passive a regard for the moral laws",[22] cited **Antigone** as a stirring example of civil disobedience.

Building upon Plato's theory of Ideas,[23] which sought to elevate "nature" from the sphere of contingent facts to the realm of immutable archetypes or **Forms**,[24] Aristotle advanced in his **Ethics** the concept of "natural justice".[25] Quoting the **Antigone**, he argued that "an unjust law is not a law."[26] This position, of course, is in stark contrast to the opinion of the Sophists that justice is never more than an expression of supremacy, that it is what Thrasymachus calls, in Plato's **Republic**, "the interest of the stronger".[27]

The Stoics, whose legal philosophy arose on the threshold of the Greek and Roman worlds, regarded nature itself as the supreme legislator in the moral order.[28] Applying Platonic and Aristotelian thought to the emerging cosmopolis, they defined this order as one where humankind, through its divinely granted capacity to reason, can commune directly with the gods.[29] And since this definition required an expansion of Plato's and Aristotle's developing notions of universalism, the Stoics articulated a division between *lex aeterna*, *ius natural* and *ius humanum*.[30]

Lex aeterna is the law of reason of the cosmos, the *logos* which rules the universe. As an emanation of cosmic reason, human reason rules the lives of men. It follows that natural law partakes of eternal law, though it has a more limited range of application. Unlike the more elitist conception of Plato (and, to a certain extent, even Aristotle), the Stoic idea of an innate right reason presumed no divisions between peoples.[31] Rather, in linking all persons with the cosmic order, it established the essential foundations of true universality.

Cicero, in **De Republica**, defined the state as a "coming together of a considerable number of men who are united by a common agreement about law and rights and by the desire to participate in mutual advantages".[32] This definition sheds light on the problems surrounding positivist jurisprudence, a legal philosophy that values a state's edicts as intrinsically just and obligatory.[33] In a famous passage of **De Republica**, Cicero sets forth the classic statement on natural law:

> True law is right reason, harmonious with nature, diffused among all, constant, eternal; a law which calls to duty by its commands and restrains from evil by its prohibitions… It is a sacred obligation not to attempt to legislate in contradiction to this law; nor may it be derogated from nor abrogated. Indeed, by neither the Senate nor the people can we be released from this law; nor does it require any but oneself to be its expositor or interpreter. Nor

> is it one law at Rome and another at Athens; one now and another at a late time; but one eternal and unchangeable law binding all nations through all time…[34]

Israel has an obligation under natural law to preserve itself. Where the government of Israel acts contrary to this obligation – which is assuredly the case with disengagement – it is not only the right of Israel's citizens and soldiers to protest meaningfully, it is a decisive responsibility. Even if Israel has already bound itself in various agreements (e.g., Oslo/"Road Map") to implement evacuation of some of its own lands (presently Samaria and Gaza), it must immediately recognize these agreements to be null and void. In his **Opinion on the French Treaties**, written on April 28, 1793, Thomas Jefferson stated that when performance in international agreements "becomes impossible, nonperformance is not immoral. So if performance becomes **self-destructive** to the party, the law of self-preservation overrules the laws of obligation to others."[35] In that same document, Jefferson wrote: "The nation itself, bound necessarily to whatever its preservation and safety require, cannot enter into engagements contrary to its indispensable obligations."[36] It would be altogether reasonable to infer from this that all states are similarly prohibited from entering into disengagements that are "contrary to its indispensable obligations".

II

But what is to be done when positive law is at variance with true law, the question in Israel at this very moment? The Romans had a remedy. They incorporated in their statutes a contingency clause that man-made law could never abrogate obligations that are sacred.[37] On several occasions, Cicero and others invoked this clause, or *jus*, against one statute or another.[38] In this way, the written law of the moment, never more than an artifact of the civic community, remained subject to right reason.

Later, St. Augustine reaffirmed that temporal law must conform to the unchangeable eternal law,[39] which he defined as "the reason or will of God" (*ratio divina vel voluntas Dei*).[40] Aquinas continues this tradition of denying the status of law to prescriptions that are unjust (*lex iniusta non est lex*).[41] "Human law," he wrote in the **Summae**,[42]

> has the quality of law only insofar as it proceeds according to right reason; and in this respect it is clear that it derives from the eternal law. Insofar as it deviates from reason it is called an unjust law, and has the quality not of law, but of violence.[43]

The concept of a Higher Law was widely integrated into medieval jurisprudential thought.[44] According to John of Salisbury's **Policraticus**, "There are certain precepts of the law which have perpetual necessity, having the force of law among all nations and which absolutely cannot be broken."[45] Recognizing the idea that all political authority must be intrinsically limited, John noted that the prince "may not lawfully have any will of his own apart from that which the law or equity enjoins, or the calculation of the common interest requires."[46] Natural law, then, exists to frustrate political injustice.

In the seventeenth and eighteenth centuries, natural law doctrine was reaffirmed and secularized by Grotius.[47] Reviving the Ciceronian idea of natural law and its underlying optimism about human nature, Grotius must be credited with liberating this idea from any remaining dependence on ecclesiastical or Papal interpretation.[48] Building upon the prior speculations of the Dominican Francisco de Vitoria, who had proclaimed a natural community of humankind and the universal validity of human rights,[49] Grotius fashioned a bridge from the Christian **Commonwealth** of the Middle Ages to a new interstate society.[50] In this connection, he strengthened the idea of a universally valid natural law transcending in obligation all human law, including the law of the sovereign state.[51]

Unlike Machiavelli and Hobbes,[52] Grotius did not reduce law to the will of the prince or of the state.[53] Rather, while recognizing such will as a constitutive element in the international legal order, he understood that the binding quality of human edicts must be derived from the overriding totality of natural imperatives.[54] Hence, he proceeded to reject *raison d'etat* as a just cause for war.[55]

This brings us directly to the conveyance of natural law ideas into American political theory, a transmittal – as we have already learned – that was preeminently the work of Locke's **Second Treatise on Civil Government** (1690).[56] The codified American "duty" to revolt when governments commit "a long train of abuses and usurpations"[57] flows from Locke's notion that civil authority can never extend beyond the securing of humankind's natural rights.[58] Significantly, for those practicing civil disobedience/civil resistance in Israel today, the motto that Jefferson chose for his seal was, "Rebellion to Tyrants is Obedience to God."[59] As for the right to pursue **happiness**, which Jefferson drew from Burlamaqui's incorporation into natural law,[60] it had nothing whatever to do with today's contemporary celebrations of materialism. Rather, happiness was viewed by Jefferson (in deference to Pufendorf and Locke) as a condition to be achieved as a result of humankind's commitment to reason.[61]

Above all else, perhaps, the Declaration of Independence codified a social contract that sets limits on the power of **any** government.[62] Its purpose was to articulate a set of universally valid constraints upon all secular political authority. As justice, which is based on natural law, binds all human society, the rights described by the Declaration of Independence cannot be reserved only for Americans. Instead, they extend to all human societies, **including Israel**, and can never be abrogated by positive law.

This theory of a Higher Law is based on clarity, self-evidence and coherence. Its validity cannot be shaken by the presumed imperatives of geopolitics, even when Israeli leaders feel themselves threatened by political upheaval. Even if the Sharon Government takes seriously the promise of disengagement, it lacks altogether the authority to cancel overriding legal imperatives.

Significantly, in an informed critique of the conduct of an earlier Attorney-General of Israel serving then Prime Minister Ehud Barak, Irving Gendelman, a citizen of Israel, observed:

> It is interesting that there is a commonality between the US Declaration of Independence and the Declaration of the Establishment of the State of Israel in the enunciation of this underlying principle of government; namely, that governments derive their just powers from the consent of the governed and thus governments should be the means whereby the people may seek to achieve their destiny. In a profound sense, the intent of these notions may be to focus on the truism that government should be the handmaiden of the people in contrast to the Machiavellian approach.[63]

As noted by the Swiss scholar, Emmerich de Vattel, in the 1758 edition of **The Law of Nations** (a work in which several American fathers of independence discovered important maxims of political liberty): "No agreement can bind, or even authorize, a man to violate the natural law."[64] Rather, Vattel cautioned that only obedience to higher legal obligations can produce a virtuous and thus a safe and prosperous state:

> One would have to be very ignorant of political affairs not to perceive how much more capable a virtuous Nation is of forming a happy, peaceful, flourishing and secure state, respected by its neighbors and formidable to its enemies.[65]

III

In the end, the Higher Law expectations of the American political tradition, expectations that apply also to Israel, are not self-enforcing. Defied again and again by transient political elites, they can be sustained only where individuals seize their own inwardness and act (as does Antigone before Creon[66]) according to conscience. "Why has every man a conscience?",[67] asks Thoreau in his essay on **Civil Disobedience**.

> I think that we should be men first, and subjects afterwards. It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have a right to assume is to do at any time what I think right. It is truly enough said that a corporation has no conscience; but a corporation of conscientious men is a corporation **with** a conscience.[68]

Where are such "conscientious men" (and women) to be found? Certainly not, says Thoreau, among the "commonly esteemed good citizens".[69] These mass men and women serve the state "not as men mainly, but as machines, with their bodies".[70] Placing themselves "on a level with wood and earth and stones",[71] they are incapable of making essential moral distinctions; thus, "they are as likely to serve the devil, without **intending** it, as God."[72] This is easily enough seen today in Israel, where many citizens are still unable to recognize the difference between transient laws of the state and true law, a difference that is deeply rooted in Jewish law and international law, and that **demands** the authentically law-enforcing behavior of civil disobedience and/or civil resistance.

Can Israel create the conditions for a conscientious "corporation" though the education of an informed citizenry? From Rousseau to the present, this has been the path of virtually all democratic theory. Rousseau believed that law and liberty could exist in a city-state of properly educated voters like Geneva:

As he stipulates in Book III of the **Social Contract**:

> First, a very small state where the people can be readily got together and where each citizen can with ease know all the rest; secondly, great simplicity of manners, to prevent business from multiplying and raising thorny problems; next, a large measure of equality in rank and fortune, without which equality of rights and authority cannot long subsist; lastly, little or no luxury – for luxury either comes of riches or makes them necessary.

But Israel is not Geneva, and Rousseau's idea that (even under very definite conditions) a majority can be trusted with what is really best for "the people" is always baneful. The dangers of the "general will" have been made manifest not only in the exploits of Robespierre and Napoleon, but also in the banal collectivism of contemporary Israel's political Left and its sometimes unwitting allies, whatever the particular political party affiliations involved. Although certainly not by any means a majority (quite the contrary), this deluded segment of Israelis fails to recognize that the struggle against terror is deeply embedded in the laws of its allies,[73] in antecedent international law,[74] and that all terrorists are *Hostes humani generis*,[75] "Common enemies of mankind".

Rousseau's deification of The People points toward the very opposite of the Higher Law tradition and its underlying Jewish origins. The Genevan made "The People" sovereign; for Israel, however, sovereignty must soon come to reside in The Person.[76] As Thoreau understood, apathy, complacency passivity and moral cowardice are the inevitable trappings of the mass of men and women. Hope lies only in those real individuals whose primary allegiance is to overriding and universal laws, not in the presumptive "good citizen" but in the "wise minority".

What is the task of this body of persons, which – in fact – could easily represent a true and distinct **majority**? Of those **individuals** whose choice of inwardness compels them to remain forever outside the grazing herd? Thoreau speaks truthfully of civil disobedience, an act of "counter-friction" that may undermine expediency and restore higher standards of personal judgment. Confronted with an evil of the sort now confronted by Israelis, the evil of an existentially dangerous foreign policy,[77] he would urge, as he once did about other policy deformations in **Civil Disobedience**, "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 not to suggest that civil disobedience or civil resistance should be undertaken lightly. As the authors of the Declaration of Independence understood, prudence dictates that "Governments long established should not be changed for light and transient causes." Moreover, even much less extreme forms of opposition than revolution must be considered with great care, since the benefits and strengths of the state are manifest and self-evident. What we require in Israel today is neither revolution nor even regularized patterns of civil disobedience or resistance, but rather a greatly enlarged citizen inclination (1) to recognize the prevailing draft of unwisdom in the Sharon Government; and (2) to confront those responsible for this drift with a sustained, informed and necessary opposition. Such a confrontation, when it takes the form of active protest and far-reaching non-cooperation (civilian and military) would represent the very highest levels of lawful behavior – both from the standpoint of international law and Jewish law.

In the years before the Civil War, thousands of Americans organized an Underground Railroad to help those fleeing from slavery. At that time, those who participated in this movement were judged lawbreakers by the Federal government, and were frequently imprisoned under the Fugitive Slave Act. Today, it is widely recognized that the only lawbreakers of the period were those who sustained the system of slavery, and that every individual act to oppose this system had been genuinely law-enforcing. Similar patterns of recognition will soon emerge in regard to the anti-disengagement movement in Israel,[78] but, alas, probably not until the Sharon administration has fought bitterly against the legitimacy of civil disobedience and civil resistance.

Here Israel may learn a further lesson from the United States. This country has long maintained a common law defense known as "necessity". This defense, which has also now been incorporated into various state criminal codes,[79] permits conduct that would otherwise constitute an offense **if the accused believed that such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his/her own conduct**. Transposed to the Israeli context, where the greater public and private injury occasioned by disengagement could include expanding terrorism,[80] war crimes, crimes against peace (aggression)[81] and even crimes against humanity[82] (genocide), a "necessity" defense could be compelling in disobedience/resistance cases. This is the case even if Israeli law recognizes no explicit form of "necessity", because this law must recognize the Higher Law principle from which the "necessity" defense derives. This principle, in an ironic turn, has its own origins in the law of ancient Israel.

IV

"When I get to heaven," said the Hasidic Rabbi Susya just before his death, "they will not ask me, 'Why were you not Moses?' but 'Why were you not Susya?'" Unless they are successful, when the People of Israel come to confront the dire consequences of disengagement they will ask many things: "Why did we not oppose the Government, when we still had time, with apt forms of disobedience and resistance?" "Why did we not do what we were **obligated** to do?"[83] "Why did we act in a fashion contrary to our own unique Jewish potentiality?" "Why did we abandon our Jewish traditions and our survival interests at the same time?"

Of course, some of the People will not need to ask these questions. These people will have already done what was required by law, both by Jewish law and by international law.[84] Regarding Jewish law, which is itself a foundation of international law, the earlier important *halachic* opinion[85] issued by prominent rabbis in Israel should be taken very seriously. The ruling that "It is forbidden, under any circumstance, to hand over parts of *Eretz-Yisrael* to Arabs,"[86] derives in part from the obligations of "*Pikuach Nefesh*",[87] the obligations to save Jewish lives in a matter of life or death. Where the Government of Israel, by proceeding with disengagement, jeopardizes Jewish lives and places them in a situation of *Pikuach Nefesh*,[88] acts of civil disobedience and civil resistance against this Government are not only permissible, but also **law-enforcing**.

Regarding international law, there are standing Nuremberg[89] obligations to resist crimes of state,[90] crimes such as those involved in deliberate assaults upon the principle of *Nullum crimen sine poena*[91] and in flagrant indifference to national survival.[92] Major legal theorists through the centuries, especially Bodin, Hobbes[93] and Leibniz, always understood that the provision of security is the first obligation of the state. Where the state can no longer provide such security, it can no longer expect obedience. And where the state actively avoids the provision of such security, as is the case today in Prime Minister Sharon's wilful surrender of security to enemy Arab forces, citizens have an obligation to resist the state's policies. Indeed, as the Sharon Government's policies could lead even to another Jewish genocide,[94] this proper obligation could arguably go far beyond the more gentle forms of disobedience and resistance.

International law, which is based upon a variety of Higher Law foundations, forms part of the law of all states, including the State of Israel.[95] This is the case whether or not the incorporation of international law into municipal law is codified explicitly, as it is in the United States.[96] It follows that the Government of Israel is bound by pertinent norms of international law concerning punishment of terrorist crimes,[97] the

prevention of genocide and physical survival of the state.[98] Where this Government fails to abide by these peremptory norms,[99] civil disobedience and/or civil resistance are not only permissible but **required**.

Afterword

Why There Are No "Israel Occupied Territories" from Which to "Disengage"

Contrary to widely-disseminated but erroneous allegations, a sovereign state of Palestine did not exist before 1967 or 1948; a state of Palestine was not promised by authoritative UN Security Council Resolution 242. Indeed, a state of Palestine has **never** existed.

As a nonstate legal entity, Palestine ceased to exist in 1948, when Great Britain relinquished its brutal (to the Jews) League of Nations mandate. When, during the 1948-49 War of Independence, Judea/Samaria and Gaza came under illegal control of Jordan and Egypt respectively, these aggressor states did not put an end to an already-existing Arab state. From the Biblical Period (ca. 1350 BCE to 586 BCE) to the British Mandate (1918-48), the land named by the Romans after the ancient Philistines (a naming to punish and to demean the Jews) was controlled exclusively by non-Palestinian elements. Significantly, however, a continuous chain of Jewish possession of the land was legally recognized after World War I at the San Remo Conference of April 1920. There, a binding treaty was signed in which Great Britain was given mandatory authority over Palestine (the area had been ruled by the Ottoman Turks since 1516) to prepare it to become the "national home for the Jewish people".

Palestine, according to the treaty, comprised territories encompassing what are now the states of Jordan and Israel, including Judea/Samaria and Gaza. **Present-day Israel, including Judea/Samaria and Gaza, comprises only 22% of Palestine as defined and ratified at the San Remo Peace Conference**. In 1922, Great Britain unilaterally and illegally split off seventy-eight percent of the lands promised to the Jews – all of Palestine east of the Jordan River – and gave it to Abdullah, the non-Palestinian son of the Sharif of Mecca. Eastern Palestine now took the name Transjordan, which it retained until April 1949, when it was renamed as Jordan.

From the moment of its creation, Transjordan was closed to all Jewish migration and settlement, a clear betrayal of the British promise in the Balfour Declaration of 1917, and a contravention of its Mandatory obligations. On July 20, 1951, a Palestinian Arab assassinated King Abdullah for his hostility to Palestinian nationalist aspirations. Several years prior to Abdullah's murder, in 1947, the newly-formed United Nations, rather than designate the entire land west of the Jordan River as the Jewish National Homeland, enacted a second partition. Ironically, because this second fission gave grievously unfair advantage to the Arabs (whose genocidal views toward the Jews were already open and undisguised), Jewish leaders accepted the painful judgment while the Arab states uniformly rejected it.

On May 15, 1948, exactly one day after the State of Israel came into formal existence, Azzam Pasha, Secretary General of the Arab League, declared – to the new tiny state founded upon the ashes of the Holocaust: "This will be a war of extermination and a momentous massacre..." This declaration, of course, has been and remains the cornerstone of all subsequent Arab policies toward Israel. In 1967, almost 20 years after Israel's entry into the community of nations, the Jewish state – as a result of its stunning military victory over Arab aggressor states – gained unintended control over Judea/Samaria and Gaza. Although the inadmissibility of acquisition of territory by war had already been enshrined in the UN Charter, there existed no authoritative sovereign to whom the territories could be "returned". Leaving aside the compelling argument that these were Jewish lands, Israel could hardly have been expected to transfer these lands back to Jordan and Egypt, which had exercised wholly illegitimate and cruel control since the Arab-initiated war of extermination in 1948-49. Moreover, the idea of Palestinian "self-determination" was only just beginning to emerge after the Six Day War, and was not even codified in UN Security Council Resolution 242, which had been adopted on November 22, 1967. For their part, the Arab states convened a summit in Khartoum in

August 1967, concluding: “No peace with Israel, no recognition of Israel, no negotiations with it...” Since then there have been intermittent negotiations, even formal peace treaties with Egypt and Jordan, but no substantive changes on the Arab side. To this very day, no Arab maps include Israel, and on the official Palestinian Authority maps, “Palestine” includes **all** of Israel. There are no “two states” on the Palestinian maps. Yet it is to this same Palestinian Authority that Israeli Prime Minister Sharon now prepares to surrender Gaza and parts of Samaria.

*** * ***

Disengagement is unacceptable for Israel at all principal levels of legal appraisal: international law; Higher Law and Torah law. (It is also unacceptable under Israel’s own municipal law, which is interwoven with international law, Higher Law and Torah law.) The following essay in this Policy Paper – an elucidation by Prof. Paul Eidelberg of Dr. Chaim Zimmerman’s “The Prohibition of Abandoning Land in *Eretz-Yisrael*” – is essential to fully understanding the soon-to-be irremediable errors of Sharon’s suicidal surrender program. Drawn from Rav Chaim’s 10,000-word *halachic* discourse, it serves to remind the reader that opposition to disengagement is founded upon the most venerable and immutable principles of jurisprudence and justice. As disengagement places the entire State of Israel in a condition of *pikuach nefesh*, a situation so precarious that Israel’s very existence is imperiled, Rav Chaim’s great erudition is profoundly important here. In this connection I am especially grateful for the efforts of my friend and coauthor, Prof. Paul Eidelberg, a distinguished scholar in his own right who provides the reader a rare and learned fusion of political philosophy with Torah scholarship.

Endnotes

1 There are meaningful differences between civil disobedience and civil resistance. In its classic expression, civil disobedience involves purposeful violations of domestic law in order to produce changes in this law. Those who engage in civil disobedience normally understand that they are “guilty” of particular infractions, even when the opposed rule is egregious (e.g., norms sustaining slavery or segregation), and where the intent of the infraction is plainly noncriminal and humane. Hence, civil disobedience defendants – even where the legitimacy of the courts themselves is denied – are ordinarily prepared to accept court-ordered punishment as the required and possibly reasonable price of their activities. Civil resistance, however, is another matter. In the first place, although it may involve purposeful violations of municipal law, these violations are not conceived with a view to changing that particular law. In Israel, protestors against disengagement will not be seeking any precise changes in Israeli law *per se*; rather, what they will seek is a reversal of very specific expressions of Israeli foreign policy. In the second place, individual protestors who would engage in nonviolent civil resistance activities to oppose certain elements of Israeli foreign policy will be attempting to prevent the ongoing violation of certain settled norms of national and international law. These protestors, who may even include soldiers refusing to carry out eviction/deportation orders, will be fulfilling important Nuremberg and other Higher Law expectations.

2 In this tradition, God is unambiguously the source of all law. Here, law is an aspect of the divine order for the cosmos. The Torah reflects both God’s transcendance and immanence. The basis of obligation, which concerns us presently in the context of civil disobedience/civil resistance, inheres in the law’s transcendant nature. See: Aaron M. Schreiber, **Jewish Law and Decision-Making: A Study Through Time** (Philadelphia: Temple University Press, 1979), 440 pp. See especially Chapter V: “Talmudic Law in General: The Effect of Cultural and Socio-Economic Conditions on Talmudic Law”.

3 In international law, the idea of a Higher Law is contained (*inter alia*) within the principle of *jus cogens* or peremptory norms. According to Article 53 of the Vienna Convention on the Law of Treaties: “A peremptory norm of general international law...is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” See **Vienna Convention on the Law of Treaties**, May 23 1969, art. 53, 1155 U.N.T.S. 344, reprinted in 8 I.L.M. 679 (1969).

[4] Surely the most dangerous expected consequence will be the creation of a new anti-Israel terror state in the region, an Arab state of "Palestine". For the particular dangers to Israel of a Palestinian state, by this author, see: Louis René Beres, "On Hamas 'Freedom Fighters': The View From International Law", **Midstream**, Vol. L, No. 1, January 2004, pp. 8-10; Louis René Beres, "'Strategic Balance' in the Middle East: An Injurious Concept", **Midstream**, Vol. XXXXVII, No. 5, pp. 4-6; Louis René Beres, "Before the 'Real' Terror", **Midstream**, Vol. XXXXVII, No. 8, December 2000, pp. 4-5; Louis René Beres, "Implications of a Palestinian State for Israeli Security and Nuclear War: A Jurisprudential Assessment", **Dickinson Journal of International Law**, Vol. 17, No. 2, Winter 1999, pp. 229-286; Louis René Beres, "Why a Demilitarized Palestinian State Would Not Remain Demilitarized: A View Under International Law" (with Ambassador Zalman Shoval), **Temple International and Comparative Law Journal**, Winter 1998, pp. 347-363; Louis René Beres, "Israel, the 'Peace Process', and Nuclear Terrorism: Recognizing the Linkages", **Studies in Conflict and Terrorism**., Vol. 21, No. 1, January 1998, pp. 59-86; Louis René Beres, "After the 'Peace Process': Israel, Palestine and Regional Nuclear War", **Dickinson Journal of International Law**, Vol. 15, No. 2, Winter 1997, pp. 301-335; Louis René Beres, "Israel, the 'Peace Process', and Nuclear Terrorism: A Jurisprudential Perspective", **Loyola of Los Angeles International and Comparative Law Journal**, Vol. 18, No. 4, September 1996, pp. 767-793; and Louis René Beres, "On Demilitarizing a Palestinian 'Entity' and the Golan Heights: An International Law Perspective", **Vanderbilt Journal of Transnational Law**, Vol. 28, No. 5, November 1995, pp. 959-971. Co-authored with Zalman Shoval, Israel's two-time Ambassador to the United States.

[5] Oslo II was signed at the White House on September 28, 1995. Oslo I was signed at the same venue on September 13, 1993. Of course, neither accord is an authentic treaty under international law.

[6] Regarding the lawfulness of opposition to this Process, including civil disobedience and civil resistance, international law stipulates, at the **Vienna Convention on the Law of Treaties**, that even a treaty must always be subordinate to peremptory expectations: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." (*supra*, p. 344). Significantly: (1) The compendium Oslo Agreement is **not** even a treaty under international law (as one of the parties is a nonstate entity); and (2) There are at least two peremptory norms violated by the Oslo Agreement. First, the Agreement contravenes the obligation of each state to preserve itself. Second, the Agreement contravenes the universally binding obligation to punish egregious acts of criminality, an obligation known jurisprudentially as *Nullum_crimen sine poena*, "No crime without a punishment." The first contravention is expressed lucidly, *inter alia*, by Thomas Jefferson in his "Opinion on the French Treaties" (April 28, 1793): "The nation itself, bound necessarily to whatever its preservation and safety require, cannot enter into engagements contrary to its indispensable obligations." The second contravention, which is founded upon Israel's illegal entry into diplomatic agreement with a terrorist organization, is discussed more fully by this author in: Louis René Beres, "Israel's Survival Imperatives: The Oslo Agreements in International and National Strategy", Ariel Center for Policy Research, Israel, Policy Paper No. 102, 2000, 110 pp; Louis René Beres, "Implications of a Palestinian State for Israeli Security and Nuclear War: A Jurisprudential Assessment", **Dickinson Journal of International Law**, Vol. 17, No. 2, Winter 1999, pp. 229-286; Louis René Beres, "Israel After Fifty: The Oslo Agreements, International Law and National Survival", **The Connecticut Journal of International Law**, Vol. 14, No. 1, Summer 1999, pp. 27-81; Louis René Beres, "Israel's Freeing of Terrorists Violates International Law", **Journal of Counterterrorism and Security International**, Winter 1999, Vol. 5, No. 4, pp. 44-46; Louis René Beres, "The Oslo Agreements in International Law, Natural Law and World Politics", **Arizona Journal of International and Comparative Law**, Vol. 14, No. 3, pp. 715-746; Louis René Beres, "Why the Oslo Accords Should Be Abrogated by Israel", **American University Journal of International Law and Policy**, Vol. 12, No. 2, 1997, pp. 267-284; and Louis René Beres, "International Law Requires Prosecution, Not Celebration, of Arafat", **University of Detroit Mercy Law Review**, Vol. 71, Issue 3, Spring 1994, pp. 569-580.

[7] See Edward S. Corwin, **The "Higher Law" Background of American Constitutional Law** (1955); Alexander P. D'Entreves, **Natural Law: An Introduction to Legal Philosophy** (1951).

[8] See US Constitution, Art. IX. According to Clinton Rossiter, there exists a "deep-seated conviction" among Americans "that the Constitution is an expression of the Higher Law, that it is, in fact, imperfect man's most perfect rendering" of eternal law. See Rossiter, *preface to* Corwin, *supra*, p. vi.

[9] The Higher Law origins of United States municipal law are embedded, *inter alia*, in Blackstone's **Commentaries**, which recognize that all law "results from those principles of natural justice, in which all the learned of every nation

agree...” See William Blackstone, **Commentaries on the Laws of England**, adapted by Robert Malcolm Kerr (Boston; Beacon Press, 1962), Book IV, “Of Public Wrongs”, p. 62 (Chapter V, “Of Offenses Against the Law of Nations”).

[10] See John Locke, **Two Treatises of Government 123** (T.I. Cook, ed., 1947).

[11] See **The Declaration of Independence**.

[12] See Julius Stone, **The Province and Function of Law** (Cambridge MA: Harvard University Press, 1950), Chapter VIII, “Natural Law”.

[13] Here, in the Deist view, Nature had “replaced” God as the source for lawful behavior.

[14] Newton says in his **Principia**: “This most beautiful system of the sun, planets, and comets could only proceed from the counsel and dominion of an intelligent and powerful Being.” Cited by Abraham Kaplan, **In Pursuit of Wisdom: The Scope of Philosophy** (Beverly Hills CA: Glencoe Press, 1977), p. 550.

[15] See Stone, *supra*, Ch. VIII.

[16] See Locke, *supra*, p. 123.

[17] See **The Bill of Rights**.

[18] See **US Constitution**, Ninth Amendment.

[19] The fundamental principle of ancient Hebrew law, of course, is that the revealed will of God is the only source of all Jewish Law. In the Talmudic position, “Whatever a competent scholar will yet derive from the Law, that was already given to Moses on Mount Sinai.” (See **Jerusalem Megillah IV**/74d.)

[20] See Sec. 81, Fragment No. DK 22B114 of **The Presocratics 75** (Philip Wheelwright ed., Bobbs-Merrill 1960). The authoritative text for the fragments of Heraclitus is Hermann Diels & Walther Kranz, **Die Fragmente Der Vorsokratiker** (6th ed., Weidmann, 1966).

[21] A century before Demosthenes, Antigone’s appeal against Creon’s order to the “unwritten and steadfast customs of the gods” had evidenced the inferiority of human rule-making to a Higher Law. Here, in the drama by Sophocles, Creon represents the Greek tyrant who disturbs the ancient harmony of the city-state. Aristotle, in his **Rhetoric**, quotes from Sophocles’ **Antigone** when he argues that “an unjust law is not a law.” See **Rhetoric 1**, 15, 1375, p. 27 *et seq*.

[22] See Henry David Thoreau, **On the Duty of Civil Disobedience,** in **Walden,** or **Life in the Woods and on the Duty of Civil Disobedience** (Signet 1960).

[23] Plato’s theory, offered in the fourth century BCE, seeks to explain politics as an unstable realm of sense and matter, an arena formed and sustained by half-truths and distorted perceptions. In contrast to the stable realm of immaterial Forms, from which all genuine knowledge must be derived, the political realm is dominated by the uncertainties of the sensible world. At the basis of this political theory is a physical-mental analogy that establishes a correlation between the head, the heart and the abdomen, and the virtues of intelligence, courage and moderation.

[24] *Supra*.

[25] See Corwin, *supra*, p. 7.

[26] *Id*.

[27] “Right is the interest of the stronger,” says Thrasymachus in Bk. I, Sec. 338 of Plato, **The Republic** (B. Jowett tr., 1875). “Justice is a contract neither to do nor to suffer wrong,” says Glaucon, *id*., Bk. II, Sec. 359. See also, Philus in Bk III, Sec. 5 of Cicero, **De Republica**.

[28] See Corwin, *supra*, at 9: “The Stoics...thought of Nature or the Universe as a living organism, of which the material world was the body, and of which the Deity or the Universal Reason was the pervading, animating and governing soul; and natural law was the rule of conduct laid down by this Universal Reason for the direction of mankind.” Salmond, **Jurisprudence 27** (7th ed., 1924), cited in Corwin, *supra*, p. 9.

[29] *Id*.

[31] See Corwin, *supra*, p. 9.

[30] These terms are defined and discussed below.

[32] Spoken by Scipio in Bk. I of **De Republica**; cited in Alexander P. D'Entreves, **The Notion of the State 24** (1967).

[33] See Stone, **The Province and Function of Law**, *supra*, pp. 224-230. Stone calls positive law "...the law actually enforced by organized society in a particular place at a particular time." (p. 225) Understood in terms of natural law, positive law is merely a necessary evil, tolerable and valid only to the extent that it coincides with natural law. In this theory, says Julius Stone, "Not only does natural law provide the criterion for judgment whether positive law is just. It goes further and provides the criterion for deciding whether positive law is valid law at all." (*Id*., p. 226)

[34] See Cicero, **I De Legibus**, cited in Corwin, *supra*, p. 10; D'Entreves, *supra*, pp. 20-21. Similarly, in his **De Officiis**, Cicero wrote: "There is in fact a true law namely right reason, which is in accordance with nature, applies to all men and is unchangeable and eternal... It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law eternal and unchangeable binding at all times and upon all peoples." (Cited by Stone, *supra*, p. 216.) See also **De Legibus**, Bk. i, c, vii; cited by Stone, *supra*, p. 216.

[35] See: Thomas Jefferson, **Opinion on the French Treaties**, April 28, 1793, in **The Political Writings of Thomas Jefferson 114** (Merrill D. Peterson, ed., 1993). Here it must also be mentioned that Jefferson is speaking of authentically "international" agreements, whereas any Israeli agreement with the Palestinian Authority is, by definition, on a lower order of obligation.

[36] See: *Id*., p. 115.

[37] See Corwin, *supra*, p. 12.

[38] *Id*, p. 13.

[39] See D'Entreves, *supra*, p. 36-37. In early Christendom, Augustine offered a system of thought that identified the locus of all global problems in the human potentiality for evil. Combining a philosophy of Neoplatonism with a view of the universe as a struggle between good and evil, he attributed the trials of humankind to the taint of original sin. This view, transformed into a secular political philosophy, is now reflected by exponents of the school of realism or *realpolitik*. Augustine, writing at the beginning of the fifth century CE, sets out, in the **City of God**, to describe human history as a contest of two societies, the intrinsically debased City of Man and the eternally peaceful City of God. In this contest, the state, the product of humankind's most base tendencies, is devoid of justice and destructive of salvation. A mirror image of human wickedness, the state is little more than a "large gang of robbers". In an oft-quoted passage, Augustine recalls the answer offered by a pirate who had been captured by Alexander the Great. When asked by Alexander what right he had to infest the seas, the pirate replied: "The same right that you have to infest the world. But because I do it in a small boat I am called a robber, while because you do it with a large fleet you are called an emperor."

[40] See Julius Stone, **Human Law and Human Justice** (Stanford CA: Stanford University Press, 1965), p. 44. For Augustine, this reason or will of God "commands us to preserve the natural order and prohibits us to disturb it." (See **Contra Faustum**, XXII, 27; cited by Stone, **Human Law and Human Justice**, *supra*, p. 44.)

[41] Thomas Aquinas recalls Augustine as follows: "St. Augustine says: 'There is no law unless it be just.' So the validity of law depends upon its justice. But in human affairs a thing is said to be just when it accords aright with the rule of reason: and as we have already seen, the first rule of reason is the Natural Law. Thus all humanly enacted laws are in accord with reason to the extent that they derive from the Natural law. And if a human law is at variance in any particular with the Natural law, it is no longer legal, but rather a corruption of law." See **Summa Theologica**, 1a 2ae, 95, 2; cited by D'Entreves, *supra*, pp. 42-43.

[42] See D'Entreves, *supra*, pp. 42-43.

[43] The importance of reason to legal judgment was prefigured in ancient Israel, which accomodated reason within its system of revealed law. Jewish theory of law, insofar as it displays the marks of natural law, offers a transcending order revealed by the divine word as interpreted by human reason.

[44] See Stone, **The Province and Function of Law**, *supra*, Chapter VIII.

[45] See Corwin, *supra*, p. 17-18.

[46] *Id.*, p. 19.

[47] See Stone, **Human Law and Human Justice**, *supra*, pp. 64-68.

[48] *Id.*

[49] See Stone, **Human Law and Human Justice**, *supra*, pp. 61-63.

[50] *Id.*, pp. 65-68.

[51] *Id.*

[52] The sixteenth-century Florentine philosopher, Niccolo Machiavelli, joined Aristotle’s foundations for a scientific study of politics with assumptions of *realpolitik* to reach certain conclusions about politics. His most important conclusion underscores the dilemma of practicing goodness in an essentially evil world: “A man who wishes to make a profession of goodness in everything must necessarily come to grief among so many who are not good.” (See **The Prince**, Chapter XV.) Recognizing this tragic state of affairs, Machiavelli proceeds to advance the arguments for expediency that have become synonymous with his name. With the placing of the idea of force at the center of his political theory, the author of **The Prince** stands in sharp contrast to the Platonic and early Christian concepts of the “good”. Rejecting both Plato’s argument that there is a knowable objective “good” that leads to virtue, and Augustine’s otherworldly idea of absolute goodness, Machiavelli constructs his political theory on the assumption that “all men are potential criminals, and always ready to realize their evil intentions whenever they are free to do so.” In his instructions to the statesman on how to rule in a world dominated by force, he advises “to learn how not to be good”. The seventeenth-century materialist and social philosopher, Thomas Hobbes, elaborated a complex system of thought in which man was reduced to a state of nature and then reconstructed. Seeking a science of human nature that would have the rigor of physics, Hobbes looked to introspection as the source of genuine understanding: “Whosoever looketh into himself and considereth what he doth when he does think, opine, reason, hope, fear, etc., and upon what grounds, he shall thereby read and know, what are the thoughts and passions of all other men, upon the like occasions.” (See Introduction to **Leviathan.**) The results of such an analysis of one’s own thought processes led Hobbes to his celebrated theory of the social contract: the natural egoism of man produces a “war of all against all” in the absence of civil government and must be tempered by absolute monarchy. Moreover, the condition of nature, which is also called a condition of war marked by “continual fear, and danger of violent death”, has always been the characteristic condition of international relations and international law: “But though there had never been any time, wherein particular men were in a condition of war one against another; yet, in all times, kings, and persons of sovereign-authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their forts, garrisons, and guns upon the frontiers of their kingdoms, and continual spies upon their neighbors, which is a posture of war.” (See **Leviathan**, Chapter XIII.)

[53] This is because the principal Grotian effort was to “translate” natural law from pure philosophical speculation into a pragmatic legal ordering. See Stone, **Human Law and Human Justice**, *supra*, p. 65.

[54] *Id.*

[55] The Swiss scholar, Emmerich de Vattel, notes – in his 1758 classic **The Law of Nations**: “No agreement can bind, or even authorize a man to violate the natural law.” See Albert de LaPradelle, Introduction to Emmerich de Vattel, **Le Droit Des Gens** (**The Law of Nations**)(Charles G. Fenwick, tr., 1916).

[56] See Corwin, *supra*, p. 61.

[57] *Id.*

[58] *Id.*

[59] See Thomas Jefferson, **IV Works 362** (New York, P.L. Ford, ed., 1892-99).

[60] J.J. Burlamaqui, author of **Principes Du Droit De La Nature Et Des Gens** (1774) was a Swiss scholar who held a Chair at the University of Geneva. His work has been described by J. Stone and others as “rational utilitarianism”. See Stone, **Human Law and Human Justice**, *supra*, p. 71.

[61] See Corwin, *supra*, p. 81.

[62] *Id.*

[63] See Irving Gendelman, **Critique of the Office of the Attorney-General** (mimeo), p. 2. Document available from the author. This document, *inter alia*, discusses findings of the Association of Civil Rights in Israel (ACRI) concerning unlawful government suppression of legitimate dissent, unlawful resort to emergency regulations and extended police brutality. It refers to events and policies in the Barak era.

[64] See Vattel, **The Law of Nations** (Washington DC: Carnegie Institution, 1916), C.G. Fenwick tr., p. 4.

[65] *Id.*

[66] See Sophocles, **Antigone**, *supra*.

[67] See H.D. Thoreau, **On The Duty of Civil Disobedience** (New York: New American Library, 1959).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] In the United States, for example, strong action against terrorists was already mandated ten years ago by **The Comprehensive Terrorism Prevention Act of 1995**, Title II, Sec. 201(4): "The President should use all necessary means, including covert action and military force, to disrupt, dismantle and destroy infrastructures used by international terrorists, including terrorist training facilities and safe havens." See: **The Comprehensive Terrorism Prevention Act of 1995**, 104th Congress, 1st Sess., S. 735, US Senate, April 27, 1995, p. 18.

[74] Here it should be noted that pertinent international law is found also in "international custom", which may or may not identifiably derive from Higher Law foundations. Article 38(1)(b) of the Statute of the International Court of Justice describes international custom as "evidence of a general practice accepted as law". In this connection, the essential significance of a norm's customary character under international law is that the norm binds even those states that are not parties to the pertinent codifying instrument or convention. With respect to the bases of obligation under international law, even where a customary norm and a norm restated in treaty form are apparently identical, the norms are treated as separate and discrete.

[75] See: **Harvard Research in International Law: Draft Convention on Jurisdiction with Respect to Crime**, 29 AM. J. INT'L L., 435 (Supp. 1935) at 566 (quoting Coke, C.J. in King v. Marsh, 3 Bulstr. 27, 81 E.R. 23 (1615)("*a pirate est Hostes humani generis*").

[76] Jewish law (*Halakhah*) rests upon twin principles – the sovereignty of God and the sacredness of the Person or individual. Both principles, intertwined and interdependent, underlie the present argument for civil disobedience in Israel. On the importance of the dignity of the person to the Talmudic conception of law, see: S. Belkin, **In His Image: The Jewish Philosophy of Man as Expressed in Rabbinic Tradition** (New York: 1960). From the sacredness of the Person, which derives from each individual's resemblance to divinity, flows the human freedom to choose. The failure to exercise this freedom, which is evident wherever response to political authority is automatic, represents a betrayal of legal responsibility. On human freedom to choose good over evil, see: J.B. Soloveitchik, **Thoughts and Visions: The Man of Law** (Hebrew: New York: 1944-45), p. 725. Moreover, Jewish law is democratic in the sense that law belongs to all of the people, a principle reflected in the Talmudic position that each individual can approach God and pray without priestly intercessions. This points toward a fundamental goal of law to be *creative*, to improve society and the state – a goal to be taken seriously in current evaluations of the permissibility of civil disobedience in Israel.

[77] One such overriding danger has to do with the disappearance of Israel's "strategic depth", an inevitable and intolerable consequence of transforming certain Jewish lands into "Palestine". Regarding this military concept of "strategic depth", one should recall Sun-Tzu's timeless observation: "If there is no place to go, it is fatal terrain."

See: Sun-Tzu, **The Art of War**, Ralph D. Sawyer, tr. (New York: Barnes and Noble Books, 1994), Chapter 11, “Nine Terrains”.

[78] Here it is important to recall that those who oppose disengagement, not those who support it, are acting to fulfil the peremptory expectations of *Nullum crimen sine poena*, “No crime without a punishment”. International law presumes solidarity between states in the fight against crime. (Terrorism is a crime under international law.) This presumption is mentioned in the **Corpus Juris Civilis**; in Hugo Grotius’ **De Jure Belli Ac Pacis Libri Tres** (Book II, Ch. 20); and in Emmerich de Vattel’s **Le Droit Des Gens** (Book I, Ch. 19). The case for universal jurisdiction over egregious crimes, which derives from the presumption of solidarity, is found in the four Geneva Conventions of August 12, 1949. These Conventions unambiguously impose upon the High Contracting Parties the obligation to punish certain “grave breaches” of their rules. The term “grave breaches” applies to certain infractions of the Geneva Conventions of 1949 and Protocol I of 1977. The High Contracting Parties to the Geneva Conventions are under obligation “to enact any legislation necessary to provide effective penal sanctions for persons commiting, or ordering to be committed”, a grave breach of the Convention. As defined at Art. 147 of Geneva Convention (IV), Relative to the Protection of Civilian Persons in Time of War (6 U.S.T. 3516, signed on Aug. 12, 1949, at Geneva), grave breaches “shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health...” Clearly, multiple grave breaches were committed by the PA/PLO, the organization with which the Sharon Government now claims to be “partners in peace”.

[79] Two widely-cited criminal cases are representative here: *People v. Jarka*, No. 002170 in the Circuit Court of Lake County, Waukegan, Illinois; and *Chicago v. Streeter*, No. 85-108644, in the Circuit Court of Cook County, Chicago, Illinois. Defendants in both cases were acquitted by invoking the “necessity” defense, which had been incorporated into the Illinois Criminal Code. See Chapter 38, Secs. 7-13, of the Illinois Revised Statutes (1983).

[80] Terrorism is specifically criminalized by customary and conventional international law. See, especially: **European Convention on the Suppression of Terrorism**, done at Strasbourg, Nov. 10, 1976. Entered into force, Aug. 4, 1978, Europ. T.S., No. 90, *reprinted in* 15 I.L.M. 1272 (1976).

[81] See: **Resolution on the Definition of Aggression**. Adopted by the UN General Assembly, Dec. 14, 1974. U.N.G.A. Res. 3314 (XXIX), 29 UN GAOR, Supp. (No. 31) 142, UN Doc A/9631 (1975), *reprinted in* 13 I.L.M. 710 (1974).

[82] For authoritative definition of crimes against humanity, see: **Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal**, done at London, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (entered into force, Aug. 8, 1945).

[83] Regarding their particular Jewish obligations, citizens of Israel should now also recall David Ben-Gurion’s warning at the 21st Zionist Congress in Basel, Switzerland (1937): “No Jew has the right to relinquish the rights of the Jewish Nation in the Land of Israel. No Jew has the authority to do so. No Jewish body has such authority. Even the whole Jewish people – alive today – has no authority to relinquish any part whatsoever of the Land. This is the right of the Jewish Nation in all its generations, a right which may not be forfeited under any condition. Even if there would be, at some time, those who would announce that they give up this right, they have neither the power nor the authority to deprive future generations of this right. The Jewish Nation is neither obligated nor bound by any such relinquishment. Our right to the Land – to this **entire** land – is valid and enduring forever, and until the full and complete redemption is carried out, we shall not budge from this historic right.”

[84] For a comprehensive assessment of the natural law origins of international law by this writer, see: Louis René Beres, “Justice and Realpolitik: International Law and the Prevention of Genocide”, **The American Journal of Jurisprudence**, Vol. 33, 123-159 (1988). This article was adapted from the presentation by this writer to the International Conference on the Holocaust and Genocide, Tel Aviv, Israel, June 1982.

[85] The full text of this Opinion, *Daas Torah*, was published in the July 20, 1995 edition of **The Jerusalem Post**, p. 3.

[86] *Id.*

[87] *Id.* A fuller elucidation of *Pikuach Nefesh* will be found in the following discussion of Rav Chaim Zimmerman by Professor Eidelberg.

[88] On the very same day that he signed the Declaration of Principles in 1993 (Oslo I), Yasser Arafat addressed the Palestinian people on Jordan television, assuring them that the agreement was nothing more than the implementation of the 1974 PLO Plan of Phases, a 10-point scheme for the incremental destruction of the State of Israel. The first stage, said Arafat, is "the establishment of a national authority on any part of Palestinian soil that is liberated or from which the Israelis withdraw." (See "Solid Paper Facts", editorial, **The Jerusalem Post**, International Edition, week ending October 7, 1995, p. 10.) The same assertion was repeated by Chairman Arafat after the signing of Oslo II. (*Id*.) These assertions, when considered together with Israel's peremptory right to endure, its peremptory obligation to punish terrorist crimes and the PLO's persistent breaches of all agreements with the Jewish State, *obligate* prompt termination of the "Peace Process". For jurisprudential arguments in support of this position, see: Louis René Beres, "International Law Requires Prosecution, Not Celebration, of Arafat", **University of Detroit Mercy Law Review**, Vol. 71, Issue 3, Spring 1994, pp. 569-580.

[89] The principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal were affirmed by the UN General Assembly as **Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal**, **adopted by the UN General Assembly**, December 11, 1946, U.N.G.A. Res. 95(1), UN Doc. A/236 (1946) at 1144. This affirmation of 1946 was followed by G.A. Res. 177 (II) **adopted by the UN General Assembly**, November 21, 1947, directing the UN International Law Commission to: (a) Formulate the principles of international law recognized by the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal; and (b) Prepare a draft code of offenses against the peace and security of mankind..." See: UN Doc. A/519, p. 112. The principles formulated are known as the **Principles of International Law Recognized in the Charter and Judgment of the Nuremberg Tribunal**. Report of the International Law Commission, 2nd Session, 1950; UN G.A.O.R. 5th Session, Supp. No. 12, A/1316, p. 11.

[90] These obligations are found in The Nuremberg Principles, which were formulated by the United Nations International Law Commission at the request of the General Assembly. According to Principle I of the Nuremberg Principles: "Any person who commits an act which constitutes a crime under international law is responsible therefore and is liable to punishment." The entire matter of Arafat, Mahmoud Abbas, the PLO and "engagement" should be examined in light of this Principle. Where it is so examined, the essential rightfulness of civil disobedience/resistance in Israel becomes manifest.

[91] The earliest expressions of *Nullum crimen sine poena* can be found in the Code of Hammurabi (c. 1728-1686 BCE); the Laws of Eshnunna (c. 2000 BCE); the even-earlier Code of Ur-Nammu (c. 2100 BCE) and, of course, the law of exact retaliation or *lex talionis* presented in three separate passages of the Torah. Hence, the Sharon Government's indifference to *Nullum crimen sine poena* in the matter of releasing Palestinian terrorists and negotiating disengagement is especially ironic because that principle has prominent Jewish origins.

[92] These obligations are peremptory norms (*jus cogens*) based on natural law. Vattel identifies the immutability of such norms, which is most relevant to the case at hand – the case of Israel: "Since, therefore, the necessary Law of Nations consists in applying the natural law to States, and since the natural law is not subject to change, being founded on the nature of things and particularly upon the nature of man, it follows that the necessary Law of Nations is not subject to change. Since this law is not subject to change, and the obligations which it imposes are necessary and indispensable, Nations can not alter it by agreement, nor individually or mutually release themselves from it." See: Emmerich de Vattel, **The Law of Nations**, tr. of the edition of 1758 by Charles G. Fenwick, New York and London: Oceana Publications, reprinted in 1964, Introduction to Book I, p. 4.

[93] "The obligation of subjects to the sovereign," says Thomas Hobbes in Chapter XXI of **Leviathan**, "is understood to last as long, and no longer, than the power lasteth by which he is able to protect them."

[94] See **Convention on the Prevention and Punishment of the Crime of Genocide**, adopted Dec. 9, 1948, S. Exec. Doc. O, 81st Cong., 1st Sess 7 (1949), 78 U.N.T.S. 277.

[95] In this connection, a particular irony must be noted: Earlier, it had been the State of Israel that had most conspicuously demonstrated meaningful support for the Higher Law norm, *Nullum crimen sine poena*. On this example, which refers to Israel's prosecution of Nazi war criminal Adolph Eichmann, see: Gideon Hausner, **Justice In Jerusalem** (New York: Shoken Books, 1966). Indicted under Israel's Nazi and Nazi Collaborators Punishment Law, Eichmann was convicted and executed after the judgment was confirmed by the Supreme Court of Israel, on

appeal, in 1962. See: Attorney-General v. Adolph Eichmann, 36 Int’l L. Rep., 5 (Isr. Dist Ct., Jerusalem 1961), aff’d 36 Int’l L. Rep., 277 (Isr. S. Ct., 1962).

96 Under the Supremacy Clause of the United States Constitution, international law forms part of the law of the United States. U.S. Constitution, Art. VI. See also *The Paquette Habana*, 175 U.S. 677, 700 (1900); *Tel-Oren v. Libyan Arab Republic*, 726, F.2d 774, 781, 788 (D.C. Cir 1984)(per curiam).

97 A petition to charge Yasser Arafat with terrorist crimes *was* submitted to Israel’s High Court of Justice in May 1994. This petition, filed by Shimon Prachik, an officer in the IDF reserves, and Moshe Lorberaum, who was injured in a 1978 bus bombing carried out by the PLO, called for Arafat’s arrest and for an investigation into his then upcoming entry into Gaza-Jericho. The petition noted that Arafat, *prima facie*, had been responsible for numerous terror attacks in Israel and abroad, including murder, airplane hijacking, hostage-taking, letter bombing and hijacking of ships on the high seas. Significantly, the petitioners’ allegation of Arafat’s direct personal responsibility for terror attacks was seconded and confirmed by Dr. Ahmad Tibi, Arafat’s most senior advisor: “The person responsible on behalf of the Palestinian people for everything that was done in the Israeli-Palestinian conflict is Yasser Arafat,” said Dr. Tibi on July 13, 1994, “and this man shook hands with Yitzhak Rabin.” See, Joel Greenberg, “Israelis Keep Arafat Aides Out of Gaza,” **The New York Times**, July 14, 1994, p. 1.

98 The norms concerning such physical survival are so overriding that they include even the principle of anticipatory self-defense, the residual right of states to strike preemptively (subject to the constraints of humanitarian international law) in order to prevent annihilation. On this principle, with particular reference to Israel, see: Louis René Beres/Chair, “Project Daniel: Israel’s Strategic Future”, Ariel Center For Policy Research, Israel, Policy Paper No. 155, 2004, 64 pp. (a special report to Prime Minister Sharon); Louis René Beres, “Security Threats and Effective Remedies: Israel’s Strategic, Tactical and Legal Options”, Ariel Center For Policy Research, Israel, Policy Paper No. 102, 2000, 110 pp.; Louis René Beres, “Israel’s Survival Imperatives: The Oslo Agreements in International Law and National Strategy”, Ariel Center For Policy Research, Israel, Policy Paper No. 25, 1998, 74 pp.; Louis René Beres, “Israel and the Bomb”, **International Security** (Harvard), Vol. 29., No. 1, Summer 2004, pp. 1-4; Louis René Beres. “Reconsidering Israel’s Destruction of Iraq’s Osiraq Nuclear Reactor” (with COL/IDF Res. Yoash Tsiddon-Chatto), Menachem Begin Heritage Center, **Israel’s Strike Against the Iraqi Nuclear Reactor**, June 7, 1981, Jerusalem, Israel, September 2003, pp. 59-60; Louis René Beres, “The Newly Expanded American Doctrine of Preemption: Can it Include Assassination”, **Denver Journal of International Law and Policy**, Vol. 31, No. 2, Winter 2002, pp. 157-177; Louis René Beres, “Israeli Nuclear Deterrence”, **Midstream**, February/March 2001, Vol. XXXXVII, No. 2, pp. 10-12; Louis René Beres, “In Support of Anticipatory Self-Defense: Israel, Osiraq and International Law”, **Contemporary Security Policy**, Vol. 19, No. 2, August 1998, pp. 111-114; Louis René Beres, “Israel, Iran and Preemption: Choosing the Least Unattractive Option Under International Law”, **Dickinson Journal of International Law**, Vol. 14, No. 2, Winter 1996, pp. 187-206; Louis René Beres, “The Iranian Threat to Israel: Capabilities and Intentions”, **International Journal of Intelligence and Counterintelligence**, Vol. 9, No. 1, Spring 1996, pp. 51-62; Louis René Beres and Yoash Tsiddon-Chatto, “Reconsidering Israel’s Destruction of Iraq’s Osiraq Nuclear Reactor”, **Temple International and Comparative Law Journal**, Fall 1995; Louis René Beres, “Power, Preemption and the Middle East Peace Process”, **Midstream**, Vol. XXXXVII, No. 9, December 1995, pp. 2-4; Louis René Beres, “Preserving the Third Temple: Israel’s Right of Anticipatory Self-Defense Under International Law”, **Vanderbilt Journal of Transnational Law**, Vol. 26, No. 1, April 1993, pp. 111-148; Louis René Beres, “After the Gulf War: Israel, Preemption and Anticipatory Self-Defense”, **Houston Journal Of International Law**, Vol. 13, No. 2, Spring 1991, pp. 259-280; Louis René Beres, “Striking ‘First’: Israel’s Post Gulf War Options Under International Law”, **Loyola of Los Angeles International and Comparative Law Journal**, Vol. 14, Nov. 1991, pp. 10-24; Louis René Beres, “Israel and Anticipatory Self-Defense”, **Arizona Journal of International and Comparative Law**, Vol. 8, 1991, pp. 89-99; Louis René Beres, “After the Scud Attacks: Israel, Palestine and Anticipatory Self-Defense”, **Emory International Law Review**, Vol. 6, No. 1, Spring 1992, pp. 71-104; Louis René Beres, “Israel, Force and International Law: Assessing Anticipatory Self-Defense”, **The Jerusalem Journal of International Relations**, Vol. 13, No. 2, 1991, pp. 1-14; and Louis René Beres, “Striking Preemptively: Israel’s Post Gulf War Options Under International Law”, in **Arms Control Without Glasnost: Building Confidence in the Middle East**, a special publication of the Israel Council on Foreign Relations, pp. 129-160 (1993). For more specific examinations, also by this author, of assassination as a potentially permissible form of anticipatory self-defense, see: Louis René Beres, “On Assassination as Anticipatory Self-Defense: The Case of Israel”, **Hofstra Law Review**, Vol. 20, No. 2, Winter 1991, pp. 321-340; Louis René Beres,

"Assassinating Saddam Hussein: The View From International Law", **Indiana International and Comparative Law Review**, Vol. 13, No. 3, 2003, pp. 847-869; Louis René Beres, "Assassination and the Law: A Policy Memorandum", **Studies in Conflict and Terrorism**, Vol. 18, No. 4, October/December 1995, pp. 299-316; and Louis René Beres, "Victims and Executioners: Atrocity, Assassination and International Law", **Cambridge Review of International Affairs**, Cambridge, England, Fall 1993, pp. 1-11.

99 Regarding the normative obligation to punish, see: **Resolution on Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity**, G.A. Res. 3074, UN GAOR, 28th Sess., Supp. No. 30, at 78, UN Doc. A/9030 (1973). Other resolutions affirm that a refusal "to cooperate in the arrest, extradition, trial and punishment" of such persons is contrary to the United Nations Charter "and to generally recognized norms of international law". See G.A. Res. 2840, UN GAOR, 26th Sess., Supp. No. 29 at 88, UN Doc. A/8429 (1971). See also G.A. Res. 96, UN GAOR, 1st Sess., pt. 2 at 188, UN Doc. A/64 (1946). As to the responsibility of states toward Geneva Law in particular, Common Article 1 of the Geneva Conventions addresses the obligation of all signatories "to respect and to ensure respect" for the Conventions "in all circumstances". See **Geneva Convention Relative to the Protection of Civilian Persons in Time of War**, Aug. 12, 1949, Art. 1, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 288.

Abandonment of Jewish Land
Introduction

Paul Eidelberg

I. Urgently Needed: The Erudition of HaGaon HaRav Dr. Chaim Zimmerman

Prominent Jews in Israel believe that the country is approaching civil war. The public is profoundly divided over a government plan called disengagement. This plan requires Israel to withdraw unilaterally from Jewish land, to uproot and relocate its Jewish residents, and to surrender this land to Arabs.

Remarkably, even rabbis are divided over the government's disengagement plan, and Israel's highest military and intelligence officials have warned of its dire consequences. Indeed, eminent military and political experts warn that disengagement, quite apart from the danger of civil war, can lead to the incremental demise of the Jewish state. Hence the present writer feels obliged to bring to the general public's attention a work of the world-renowned Talmudic scholar and Torah philosopher, the late Dr. Chaim Zimmerman. As we shall see, Dr. Zimmerman's extraordinary erudition has a direct bearing on the issue of disengagement and therefore on Israel's survival.

*** * ***

I was privileged to sit at the table of Rav Chaim almost every Friday morning for 18 years. Dr. Zimmerman was widely known for his prodigious memory. The Babylonian Talmud (the *Bavli*) as well as the Jerusalem Talmud (the *Yerushalmi*) and literally thousands of other Hebrew tomes were stored in his memory as if his mind were a giant computer. But unlike a computer, his was a creative mind. He could interface Torah with science and philosophy as well as with politics and thereby illuminate the Torah as the paradigm of reason and of how man should live.

Hence it is with profound reverence and diffidence that I venture to write an introduction to his essay, "The Prohibition of Abandoning Land in *Eretz-Yisrael*", which appears in chapter 3 of his monumental work, **Torah and Existence**.[1] There is precedence for this endeavor. It so happens that, with Rav Chaim's permission and supervision, I published a condensed version of chapter 1 of **Torah and Existence**, which dealt with the concept of *atchalta-degeula*, the beginning of (Israel's) redemption.[2] That lengthy chapter, which was composed primarily for Torah scholars, relates the controversy over Israel's rebirth not only to the Written Torah, the Prophets, and the Hagiographa, but also the *Bavli*, the *Yerushalmi*, the *Midrash*, the *Zohar*, as well as the *Rishonim* (including such luminaries as Rashi, the Rambam, and the Ramban), the *Achronim* (the successors of the *Rishonim*), and more recent Torah masters. That same chapter is perhaps the only systematic attempt to prove that the rebirth of the State of Israel in 1948 confirms the existence of certain laws of history governing the Jewish people.

I mention this because certain rabbis oppose disengagement partly because they do not regard the State of Israel – given its secular character – as a stage in Israel's redemption process, even though Dr. Zimmerman has refuted their position. Be this as it may, it behooves these and other rabbis as well as the public in general to study Dr. Zimmerman's "The Prohibition of Abandoning Land in *Eretz-Yisrael*". Alas that I do not have

Rav Chaim to guide me in this attempt – once again – to condense and clarify his work in order to bring it to a wider public, especially in this moment of Israel's plight.[3]

Before doing so, however, it will be necessary to elucidate the historical and political context of the government's disengagement plan, a euphemism for retreat from Jewish land.

II. Disengagement

Disengagement is a consequence of the Israel-PLO "Declaration of Principles" of September 13, 1993, commonly known as the "Oslo Agreement". This agreement is based on the principle of Israel giving land to the Arab inhabitants of Judea, Samaria, and Gaza in return for peace. Those who crafted the agreement had in view the establishment of an Arab state on this land. However, while Israel has given the PLO – the Palestine Liberation Organization – control over most of this land, the PLO has given Israel only a war of terror. Indeed, since September 2000, when the war exploded in all its fury, Arab terrorists have murdered and maimed some 10,000 Jewish women, men, and children.

The Government's policy of disengagement ignores the deadly consequences of Oslo and its charade of "land for peace". The first stage of disengagement requires Israel to withdraw unilaterally from Gaza and northern Samaria. Withdrawing from Gaza alone means uprooting 8,000 Jews from their homes and farms, their schools and synagogues. If this upheaval were not enough, the so-called security fence indicates – as have government officials – that the same upheaval will eventually befall most of Judea and Samaria, the heartland of the Jewish people. Some 250,000 Jews would then be expelled to facilitate the establishment of an Arab state. Such a state, to judge from its probable rulers, would remain committed to Israel's destruction if only because a generation of Arab children has been indoctrinated to hate Jews and emulate suicide bombers.

Disengagement was the central issue of the January 28, 2003 Knesset elections. Prime Minister Ariel Sharon and his Likud Party campaigned *against* disengagement – the policy of the Labor Party. Labor suffered an unprecedented defeat in that election, winning only 19 Knesset seats, while the Likud won 38, to which add no less than 31 seats won by opponents of disengagement in other parties. It thus appears that a large majority of the public opposed disengagement in the January 2003 elections. Nevertheless, in December of that same year, Mr. Sharon adopted Labor's pro-disengagement policy. Nor is this all.

A few months later Mr. Sharon initiated a referendum of Likud members on the issue and he promised to abide by the outcome. The referendum took place on May 2, 2004, with almost 100,000 party members participating. A stunning 60% voted against disengagement. Mr. Sharon ignored the result. Indeed, he proceeded to impose his disengagement plan on his cabinet by dismissing two opposing ministers. One may therefore conclude that, contrary to (tendentious) polls, and despite the power and paralyzing prestige of this prime minister, a substantial majority of the public remained opposed to disengagement and what this portends for Jews throughout Israel.[4]

How does the Government justify disengagement? Israel's *political* echelons contend:

(1) Evacuating 25 Jewish communities in Gaza and northern Samaria will enable Israel to retain major settlement blocs in Judea and Samaria. This contention is based on President George W. Bush's letter of April 14, 2004, responding to Sharon's disengagement plan. The letter declared, "In light of new realities on the ground, including already existing major Israeli population centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949." Spokesmen of the Bush administration have denied Mr. Sharon's optimistic if not tendentious interpretation of this letter.

(2) Evacuation of Jews from the Gaza Strip will reduce friction with the Arab inhabitants and bears with it the potential for improving their economy and living conditions. However, virtually all the experts agree that the absence of Jews will prove disastrous to Gaza's economy.

(3) Finally, the Government contends that disengagement will save Jewish lives and lead to peace. (Were it not for this contention, rabbis would not be divided over disengagement, since many believe that the saving of Jewish lives – *pekuach nefesh* – takes precedence over the retention of Jewish land, an issue Dr. Zimmerman will clarify.) This last contention, however, has actually been contradicted by the heads of Israel's security echelons, Lt. Gen. Moshe Ya'alon, IDF Chief of Staff, Maj. Gen. Aharon Ze'evi-Farkash, head of IDF Intelligence, and Avi Dichter, Director of the *Shin Bet* (General Security Service).[5] Hence ex-Deputy IDF Intelligence Chief, Maj. Gen**.** (res.) Yaakov Amidror, concludes: "The Israeli government has not succeeded in producing a single serious argument that can refute objections [to disengagement] and justify the grave step that it is taking."[6]

Given this bleak assessment – and I have only touched the surface – countless Jews in Israel see no compelling reasons for the Government's surrender of Jewish land to Arab terrorists, none that might allay their fears, dispel their moral outrage, or justify the sacrifice of their homes, the splendor of once desolate land, their close-knit communities, their Zionist ideals and religious aspirations – the trampling on which may cause civil war.

III. Civil War

The threat of civil war in Israel cuts across the religious-secular divide. The conflict is not simply between religious Zionists and left-wing secularists. Rabbis across the religious spectrum are divided on the issue. Some have called upon soldiers to disobey orders to evacuate Jews from their homes in Gaza. Other rabbis, though opposed to withdrawal from any part of Judea, Samaria, and Gaza, have rejected such disobedience. Meanwhile, legal experts in Israel have argued that the Government's withdrawal plan, in particular the uprooting of Jews from their homes, violates domestic and international law.[7] Numerous religious and secular Jews have therefore expressed the intention to engage in civil disobedience to defeat this plan. Accordingly, the Government has trained thousands of soldiers to forcefully evict such Jews and herd them into detention camps.

Complicating matters, the Likud-led Government lost its Knesset majority when its coalition partners resigned from the cabinet over disengagement. To remain in power, the Government had to depend on the support of the opposition Labor Party. Accordingly, despite calls for new Knesset elections, Prime Minister Sharon, on January 6, 2005, formed a slim 64-member national unity government with Labor together with United Torah Judaism. By so doing, he nullified the January 2003 election and thereby made a mockery of democracy.

Here I must pause and request the reader's acute attention. United Torah Judaism, having five Knesset Members (MKs), holds the balance of power in the Government. UTJ consists of two *haredi* or ultra-Orthodox factions, Degel Hatorah and Agudat Yisrael. UTJ received permission from its Council of Sages to join the secular Likud-Labor coalition on a three-month trial basis to see whether the coalition agreements concerning *haredi* education and religious services would be upheld. Only eight of the 15 members of that Council ruled on whether UTJ should join this disengagement-dominated government, and of these only six approved. What is more, when, on a previous occasion, the Knesset voted for disengagement, Degal Hatorah's spiritual leader, Rabbi Shalom Yosef Elyashiv, advised UTJ to abstain, whereas Agudat Yisrael's spiritual leader, the Gerer Rebbe, advised UTJ to vote against disengagement. Given the divergent opinions of such influential rabbis on this life-and-death issue, the erudition of a Torah giant like Dr. Chaim Zimmerman becomes all the more relevant, indeed, vital.

One related point needs to be emphasized. Many religious Jews have advocated a national referendum on disengagement. However, to support a referendum on whether Jewish land should be surrendered to non-Jews may not be consistent with Jewish law and therefore a compelling reason to consult Dr. Zimmerman's essay on "The Prohibition of Abandoning Land in *Eretz-Yisrael*".

The Prohibition of Abandoning Land in *Eretz-Yisrael*

Chaim Zimmerman

Edited and Annotated by Paul Eidelberg

I. Prologue: Insiders and Outsiders

The Torah can be understood only from its own premises and principles. For the insider, the laws of the Torah – the *Halacha* – constitute a rational and logical system.[8] This system will not be understood by outsiders, by those who regard the Torah as one among a number of diverse religions. The Torah-system is not a subset or particular exemplification of some general philosophical category or of any sociological theory concerning the religions and ethical ideas of mankind. The concepts and laws of the Torah are *sui generis*.

When outsiders of the Torah, be they philosophers, scientists or other laymen, express their opinions on what the *halacha* is or should be on some specific issue, they fail to penetrate the profound truths of Torah. Their errors underlie most arguments concerning the issue of separation of state and religion. They overlook the purpose of the Torah, which is to establish a people of *kedusha*, a concept that has no logical relation to the secular or gentile understanding of state and religion. The divine-like concept of *kedusha* renders a Torah-society more advanced in rational freedom and creativity than any democratic society. As anyone learned in the Talmud knows, a Torah-society excels in logical reasoning and understanding, in law and justice, in ethics and kindness.[9]

Just as a Torah-society differentiates itself from the secular democratic state, so it differentiates itself from the religious authoritarian state. The claim that a Torah-society involves religious coercion has no validity. It is a myth spread by shallow secularists who mistakenly classify the Torah as a religious creed based on faith as opposed to reason – as something subjective or personal, hence to be separated from public law.[10]

However, for an individual to relate his own opinions and sentiments to the Torah without understanding Torah-principles and logic, and to demand that the supposed-to-be Jewish State of Israel conform to his predilections, is the same as demanding a mathematician to abandon mathematical logic and adjust his logical equations to a layman's fancies.

The failure to make the distinction between insiders and outsiders of the Torah underlies all the controversies by writers on both sides of the issue of separation of state and religion, as well as other vital issues such as giving away Jewish land to non-Jews.

II. On Giving Away Jewish Land to Gentiles

For the insider of Torah, the question of giving away *shtachim* (parts) of *Eretz-Yisrael* to non-Jews for political or other reasons obviously falls under the rubric of the *Halacha*. The insider understands that the status of any part of *Eretz-Yisrael* is decided by the logical relationship among the concepts and laws of the Torah. Subjectivity has no place among those who master the *halacha* on yielding parts of *Eretz-Yisrael* to Gentiles. Dilemmas arise not from the complexity of the *halacha*, but from the polemics of outsiders and laymen who are not masters of the *halacha*, but who nonetheless feel free – especially in a democracy – to express their subjective opinions on *halachic* issues. They relate their own ideas and feelings to the *halacha* and from there draw their own biased conclusions. Before explaining the *halacha* in question, a few preliminary words are necessary.

[In Israel no issue is so avoided and obscured – often deliberately – as the logical and practical contradictions between democracy and Judaism. Spinoza, who exalted democracy and scorned Judaism, would be either amused or astonished by the many politicians, judges, and even rabbis who allege or pretend that the two are compatible. (The present writer has refuted this sophistry, as well as Spinoza's contemptible view of Judaism.[11]) I mention this here because religious Jews, who piously denounce disengagement as undemocratic, would be mystified if disengagement were approved in a national referendum. But let us return to Dr. Zimmerman.]

Halachic decisions have no logical relation to democracy. When the *Sanhedrin* deliberates on some issue, the decision accords with the *judgment* of the majority. This is not a result of any democratic system or mode of thought.

In the case of the *Sanhedrin,* the judgment of the majority is reached by thorough examination of diverse evidence and diverse opinions. The judgment of that majority carries moral authority because it is more likely to be in accord with truth on matters of law. In fact, because truth is the aim and criterion, the majority principle in Torah jurisprudence is applicable only among equals in scholarship. (See *Yevamot,* 14a.) Consistent therewith, there are numerous cases in Jewish law when the conclusion of an outstanding individual jurist or scholar was accepted against the rest of his colleagues. (See *Berachot* 37a, *Kiddushin* 59b, *Yevamot* 108b, *Gittin* 15a, 47a.)

To further clarify the issue: If the truth or falsity of some theory concerning subatomic processes were to be decided by the vote of a scientific convention, the outcome would obviously depend not on the *will* but on the *reasoning* of the majority. In a democracy, however, what is decisive is not reason or truth but the will or rights of the majority. Moreover, in a democracy, we take the opinion of the majority because it is assumed that all individuals are equal regardless of their diverse lifestyles or occupations and despite their obviously unequal intellectual abilities.

The decision in any democratic collectivity cannot be dictated by an individual or a minority, even when the truth resides in the latter. Furthermore, such are the vicissitudes in public affairs in a democracy that the decision of a democratic majority has less to do with the truth than with the transient opinions of the people, regardless of facts or reality.

And yet, if the notion of majority rule is assimilated to the concept of *probability,* it can be rationally applied in the context of science. Paradigm shifts aside, the agreement of most scientists on a scientific issue is usually closer to the truth than the opposed position of a single scientist. In this context, however, what is relevant is not the will of these scientists but their educated ability to observe and understand scientific phenomena.

The same may be said of the *Sanhedrin,* where the term *rov* (majority) is assimilated to the concept of probability and thus ceases to be arbitrary. Of course, to say that the majority opinion in the *Sanhedrin* is the truth, or more likely to be so than the minority opinion, is to assume that all members of the *Sanhedrin* possess more or less equal knowledge of Torah. But this assumption is quite rational since the deliberations of the *Sanhedrin* are based on the logical reasoning of qualified judges, not on the will of random individuals. Its decision on a particular issue represents the truth because it has been shown to follow logically from the premises of the *halacha* as applied to the issue in question. We see, therefore, that a majority decision of the *Sanhedrin* is not a *democratic* decision – a matter of volition – but a *rational* decision.

Only a person ordained and certified and accepted by *Klal-Yisrael* as a master of the subject has the right to render a *halachic* decision – a *psak-halacha* – on a question that concerns *Klal-Yisrael*.[12] This is a very important principle of which many laymen are not aware. Moreover, in rendering a *halachic* decision, a crucial distinction must be made between *halacha* and *halacha-lema`aseh*. In this context, *halacha* means a theoretical decision on a hypothetical problem comprehended by the Oral Law, the *Torah she-ba`al-peh*. *Halacha-lema`aseh* means a problem that requires immediate practical decision. The question of giving away

shtachim appears, to many people, as an immediate practical issue. This is not so, as a clear and more comprehensive analysis will indicate.

As shown in Chapter I of **Torah and Existence**, Israel is only in the physical stage (*geulat-haguf*) of its redemption (*atchalta-degeula*). This means that Israel has yet to achieve its spiritual redemption (*geulat-hanefesh*). Its government is not a Torah-government. Leaving aside the Supreme Court, whose rulings often violate Jewish principles and values, the laws of the country are made in a 120-member Knesset whose overwhelming majority are not Torah-people. Consideration of *halacha* does not enter the position they take on various issues. They decide matters according to their own personal views or partisan interests, or perhaps according to certain principles of democracy that foster permissiveness or a leveling of moral standards.

The Prime Minister does not ask the *chachamim*, the learned men of Torah, whether it is permissible to give away *shtachim.* He does not commit himself to following the Torah and its laws concerning that issue. Hence, the polemic about this question in the Hebrew press is useless from the *halacha-lema`aseh* or practical point of view. It is only a hypothetical question as to whether a Torah-government may give away parts of the Land of Israel.

Nevertheless, this question may still serve a practical purpose. There is a great difference between a state conducted by *halacha* and a *clerical* state – a state in which religion is used for political purposes. We see this, to some extent, in Israel, where the government is composed of diverse secular and religious parties and factions. Some use religion merely to gain political power and thereby advance their own partisan interests and political aspirations. They use Torah not as an end in itself but only as an instrument of politics, which makes their politics clerical. It may be said, of course, that some want to use politics as a means of promoting the influence of Torah in Israel – as certain religious parties claim. In this context, the polemic about *shtachim* is not futile. The question of giving away *shtachim* can serve pragmatically for those who use politics for the sake of Torah, as well as for those who use the Torah for the sake of politics or political considerations. But all this has nothing to do with a pure *halacha*-decision, which is not affected by extraneous factors, but only by purely logical equations that follow from the laws of the Torah.

Even though Israel does not have a Torah-government, it is important to clarify the issue of *shtachim*. Since the government is usually dependent on the cooperation of religious parties, it may eventually see the practical importance of the *halacha* on *shtachim,* and incorporate the logic of *halacha* in the rationale for Jewish possession of *Eretz-Yisrael* as a whole.

The problem of *shtachim* includes many aspects of *halacha*, of which four are relevant to the present discussion. The first aspect is the law of *kibush-ha`aretz* – of waging war and conquering *Eretz-Yisrael*. The second aspect is whether *shtachim* may be given away for political or other reasons. The third aspect is whether the *halacha* of *pikuach nefesh* – danger to life – is applicable to giving away *shtachim*. The fourth aspect is whether there is any difference in *halacha* between *pikuach nefesh* of the *yachid* (the individual) and *pikuach nefesh* of the *tzibur* (the community). The solutions to all these questions depend on pure *halacha*-logic and determinations without any partisan or personal or other considerations. Like any other *halacha*-problem, the validity of the solution depends solely on the reasoning and logical understanding of the *halacha*, without other motivations. All this will be explained clearly in what follows.

III. The Mitzva of Possessing *Eretz-Yisrael*

Concerning the first aspect, the mitzva of *kibush-ha`aretz* – of waging war and conquering *Eretz-Yisrael*: regardless of whether this is a mandatory war (*milchemet-mitzva*) or a discretionary war (*milchemet-reshut*), the *halacha* is clear. Since every war involves *pikuach nefesh*, a war for *kibush-ha`aretz* cannot be waged *halachically* without a king and the permission of the *Sanhedrin* and a prophet, and without consulting the *Kohane Gadol* (the High Priest).

Although the *halacha* concerning a mandatory or discretionary war is beyond the scope of the present inquiry, it should not be confused with the *halacha* of *pikuach nefesh*, of self-defense. When any one wages war to destroy *Klal-Yisrael*, or to obtain any part of *Eretz-Yisrael*, this situation belongs to the subject of *pikuach nefesh*, of self-defense, which also falls under the category of *rodef* (explained below). Thus, if an enemy attacks Israel, Israel is *halachically* required to use the most effective available means to defend itself. The relation of the enemy to Israel is identical to the relation of a *rodef* to an individual: someone pursuing another to murder him. The pursued person has a right, according to the *halacha*, to use any means to defend himself, even if he has to kill the *rodef*, the pursuer.

[Dr. Zimmerman's above statement regarding the *halacha* of *pikuach nefesh* contradicts the Government's policy of self-restraint *vis-à-vis* Arab terrorism. The Government often refrains from employing the most effective weapons against terrorist havens. Instead of destroying such havens by aerial bombardment, the IDF engages in house-to-house fighting, losing Jewish lives in the process. This policy of self-restraint, which violates every canon of military science, reflects the weakness – to put it mildly – underlying the Government's disengagement plan, its retreat from Jewish land.]

A. Yerusha and Matana

It says in Exodus 6:8, "*And I will bring you to the land which I swore to give to Avraham, to Yitzchak and to Yaakov, and I will give it to you for an inheritance.*" In the text of the Torah it says "***Venatati** oto lachem **morasha**.*" The word ***venatati*** in Hebrew relates to the word ***matana***, a gift, and the word ***morasha*** is synonymous with the word ***yerusha***, inheritance. There is a great difference in *halacha* between inheritance (*yerusha*) and a gift (*matana*).

The *halacha* of *yerusha* is that a relative – a son for example – inherits his father's possessions and they automatically belong to him. Even if he refuses them, he remains their owner. Of course, he can give them to someone else or he can *mafkir* (abandon) them, as one can give away or abandon his own property. But he cannot resign from his property by simply saying "I don't want my possessions." In *halachic* terms, a man cannot *misalek* himself, i.e. remove himself, from his possessions. He can only do this through a *kinyan* – a legal act of transferring possessions – or he can publicly proclaim, *"harei zeh hefker,"* that his property is abandoned.

As for a *matana*, a gift: If you give a *matana* to some person and he refuses to accept it, the gift is not valid, and he does not acquire ownership. You cannot force anyone to accept a *matana*. This contrasts with an inheritance, which the heir receives automatically, even against his will. Afterwards, he can dispose of it, as he can with his own possessions.

It says in the *Yerushalmi, Baba Batra*:

> Reb Yochanan asks: Since G-d promised us that He will "give" *Eretz-Yisrael* to us as an "inheritance", and since the verse uses two different concepts – first it says *venatati*, which means *Eretz-Yisrael* is a *matana* from G-d to *Klal-Yisrael*, and then it says *morasha*, which means it is an inheritance to *Klal-Yisrael* – there appears to be here a contradiction of terms, since *matana* and *morasha* are two different concepts in *halacha*. In the language of the *Yerushalmi*: "*Im matana lama yerusha* – if it is a *matana*, why *yerusha*? *Ve`im yerusha lama matana* – if it is a *yerusha*, why *matana*?" Answers Reb Yochanan: "What we learn from this is that first G-d gave *Eretz-Yisrael* as a *matana* and afterwards He gave it as a *yerusha*" [not chronologically but conceptually]. Reb Oshia said: "In every place where it says *morasha* (not *yerusha*) *lashon-dihu*, which means that the inheritance is expressed vaguely." Then the *Yerushalmi* asks: "It says *morasha kehilat Yaakov* – Moshe commanded us the Torah, the inheritance of the community of Yaakov. Would you also say that this inheritance is vague?" Answers the *Yerushalmi*: "Yes, no situation is vaguer than this, since without toil one cannot receive and comprehend the Torah."

The meaning of this *Yerushalmi* is explained brilliantly by the *Gaon*, Reb Eizel Charif (*z"l*) in his book, **Noam Yerushalmi**. The *Ketzot Hachoshen*, in **Choshen Mishpat**, says that even though the *halacha* stipulates that a man cannot *misalek* (remove) himself from *yerusha* (his inheritance), a *bechor* (an oldest son) who inherits double can *misalek* himself from the extra part of the *yerusha* because the extra part which the eldest son receives in his inheritance is called by the Torah, *matana*. And since it is called *matana*, even though the *yerusha* is acquired automatically, still it is as if a man were to acquire the extra part through a legal transfer of property, and therefore can *misalek* himself from the extra part of the inheritance. This is one of the brilliant *chidushim* (Novellae) of the *Ketzot* in *halacha*, which explains many complicated discourses in the Talmud.

The **Noam Yerushalmi** brings proof to the *psak-halacha* of the *Ketzot* from the *Yerushalmi*, *Kiddushin*, chap. 1, *halacha* 4, as well as from *Gemaras* in the *Yerushalmi*, *Baba Batra*, *Sota*, *Yevamot*, and *Ketubot*. (This is not the place to explain these *sugiyot* – dialectical arguments – at length, which would require a complete discourse on the subject. The advanced Talmudic student, who is interested in understanding the logical subtleties of the proof of this *halacha*, is advised to study in detail the texts of the *Ketzot Hachoshen* and the **Noam Yerushalmi**.)

Now the *Yerushalmi* becomes clear. The Torah is called both a *matana* and a *morasha*. Since the Torah is a *matana*, a person can *misalek* himself from it by not putting forth effort to acquire it. Therefore, the Torah juxtaposes the vague word *morasha*, and not *yerusha*, to the word *matana*, to indicate that even though the Torah is a *matana*, it is also a *yerusha* – but a *yerusha* that comes through effort and not an automatic *yerusha*.

The same law is applied to *Eretz-Yisrael*: it is both a *matana* and a *yerusha*. Since *Eretz-Yisrael* is a *matana*, from which one can *misalek* himself, it is also called a *yerusha*, but one which is acquired through action or effort, not an automatic *yerusha*. And so, what we learn from the *Yerushalmi*, according to the explanation of the **Noam Yerushalmi**, is that *Eretz-Yisrael* has the two functions of *matana* and *yerusha*. **From this point of view we should not give away *shtachim*. To *misalek* ourselves from parts of *Eretz-Yisrael* is to reject the *matana* of *Hashem*. No economic or social or political cause can compensate for the value of *Eretz-Yisrael* and its *kedusha*. And it is one of the greatest sins to refuse G-d's *chesed*.**

B. The Iniquity of Jews in Abandoning *Eretz-Yisrael*

The great *Gaon*, Reb Yonatan, the author of the famed book, **Urim Vetumim**, writes that the main sin of the Jews was their abandonment of *Eretz-Yisrael*, their inheritance, and that their *tshuva* (repentance) in the future will consist in not abandoning their inheritance in the *Eretz-Hakdosha* – the Holy-Land. We read in (the Prophet) Micha 5:9: "*And it shall come to pass on that day, says the L-rd, that I will cut off thy horses out of the midst of thee, and I will destroy thy chariots.*" Reb Yonatan explains that it is ***known*** – here the word "known" refers to the obvious sources of the *halacha* in the Talmud – that G-d will save the Jews from the war of Gog and Magog after they go through many, many troubles, and despite these troubles, they will not abandon *Hashem* and His heritage, *Eretz-Hakdosha*. This will be their fundamental *tshuva* because *tshuva* has to occur in the same place and concern the same act. The main sin of the Jews in the time of the *Beit-Hamikdash* (the Temple) was their going down to *Mitzraim* (Egypt), as the Prophet says "*Woe is to those who go down to Mitzraim for help*." From this act came forth great sins, and this is why their *tshuva*, in the future, will consist in not abandoning their inheritance, *Eretz-Yisrael*.

The reason for their going to *Mitzraim* was to obtain many horses, as mentioned in many places in the *Tanach* (the Bible). That is why the Prophet says, "*And it shall come to pass on that day, says the L-rd, that I will cut off thy horses out of the midst of thee, and I will destroy thy chariots.*" Even though you will not have horses in your land, nevertheless, you will not again leave your inheritance and become a *yored* (an emigrant) and go to *Mitzraim*. This will constitute a perfect *tshuva*, because if horses (*susim*) were

abundant in *Eretz-Yisrael*, the Jews would have no reason to go to *Mitzraim*, and then the effort of *tshuva* would not be genuine.

Here, the words "*susim*" and "*Mitzraim*" are symbolic, as one who knows *Tanach* will understand. The *Gaon*, Reb Yonatan Praeger, here reveals the great sin of the Jews in the time of the *Beit-Hamikdash*. The Jews left *Eretz-Yisrael* with its *kedusha* and went to look for economic status and mundane pleasures in other places (as many unfortunates do today).

Reb Yonatan clarifies the subject by referring to this statement of *Chazal* (the Talmudic Sages): The elders of Midian said to Bil`am (when he was going to curse *Yisrael*), "*Ami lo rachavta asusa*," why didn't you ride on a horse? The *Gaon* explains brilliantly:

> The elders of Midian told Bil`am, if you want to curse the Jews, you should tempt them by riding [not a donkey but] a horse, which was the status symbol of wealth, power, and achievement in those days, as are today's aircraft, missiles, and rockets.

In other words, tempt Jews with what they foolishly believe will give them prestige and power, so that they will sacrifice *ruchniyut* (spiritual) for *gashmiyut* (physical) values, or the *kedusha* of *Eretz-Yisrael* for materialistic values.

C. The Great Sin of Rejecting *Chesed-Hashem*

The abandoning or giving away *shtachim* of *Eretz-Yisrael* for political or social or economic reasons is a terrible rejection of the *chesed-Hashem*, of G-d's benevolence. This was the cause of the *churban* (the destruction of the Temple) – *mida keneged mida* (measure for measure).

The rejecting of *Hashem*'s favor is the premise in the Torah-function of *mida keneged mida*. [As stated in Chapter I of **Torah and Existence**, *mida keneged mida* is a basic Torah-law discussed by the *Tosefta* in *Mishna Sota*. The **Tosefta** is a 12th century *halachik* work that corresponds in structure almost exactly to the Mishna.] The *Tosefta* in *Sota* is the Torah-explanation of every episode in the history of mankind, in the struggle for survival from generation to generation. It clearly demonstrates *hashgacha-pratit* – divine guidance in history – and no rational mind can reject the facts mentioned in the *Tosefta.* As a basic Torah-law, *mida keneged mida* operates not occasionally, but constantly in history, whether one accepts it or not.

The greatest *chesed* of *Hashem* for *Klal-Yisrael*, for humanity, and for the *briya* (creation), is *Eretz-Yisrael* and its *kedusha*, since *Eretz-Yisrael* is the only place where all the *taryag-mitzvot* (the 613 *mitzvot*) of the Torah can be fulfilled. As Rashi comments on the first word of the Torah, *Bereishit* (In the beginning), G–d created the universe *bishvil hatorah u`bishvil Yisrael shenikriu reishit* – which means, G-d created the universe for the Torah (since the Torah is called His beginning) and for *Yisrael* (whose system of *kedusha* can be fulfilled only in *Eretz-Yisrael*). That is why *Eretz-Yisrael* is the greatest *chesed* of *Hashem*, both from the spiritual point of view and from the physical point of view, since *Klal-Yisrael*'s freedom, independence, and meaningful existence depends on its possession of *Eretz-Yisrael.*

In *galut* (exile), the destiny of the Jews was not and is not in their own hands. Every gentile nation persecuted and tortured them. Since *Eretz-Yisrael* is the greatest *chesed* of *Hashem*, for *Klal-Yisrael* to reject this *chesed* by abandoning *Eretz-Yisrael* could not but have the gravest consequences, in accordance with *mida keneged mida*: the *churban*, the *galut* persecutions, the Holocaust. And now, when there is no *shibud-malchiyot* (political subjugation), and when the Jews have returned to *Eretz-Yisrael*, to give away *shtachim* for political or other reasons is a rejection of the greatest *chesed* of *Hashem*. It also represents an utter lack of understanding of the present situation as well as a failure to remember the state of affairs of *Klal-Yisrael* in the past.

Only recall how much the Crusaders sacrificed to reach *Eretz-Yisrael* [and compare those who now look with envy on this rich land, and on *Klal-Yisrael* with genocidal hatred]. Therefore [and especially now, when the

State of Israel is more powerful than its enemies], for Jews to give away parts of their precious heritage, which they received through *hashgacha-pratit*, is not only to reject the *chesed* of *Hashem*, but also to erase history entirely [and commit the greatest folly]. Looking back upon their tortured past and the rule of *mida keneged mida*, Jews should be filled with fear to reject G-d's *chesed*, since *mida keneged mida* is the most formidable rule of the *hashgacha-pratit* in history.

D-1. Yielding *Shtachim* in Relation to *Pikuach Nefesh*

Much has been written about the question of giving away *shtachim* in relation to *pikuach nefesh*, saving human life. Many different opinions have been publicized recently by rabbis and laymen as well as by political-religious leaders. However, the *halacha* of *pikuach nefesh* is clearly explicated in the minutest detail and is applicable to any situation. Its sources are explicit from the time of Moshe *Rabbenu* to the present, in the Torah *she-ba`al-peh*, in the *Rishonim* and *Achronim* (the early and later rabbinic masters), and in the *poskim* (decisers of the law).[13] No objective *halacha*-man can find here two different opinions, unless his thinking is subjective or exposed to emotional or political inclinations. Whoever approaches the *halacha* of *pikuach nefesh* according to the rules of logic, hence without prejudice or wishful thinking, will see the truth clearly.

To explain this *halacha*, it is necessary to set forth certain aspects of the *dinim* of *pikuach nefesh* – the laws concerning danger to human life.

In the Torah, in *Bamidbar* (Numbers 35), we have the *halacha* of *goel-ha-dam* (avenger of blood). If one kills any person *beshogeg* (unintentionally), he has to go to one of the *arei-miklat*, one of the assigned cities of refuge. He stays there to avoid the *goel-ha-dam* – a relative who seeks revenge. If the killer goes out from the city of refuge, then, if the avenger kills him, he is *patur* – exempt. The *beit-din* (the court) will not punish the avenger. (Of course, if the avenger kills him in the city of refuge, he receives his proper punishment.)

The Rambam says in *Hilchot Rotzeach* that "a man who killed someone unintentionally and was exiled in the city of refuge, does not have to go out from there at any time." (Because if he leaves the city of refuge, he puts himself in danger of being killed by the avenger.) The Rambam emphasizes that "the *shogeg* does not have to go out from the city of refuge even to do a *mitzva*, for example, to be a witness in monetary cases or even in cases involving capital punishment, or to save someone from a fire or from drowning in a river..." (This follows logically from the *halacha* that a man is not obliged to sacrifice himself in order to save another man's life, since the value of every human life is equal.)

Emerging here is a most astonishing rule of the *halacha*. The Rambam continues: "Even if the entire Jewish nation needs his help, like Yoav the son of Tzeruya, he still does not have to go out to endanger his life." (This *halacha* of the Rambam is taken from the Talmud *Yerushalmi, Makot*.) We clearly see from this *halacha* that the value of any individual is infinite: a million individuals have no greater value than one individual. This applies to the millions of people that constitute *Klal-Yisrael*.

[In *Yesodei Hatorah*, chapter 5, *halacha* 1, the Rambam quotes Leviticus 18:5 concerning the *mitzvot* of the Torah, "*which if a man perform he shall live by them*". The *mitzvot* were given so that one may live by them and not die because of them.]

Accordingly, in his subsequent discussion of the *dinim* of *pikuach nefesh* in ***Yesodei Hatorah***, chapter 5, *halacha* 5, the Rambam confirms that danger to human life *docheh kol-hatorah* (sets aside the entire Torah) except for three transgressions – idolatry, illicit sexual relations, and murder. He writes,

> If gentiles say: "Give us one of you to kill, otherwise we will kill all of you," they should all be killed and not surrender a single soul of *Yisrael* to them. But if they single out [a specific individual] and say: "Give us this person or we will kill all of you," if he was guilty of a capital crime, like Sheva ben Bichri (see Samuel II, chap. 20), they may surrender him. However, if the person specified by the gentiles is not guilty of a capital crime, they should allow

> themselves all to be killed rather than give over a single soul. (The source of the Rambam's *psak-halacha* is explicitly stated in *Yerushalmi Trumot* 8:12.)

Not only does *pikuach nefesh* set aside the whole Torah when the danger to life is a certainty, but also *safek pikuach nefesh* – when there is a very low technical probability that the danger to a person is life-threatening. In that case, he is allowed to violate the *Shabbat* (or any other prohibition, except the three previously mentioned). In short, when it comes to *pikuach nefesh*, all prohibitions of the Torah are set aside, except "the three".

Notice that the *halacha* against sacrificing one person for the sake of the many follows from one of those three prohibitions: murder.

Now, suppose Gentiles approach to wage war against a town in Israel. The Rambam addresses this subject in *Hilchot Shabbat*, chapter 2. There he quotes the *Gemara* in *Eruvin* 45a:

Rab Judah stated in the name of Rab:

> If foreigners besieged Israelite towns, it is not permitted to sally forth against them and desecrate the Sabbath...on their account... This, however, applies only where they came for the sake of money matters; but if they came with the intention of taking lives, the people are permitted to sally forth against them with their weapons and to desecrate the Sabbath on their account. Where the attack, however, was made on a town that was close to a frontier, even though they did not come with any intention of taking lives, but merely to plunder straw or stubble, the people are permitted to sally forth against them with their weapons and to desecrate the Sabbath on their account.

Said R. Joseph b. Manyumi in the name of R. Nahman:

> Babylon is regarded as a frontier town and by this he meant Nehardea. R. Dostai of Bin made the following exposition: What is the significance of the Scriptural text, "*And they told David saying: Behold the Philistines are fighting against Keilah, and they rob the threshing floors*."

A *tanna* taught:

> Keilah was a frontier town and they only came for the sake of plundering straw or stubble, for it is written, "*And they rob the threshing floors*," and yet it is written, "*Therefore David enquired of the L-rd, saying, 'Shall I go and smite these Philistines?' And the L-rd said unto David: 'Go and smite the Philistines and save Keilah.'*"

The Rambam quotes this *Gemara* and writes:

> In every place, if *bairn al iskei nefashot* – which means, if they want to kill Jews, or wage war, or beleaguer a city without specifying any intention – the Jews are obliged to sally forth against them with their weapons and violate the Shabbat.

(The preceding does not contradict the aforementioned *halacha* prohibiting the sacrificing of one for the many, since here no person is specifically sacrificed, but rather, Jews are sallying forth to defend other Jews from Gentiles.)

This *halacha* has nothing to do with the concept of *milchemet-mitzva* or *milchemet-reshut* mentioned earlier, because here we are dealing with *defense*. *Klal-Yisrael* or a city must defend itself, and it is a *mitzva* for an individual to help defend his brother. This is defined in *halachic* terms as *milchemet-hatzala*, a war of defense. It belongs to the logical discourse or *sugya* of *pikuach nefesh*.

D-2. The Secular-Military Determination of *Pikuach Nefesh* is Completely Different from *Pikuach Nefesh* in *Halacha*

As far as giving away *shtachim* for *pikuach nefesh*, one has to know whether it is more dangerous to yield or not yield *shtachim*, an assessment that requires knowledge of all the logistics of defense as well as facts about Israel's political and international situation.[14]

According to the concepts of *halacha*, it is definitely dangerous to allow enemies near the borders of *Eretz-Yisrael*. The danger is proportional to the enemy's proximity: the closer he is to Jewish *shtachim*, settlements, or towns, the greater the danger to all the Jews who live in *Eretz-Yisrael*. As the Rambam says in *Hilchot Avoda Zara*, chapter 4, *halacha* 4, "A border city is never condemned as a seduced city – an *ir handachat bisfar* – lest gentiles become aware of it, invade, and destroy the whole of *Eretz-Yisrael*." (The source of the Rambam is explicit in *Sanhedrin* 16b.)

[The relevance of this *halacha* to the evacuation of Gaza is obvious.]

It has been argued that, just as the state of *pikuach nefesh* of a sick person must be determined by a doctor, an expert in that person's illness, so the *pikuach nefesh* of *Klal-Yisrael* in *Eretz-Yisrael* has to be determined by military experts. This argument is not valid, and the analogy is only apparent, since the *halacha* of *pikuach nefesh* in military affairs differs completely from the *halacha* of *pikuach nefesh* in medical affairs.

In any military situation, non-Torah military experts will choose to sacrifice a few Jews for the sake of many Jews, whereas, according to the *halacha*, and as noted, the *pikuach nefesh* of an individual and of a community are on an equal scale. Also, the military concept of safety differs greatly from *halacha*. In military matters it may be necessary to take into consideration political and other factors which may have consequences for *pikuach nefesh* in the future, whereas, in most cases, the *halacha* determines *pikuach nefesh* according to **the present situation**.

One should also bear in mind that when a doctor determines the *pikuach nefesh* of a sick person, there can be no conflict between the *halacha* and the medical decision, since the violation of *Shabbat* permitted by that decision is committed by a *Shabbat*-observant person. After receiving the expert's opinion, he would act according to the *halacha*.

Conversely, military experts not only advise the government about the logistical situation, but regardless of their military assessment, they must act according to the government's decision. As for the government, it does not inquire about the *halacha*; it acts according to its own judgment. Hence the *halacha*-man cannot accept the government's decision dogmatically. He has to know exactly the military logistics as well as the political and international situation to determine whether it is really *pikuach nefesh* not give away *shtachim*, or whether it will be more dangerous to give away *shtachim*. Only with such knowledge can he determine which alternative is *halachically* more dangerous.

[At this point it may be argued that Israel must withdraw from Gaza and other parts of *Eretz-Yisrael* because of international pressure, especially from the United States, on which Israel largely depends for its arms. I have refuted this argument in a paper cited below.[15] Here it should be noted that it was an Israeli government under Prime Minister Menachem Begin that **initiated** the negotiations that led to the 1978 Camp David Accord, the first international legal document that designated Judea and Samaria as the "West Bank". Moreover, the negotiations that culminated in the 1993 Israel-PLO Agreement were **initiated** by Israeli politicians in contravention of a 1985 ordinance prohibiting any contact with the PLO. Those clandestine negotiations, concluded by the government of Prime Minister Yitzhak Rabin in 1993, rehabilitated Yasser Arafat and legitimized his terrorist organization now ensconced in Judea, Samaria, and Gaza. By 1998, then Foreign Minister Ariel Sharon, contrary to his party's long-established principles, advanced the idea of a PLO-Palestinian state – this, more than two years before George W. Bush became the first American president to call for the establishment of such a state. And so it was with *unilateral disengagement*, a policy for which Mr. Sharon sought and obtained President Bush's endorsement *before* he submitted that policy to

Israel's cabinet for approval. It has not been American pressure so much as the folly and frailty but above all the unfaithfulness of Israeli governments, epitomized by its policy of "land for peace", that underlie Israel's retreat toward its pre-1967 borders, undoing thereby the miracle of the Six Day War. Hence Dr. Zimmerman's last statement,

> In military matters it may be necessary to take into consideration political and other factors which may have consequences for *pikuach nefesh* in the future, whereas, in most cases, the *halacha* determines *pikuach nefesh* according to the present situation,

while certainly correct, provides no support for the aforementioned conduct of Israeli governments.]

D-3. The Situation of *Pikuach Nefesh* of the *Yachid* is Not the Same as the *Pikuach Nefesh* of the *Tzibur*

[Only a minute portion of Dr. Zimmerman's discussion of this exceedingly complex *halachic* subject follows.]

[Concerning the individual] the Ramchal (Rabbi Moshe Chaim Luzzatto) provides a brilliant explanation in his ***Mesilat Yesharim*** (**The Path of the Just**). There he emphasizes the obstacles that sometimes prevent a person from doing *mitzvot*, such as fear for his security or its opposite, foolhardiness. The Sages in all places have said that a man should be especially attentive to his well-being and not put himself in danger even if he is righteous and a doer of good deeds. The Torah states (Deuteronomy 4:15), "*Be very watchful of yourselves.*" On the other hand, the Ramchal points out, "Our Sages further state, when a *mitzva* is to be performed, know that there is...appropriate fear and there is foolish fear. There is confidence and there is recklessness. The Lord blessed be He, has invested man with sound intelligence and judgment so that he may follow the right path and protect himself from...evildoers."

The criterion by which to distinguish between rational and irrational caution as to what may be a dangerous situation [for the *yachid* or the *tzibur*] is deduced from a general principle of *halacha* – again the principle of probability (*rov*). Thus, in all situations where we have to choose between two alternatives, the *halacha* requires us to examine the evidence pointing to the alternative having the greater probability of benefiting us. Even though a possibility remains that that alternative may be harmful, to refrain from choosing it would be a case of irrational caution. We must act according to what is most evident. For example, on the question of whether something is kosher or *treif*, the *Gemara* says, if we do not observe a *re`uta* (a defect), we do not assume it to be defective.

[An oft-cited example of the probability principle is the town in which nine butcher shops sell kosher meat and one sells non-kosher meat (*Hullin* 11a). Any meat found in the town is *halachically* kosher. Thus, unless there is an observable defect, what determines the status of the meat is not whether it was in fact ritually slaughtered but the *halachic* principle of probability. This principle places in question the government's self-restraint *vis-à-vis* Arab terrorists, a policy animated by fear of the unseen – an exaggerated fear of possible sanctions resulting from adverse world opinion (which is nothing more than ever-present but fluctuating anti-Semitism). Not only has this fear-driven policy resulted in horrific Jewish bloodshed, but as years of accumulated evidence indicate, it is precisely the government's retreat from zero tolerance for terrorism – which means its tolerance of evil – that arouses contempt for Israel on the one hand, and lends color of legitimacy to terrorism and the possibility of sanctions on the other. The government's irrational fear of unseen or uncertain or perhaps even bearable sanctions has superseded the *halachic* principle of probability.]

Where danger to life may be involved, the *Gemara* uses the expression, "*heicha deshechiach hezeka sha`ani*" – where there is a place of danger, the situation [or how one should act] is different [from other situations]. For instance, when a man has to walk a long way to do a *mitzva*, he can depend on providence (*hashgacha*) and be secure in his mind that nothing bad will happen to him, because *sheluchei mitzva einan*

nizakin – no evil happens to the agent of a *mitzva*. However, the *Gemara* says, in a place where there is *shechiach-hezeka* – a probability of danger, for example, where gangsters lurk or where dangerous animals prowl – the *halacha* requires him to avoid that area.

The Ramchal uses this *halacha* as a criterion of *yira* – fear and caution with respect to danger. The rule appears in a general discussion about zeal – *zerizut:*

> The type of fear and caution or self-protection regarding danger which is appropriate, is that which grows out of the workings of wisdom and intelligence. It is the type about which it is said (Proverbs 22:3), "*The wise man sees evil and hides, but the fools pass on and are punished*." [On the other hand] Foolish fear is a person's desire to multiply protection upon protection and fear upon fear, so that he makes a protection for his protection and neglects Torah and Divine service. The criterion by which to distinguish between the two fears and cautiousness regarding dangerous situations is that implied in the statement of our Sages of blessed memory (*Psachim* 8b): "Where there is a routine probability of danger, it is different." That is, where there is a recognized possibility of injury [think of the frequency of terrorist acts against Jews in Israel], one must be heedful, but where there is no apparent danger, one should not be afraid.

Along the same lines it is said (*Chulin* 56b), "We do not assume an imperfection where we do not see one." And "A wise man need be guided only by what his eyes see." (*Baba Batra* 13la) This is the very intent of the verse which we mentioned above: "*The wise man sees evil and hides…*" What is spoken of is hiding from the evil which one sees, not from that which might possibly materialize. And this is precisely the intent of the verse previously referred to: "*The lazy man says, 'There is a lion on the road...'*" which our Sages of blessed memory interpreted (*Dvarim Rabba* 8:7) as an illustration of the extent to which vain fear can go to separate a man from a good deed.

[The previous paragraph reiterates what was said above in refutation of the government's timid policy of self-restraint against Arab terror; and it may also be applied to refute the government's plan to retreat under fire from Gaza and other parts of Jewish land. It bears repeating that Israel's highest ranking security officials have stated that retreat will increase terrorist attacks. Indeed, the number of rockets fired from Gaza nearly doubled following cabinet approval of disengagement, which clearly illustrates how the government's fear and folly have magnified the danger of *pikuach nefesh*.]

Conclusion

Regarding the question of *shtachim*, which concerns *Klal-Yisrael*, it cannot be compared to the *pikuach nefesh* of an individual where a doctor can decide whether or not his condition is life-threatening. The *pikuach nefesh* of the *tzibur* must be decided by the Torah sages of the present generation. They must determine whether the existing situation involves a *re`uta* or flaw pointing *to pikuach nefesh*, or whether the present situation [like walking through a safe neighborhood] is a routine matter. To give away *shtachim* [especially to terrorists] is definitely not routine, but a situation with a *re`uta* of *pikuach nefesh*.

What has been said here is clear. The relationship of *pikuach nefesh* to giving away *shtachim* in *Eretz-Yisrael* is a very intricate *halacha*, and cannot be solved by one's wishes or intuitions or political inclinations. This *halacha* and its *psak* can be solved only by a *shakla-vetarya*, a discussion and debate of all the great *halacha*-people, meaning all the genuine *gedolei-haTorah* – the Torah giants of our generation. They must convene in one place and exchange all the *halachic* arguments for and against their respective points of view.[16] At the conclusion of this discussion and debate, a majority if not unanimous decision must issue from this conference.[17]

It must be clearly understood that only *gedolei-haTorah* – the great people of Torah who are universally accepted for their fear of Heaven and for their Torah learning – are qualified to decide the *halacha* concerning *shtachim*. No secular or pseudo-Talmudic scholars are qualified to be members of this conference. But it must be reiterated that without the meeting and debate of all the *gedolei-haTorah* in one

place at one time, any individual decision in relation to the *pikuach nefesh* of *shtachim* has no status of *psak-halacha* binding on *Klal-Yisrael* in *Eretz-Yisrael*.

Thus ends Dr. Zimmerman's discourse on "The Prohibition of Abandoning Land in *Eretz-Yisrael*". It would be well to bring this discourse to the attention of Israel's Government, above all to the luminaries and leaders of Israel's religious parties.

Endnotes

[1] Chaim Zimmerman, **Torah and Existence: Insiders and Outsiders of Torah** (Jerusalem: A.A.E. Inc., 1986). All notes are those of the present writer.

[2] See Paul Eidelberg (ed.), **Israel's Return and Restoration** (Privately published, 1987), and reprinted in Paul Eidelberg, **A Jewish Philosophy of History: Israel's Degradation and Redemption** (New York: iUniverse Inc., 2004), Appendix.

[3] I must point out that Dr. Zimmerman dictated **Torah and Existence** in English, which was not his mother tongue. I have therefore attempted to render awkward passages more readable without altering their meaning. My commentary in the text will usually appear between square brackets.

[4] According to the Babylonian Talmud, "No legislation should be imposed on the public unless the majority can conform to it." (*Avoda Zara* 36a) This principle is expressed differently in the Jerusalem Talmud: "...any legislation enacted by a court but not accepted by the majority of the public is no law." (*Avoda Zara* 2:8)

[5] In his testimony before the Knesset's Foreign Affairs and Defense Committee on January 5, 2005, *Shin Bet* Director Avi Dichter described some threats inherent in carrying out Prime Minister Ariel Sharon's plan to pull the IDF out of the Gaza Strip and northern Samaria. "In a situation where Israel is not in control of the Philadelphi corridor [which separates Gaza from the Sinai Peninsula]," Dichter warned, "terrorists arriving from Lebanon are liable to infiltrate through it into the Gaza Strip and there is the distinct possibility that in a short while the Gaza Strip will turn into South Lebanon." Dichter also cautioned that the current "trickle" of arms smuggling through the corridor is liable to turn into a "river". As to northern Samaria, Dichter said that "Samaria is an area with terrorist potential that already proved itself in the past. Therefore nothing should surprise us. If we evacuate the area and turn it into Area A, under complete Palestinian security control, we are liable to get an area there that operates by the Gaza model." According to Dichter, the number of Kassam rockets fired from Gaza nearly doubled following the cabinet approval of the disengagement plan in June. For a more detailed report, see **The Jerusalem Post**, January 6, 2005, pp. 3, 9.

[6] Yaakov Amidror, "Unilateral Withdrawal: A Security Error of Historical Magnitude", Jaffee Center for Strategic Studies, Tel Aviv University, Vol. 7, No. 3, December 2004, which contains a devastating critique of disengagement on strategic grounds. For a profound moral critique of disengagement from a retired Brigadier General, see the interview of MK Effie Eitam, **The Jerusalem Post**, January 13, 2005, pp. 13, 16.

[7] Dean of the Shaarei Mishpat Law College, Professor Emeritus Eliav Shochetman, has said that any Israeli government decision to expel people from their homes, even in the context of a diplomatic move, would represent a wanton violation of basic human rights and civil liberties protected under Israeli law (for example, Basic Law: Freedom and Human Dignity), as well as by the Universal Declaration of Human Rights, which states that it is illegal for sovereign governments to expel their own citizens from their homes, their private properties or from their farms. See Eliav Shochetman, "What is the Legal Basis for Israel and the Settlements?", **Israel Resource Review**, August 30, 2001, and Howard Grief, "The Law vs. Aharon Barak", **The Jerusalem Post**, October 22, 2004, which argues, in part, and contrary to Israel's Chief Justice Aharon Barak: "According to international law, Judea and Samaria are not 'occupied territories', as evidenced by several international agreements that have recognized the Jewish People's right to possess and settle the land [which agreements remain in force to this day]." See Louis René Beres, "Confronting 'Disengagement': Israel, Civil Disobedience and the Higher Law", in this policy paper. Beres, who was educated at Princeton (Ph.D., 1971), is Professor of Political Science and International Law at Purdue University. His work on strategic/defense matters as well as on issues of international law is well-known in Israel.

[8] When "*Halacha*" is capitalized, it refers to Jewish law as a whole; when not capitalized, it refers to a specific law.

[9] Theophrastus (372-287 BCE), Aristotle's student and successor at the Lyceum, referred to the Jews as "a nation of philosophers". Clearchus, another student of Aristotle, and in the first rank of peripatetic philosophers, records his having heard his master tell of an encounter with a Jew from Judea (the *ancient* name of "Palestine"). Aristotle relates that the man spoke Greek, and adds: "During my stay in Asia, he visited the same places as I did, and came to converse with me and some other scholars, to test our learning. But as one who has been intimate with many cultivated persons, it was rather he who imparted more to us than we to him." Numenius (fl. 150-176 CE), a Syrian philosopher who is regarded as a founder of neo-Platonism, greatly admired the Jews, especially Moses. He is recorded as having said, "what else is Plato than Moses speaking Attic Greek." For references to these and other Gentile admirers of the Jewish people, see Paul Eidelberg, **A Jewish Philosophy of History**, pp. 113-114, 120-121.

[10] To see why it is misleading to regard Judaism as a religion, see Paul Eidelberg, **Judaic Man: Toward a Reconstruction of Western Civilization** (Middletown, NJ: Caslon Co., 1996), ch. 1.

[11] See Paul Eidelberg, **Jewish Statesmanship: Lest Israel Fall** (Israel: ACPR Publishers, 2000; New York: University Press of America, 2002), ch. 3.

[12] "*Klal-Yisrael*" denotes the Jewish People as a whole, not merely the Jews now living in the State of Israel.

[13] This statement obviously deals only with a theoretical *halacha*, since the Jews were in exile. See note 16 below.

[14] See notes 5, 6, and 7 above. See Paul Eidelberg, "A Machiavellian Analysis of Ariel Sharon", **Nativ: A Journal of Politics and the Arts** (September 2004, in Hebrew), for evidence that in June 2002 the Bush administration gave the Sharon Government the green light to destroy the entire leadership of the Palestinian Authority.

[15] See Paul Eidelberg, "A Peace of Perfidy", **The Journal of Jewish Statesmanship** (Jerusalem: Foundation for Constitutional Democracy), Vol. I, No. 3, Summer 2001.

[16] This statement involves a practical *halacha*, and so does not contradict the statement referred to in note 14 above, which deals only with a theoretical *halacha*.

[17] Compare this statement with the decision of United Torah Judaism to join the Sharon Government as described above in the Introduction, section III. In reaching this decision, did the Council of Torah Sages consider public opinion regarding the expulsion of Jewish communities in Gaza in the light of the *halacha* stated in note 4 above?