



What is the halakhic status of the Israeli Occupation?

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Many groups and individuals have decried Israel's occupation of the Palestinian territories on moral or legal grounds. The purpose of this white paper is to envision what the values of the halakhic tradition might be if we considered the State of Israel and its occupation through those eyes. Its analysis will also inform to some extent how we would view the actions of a Jewish State if it were a halakhic entity—though, as we shall see, it is difficult to see the current state in those terms.

All forms of religious Zionism are enmeshed with and/or dependent upon international law. This is because of the “Three Oaths” that God bound humanity to, according to a midrash in Talmud Ketubot 111a: two upon Jews—not to return to the land of Israel en masse until the coming of the messiah, and not to rebel against the nations of the world—and one upon the nations, not to oppress the Jews too much. The halakhic permission to found a State of Israel in opposition to the oaths is therefore based on the agreement of the “nations” (i.e. the British Government, then the UN) to the plan.² This is what defined the Zionist movement halakhically as a “non-rebellious” movement, i.e. one in line with halakha. This “agreement of the nations” is then also intimately connected to the further unfolding of the State.

Jewish law recognizes two kinds of war. *Milkhemet mitzvah*, a commanded war, is often a defensive war, or else one explicitly commanded by the Torah. *Milkhemet reshut*, an “optional” war, covers all other categories and must be authorized by a King of Israel or by the Sanhedrin.³ The wars of 1948 and 1967 were considered *milkhamot mitzvah* because they were defensive wars—and,

¹ With significant input from Shaul Magid.

² Rabbi Menachem Kasher collects many of the sources arguing this point in “*Daat Torah al Hashevuah Shelo Yaalu Yisrael Kahomah*,” *Shanah beShanah* 1967. Reprinted electronically: <http://www.daat.ac.il/daat/kitveyet/shana/daat-2.htm> (accessed on 4.1.16)

³ See Jerusalem Talmud Sotah 23a, Mishneh Torah Hilchot Melachim ch. 5. The categories are actually more complicated than this. There is also another category, *milhemet hovah*/obligatory war. However, these are not relevant for this discussion. For an in depth review of the laws of war see Reuven Firestone, *Holy War in Judaism: The Fall and Rise of a Controversial Idea* 2012, Oxford University Press.

ultimately, because of the initial agreement of the world that Israel should exist. Therefore, also, the Israeli army was allowed to abrogate Shabbat laws, for example, to fight.⁴

The occupation, which exists as a result of the 1967 war, might be considered as a continuation of this *milkhemet mitzvah*/commanded war. If the nations of the world continue their acquiescence, the occupation could continue. This is not the case. The world sees the Palestinian territories as occupied under international law. The world also does not recognize the possibility of long-term Israeli control of those territories. As the former Rishon Letziyon, the Sephardic Chief Rabbi of Israel Rav Ovadyah Yosef Of Blessed Memory, said (in a 1988 address):

We learn from this that even for Nachmanides⁵ there is no commandment in our time to wage war and risk mortal danger in order to defend the control over the occupied territories against the opinion of the nations of the world. ... Therefore, when it is possible to return territories, and to prevent the danger of war with our enemies, we are obligated to do so because of the obligation of saving lives.⁶

THEREFORE there is no halakhic manner in which the continued fight for those territories by either the State or private Jewish actors (i.e. settlers) is considered a *milkhemet mitzvah*/commanded war. Neither can it be considered a *milkhemet reshut*/optional war since the latter would have to be sanctioned by the Sanhedrin and the High Priest.⁷

⁴ E.g. Rabbi Eliezer Waldenburg, *Tzitz Eliezer* 3:9:2: "It follows from the decision of the Tur that it is even permissible to initiate a *milkhemet mitzvah*/commanded war on Shabbat, that a contemporary war in the Land of Israel in which we are fighting against the Arabs in order to capture the Land, after the partial recognition of the nations of the world in our rights to our land, this war must be permitted, and even to initiate it on Shabbat if the attack is for the purpose of capture."

⁵ Nachmanides counted the commandment to settle the land as one of the 613 commandments from Torah. In contrast, Maimonides did not include it in his list of mitzvot.

⁶ *Mesirat Shtahim Me-eretz Yisrael Bimkom Pikuah Nefesh*, transcribed lecture given at the *Kenes Le-Torah Shbe'al Peh* at Mossad Harav Kook in Jerusalem.

⁷ Even the lesser claim that one is forbidden from allowing Muslims or Christians to live in the Land of Israel is given short shrift by Rav Ovadyah Yosef: "In any event, according to the opinion of most medieval sages, the prohibition of "they shall not reside in your land" does not apply to the Ishmaelites [Muslims] who are not idolators. It is universally agreed that in our time, when the Israel is not in a stronger opinion in relation to the nations of the world, so that it can expel the non-Jews from the Land of Israel, as a result of the fear of the nations, this law obviously does not apply (as Maimonides said). Moreover, even the non-Jews who are idolators who live amongst us, behold there is no possibility of moving them from their places. The opposite is true. It is incumbent upon the Government of Israel, as a result of International Law, to protect and preserve the Christian churches in the Land of Israel, even though they are house of idolatry and specifically for their rituals.... It is obvious that this weakens, from a halakhic standpoint, the power of the conquering of the land that was carried out by the IDF."

The previous is all well and good if one considers the State of Israel a halakhic entity. It is not clear, however, how one would do that. While there is a Chief Rabbinate, the Chief Rabbinate only has real power over personal status issues. Even in those cases, some decisions are open to being appealed and overridden by the Knesset and/or the Supreme Court. There is no area of government, especially not defense or foreign policy, which is under the sway of the Rabbinate. This is not surprising since Israel is not a theocracy.

The State of Israel is a democracy, and therefore its laws are fashioned by its legislative body and adjudicated by its court system. "God" is not mentioned in the Israeli Declaration of Independence (the closest that the authors were able to get was "*tzur yisrael*" /the rock of Israel), nor is halakhah as a source of law (here the closest that the authors got was "*le-or hazonam shel nevi'ay yisrael*" /as envisaged by the prophets of Israel).

Beyond the fact that the State is not governed by a halakhic system, its legislative body is not entirely Jewish, and one third of its voting citizens are not Jewish. Moreover, of those Jewish citizens, a great many are not believers, nor do they wish to be governed by halakhah. Once we set aside this conceit, it is much easier to judge the continued occupation on purely legal and moral grounds. The law is pretty clear. An overwhelming majority of international legal experts see the ongoing Israeli occupation of Palestinian territory as contravening international law⁸.

⁸ See, for example, Nathaniel Berman, "San Remo in Shilo: The settlements and legal history," <http://blogs.timesofisrael.com/san-remo-in-shilo-the-settlements-and-legal-history/>. Commenting on the Levy report (which argued that the settlements were legal, and that there was no occupation) Berman writes: "The uncanny quality of the Commission's report for most international lawyers stems, in the first place, from the fact that its international legal arguments have virtually no support within the discipline, beyond the narrow circles of former or present Israeli government officials and a handful of non-Israeli Jews associated with staunchly right-wing views on Israel. It would not be an exaggeration to say that at least 90% of international lawyers – including the International Court of Justice – firmly reject the position that the report announces as representing the "point of view of international law." Of course, one can argue that the overwhelming majority of international lawyers are wrong, either legally or morally or both. But it is odd, to say the least, to declare a position the "point of view of international law" without even bothering to mention that all but a handful of international lawyers, and all states but Israel, reject it. The oddity of this would be true in any discipline, but even more so in international law, where "legal opinion," known to lawyers under the Latin phrase "*opinio juris*," plays such a large role in the determination of legal rules. It is as though the Commission were operating in an alternative legal universe, populated only by a handful of pro-settler lawyers. Aeyal Gross, "If there are no Palestinians, there's no Israeli occupation," <http://www.haaretz.com/misc/article-print-page/if-there-are-no-palestinians-there-s-no-israeli-occupation-1.449988>

Morally, the acts of appropriating land⁹ (by private individuals or by the State) are simple theft¹⁰; the acts of killing are simple murder¹¹; checkpoints and other obstruction of free movement are human rights abuses¹². All these acts are forbidden and they are no less forbidden because they are woven together in a blanket of occupation.

That the occupation itself is not an act of self-defense, that it is not a buffer against security threats, is attested to by most of the security establishment, past and present.¹³

In sum, the claim for Israel's wars to have a *halakhic validity* is bound up with the notion of a legitimacy given to the State of Israel by international legal bodies. These legal bodies overwhelmingly do not give their consent to the occupation. Thus, even if the State of Israel and its agencies, such as the IDF, were halakhic subjects, to be analyzed by halakhic categories, there would be no halakhic legitimacy for the occupation. However, the fact of the matter is that the State of Israel is not a halakhic subject per se, and therefore must be judged by the legal and moral norms that democratic countries are judged by. Seen in this light the occupation is illegal, it gives rise to immoral acts such as land appropriation and murder, and is self-defeating since it erodes the democratic core of the State of Israel and decreases the possibilities of peace.

⁹ As documented by Peace Now's Settlement Watch project. http://peacenow.org.il/eng/Settlements_Data

¹⁰ Expressly forbidden under the Fourth Geneva Convention, as is the movement of a settler population on to occupied territory.

¹¹ <http://www.breakingthesilence.org.il>

¹² <http://www.en.machsomwatch.org>

¹³ See, for example, the testimony of the heads of Israel's secret service in the documentary *Gatekeepers*. <http://www.sonyclassics.com/thegatekeepers/>