The Israeli Nation-State

Political, Constitutional, and Cultural Challenges

Israel: Society, Culture, and History

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EDITED BY
Fania Oz-Salzberger and
Yedidia Z. Stern

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DANIEL STATMAN

Questions concerning the right of the Jewish people to its land versus the rights of its non-Jewish inhabitants have troubled Zionist thinkers since the earliest days of Zionism. The realization that the implementation of this right, namely, the establishment of the State of Israel, involved the displacement of hundreds of thousands of Arabs from their homes only reinforced the resulting ethical dilemma.[1] The dilemma surfaced again after the Six-Day War as a result of the settlement project throughout what has become known as "Greater Israel." Perhaps I should make it clear from the outset that the object of these introductory words is not to say that the Jewish people do not have a right to the territories gained in 1948 and then in 1967, but only to suggest that the settlement that followed the conquest must have created a dilemma in the Zionist mind and—more importantly—that this dilemma could not have escaped the notice of religious thinkers. My aim in this chapter is to illustrate the way in which the latter group addresses this dilemma. I attempt to show that although "officially" the religious camp relies on religious considerations to solve the dilemma, at some point they shift gears and turn to the considerations and language of morality.

More precisely, I make two claims. The first is that the moral dilemma concerning the right of the Jewish people to the Land of Israel ("The Right to the Land") cannot be adequately resolved by religious considerations, but at some stage must be replaced by moral ones. The second is that the arguments put forward by religious writers fluctuate between religious and moral justifications, and indicate dissatisfaction with the religious claims. In other words, I demonstrate the failure of the attempt to bypass the relevant moral discourse by relying on religious discourse in its stead, and I show that this failure is implicitly recognized by religious writers. If I am right, then the problem of the Right to the Land, whether in the context of the Zionist project in general, or in the context of settlement throughout Judea and Samaria in particular, is far more vexing for religious thinkers than either religious or even non-religious thinkers tend to assume.

In the first part of the chapter, I present what seems to be the fundamental philosophical dilemma faced by attempts to offer a religious justification for the Right to the Land and for the Zionist settlement in the occupied territories. In the second part, I illustrate this dilemma through a critical analysis of the attempt to base the Right to the Land on a Talmudic principle, according to which conquest determines ownership.

THE RIGHT TO THE LAND AND THE *EUTHYPHRO* DILEMMA

As elaborated elsewhere,[2] the fundamental dilemma in any discussion of the relation between religion and morality was raised many years ago by Socrates in the dialogue called *Euthyphro*, hence "the *Euthyphro* dilemma." The heart of this dilemma is the claim that religious justification for moral claims is either invalid or begs the question of the validity of the claims themselves. Suppose one offers a religious justification for the claim that X is a moral obligation, namely a claim that is anchored on some proposition about God, typically that God issued a command to do X. The logic of this argument is simple.

1) God commanded that X be done.
2) Therefore, X is a moral obligation.

The obvious question that arises is the following: how can a commandment by God logically justify the conclusion that what God commands *is a moral obligation*? A possible answer is that the claim assumes what is known in the philosophical literature as a "divine command theory of morality," according to which morality depends on religion. This theory, however, encounters serious philosophical difficulties, of which the claim at hand is an excellent example. Without relying on other premises, the fact that some authority—human or indeed divine—commands its subordinates to perform X seems to fall short of justifying the conclusion that X is a moral obligation. Moreover, even if this view could be defended from a philosophical point of view, it has been almost completely rejected in Jewish tradition.[3]

In response to this difficulty, an alternative answer might be proposed. On this answer, we are entitled to move from the premise that God commanded X to the conclusion that X is a moral obligation on the basis of the assumption of God's moral perfection. Because God is all-righteous and all-just, if He commanded X, then X is necessarily morally required. However, this solution to the above dilemma comes at the cost of relinquishing, or significantly weakening, the religious basis for X. It implies that, in the final analysis, X is a moral obligation not because God commanded it, but because of substantive moral reasons that guide the actions of God, so to speak. The fact that God commanded X provides us with a strong reason to *believe* that X is correct, which is not the reason *why* it is correct. Therefore, if one wishes to understand why X is a moral obligation—to really grasp the *reasons* that support this assertion—then simply claiming that God issued a command that X be done does not offer even the beginning of an answer.

To be sure, we often trust the advice of professionals, such as doctors and computer technicians, and follow their instructions, even without fully understanding the basis for their advice. When the instructions of such professionals appear reasonable, it is indeed rational to follow them. When they appear unreasonable (such as "drink three cups of paraffin a day," or "immerse the computer in the bath to get rid of its virus") we ask for explanations and try to understand them. Similarly, the move from premise (1) to conclusion (2) in the argument above appears natural and

smooth only insofar as the command is perceived as compatible with basic moral concepts. When, however, it is not, the assertion "X is God's commandment" is not very helpful in explaining how X might be a moral obligation, and one is forced to search for moral reasons that apply to the case at hand.

What is true about God's commands is true also of His deeds, namely, of whatever happens in the world (if one assumes some form of divine providence). Saying that a particular event is good merely because God brought it about does not provide any clue to understanding why this is so, especially if the event raises disturbing thoughts, such as in cases involving the deaths of innocent people. In such cases, the assertion that God is behind the act not only fails to solve the problem, but actually also aggravates it, leading to the following question: How can an all-just and all-benevolent God bring about, or even allow, such outcomes to occur?

In light of these considerations, it is not surprising that philosophers and commentators throughout history have attempted to provide "standard" moral explanations for apparently problematic commandments, as well as for apparently unjust acts and events. They do not attempt to resolve the theological-moral difficulty raised by the death (or the killing) of innocent people on the basis of statements such as "it was the will of God," but offer alternative explanations, such as that the innocent victim will be compensated in the world to come, that his death was necessary to prevent him from sinning and thus harming himself or society in the future, and so on. The working assumption of these commentators is that, first, God's commands and deeds are in keeping with the justice, goodness, and loving kindness that are always attributed to Him and, second, that human beings, despite their limited understanding, can explain the compatibility between divine actions or commandments and justice. As mentioned elsewhere, such explanations turn the concept of divine goodness from an abstract idea, the acknowledgment of which is an empty statement, to a concrete idea, which can be the source of inspiration and a model for imitation.[4]

With this brief introduction in mind, let us now turn to the question of the Right to the Land. According to a widespread view, this right, which is supposed to establish the legitimacy of the occupation and settle-

ment after the wars of 1948 and 1967, is grounded in religious premises. R. Isaac said:

> It was not necessary to begin the Torah [whose main objective is to teach commandments, with this verse] but from "This month shall be for you" (Exodus 12:2), since this is the first commandment that Israel was commanded [to observe]. And what is the reason that it begins with Genesis? Because of [the verse] "The power of His works He hath declared to His people in giving them the heritage of the nations" (Psalms 111:6). For if the nations of the world should say to Israel: "You are robbers because you have seized by force the lands of the seven nations [of Canaan]," they [Israel] could say to them, "the entire world belongs to the Holy One, Blessed Be He. He created it and gave it to whomever it was right in his eyes. Of His own will He gave it to them and of His own will He took it from them and gave it to us."[5]

The claim that the land belongs to the People of Israel is based here on two assumptions: that the Land of Israel belongs to God, as does the entire world; that God took this land from the Seven Nations who dwelt there and gave it to the Jewish people. For many years, religious philosophers and educators have drawn on these words of Rashi as the standard justification for settling the land. The great Talmudic scholar, Ephraim Elimelech Urbach, noted the prevalence of this line of argument fifty years ago:

> The young religious person generally appears, at least outwardly, to have no problems. As far as he is concerned, all the questions have already been answered . . . One example will suffice, from a confused article in *De'ot*, 1963. The author writes: "The secular Jew has to find many contorted arguments to explain the return of his people to its land after thousands of years of wandering . . . It is even more difficult for nonbelievers to explain, if only to themselves, the evacuation and expropriation of the Arabs and the settlement on their land at the time of the War of

> Independence, and self-accusation among them [the Jewish non-believers] is rife today. The religious person, however, conveys internal calm and confidence in the necessity and justifiability of this act. The explanation is familiar to anyone who has ever read a portion of the Bible with Rashi's commentary."[6]

It is interesting that the author to whom Urbach is referring takes for granted that the War of Independence involved "evacuation and expropriation [rather than voluntary departure or escape] of the Arabs and the settlement on their land" long before the revelations of the New Historians and the rise of post-Zionism. Moreover, he believes that such acts created a moral problem, one so serious that, viewed from a non-religious point of view, it cannot be resolved. Nevertheless, merely by virtue of his reading of Rashi, the young religious person conveys "internal calm and confidence in the necessity and *justifiability* of this act" (italics added). What was perceived as an act of unjust eviction prior to the reading of Rashi, is perceived as necessary and just after the reading.

The assumption that only believers have a good answer to the question of the Right to the Land is often used to show the apparent advantage of religious Zionism over secular Zionism, which is presented as resting on very shaky ground. A clear expression of this line of thinking in recent times can be found in an article by Emunah Elon, a predominantly religious writer, in a special edition of the magazine *Eretz Acheret*, which was devoted to the question of how internal decisions within religious Zionism might influence the future of Israeli society. According to Elon, the secular call for a withdrawal from Judea and Samaria ultimately undermines the right of Jews to reside in Tel Aviv or in Haifa, that is to say, it undermines the entire Zionist project:

> If the Zionist movement is not founded on the "religious" basis of the divine promise to our ancestors, it has no raison d'etre in Judea and Samaria or within the boundaries of the Green Line, either. It is becoming increasingly clear, even if not everyone will admit it yet, that only the Torah can justify the ingathering of Jews of the past 150 years from all over the world to the heart of

> the Middle East, and the price—which all would agree has been heavy—that the Arab inhabitants of the land have been forced to pay."[7]

Elon does not deny that Zionism has demanded a heavy cost from the Arabs, and she apparently believes that the cost is so high that it cannot be justified by standard moral considerations. In her opinion, only the "Torah of Israel" can offer justification for such a high cost.

Can it really? Let us recap the moral question to be resolved. A nation dwells on some territory for many generations. Another nation arrives, evicts, and expropriates the first nation and settles on the land. Such acts are indisputably morally problematic. To justify them, the aggressive nation claims that the evacuation and dispossession of the land was performed on God's authorization; therefore, there is no room for moral concern. But the problem is not only unresolved, it is exacerbated. It is not resolved because this solution does not offer the smallest lead toward understanding why removing the first nation from its land was *right*. As explained above, the very fact that God commanded or authorized some act is insufficient in itself to explain the justice of it, especially when the act looks very problematic from a moral point of view. The problem is exacerbated because it points to a troubling difficulty regarding the nature of God: What kind of a god arbitrarily uproots a nation from its land and settles another nation in its place ("gives according to His will, and takes according to His will")?

We can, therefore, formulate the fundamental difficulty in the religious answer to the question of the Right to the Land as a version of the *Euthyphro* dilemma. The religious answer asserts that the Jewish people has the right to its land (and hence, presumably, is allowed to evict and expropriate the non-Jewish inhabitants) because God has commanded them to do so. Now God's authorization is either based or not based on moral considerations. If it is—then, ultimately, the Right to the Land is based neither on divine will, nor on divine power ("The power of His works He hath declared to His people in giving them the heritage of the nations"[8]), but on "regular" moral considerations. If that is the case, then to understand why the Jewish people has a moral right to its land, these

considerations must be highlighted and defended. If, however, God's authorization is not based on moral considerations, but rather on His arbitrary will, then the proposed answer is completely unhelpful in regard to solving the *moral* problem.

A possible reaction to this dilemma would be to say that God always acts righteously and justly, therefore His prescribed distribution (that one nation will inherit one land, and another nation will inherit another) is morally sound. Nevertheless, our limited minds are unable to comprehend why this is the case, just as we cannot comprehend why some righteous people suffer or why *Mamzerim* (children of marriages forbidden by the Torah) should be punished for the sins of their parents. On this line of argument, relying on God's command does not assume that He acts arbitrarily, but neither does it make God's command superfluous in a way that would enable us to rely directly on the relevant moral considerations.

This is a reasonable reaction, but it means that believers fare no better than non-believers *vis-à-vis* the moral challenge posed by the occupation and settlement in the Holy Land, and it is unclear how they might acquire the internal calm and "confidence in the necessity and justifiability of this act" referred to by Urbach.[9] By claiming that their minds are too limited to comprehend how it might be morally sound to evict a nation from its land and settle another nation in its place, the believers admit *that they have no satisfactory answer to the question regarding the moral Right to the Land*. Their position in relation to the moral problem at hand is akin to that of those who generally trust their doctor, but who have received seemingly unreasonable instructions from him in specific circumstances. They might obey the doctor by virtue of their trust in him, but would do so with uncertainty and reluctance, and would not pretend to their doubting friends that they understand why it is right to follow the doctor's peculiar instructions.

A different response to the above dilemma is to distinguish between human and divine justice and to suggest that, although human justice fails to provide an explanation for the Right to the Land, divine justice *does* provide an answer, and that it is on this type of justice that the religious claim rests. However, the distinction between these two notions of justice is not entirely clear. If the concept of divine justice refers to how

God applies the principles of justice—those same general principles that are incumbent upon everyone—then this distinction seems to resemble a version of the previous response. It says something like the following: God indeed acts according to the tenets of justice, but as His intentions are hidden from us, we do not really understand His actions. If, however, what is meant by "divine justice" is that God acts in accordance with principles that are different from, and even opposed to, our familiar principles of justice, then this answer comes very close to the view that God acts according to His will rather than according to what is just.

Furthermore, study of the Bible shows clearly that the moral expectations from God, so to speak, are that He will act according to justice in its usual sense, not according to some other notion of justice. When Abraham complains that indiscriminate annihilation of the entire population of Sodom contradicts the divine values of righteousness and justice, God does not silence him by saying something like "my justice is of a different kind," but accepts as self-evident that the killing of a righteous person along with a wicked person is unjustified. In a similar way, Jeremiah takes for granted that justice demands reward for the righteous and retribution for the wicked, and therefore challenges God: "Right wouldest Thou be, O Lord, were I to contend with Thee, yet will I reason with Thee: Wherefore doth the way of the wicked prosper? Wherefore are all they secure that deal very treacherously?" (Jeremiah 12:1). The idea of divine justice, therefore, cannot rescue the believer from the aforementioned dilemma.

In sum, if believers admit that the Zionist enterprise is morally problematic because of its repercussions for the Arab inhabitants of the land, they cannot circumvent this problem by drawing on religious claims. If they recognize the existence of a moral problem, they have no choice but to dirty their hands, as it were, and delve into the relevant moral discussion to respond to the internal criticism, i.e., the voice of conscience, as well as the external criticism, i.e., the allegations of robbery voiced by Jews and non-Jews alike. It was to this conclusion that I was referring in the second part of the title to this chapter: "From moral justifications to religious justifications and back again." The Right to the Land raises a *moral* problem, and as such directs us to moral considerations. But such

considerations seem intimidating to some religious people, who fear that taking them seriously might force them into positions that they would rather not take. Hence, they try to avoid such considerations and rely, instead, on religious ones, such as Rashi's commentary. Nevertheless, because of the deep connection between divine commands and morality, which was explained above through the *Euthyphro* dilemma, exploring the religious considerations ends up restoring, so to speak, the suppressed moral considerations.

Let me now return to Rashi's words (cited above), and examine whether they indeed support the claim that the Jewish people has an eternal, unconditional right to the land, a right that necessarily takes precedence over the rights of others. Rashi does not say that the land belongs to the Jewish people, or to any other nation, but that it belongs to *God*, who, at a certain point in time, gave it to the Seven Nations, and then, at another point in time, took it from them and gave it to the Jewish people. The expression "He gave it to them by fiat, and by fiat, He took it from them and gave it to us" indicates the fragility and instability of any human entitlement to the land, as such a right depends completely on God's will. In the same way that He willed to take it from the Seven Nations, He could change His mind and give it back to them.

Moreover, as evident from many places in the Bible, the land is taken from its inhabitants not through some arbitrary act, but as a result of their moral-religious level:

> Defile not ye yourselves in any of these things; for in all these the nations are defiled, which I cast out from before you. And the land was defiled, therefore I did visit the iniquity thereof upon it, and the land vomited out her inhabitants. Ye therefore shall keep My statutes and Mine ordinances, and shall not do any of these abominations; neither the home-born, nor the stranger that sojourneth among you—for all these abominations have the men of the land done, that were before you, and the land is defiled—that the land vomit not you out also, when ye defile it, as it vomited out the nation that was before you. (Leviticus 18:24–28)

According to these and many similar verses, the right to live in the Land of Israel is conditional on the moral and religious level of the nation wishing to dwell there. Any nation that does not meet the conditions set by God will be evicted, or "vomited out," to use the harsh words of the Torah. This principle applies to Jews and non-Jews alike: the Land of Israel vomited out the Canaanites because of their shameful deeds ("and the land will vomit out its inhabitants"), and if the Israelites imitate such deeds, they will be vomited out likewise. Even though God has promised to eventually return the Jewish people to its land (hence "the promised land"), the right to inhabit the land at any specific point in history is always conditional. Furthermore, if the nation that dwells in the land at a given point in time does *not* defile it through bad behavior, it cannot be evacuated from it even if this means a delay in the Jewish people's return to its land. This is clear from the Covenant made between God and Abraham: "And in the fourth generation they shall come back hither; [i.e., only the fourth generation, and not before] *for the iniquity of the Amorite is not yet full*" (Genesis 15:16).

What follows is that not only does the religious viewpoint fail to justify the internal calm and with it the unshakable confidence in the Right to the Land mentioned earlier, but it has quite the opposite effect: It leads to rather somber thoughts about the existence of this right in the current historical period. In the Israeli reality of corrupt leadership, increasing gaps between the rich and poor, public desecration of the Sabbath and many other sins that do not bear mentioning here, the warnings in the Torah about the repercussions of such behavior from the point of view of the Right to the Land should be taken (again, from a religious point of view) in all seriousness. In this iniquitous atmosphere, frequently lamented by rabbis, it is difficult to understand how believers can, nevertheless, proclaim that the Jews of today have an unequivocal right to the land, and state confidently, as did those at the time of Ezekiel: "The land is given us for inheritance" (Ezekiel 33:24).

Had Ezekiel lived today, he would surely have answered them as he answered our ancestors: "Wherefore say unto them: Thus saith the Lord God. Ye eat with the blood, and lift up your eyes unto your idols, and shed blood; and shall ye possess the land? Ye stand upon your sword, ye

work abomination, and ye defile every one his neighbor's wife; and shall ye possess the land?" (Ezekiel:25–26).

Finally, the fact that inheriting the land depends on the behavior of the people does not contradict the recurring biblical promise that the Land of Canaan will be given to the Jewish people. This is because this promise means simply that at the end of days, after repeated cycles of sin-exile-repentance, the Jewish people will repent, gaining full entitlement to the land, and will then inhabit it forever (just as the other nations will inhabit their own lands at the end of days[10]).

THE RIGHT TO THE LAND AS BASED ON CONQUEST

Another example of how the religious discussion on the Right to the Land is logically compelled to rely on moral claims can be found in an article by R. Abraham Sherman, who refers to Israel's conquests in 1948 and 1967 to establish the right to the occupied land. This is how he develops his argument. In his introduction, Sherman declares unequivocally that "the legal basis for Jewish sovereignty over the Land of Israel is rooted in The Book of God's Law, the Bible."[11] Even the arguments against this right—raised by non-Jews—were based, at least in earlier times, on (distorted) interpretations of the Bible, as is apparent in the story of Alexander of Macedonia in the Babylonian Talmud (Tractate Sanhedrin 91a). This notwithstanding, says Sherman, the current arguments against the Jews' Right to the Land are not based on biblical exegesis, but on "the nature and the legality of Israel's wars with the Arab states and the Palestinians." Therefore, it is worthwhile to examine the halakhic view on this matter and to present "a halakhic clarification of the legal validity of Israel's wars for determining sovereignty within the nation, but, nonetheless, from the Torah point of view." However, as I attempt to show in this section, the discussion of "the Torah's point of view" eventually requires that moral considerations are addressed under what Sherman calls "the ethical (*yosher*) test."

Now let us take a detailed look at the way halakha is supposed to establish the "legal validity" of the Jewish people over the land between the Mediterranean Sea and the Jordan River, and at the way this validity relies—somewhat unexpectedly—on moral considerations. The argument

is based on the Talmudic explanation of certain verses in the Bible that ostensibly teach us nothing, and therefore "ought to be burned." However, says the Talmud, these verses express a fundamental biblical principle:

> R. Shimon ben Lakish said: There are many verses which to all appearances ought to be burned but are really essential elements in the Torah, [e.g.,] "and the Avvim, that dwelt in villages as far as Gaza, [the Kaphtorim, that came forth out of Kaphtor, destroyed them, and dwelt in their stead]." (Deuteronomy 2:23) In what way does this concern us?? Inasmuch as Abimelech adjured Abraham, saying "that thou wilt not deal falsely with me, nor with my son, nor with my son's son" (Genesis 21:23), "the Holy One Blessed be He said Let the Kaphthorim come and take the land away from the Avvim, who are Philistines, and then Israel may come and take it away from the Kapthorim." Similarly, you must explain the verse "For Heshbon was the city of Sihon the king of the Amorites, who had fought against the former king of Moab, and [taken all his land out of his hand, even unto the Ammon]" (Numbers 21:26). In what way does this concern us? Inasmuch as the Holy One Blessed be He had commanded Israel, "Be not at enmity with Moab" (Deuteronomy 2:9). He therefore said: Let Sihon come and take away the land from Moab and then Israel may come and take it from Sihon. This, indeed, explains R. Papa's saying: "Ammon and Moab were rendered clean [unto Israel] through Sihon." (Tractate Hulin 60b)

According to Resh Lakish, the abstruse and apparently redundant historical information that the Kapthorim destroyed the Avvim [the Philistines] and inherited their land helps us resolve a disturbing difficulty in the Bible. Abraham makes a covenant with Abimelech, King of the Philistines, and promises him that neither he nor his descendants will take Abimelech's land. Yet when the land of Canaan was conquered by the Israelites, they did fight against the Philistines, apparently violating the covenant. How could they do this? The explanation offered by the Talmud in this paragraph is that since the Kaphthorim had conquered the

Philistines before the Israelites arrived and had taken possession of the entire territory, Israel's conquest over the Kapthorim did not constitute a breach of the covenant with Abimelech. Similarly, regarding Sihon, King of the Amorites, who had fought the King of Moab and conquered all his land: this conquest and the change in possession implied explains why Israel was permitted to conquer the land of Moab despite the command, "Be not at enmity with Moab." On conquering Moab, Sihon gained full ownership over this territory, thus invalidating the prohibition against conquering it: The biblical prohibition was against taking *Moabite* territory, but when the Israelites arrived in the region, it had already become *Amorite* territory. In R. Papa's words, "Ammon and Moab were rendered clean in Sihon."

The principle that the Talmud formulates here determines that the conquest of land in war transfers full ownership to the conqueror without any residue. Although the accepted rule in halakha is that land cannot be stolen, namely, that landowners never lose their claim to land stolen from them, the law regarding land taken in war is different. R. Shneur Zalman of Liadi (1745–1812) views this law as anchored in the authority of the king: "If a king—even a gentile king—conquers another state in war, he acquires it together with all the rivers and forests in it. (See Maimonides, *Laws of Kings*, end of Chapter 4, and how much more so regarding Israel). If he sells or gives a forest in it to one of his subjects, that person acquires full ownership over it . . . For this is one of the statues and laws of kingship, that the entire land with its rivers and forests belongs to the king, be it his native country or the lands that he conquers in war. And the statues of kingship are binding, just laws, like the laws of the Torah."[12]

The argument is simple. The laws of kingship are just as binding as the laws of the Torah; these laws grant the king (or any political ruler) ownership over the territory that he conquered in war. Therefore, the implications of such conquest in terms of ownership are binding not only from a political-legal point of view (according to the Laws of Kings), but also from a halakhic point of view. It is revealing that in the section quoted, R. Shneur Zalman connects the aforementioned law to Maimonides' statement in the *Laws of Kings*, which determines that territories gained in war by the King of Israel "belong to him. He may apportion them to

his servants and soldiers as he desires and keep the remainder for himself. In all these matters, the judgment he makes is binding."[13]

According to R. Shneur Zalman, then, the law that enables the expansion of borders through conquest does not derive from the unique status of the king of Israel, or from the value of the land of Israel, but is a corollary of a general law that grants kings the power to extend the borders of their kingdoms through war.

What is the implication of applying this principle to Israel's conquest in the War of Independence? According to R. Frank, who is quoted by R. Sherman, the principle implies that all the conquered land and property are considered to be in Jewish possession. Contrary to this, according to R. Herzog, the conquest itself does not entitle transfer of the conquered territory to the conqueror's possession, unless he has a clear intention to settle the territory, and has received international approval for this: "Even though I have publicly stated that we gained ownership over the land through conquest in war, I now know that the government of Israel has not yet declared ownership through conquest. This has not yet been decided, and it depends on the decision of the nations in the peace agreement."[14]

In R. Sherman's opinion, R. Herzog is correct, because, as explained by R. Shneur Zalman from Liadi above, the validity of ownership through conquest is derived from the Law of Kings and from the principle that the Law of the King is the Law (*Dina Demalkhuta Dina*). Therefore, "when international law does not authorize ownership through conquest, and the local government has not yet fixed the boundaries, the conquest might not yet constitute ownership."[15] In any event, it is clear that, according to R. Herzog, conquest that does receive international approval does grant the conquerors ownership over the territory taken by war.

An argument on these lines was developed by R. Saul Yisraeli, identifying the British conquerors as the landowners, and basing his argument on the UN approval to transfer ownership of the land to the Jewish people: "The landowners are considered to be those who acquired ownership through conquest in war, and these were the British, who had conquered the land and continued to rule it as custodians on behalf of other nations to whom they had transferred the right of ownership (a right they had

obtained through conquest in war) and from whom they received the mandate at that time. If so, the decision made by these nations, who were in possession of the land, is valid. And the Arab peoples have no right to the land . . . *because ownership through a war of conquest turns the conqueror into landowner* . . . and the state, in itself, is legal according to the Torah point of view."[16]

This is quite a surprising argument. According to R. Yisraeli, the relevant conquest for determining the Jewish people's Right to the Land was not the Jewish-Israeli conquest over the Arabs in 1948, but the British conquest over the Turks in 1917. The British became landlords through conquest, and gained legal power to transfer the decision about the fate of the land to the League of Nations (and afterwards to the United Nations), who decided to bequeath the land to the Jewish people to establish an independent state.[17]

The principle that conquest transfers ownership seems morally problematic. Granting ownership to the conqueror of any land or property is tantamount to awarding a prize for aggression and encourages further aggression. It goes without saying that the principle is diametrically opposed to existing international law, which unequivocally states that the occupying power is forbidden to annex territory conquered in war. It accords more with the rules of the jungle or of the Mafia than with the settling of international relations. This difficulty has not gone unnoticed by halakhists, and in response, they interpreted the principle under discussion as applicable only to *justifiable* conquest. In halakhic terms, it was suggested that one must distinguish between the Law of the King (*Dina Demalkhuta*), which is binding, and robbery by the king (*Hamsnuta Demalka*), which is not, and has no legal validity. R. Sherman concluded that when a state wages war for an unjust cause, the *Dina Demalkhuta* principle does not apply, and hence, ownership of the land taken in that war does not transfer to the conqueror. The outcome of this line of thought is that one cannot determine that any war transfers ownership without first determining that the war was just. As R. Sherman stated, it all depends on one question: "Was there a justifiable and legal reason for going to war?"[18]

This modification of the principle under discussion makes good sense, but it means that this principle cannot be drawn upon to establish

the right to the territories conquered in 1948 and 1967 before first demonstrating that these wars were morally justified. Following the argument in the first part of the chapter, this means that the religious-halakhic basis for the Right to the Land cannot circumvent the moral discussion. To R. Sherman, the moral answer regarding these two wars is obvious: "Without a doubt, Israel's wars of 1948 and 1967 were defensive wars, to save her from her enemies. And if so, the outcomes of these wars (the occupations) should grant sovereignty to Israel [over the territories Israel occupied]."[19]

Nonetheless, the moral picture is far more complex and far less clear. First, some people believe that Israel's wars were not entirely defensive, and that, at least in 1967, the war was in Israel's interest and the nation was not simply forced into it.[20] Second, even if some country has a moral justification to wage war, it is not allowed to expand its borders thereafter, and doing so looks like a case of "robbery" in Sherman's terminology. This point is easy to understand when comparing the acquisition of ownership over enemy land and property. According to the principle that conquest transfers ownership, the conqueror takes possession of both the conquered territories and property. However, from a moral point of view, even in a just war, one is not allowed to help oneself unrestrainedly to the possessions of the aggressor state. The same is true for the land: usurpation of enemy land is difficult to justify even if the war is defensive.

In these brief comments, I do not intend to take a side in the debate about the justness of Israel's wars in general and of the 1948 and 1967 wars in particular. I merely point to the fact that this question is incredibly complex from a historical, legal and moral viewpoint. Hence, it calls for a cautious—and convincing—answer before one can hope to apply the halakhic principle under discussion ("Ammon and Moab were rendered clean [unto Israel] through Sihon"). If the answer is indeed convincing—namely, that the relevant war was just, and that this justness somehow legitimizes the taking of territory—it is doubtful whether the Talmudic principle is still required. The moral considerations would then seem to do all the necessary work in establishing the Right to the Land.

The need to refer to moral considerations also arises from R. Sherman's discussion about the implications of the UN decision regarding the State of

Israel's right to the territories it occupied, especially in 1967. I mentioned R. Sherman's argument that the conquest-transfers-ownership principle is based on the Talmudic principle that "the Law of the King is Law" (*Dina Demalkhuta Dina*). However, it seems that the "Law of the King" that applies between states today is international law. As this law determines that Israel has no right to the territories conquered in the Six-Day War, this Talmudic principle would delegitimize their annexation from a halakhic point of view. Sherman recognizes this difficulty and responds by saying that "the international law must pass the ethical (*yosher*) test that qualifies the Laws of Kingship in order to qualify as *Dina Demalkhuta*."[21] As the United Nations failed this test in its systematic discrimination against Israel throughout the years, its decisions, therefore, do not qualify as *Dina Demalkhuta* and are not halakhically binding.

One can again see how the halakhic ruling relies on a prior moral decision. Only after applying the ethical test, which is based on morality rather than on the halakha, can we know whether a specific law is included within *Dina Demalkhuta,* and is therefore halakhically binding. R. Sherman believes that there are grounds to disqualify all UN decisions concerning Israel because of its general discriminatory policy. However, even if this view of the United Nations is accepted, an additional problem exists regarding the status of central international treaties and agreements that are signed by almost all the countries in the world. These treaties, which unequivocally forbid ownership through conquest, are a clear expression of "the accepted rules among [decent] nations,"[22] and, therefore, should be binding under the principle of *Dina Demalkhuta*. Hence, by virtue of this principle, Israel should have been made to withdraw from the territories conquered in 1967. However, whereas with the UN there is some basis for the complaint that its decisions are laced with prejudice against Israel, the same cannot be said about a document such as the Geneva Convention, which does not directly concern Israel and was not "tailored" to harm it or to deprive the nation of its rights.

In other words, once R. Sherman admits that international law gains halakhic validity if it passes the ethical test, he must accept that any parts of this law that do pass the test are halakhically binding. Since treaties such as the Geneva Convention successfully pass the test

(and Sherman provides no indication to think otherwise), they must be binding. Sherman might respond by saying that the international law is one entity, so to speak, so that if one part is rejected, i.e., the UN decisions concerning Israel, it is rejected in its entirety, including the treaties mentioned above. This seems ad hoc and, if taken seriously, would lead to a complete revocation of the category of *Dina Demalkhuta*, understood by Sherman himself as the "the accepted rules among [decent] nations."[23]

In conclusion: For several rabbis, the idea of "Ammon and Moab were rendered clean in Sihon," which assumes that conquest transfers ownership, serves as the halakhic-legal basis for the Right to the Land, a basis seemingly independent of moral considerations. One version of the argument bases this right on the British conquest of 1917, while others base it on Israel's conquest in 1948. Either way, the aforementioned principle is supposed to assure the Jewish people's Right to the Land on which it established its state in 1948 and its right to the land occupied in 1967. I have tried to show that, contrary to how it seems at first, the application of this principle to real-life political cases cannot be detached from considerations of justice, because, according to an established interpretation of this principle, conquest transfers ownership only in a just war, and only when in keeping with the law of the nations (which also has to pass the ethical test). When the principle passes all these tests, it is unclear whether it plays any independent role in justifying the Jewish people's right to the land.

SUMMARY AND CONCLUSIONS

The majority of rabbis, certainly from the religious-Zionist stream, take for granted the Jewish people's eternal and unequivocal right to its land, a right that extends, in the current historical reality, from the Mediterranean Sea to the Jordan River. They interpret the vacillations and hesitations, which trouble some non-believing Jews regarding this right, as an expression of weakness. For the rabbis and their followers, the problem of the Right to the Land is either easily resolved, or does not arise in the first place. Rashi's famous commentary on the first verse in Genesis is perceived as providing a conclusive answer to any queries about this issue.

I have attempted to show that this line of thinking is superficial and misguided. If moral questions arise regarding the Right to the Land—and one can hardly deny that some tough questions *do* arise in this context—they cannot be circumvented by religious arguments, whether based on God's ownership of the world, or on talmudic principles, such as conquest transfers ownership. The reason for this inability to evade the moral discussion is common to all the aforementioned arguments, and this is because, in general, the commands of God do not determine moral obligations. Therefore, believers can profess to have resolved the troublesome moral questions regarding the Right to the Land only after using historical-legal-moral tools, the exact same tools that are at the disposal of their non-believing counterparts. If no satisfactory solution to the moral problem exists, then the religious Zionist and the secular Zionist are in the same deep trouble.

Finally, I should state that I take no stance in the hot political and ideological debate between Zionists and their opponents and between Right and Left. In particular, and to remove any shadow of a doubt, I did not assume here that the Jewish People does *not* have a moral right to its land (or to the territories occupied in 1967). My argument is that those who believe that such a right exists cannot hide behind religious arguments alone, but need to base their belief on moral considerations. No shortcuts are open to the believer on the way to establishing this right. I also attempted to show that, because of this, the religious discourse on the Right to the Land tends not to rely purely on religious arguments (although such arguments are "officially" declared to be sufficient) but tends to fall back on general moral and legal arguments. On the one hand, these arguments seem to strengthen and reinforce this right, but, on the other, they expose the contender to moral criticism. When you start to play the moral game, there's no way back.

NOTES

1 See Benny Morris, *The Birth of the Palestinian Refugee Problem Revisited* (Cambridge: Cambridge University Press, 2004).

2 Avi Sagi and Daniel Statman, *Religion and Morality* (Amsterdam: Rodopi, 1995), Part I.

3 Divine command theory of morality: see ibid., Parts I–II. Avi Sagi and myself addressed the issue of divine commands being a moral obligation in detail in our article "Divine Command Morality and the Jewish Tradition," *Journal of Religious Ethics* 23 (1995): 49–68.

4 Sagi and Statman, *Religion and Morality*, chap. 2.

5 *The Pentateuch and Rashi's Commentary*, ed. R. Abraham Ben Isaiah and R. Benjamin Sharfman (New York: S. S. & R. Publishing Company, 1976), 1.

6 E. E. Urbach, *On Judaism and Education: Collected Essays* (Jerusalem: School of Education of the Hebrew University, 1967) [Hebrew], 20–21. (*De'ot* ["opinions"] was a Hebrew journal, subtitled *A Journal for Religious Academics*.)

7 Emunah Elon, "Israel's Leadership Will Become Increasingly Religious," *Eretz Acheret,* October 1, 2009, at http://www.acheret.co.il/en/%20http:/?cmd=articles.278&act=read&id=1712 (accessed June 15, 2012).

8 *The Pentateuch*, ed. Isaiah and Sharfman, 1.

9 Urbach, *On Judaism and Education*, 20–21.

10 Ammon and Moab were given the land of Ar (Deuteronomy 2:9–19) and will return to their inheritance after they have been punished for their misdeeds: "Yet will I turn the captivity of Moab in the end of days, saith the Lord" (Jeremiah 48:47); " But it shall come to pass in the end of days, that I will bring back the captivity of Elam, saith the Lord" (Jeremiah 49:39).

11 Rabbi Abraham Sherman (born 1941) is an Israeli ultra-Orthodox rabbi and a member of the Supreme Rabbinical Court. Rabbi Abraham Sherman, "Wars of Israel: Halakhic Validity for Determining Sovereignty in the Land of Israel," [Hebrew] *Techumin* 15 (1995): 23–30; quotation, 23.

12 *Shulchan Aruch HaRav*, Hoshen Mishpat, Laws of Abandoned Property (*hefker*), section III.

13 An interesting implication of this statement (on political-legal and halakhic implications) can be found in the Radbaz's answer to the following question: Reuben was a pawnbroker and owned a store in a certain city. One day, he was expelled from the city along with the rest of the Jews. Later, the city was conquered by the Pope, and eventually, by a duke, who gave Simon pawnbroker rights in the very same store. Reuben claimed that he had precedence over the store, and sued to evict Simon. The Radbaz ruled that even though, in general, one never loses one's title to one's land, the situation is different when the land is lost as a result of war, which resets, as it were, all prior ownership. Drawing on the principle of Ammon and Moab being rendered clean in Sihon, the Radbaz determined that "even though at the time of the first king, all of Israel were prohibited from taking Reuben's store, once the kingdom had been lost to him and had become the property of another, any Jew could take the store, as it was part of the new kingdom" (Radbaz, *Responsa*, chap. 3, 1773). Quotation from *Laws of Kings*, Chapter 4, Halakha 10.

14 Rabbi Tzvi Pesach Frank (1873–1960), a renowned halakhic scholar and the Chief Rabbi of Jerusalem for several decades. Rabbi Yitzhak HaLevi Herzog (1888–1959) was the first Chief Rabbi of Ireland, from 1921 to 1936; from 1937 until his death in 1959, he was Ashkenazi Chief Rabbi of Palestine and of Israel after the establishment of the state in 1948. Quotation from Rabbi Herzog, *Psakim Vekatavim*, Part 3, Chapter 37, Section 4.

15 Sherman, "Wars of Israel," 27.

16 Rabbi Saul Yisraeli, *Eretz Hemda* (Jerusalem: Mosad Ha-Rav Kook, 1982) [Hebrew], 35–36. Rabbi Shaul Yisraeli (1909–1995) was one of the distinguished rabbis of religious Zionism.

17 For a similar argument regarding the legal outcomes of the British occupation of Palestine, see Reuben Gafni, *Our Historical and Legal Right to the Land of Israel* (Jerusalem: Sifriyat Torah VeAvodah, 1933), [Hebrew], 134–35.

18 Sherman, "Wars of Israel," 29.

19 Ibid.

20 See, for example, Motti Golani, *Wars Do Not Just Happen: On Memory, Power and Choice* (Tel Aviv: Modan, 2002) [Hebrew], especially 185–203. On his account of the events before the 1967 war, it was Egypt, much more than Israel, that was "drawn into it against her best interests."

21 See Sherman, "Wars of Israel," 30.

22 Ibid.

23 The precise content of the rule of the Law of the King is Law is "extremely vague," as remarked by Shmuel Shiloh at the beginning of his comprehensive book *Dina Demalkhuta Dina* (Jerusalem: Academic Press, 1975) [Hebrew]. For the purpose of the present argument, I rely on R. Sherman's own interpretation of this principle.