

**Does Ariel Sharon Consult His Rabbi?
How Israeli Responses To Terrorism Are Justified Under Jewish
Law.**

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March 5, 2003

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TABLE OF CONTENTS

I. Introduction	1
A. Background of Terrorist Attacks and Responses in Israel	2
B. Defining Terrorism.....	5
II. Responding to Terrorism as an Act of War	6
A. Is Terrorism An Act of War.....	6
1. Type of War.....	7
2. Required Procedures of War.....	8
3. Authority to Engage in War.....	10
4. Limitations on Going to War.....	12
B. Governmental Responses to Terrorism as an Act of War	13
1. Obligations of Israel to Respond to Terrorism.....	14
2. Wartime Justifications for Engaging in Assassination of Terrorists.....	14
3. Justifications for Taking and Destruction of Property Under the Laws of War.....	18
4. Limitations on Infliction of Collateral Damage During Wartime.....	20
III. Responding to Terrorism as a Criminal Act	24
A. Is Terrorism a Criminal Act?	24
B. Punishing Terrorists Under Criminal Law.....	25
1. Law Applicable to Palestinian Terrorists	25
2. Obligations of Palestinians Under the Noahide Code.....	27
3. Ability and Obligation of Israel to Enforce the Noahide Obligations.....	29
C. Authority of the Court to Impose and Enact Criminal Law.....	30
D. Government Responses to Terrorism as a Criminal Act.....	33
1. Justification to Assassinate Terrorists Under Criminal Law	34
2. Criminal Law Justification of Destruction of Property.....	43
IV. Responding to Terrorism Under the “King’s Justice”	46
A. What is the Royal Prerogative?.....	46
B. How the King’s Authority Translates to Israeli Governmental Authority.....	47
C. Authority for the Government to Apply King’s Justice.....	47
D. Application of the King’s Justice to Israeli Responses to Terrorism	49
1. Permissibility of Assassinations under the King’s Judicial Authority.....	49
2. Destruction of Property under the Royal Prerogative.....	50
3. Justification of Deportations using the “King’s Justice”.....	51
V. Conclusion	52

I. Introduction

The ultimate difficulty in considering the legality (or illegality) of governmental responses to terrorism under Jewish law is the inherent nature of Jewish Law as a system of duties. Unlike a system of rights, such as those that dominate the secular democracies of our world, a system of duties seems fraught with danger. We can imagine the difficulty. How would our world change if the United States Constitution prescribed a duty to speak freely, a duty to bear arms, or a duty to protect our privacy? How would an individual deal with a situation where on one hand they had a duty to speak freely and on the other hand they had a duty not to defame another? The individual, as well as the state, would have much greater difficulty in deciding the correct course of an action when it was placed on a continuum of conflicting duties instead of listed in the simple matter as being legal or illegal.

By ascribing to all individuals a system of duties, rather than rights, the concept of choice is itself almost alien. What is a right in a secular law system? The term itself connotes a capability, a permissible means one has at their disposal to achieve a chosen end. A duty, however, seems to remove individuals from the realm of choice and lead them down a path toward requirements, obligations, and responsibilities. Thus, for every action, and inaction, there must be by definition some penalty for not fulfilling that duty. While rights tend to be divided in two distinct categories, those rights of individuals and rights of the State, duties are more varied. One's own obligations could vary depending on status, class, ability, intelligence, age, and authority. So too, in changing circumstances, the duties may arise one instant and disappear the next.

The other difficulty is the conflict between positive and negative duties mandated by Jewish Law. Some duties state affirmatively that one must act in a specified manner. Other duties state that certain actions may not be taken. Of course, these positive and negative obligations sometimes conflict. In response, one must understand which obligation controls, and whether the controlling duty is one that must be taken, or is merely permissible. Only by understanding the interrelation of these conflicting duties can it be understood whether Jewish Law will permit or require, a desired course of action.

The question thus becomes one of understanding how, in the context of a government responding to terrorism, the Israeli government has a duty to act or not to act, and that the actions they take are obligations under Jewish Law. So how can this difficulty be reconciled? In response to suicide bombings, sniper shootings, and car bombs, a secular government has a right to react. By analyzing these same responses under Jewish Law, though, the Israeli government has a duty to act. The choices they make will either fulfill their legal duty or violate their duty.

In response to these acts of terror thrust upon the citizenry by Palestinian terrorists, the Israeli government has acted. They have undertaken a complex system of penalizing terrorists and attempting to preclude the commission of future terrorist acts. By assassinating terrorist leaders, deporting terrorists and their families, and destroying

homes of suicide bombers, the Israeli government is engaged in an extensive array of legally questionable activity. The Israeli Supreme Court has decreed that all of these actions are legally permissible under Israeli law.

Clearly, the Torah does not speak directly on the subject of terrorism. For that matter, few if any commentators have discussed the legality of these actions under Jewish Law. However, in the Talmud, commentators including Maimonides, Nahmanides, Ritva, and Ran et. al. have laid the groundwork to analyze these problems. By discussing Jewish Law responses and obligations in regard to homicide, capital punishment, destruction of property, banishment, and the role of State governments, the responses to terrorism under Jewish law may be studied. The goal of this paper is not to pass judgment on the morality of these actions but to identify how, under Jewish law, these actions may be justified. Rather than identifying whether the actions of the Israeli government would necessarily be the correct course of action under Jewish Law, the aim of this paper is to show how one can justify the actions of the Israeli government based on existing law.

A. Background of Terrorist Attacks and Responses in Israel

A brief history of the Israel-Palestinian conflict is necessary to understand the context of the terrorist attacks and responses thereto. Beginning in 1948, Israel has been at odds with the Arab world. The newly formed United Nations passed resolution 194, commonly known as the UN partition plan, which divided Israel into two halves, one reserved for the Arabs living in Israel (later identifying themselves as Palestinians) and the other for the Jewish people. However, immediately upon the resolution passing, the Arab countries decreed that they will “drive Israel into the Sea.” The Arab countries asked that all Arabs living in Israel leave the area or join their brethren and fight off the “Zionist Scourge.” The Arabs did leave, either heading for Jordan or Egypt or joining five Arab nations, Egypt, Lebanon, Syria, Jordan, and Iraq in their quest to destroy the Jewish people. In a miraculous victory, the Jewish people won the war of Independence and held the land not only reserved for the Jewish nation, but also much of the land originally reserved for the Arabs.

Following this defeat, the Arab nations vowed to strike again and continued throughout the next eight years to engage in various small attacks on the Jewish people. These 3,000 cross border attacks resulted in the deaths of 922 people. Thereafter, Egypt led a coalition organized by Nasser to once again destroy the Jewish people. This came to be known as the Suez War. Once again, Israel defeated their attackers.

The next 11 years continued to be deadly. Hundreds, if not thousands of terrorist attacks including murders, bombings, illegal landmines, and sabotage led to hundreds more dead and thousands more wounded. It was during this time that the Palestinian Liberation Organization was formed (the precursor to the Palestinian Authority). The PLO's first terrorist attack was an attempt to bomb the National Water Carrier on January 1, 1965. It should be noted that almost all of the terrorist attacks were those against

civilians. Rarely were Israeli troops targeted by Arab attackers. These attacks led to furthering of animosity and eventually led to the Six Day War.

In May-June 1967, Israeli-Arab relations began to worsen. Egypt led the charge once again. They blocked the straits of Tiran, preventing any Israeli commerce from entering or leaving the country. They removed the UN peacekeeping forces from the Sinai desert, and mounted troops along Israel's border. The tension began to mount and Israel was in dire straits, their economy stifled and random attacks occurring daily. Finally, Israel could take the blows to their economy and military no more and launched a strike to destroy those that prevented the functioning of the country. In a single day, Israel destroyed the Egyptian, Syrian, and Jordanian air forces. Six days later, Israel had not only defeated their attackers but had also captured Judea (the West Bank) from Jordan, Samaria (Gaza) from Egypt, as well as the whole of the Sinai desert.

In response, the United Nations passed Resolution 242, decreeing that Israel will negotiate some agreement with the Arab peoples that would give back some of the land taken in return for peace. Various drafters agree that the resolution called for removal of Israeli troops from territories captured but nowhere states that Israel must withdrawal from all the territories. The Arab nations, however, disagree. Since that resolution, the Arab nations attacked once again on Yom Kippur 1973. Israel once again repelled their attackers.

However, since that time, the Palestinians began to receive more public recognition as an entity separate from the Arab world. They engaged in numerous terrorist attacks to make themselves known to the world including hijacking planes in Europe, murdering members of the Israeli Olympic team in 1972 in Munich, and hijacking the *Achilles Lauro* cruise ship killing an American Jew on board. Yet, the more deadly the attacks became, the more support the Palestinians received for their cause. This support led to the United States led 1979 Camp David Peace Accords which traded the Sinai desert and \$3 billion dollars a year from the United States to Egypt in exchange for an agreement not to attack Israel and a relinquishment of the rights to the Gaza Strip.

The Palestinians, however, grew in power. Yasir Arafat led the organization to national prominence and even caused them to receive recognition first in the UN, then by the United States, and finally by Israel. Various peace agreements have been reached to stop the thousands of yearly terrorist attacks planned by Arafat and the Palestinians yet all of them have failed and the terrorist attacks still continue. Even after Jordan relinquished all rights to the West Bank in 1996, the Palestinians remain diligent in their quest to have Israel return all of the territories captured from Jordan and Egypt to the auspices of the Palestinian Authority. In 1998, Ehud Barak offered 95% of the land in Judea and Samaria to Arafat in exchange for peace. Arafat declined and responded with a call for Palestinians to wage holy war against the Israelis. To go along with the more than 20,000 attacks on Israel in the prior 52 years, the Palestinians have responded with vigor launching over 16,000 more attacks since September 29, 2000. Many of these attacks have been assassins breaking into homes, suicide bombers blowing themselves up in public areas, and car bombs exploding with the aim of killing Jewish civilians.

It is with this background that Israel began to respond forcefully to terrorist attacks. The following is one example of the thousands of attacks that have occurred over the past 55 years:

On June 18, 2002, Dr. Moshe Gottlieb, 70, of Jerusalem was en route to Bnei Brak to work with a group of children afflicted with Down's Syndrome. Once a week, Dr. Gottlieb treated the children at the hospital as he had done for a number of years. Since emigrating from the United States 24 years previously, Dr. Gottlieb worked as a chiropractor in his own private practice as well as at Bnei Brak.

However, this morning, Dr. Gottlieb would never get to the hospital². A suicide bomber stepped onto Egged bus no. 32A traveling from Gilo to the center of Jerusalem. Within seconds of stepping onto the bus, the terrorist detonated the large bomb he carried in a bag laden with ball bearings. Destroying the front half of the bus packed with schoolchildren and individuals on the way to work, 19 people were killed and 74 injured.³ Dr. Gottlieb was among the victims. Hamas⁴ took responsibility for the attack.

This example is merely indicative of the 16,442⁵ terrorist attacks that have become commonplace in Israel since September 29, 2000, when the Al Aqsa Intifada was begun with the incitement of Palestinians by Yasir Arafat. Every day, Israelis live in fear that a suicide bomber will detonate their deadly package near to themselves or a member of their family. The simple act of going to the market, driving to a friend's, or walking the dog could become a fatal choice. In addition to suicide bombers, terrorists have employed the use of assassins entering civilian homes, engaging in drive by shootings, and planting car bombs. It is in response to these acts that the Israeli government has employed various means to stop terrorist activities and protect Israelis.

Some of the actions by the Israeli government bear special consideration under Jewish Law. These actions include assassination of terrorists, destruction of homes of suicide bombers, deporting members of terrorist groups and family members of suicide bombers, and the collateral damage associated with Israeli attacks on terrorists.

Assassinations of terrorist leaders has always been a source of debate amongst commentators in both Jewish law and other legal systems. This is especially true when no trial has been held to determine the fate of these individuals. Furthermore, destruction of the homes of convicted terrorists, suicide bombers, and even untried terrorists has been a punishment imposed by the government. Because this act tends to punish not only the terrorists themselves but their family members, it has been viewed as a deterrent measure that would decrease the number of attacks on Israeli citizens. However, there is much debate over whether these acts are legally permissible under the Halacha. Deporting members of a terrorist group merely for their membership in a terrorist group or family

members of terrorists who have killed Israelis brings up problems of punishing one for the acts of another. Can these acts be reconciled under Jewish Law? Finally, the problem of collateral damage has been discussed by commentators. This problem has been present for centuries, especially during wartime. However, does Jewish Law permit a terrorist to be killed if an innocent will be endangered as well?

In order to correctly analyze these issues, this paper will first attempt to define terrorism. Should terrorism be defined as an act of war or a criminal act? The justification for any act varies depending on this classification. A third way to analyze any of the actions that may be taken is if they fall out of the rubric of the Halacha and are to be justified under the powers granted to the King (and the Government). By analyzing Israeli responses to terrorism under these definitions, it will be shown that these acts are indeed justified under Jewish law.

B. Defining Terrorism

Attempting to define terrorism may be an impossible task. In an article on terrorism written in 1986, Walter Laqueur notes that 109 different definitions of terrorism had been advanced between 1936 and 1981, each one different from every other.⁶ I have little doubt that at least that number have been advanced in the years since. So how do we go about defining terrorism? In order to advance justifications for responses to terrorism, it is not necessary that a succinct definition of terrorism is elucidated, but merely one that encompasses all of the actions taken by groups such as Fatah, Hamas, and Islamic Jihad against Israeli citizens. For the purposes of this paper, I will not delve into the moral or legal justifications that assert that terrorist acts against military forces do not come under the auspices of terrorism. In justifying Israeli actions against terrorism, I will leave those arguments to others. Nonetheless, there is no argument that the actions by these groups against civilians would be defined as terrorism. The purpose of this section is to identify how terrorist acts may be viewed from various legal perspectives.

Some key distinguishing factors of terrorist acts differentiate them from criminal acts. Acts of terrorism require an intent that the perpetrator is attempting to “instill a state of terror in the minds of particular persons.”⁷ The terrorist act too is accomplished in a manner that is geared towards attracting public attention.⁸ This is necessary because the purpose of the act is to bring attention to a political end.⁹ Finally, a terrorist act is one that “is directed against random persons with whom, until the action began, the terrorist had no relation.”¹⁰ These points are generally accepted as common to most if not all acts described to be acts of terrorism.

Secular legal systems have the luxury of dealing with the problems of terrorism by grouping them in their own category. Rather than dealing with them under criminal or wartime laws, they have decided to define terrorism for the purpose of enacting laws geared to apply only to the subset of activities defined as terrorist activities. As an ancient system of laws begun 3000 years ago, Jewish legal scholars do not have the luxury of adding a new category of laws to deal with actions associated with terrorism. Under Jewish law, there is a direct prohibition against adding to the Torah as it was

stated: "Ye shall not add unto the word which I command you, neither shall ye diminish ought from it, that ye may keep the commandments of the Lord your Gd which I command you."¹¹

So instead, we must see where terrorist acts lie within the bounds of the categories delineated in the Torah. It is incontrovertible that the acts perpetrated by Palestinian terrorist groups are terrorist acts within any definition of terrorism set forth by leading analysts on the subject. The Torah is an all-encompassing document that sets forth all laws from the ritual requirements of prayer to the rules of war. So the question becomes, how is terrorism defined under the Torah? Under Jewish law, justifications of governmental responses to terrorism can be viewed under three broad categories: (1) when terrorism is viewed as an act of war; (2) when terrorism is viewed as a criminal act; and (3) the state's authority under the "royal prerogative" or "King's Justice" to combat terrorism.

II. Responding to Terrorism as an Act of War

A. Is Terrorism An Act of War

Is terrorism an act of war? In the minds of Palestinian terrorists, their acts of terrorism are indeed acts of war. Yasir Arafat, during a speech in Ramallah, incited the crowd "To Jerusalem we will march millions of martyrs, Holy War, Holy War, Holy War."¹² In another speech, Chairman Arafat stated "with Arab and Islamic assistance, this shall be our faithful jihad (holy war)- to defend holy Jerusalem from the danger of Judaization and the Zionist plot."¹³ Similar statements abound from the Arafat and other leaders of the Palestinians. Terrorist organizations such as Hamas have founded their entire movements on a war of "liberation" against the "Zionists."¹⁴ They have declared it is the goal of Muslims to eliminate Israel¹⁵ Various other organizations such as Islamic Jihad and Fatah have invoked similar words to describe their terrorist actions.

From an outside perspective, judging Palestinian terrorists to be engaging in an act of war is less clear. The courts of Israel refuse to identify terrorists as soldiers engaged in a war.¹⁶ Professor Frits Kalshoven, discussing the question, "Should the Law of War Apply to Terrorists?" asserted that terrorist organizations and terrorists are not entitled to the status of combatants.¹⁷ One of the key factors in ascribing soldier status to terrorists is whether they themselves respect the laws of war. Because engaging in attacks against civilians and wanton acts of violence directly contradict the laws of war, these acts would not be considered acts of war.¹⁸ In his recent article, Professor Emanuel Gross concludes that Palestinian terrorists are "at best a para-military organization."¹⁹ He notes that if the "soldiers" wished to be included in the armed forces of the Palestinian Authority they would have to notify them as such, "a notification which to date has not been made."²⁰

Reconciling these two perspectives is not so simple. Should one analyzing this dispute under Jewish Law listen to the words of their fellow Jews and decide that the terrorist are not soldiers? Should they instead take the Palestinians at their word and

decide, that indeed, they should be considered soldiers and the laws of war should apply? The decision is not up those who say what they are. To determine whether the Palestinian terrorists are soldiers, we look to the precedents set forth by the Halacha.

So would we be justified to view terrorists as soldiers fighting against the state of Israel? In order to do so, the first step is to understand the Jewish definition of war. I will analyze the actions against terrorists in a war by engaging in the following analysis: (1) What are the types of war permitted under Jewish Law; (2) What is required before the Jewish nation is deemed to be at war; (3) Does the State of Israel have the authority to wage war; and (4) What limitations are imposed on the State of Israel in wartime.

1. Type of War

The Talmud identifies two categories of war: (1) Obligatory (*milhemet mitzvah*), and (2) Authorized (*milhemet reshut*).²¹ An obligatory war is one that is commanded by the Torah or is one of self defense.²² However, “as a practical matter...the only war which was a matter of obligation, was a war of self defense or a war of national survival.”²³ This is so because the wars commanded by biblical commandments include wars to defeat the seven Caananite nations and the War to destroy the tribe of Amalek.²⁴ Because these divine mandates are no longer necessary (or possible), there is no longer any basis in obligatory wars of this type.²⁵ Therefore, wars of obligation are those required for self defense of the nation. An authorized war, on the other hand, is a war to expand territory or to “diminish the heathens so they shall not march.”²⁶ As it is generally accepted that any of the rationales posed for considering actions against terrorists to be self-defense measures, rules pertaining to authorized wars would not apply.

In Ibn Tibbon’s translation of Maimonides’ commentary on the Mishnah, he suggests that an obligatory war does not begin until one is actually attacked by an army.²⁷ This definition would thus suggest that any war would be justified under the rationale that governs laws of “pursuer” and self-defense.²⁸ However, Rabbi Joseph Kapach’s translation of the same commentary finds that Maimonides suggests that war would be permitted against all nations that have previously fought against Israel and are technically still at war with Israel even if fighting has currently been interrupted.²⁹

In the context of considering the conflict with Palestinian terrorists an obligatory war, then they must be considered under the forgoing rationales. Has Israel been attacked by an army? Using Ibn Tibbon’s translation, then, repelling the Intifada would be an obligatory war because Israel has been attacked by an army who is waging jihad (holy war) against Israel. With over 16,000 attacks on Israel just since the beginning of the Al Aqsa Intifada, this view would lend support to considering this a war of obligation. Even the PLO charter, which has never been changed, states that “fighters and carriers of arms in the war of liberation are the nucleus of the popular army which will be the protective force for the gains of the Palestinian Arab people.”³⁰ At least in the Palestinian view, the suicide bombers and assassins are fighters in the “war of liberation” that Arafat has

decreed. The attacks on Israel would thus justify this war against the Palestinians as a war of obligation under the rationale of self-defense.

The pursuer rationale too would allow defining the war as war of obligation. The pursuer rationale is defined by Maimonides finding that homicide is justifiable when a pursuer who pursues another to kill him, all Israel is bidden to rescue the pursued even at the cost of the pursuer's life."³¹ Thus, by extending this application to war, the terrorists are pursuing the Jewish people and an obligation arises requiring the Jewish people to kill (i.e. wage war) the pursuer (the terrorists trying to kill the Jewish people). The laws of pursuer then would justify defining the war against terrorism as an obligatory war.

Finally, even if Rabbi Kapach's translation were correct, the Israel would be justified in saying that the war against the Palestinians was an ongoing war. After all, Arafat himself stated in a speech on October 27, 2001, that "war...will continue until Judgment Day."³² In that same speech, Arafat made reference to the nature of the war as ongoing since the "Zionist Congress met in Basel [in 1906]." However, it should be noted that first attack claimed by the PLO was an attempt to bomb the Israeli National Water Carrier on January 1, 1965.³³ Even so, few would disagree that a war ongoing for almost 40 years would suffice.

Therefore, no matter what definition of obligatory war is ultimately correct under Jewish law, the war against the terrorists is one of obligation. It is clearly not within the definition of an authorized war to "enlarge the borders of the kingdom of Israel and to increase his [the king's] greatness and prestige."³⁴ Even if the claim to Judea and Samaria was invalid, then fighting merely to stop future terrorist attacks would still not be seen to expand the borders of Israel. After all, Israel is already in possession of those territories so they cannot further expand what they already have without going outside the borders. Furthermore, over 660 of the attacks have occurred within the borders of Israel, excluding the territories.³⁵ Thus, under Ibn Tibbon's or Rabbi Kapach's view, or as an extension of the pursuer or self defense rationale, the war against terrorism is an obligatory war.

2. Required Procedures of War

Given that the dispute with terrorists may be defined as war under Jewish law, has Israel followed the required procedures in order to make the war valid? The Talmud requires that Israel follow various procedures prior to engaging in war. These procedures include a declaration of war, an attempt to make peace, and detailing the goals of war.³⁶

The Halacha requires that the Jewish nation must declare war before attacking.³⁷ As the Torah explicitly states "When thou drawest near to a city to fight against it, proclaim peace to it. And if it make a peaceful response and open its gates to thee, then shall all the people that are found in it to be compelled to...serve thee."³⁸ However, it logically follows that if they do not accept the peace then war is permitted to ensue. The sages have decreed though that even in a war of obligation, the rabbis have declared that

the obligation exists to declare war.³⁹ The sages have decreed that this obligation exists because of the desire to obtain peace before beginning a war.⁴⁰

Maimonides ruled explicitly that a peaceful alternative must be sought prior to making war: “One may not wage war against any people whosoever until one has first offered them peace, whether it be a permissive war or a war of obligation”⁴¹ This is based on the biblical ruling “when you approach to a city to wage war, you must first call out for peace.” In following this decree, Joshua, prior to beginning his conquest of the land of Israel sent letters to the inhabitants providing them a choice of three alternatives: to flee, submit in peace, or to make war.⁴² These biblical commandments remind us that the Halacha requires the people of Israel to make a peace offering prior to declaring war.

The Halacha also requires the Jewish people to detail the goals of war prior to engaging in battle. This includes detailing what one seeks by victory in the conflict.⁴³ Rabbi Michael Broyde, in his article *Fighting the War and the Peace: Battlefield Ethics, Peace Talks, Treaties, and Pacifism in the Jewish Tradition*, finds this is a requirement because “this allows one’s opponents to evaluate the costs of war and to seek a rational peace.”⁴⁴ By following these three procedures, declaring war, asking for peace, and detailing the goals of war, Israel may legally engage in a war against their enemies.

Has Israel declared war on the Palestinians? No formal declaration of war has been issued. However, analysts have decreed that this is so because the state of Israel does not want to give credence to the Palestinian terrorists as an independent entity separate from the Palestinian Authority. It is also thought that declaring war would destroy the ongoing peace process. However, in the minds of the Palestinian Authority, Israel has declared war. The *Financial Times* reported that Saeb Erakhat, a senior Palestinian Authority official, stated “This is a declaration of war” after Ariel Sharon declared a government of national emergency soon after the Intifada began.⁴⁵

Is it required that Israel formally declare war, or is a functional declaration enough? In current warfare, unlike ancient warfare, formal declarations of war are not always given even though by all standard definitions, war would clearly define the events at hand. This has been the case in the Vietnam War and the Gulf War when the United States never formally declared war on their adversary.⁴⁶ Because the lack of formally declaring war does not go against the purpose of the biblical commandment, the lack of a formal declaration does not render the actions taken against terrorists invalid under the laws of war. As Nahum Rahover stated “Only in a case where the king’s decree does not merely demand going beyond the letter of the Torah’s law but actually goes against it, do we rule that the king’s authority does not override the Torah.”⁴⁷ Thus, Israel can be deemed to have declared the functional equivalent of war even if the formal declaration has not been issued.

Because the declaration of war is only necessary because of the desire to make peace, has Israel followed through on this biblical commandment? Since the Camp David Peace Accords, Israel has made at least 12 major efforts at peace including peace offerings with the entire Arab world as well as negotiations solely with the Palestinian Authority.⁴⁸ There is little dispute that Israel offered peace agreements where they would

refrain from any further violence in negotiations with the Palestinian Authority in the Oslo Peace Accords and the Summit at Camp David.⁴⁹ These negotiations took place prior to any Israeli violence against Palestinians related to the current fighting. Even after the latest Intifada has begun, Israel has made numerous offers of cease-fires which have all been violated by the Palestinian terrorist groups.⁵⁰ These agreements are the only proof required to show that Israel has fulfilled the requirement to seek peace prior to declaring war.

Israel has also declared what they seek from the war. The Israeli government has often stated that they would like to end future terrorist attacks. Their goal then is to deter any future loss of Jewish lives. Furthermore, in formal declarations, Israel has actually proffered written goals as explicated in the Camp David Peace Summit and the Oslo Accords.⁵¹ Because Israel has stated what they hope to achieve by the war against Palestinian terrorists, they have fulfilled the biblical commandments.

By fulfilling the requirements of initiating a war, Israel is engaged in a legally valid war under Jewish law. They have functionally declared war, offered peace, and stated what they hope to gain from war. If we call the conflict with the Palestinians a war, it is lawful under the Halacha.

3. Authority to Engage in War

Besides being used to identify the type of war, the laws regarding a war of obligation define when Israel is permitted to engage in war. A Jewish state has the authority to declare war by first following the ritual requirements from the Talmud.⁵² They then are permitted to go to war if they are engaging in self defense,⁵³ or as an obligation extended from the law requiring war against the tribe of Amalek.⁵⁴

In biblical times, the Jewish people had to follow three ritual requirements in order to engage in warfare. However, these requirements have been limited by some commentators.⁵⁵ The first requirement was the consent of the Sanhedrin.⁵⁶ Currently, the Sanhedrin no longer exists in the state of Israel. So how is Israel permitted to go to war? The second requirement was the presence of a ruler or a king.⁵⁷ The final requirement was a consultation with the *urim vetumim*, an ornament worn by the High Priest.

The question of whether Halachic sanction exists for wars of the state of Israel was discussed by Rabbi Shlomoh Yosef Zevin. He concluded that Halachic sanction does indeed exist for Israel's prior wars.⁵⁸ He notes that a defensive war does not require the consent of the Sanhedrin.⁵⁹ Similarly, Rabbi Judah Gershuri asserts that the requirement of the Sanhedrin "may be dispensed with in our day."⁶⁰ He reasons that only "in the absence of a general desire on the part of the nation to engage in warfare" would the consent of the Sanhedrin be necessary.⁶¹ Therefore, under his view, the Sanhedrin's accord would only be necessary if the populace were unwilling to enter into a war.

The next ritual requirement is the presence of a king or a ruler of the State of Israel. However, Nachmanides (Ramban) states that the requirement of a king itself is

not absolute but that this is the prerogative of “the king, the judge, or whosoever exercises authority over the people.”⁶² Rabbi Abraham Isaac Kook, in *Mishpat Kohen*, further argued that the requirement of a king is not literal because the king merely serves as the agent of the people in exercising his royal function.⁶³ The sages would thus find that a legitimate government serving as an agent of the state would be permitted to wage war even if no king was present.

The final ritual requirement is that of consultation with *thurim vetimim*, a mystical ornament worn by the high priest. The rabbis are in agreement that *thurim vetumim* no longer exist. Various interpretations of this requirement have arisen. While Maimonides does not list the *urim vetumim* in his requirements, he does state elsewhere that they are necessary.⁶⁴ Since Rabbi Zevin as well as the *Aruch HaShulcan* do not find this procedural requirement necessary.⁶⁵ A middle position has been suggested by Rabbi Gershuni when he states that consultation with the *urim vetumim* would be required for authorized wars but consultation is not required for obligatory wars.⁶⁶

The State of Israel has satisfied the ritual requirements in order to wage war under Jewish Law. Because the Sanhedrin is not necessary, and may only be necessary for a non-obligatory war, their consent is not required. The government of Israel, serving as an agent for the populace, has the authority to wage war because they exercise authority over the people. As Rabbi Bleich notes that Rabbi Zevin would find Halachic sanction in Israel’s prior wars, and he himself would logically then find sanction in the 1973 wars,⁶⁷ the same logic would permit a justification of Israel’s defensive war against the Palestinians. Finally, even using Rabbi Zevin’s analysis of *thurim vetumim* requirement, Israel would be permitted to engage in the defensive, obligatory war against the Palestinian terrorists.

Israel also would have Halachic justification to engage in war when they are acting in self defense. Just as we define a war as obligatory when it is in self defense, the same logic would extend authority to the state to engage in such a war. The Talmud posits the maxim “If someone comes to kill you, rise up and kill him first.”⁶⁸ The authority thus becomes an obligation required under the Halacha. Because self defense applies to a group just as it would apply to an individual, then this implied authority is granted to the state.⁶⁹ This is seen as an obligation rather than just a permissive action because the Talmud regards the legitimate use of force as a communitarian responsibility.⁷⁰

Israel has the authority to engage in a war of self defense to prevent the killing of the Jewish people. The Palestinians have decreed in Article 15 of the PLO charter that their goal is “the liquidation of the Zionist presence.”⁷¹ In the context of the document which urges the Palestinians to fight a war of liberation against the “Zionists”, then the Jewish people are engaged in a war of self defense. Furthermore, the self-defense rationale has further justification because the terrorists have their goal to kill the Israeli citizens, creating in Jews an obligation “to rise up and kill” the Palestinians first (before they themselves are killed). In order to protect the community as a whole, Israel has an

obligation, and therefore, the authority, to engage in a war of self defense against terrorist activity.

Israel may also get their authority to fight in the war against the Palestinians is based on the commandments requiring Israel to fight a war against Amalek. The Torah commands that “You shall erase the memory of Amalek.”⁷² In an earlier section, the Torah spoke of the war of G-d against Amalek.⁷³ While these sections would seem to be obsolete because the tribe of Amalek no longer exists, commentators have disagreed on their meaning. While Maimonides finds that the commandments to eradicate the seven Canaanite nations have lapsed, he does not make the same statement regarding the ancient people of Amalek.⁷⁴

In later years, rabbis have found that this omission is due to a higher meaning given to these commandments. Rabbi Chaim Soleveitchik of Brisk, trying to resolve this difficulty, was said to have declared that the commandment to destroy Amalek extends to all who embrace the ideology of Amalek and seek to annihilate the Jewish nation.⁷⁵ Rabbi Bleich also notes that Rabbi Judah Loew of Prague remarked that all enemies of Israel throughout the generations of dispersion are in fact genealogical descendents of Amalek.⁷⁶ Rabbi Bleich suggests that because the war against Amalek is an ongoing and continuous one, the requirement of the *urin vetumim* is forsaken.⁷⁷ Therefore, by viewing the commandment to destroy Amalek as one that requires the Jewish people to engage in warfare against all who seek to annihilate Israel, and because biblically commanded wars are obligatory, Israel would have Halachic sanction to engage in a war against Amalek or those who hold the same views as the people of Amalek.

Would this biblical commandment give Israel authority to engage in war against the Palestinians? As a biblical commandment, the war is obligatory. The terrorists have publicly pronounced that their goal is the destruction of the nation of Israel.⁷⁸ While it may not be true that the Palestinians are in fact genealogical descendents of the people of Amalek, R. Soleveitchek noted that the commandment against Amalek was two fold: (1) to destroy the genealogical descendents of Amalek, and (2) a communal obligation to defend the Jewish people against any enemy threatening their destruction.⁷⁹ Rabbi Bleich argues that this is so because the commandments are recorded as two separate commandments.⁸⁰ Extending this reasoning to the conflict with the Palestinian terrorists, because they are threatening the destruction of Israel and wish to annihilate the Jewish people, the nation of Israel has the authority to engage in an obligatory war against them.

Whether viewed using the ritual requirements necessary for the state to go to war, the laws of self defense creating an implied authority to go to war, or the biblical commandment to destroy Amalek requiring Israel to go to war, Halachic authority exists permitting Israel to go to war against the Palestinian terrorists.

4. Limitations on Going to War

The Talmudic sages have placed various rules limiting the way that Israel may conduct warfare. Violation of these rules could prevent Halachic sanction of a war in

which Israel is engaged. However, if war is to be permitted as a morally sanctioned event, some forms of killing which otherwise would not be permitted under the self defense rationale must be allowed.⁸¹ As Professor Naphtali Zevi Yehuda Berlin notes, the very verse that prohibits murder would permit war.⁸² He states that this is so because, at wartime, Jews are not required to behave in a brotherly manner, then killing that would be prohibited is now permissible.⁸³

Rabbi Broyde notes that when engaging in warfare Israel could not: (1) kill an innocent third party to save a life; (2) compel a person to risk his life to save the life of another; (3) kill the pursuer after the evil act; and (4) use more force than is minimally needed.⁸⁴ These laws governing the pursuer rationale would be extended to their equivalents in wartime. Nahmanides understands that this shows that the Jewish tradition requires one to “show mercy to one’s enemies and not engage in unduly cruel activity.”⁸⁵ Another limitation mentioned is that the number of casualties cannot exceed 1/6 of the population in order for the war to retain Halachic sanction.⁸⁶ Besides these limits, war would be permissible under Jewish Law.

Israel has fulfilled their obligations in order to retain Halachic sanction of the war against the Palestinians. Israel attempts to limit civilian casualties and reduce collateral damage. While some of the specific actions taken will be discussed later, the goal of Israel’s action in wartime maintain these ideals. There is no dispute that Israel has not engaged in wanton destruction of property, rape of women, or attempts to harm the general civilian population purposefully.⁸⁷ Furthermore, with a population of at least 2.6 million,⁸⁸ and even using the Palestinian figure purporting that casualties number 2,160, this is well below 1/6th of the population. Halachic sanction thus remains for Israel’s war against the Palestinian terrorists.

Israel may be viewed as fighting a war against the soldiers of the Palestinian cause. Israel’s war is obligatory, they have fulfilled the requirements to go to war, the State has authority to be involved in a war, and Halachic sanction has not been lifted due to violations of Talmudic law by Israel. Therefore, terrorist actions against Israel may be viewed as an act of war and Israel thus has the right to treat the terrorists under the rules governing war.

B. Governmental Responses to Terrorism as an Act of War

Since the beginning of terrorist attacks on Israel, the government has employed various measures in hopes of deterring future attacks or preventing them outright. These measures have included assassinating leaders of the terrorist groups, destroying homes of suicide bombers, and deporting family members of terrorists. These responses have come after years of resorting to various means to achieve peaceful goals. However, when these means have not proved fruitful, the Israeli government has elected to punish further the terrorists who attack the nation.

The Talmud notes that permitted killing justified by war is distinctly different from other forms of justifiable killing.⁸⁹ Despite this, the Halacha imposes limitations

governing specific actions related to actions against the enemy in wartime. In order to determine whether Israel engages in lawful responses, the following questions will be considered 1) What are the rights and obligations of Israel to respond to terrorist activity; 2) When is Israel justified to kill, and even assassinate their enemy; 3) When may Israel destroy property belonging to terrorists; and 4) What are the limitations imposed in terms of inflicting collateral damage on the civilian populace.

1. Obligations of Israel to Respond to Terrorism

Two Talmudic verses control the obligation of Jews to respond to terrorist attacks. The Talmud decrees that “if someone comes to kill you, rise up and kill him first.”⁹⁰ As noted previously, this is a communitarian responsibility, thus an obligation under the Halacha.⁹¹ But when do we know when someone is coming to kill us? What if we are unsure? The Shukan Aruch has described when it is lawful to fight against those seeking to wage war against the nation of Israel:

“When there is a [Jewish] city close to the border, then, even if [enemies mount an attack, although they] come only for the purpose of [taking] straw and stubble, we should [take up arms] and desecrate the Sabbath because of them. For [if we do not prevent their coming] they may conquer the city, and from there the [rest of the] land will be easy for them to conquer.”⁹²

This description illustrates that the threat of attack is enough even if no attack has yet been made. Thus by preventing enemies from killing the populace and being obligated to do so in the face of impending danger, Israel must engage in attacks against the terrorist threats under Talmudic law.

In the same way we could compare this passage to a comparable situation in modern day Israel. The places where terrorists convene, in the West Bank and Gaza Strip, are within range of Israel, not only to attack at short notice, but they may actually fire munitions from these locations into the heart of Israel and its cities. Just as Israel was required to attack those outposts in Biblical times, this ruling would require the same in the modern age. When an enemy takes up arms on the borders of Israel, the nation has a duty to protect its citizens from the threat of attack. In this sense, it would be proper for Israel to attack their enemies who have such intentions with such close proximity to Israel.

In applying this to Israeli actions in the face of terrorism, the government has an obligation to attack the terrorists. They must do all in their power to prevent the loss of Jewish lives. In the face of a known danger, as the Palestinian terrorists pose, Israel has a duty to attack first in order to protect the people from being easily killed by terrorist actions.

2. Wartime Justifications for Engaging in Assassination of Terrorists

As part of their war to combat terror, Israel engages in the assassination of known terrorists whom they cannot capture through otherwise lawful means. In order to determine whether Israel is justified in engaging in this behavior, we must consider (1) the definition of homicide, and assassination, under Jewish Law; (2) When homicide is justifiable in times of war; (3) When are terrorists culpable, and therefore legally liable to be assassinated in times of war; and (4) What requirements or limitations govern killing an enemy in wartime.

The Bible speaks explicitly that homicide is unlawful: “Thou Shalt Not Murder.”⁹³ It also seems to even outlaw assassination itself by stating “Cursed be he that smiteth his neighbour in secret.”⁹⁴ Knowledge, however, that the intended target is subject to Israeli repercussions would seem to render the prohibition against assassinations moot (i.e. not in secret). The Mishnah too notes that some forms of killing are justifiable by illustrating that murder is “blood shed without cause” (dam hinnam).⁹⁵

Different categories of killing are also distinguished in Jewish law. While the Torah only identifies two categories of killings, premeditated homicide and negligent homicide, the Talmud identifies five other categories of killings: intentional but unpremeditated homicide, reckless homicide, gross negligence, accidental homicides, and justifiable homicides.⁹⁶ Because the Torah states that “blood unlawfully shed is innocent blood” (dam naki)⁹⁷, it acknowledges that justifiable forms of homicide exist. It is these justifiable forms of homicide that must be considered to determine if Israel may lawfully engage in assassinations. Three forms of homicide are justified under Jewish Law: execution, rescue, and war.⁹⁸

The Torah distinguishes between justifiable homicides that are permissible and those that are obligatory. Furthermore, the Talmud has illustrated justifications that may be used to illustrate that homicide in times of war is justifiable. These justifications include the laws of *rodef* (pursuer); and self-defense. Therefore, to identify whether Israeli actions are justified under Jewish Law, the assassinations must be determined as to their status and their justification.

Obligatory killings are those that are required in order to save a life. The Halacha provides various examples of obligatory killings such as participating in a public execution,⁹⁹ killing a man in self defense,¹⁰⁰ and to prevent a man from killing another or committing rape.¹⁰¹ Comparatively, permissible killings are those where one fears that their life is in danger even if that did not turn out to be the case. The Talmud provides the example of a burglar breaking into one’s home at night.¹⁰² Maimonides notes that even in regard to obligatory duties, failure to perform, though a sin, is not punishable.¹⁰³ Maimonides further cites the command “thou shalt not stand idly by the blood of thy brother” to show that these are obligatory and not permissible killings.¹⁰⁴ The question must then be asked, are the Israeli’s actions obligatory or merely permissible?

Israel’s actions to kill terrorist leaders are obligatory because they are required to prevent murder rather than just merely a possible threat to the population. The leaders of Hamas and Fatah have worked tirelessly, plotting to kill Israelis. The Talmudic examples

given, illustrating an obligation to save a life in the case of a pursuer are more akin the Israeli actions, than is the possible threat of a burglar entering the home. One example would be the assassination of Saleh Shehadeh:

On July 23, 2002, Israel found that Saleh Shehadeh was in a house in Gaza with his family. The government had been after Shehadeh, the head of Hamas' military wing, for years. They had had previous opportunities before when they knew of his whereabouts but had not acted on their information in order to restrict collateral damage. Under his leadership, the Hamas military wing had led to the murder of 232 Israelis including 220 civilians. His occupation was terror, and his only task was to engineer the deaths of Jews. Twenty of the attacks he engineered were suicide bombings. Finally, despite the collateral damage that would ensue, Israel chose to strike. They fired a targeted missile into the house killing Shehadeh along with 15 other people. Shehadeh was known to hide among civilians in order to make himself less of a target. However, despite the killing of civilians, the Israeli government noted that his death would save lives. As Ariel Sharon stated, "We hit perhaps the most senior Hamas figure on the operational side, a man who reorganized and rebuilt Hamas forces in Samaria, in addition to his actions in Gaza."¹⁰⁵

Was this an action in self defense? Was this an obligatory killing? The simple answer would be yes. Shehadeh spent his life pursuing the Jewish people. He referred to himself as a soldier, in fact, the leader of a "military wing." Furthermore, he planned numerous suicide bombings and sent people to kill. In order to save the lives of their citizens, Israel acted in self defense to eliminate a violent killer. Rather than consider him as merely a possible threat, the Israeli government knew that he had people under his command, the means and plans to kill certain Jews in certain areas, and would willingly and at any opportunity engage in murderous behavior. Therefore, Halachic sanction would be granted for the assassination of the second most wanted Palestinian terrorist in the world.¹⁰⁶

What are the Halachic justifications for obligatory killings? As mentioned previously, the laws of pursuer and self defense justify killing in wartime. The laws of war can be considered a mere extension of the laws of pursuer.¹⁰⁷ The law of pursuer (rodef) permits one to kill a pursuer who is pursuing another in order to kill him.¹⁰⁸ In wartime, the enemy soldiers can be deemed to pursue the army of Israel, thus making themselves liable to be killed. The laws of self defense follow the same rationale. When one comes to kill an individual, they have not only the authority but the obligation to kill their attacker.¹⁰⁹

Thus, assassination of terrorists is obligatory and based on the permissible justifications of the laws of pursuer and self-defense. Those military leaders who attempt to kill Jews, whether they pursue them on the battlefield or pursue them in the streets of

Jerusalem, may be assassinated under the laws of war. Despite the prohibition against assassination, these soldiers do not fight on a traditional battlefield, they fight in the dark rooms hidden in the streets of Judea and Samaria. Were they attacked without knowledge they would be? The terrorist in question, and others like him, are listed explicitly on Israel's most wanted list. Warrants are out for their arrest but they instead hide from the police and the military. Because they are actively pursuing the Jewish people, meaning to kill them, their assassinations are not only permitted, but obligatory under the Halacha.

After deciding that Israel has Halachic sanction to engage in assassinations, when is a terrorist culpable in warfare? It would be incorrect to assume that any soldier could be indiscriminately assassinated merely for being a member of an army fighting against Israel. The questions of capital murder have typically been answered in the realm of criminal law. Therefore, the best way to analyze whether one is culpable would be to apply the laws of self defense and *rodef*.

The targets of the assassinations are all those who are actively pursuing means to murder the Jewish people. The thirty-two assassinated individuals have been listed high on Israel's most wanted list. Killing in war is itself sanctioned.¹¹⁰ Just as in war, soldiers are liable to be killed when they are actively pursuing the Jewish people. In a war fought by planning individual attacks, when the enemy is unseen, then, the pursuer only shows himself at the last possible moment. Israel, thus, may find the terrorist culpable when they are actively planning these attacks on Jews. The Palestinian terrorist constructing a bomb in a house in Gaza, is analogous to the sniper on a battlefield. The laws of pursuer thus would apply, the terrorist would be culpable, and Israel would be justified in taking that individual's life through whatever means necessary in order to not transgress the biblical commandment that 'Neither shall thou stand idly by the blood of thy neighbor.'¹¹¹

Despite the permissibility of killing in wartime, various limitations govern how Jews may conduct themselves in war under the Halacha. The Halacha provides that, even in wartime, killing must be justified under the laws of pursuer or self defense and deadly force may only be used when necessary.¹¹² As long as the Israeli Defense Forces (IDF) do not engage in killing that offends the Halacha, then their actions, even assassinations, would still be justified.

The laws of pursuer and self-defense must govern every wartime casualty. In the context of the Intifada, how does Israel resolve this difficulty? There are two main forms of killing that have occurred during the war. The first type is hand to hand combat as seen in the street of Jenin.¹¹³ Killing that occurred there would be seen under the self defense rationale and those killings would not be deemed assassinations. Comparatively, the killing of leaders of terrorist entities, and suicide bombers on the way to their targets, would be justified under the pursuer justification. A common example of a terrorist whose killing is justified is when a Palestinian assassin en route to break into a home in one of the communities located in Judea or Samaria. These assassins, on sight may be

killed by the IDF or anyone else who spots them as they pursue their victims. These killings would clearly be justified under the pursuer rationale.

However, despite the ability to kill a pursuer or in selfdefense, how does the IDF justify the assassinations in those cases that are less than clear? This is especially difficult considering the Talmudic requirement, found by Maimonides, that it would be unlawful to kill him [the pursuer] where the victim could be rescued by other means.¹¹⁴ Can we stop these terrorists through other means? Maimonides further notes, however, that while this would be unlawful, the killer would not be guilty of murder. Does the Israeli government have other means at their disposal? Perhaps this can be viewed based on the intent of Israel to kill their enemies when other means are available.

What have the Israelis done when they have been able to capture terrorists? The terrorists who planted the bomb at Hebrew University that killed five students, rather than being killed, were arrested by Israeli authorities.¹¹⁵ In the eight days after the assassination of Israeli Defense Minister Rechavam Ze'evy, 42 terrorists with direct links to the assassination were arrested and none were killed.¹¹⁶ Just recently, on February 17, 2003, the latest head of the military wing of Hamas, Riad Abu-Zeid, was killed only when he pulled a gun so he could avoid capture by IDF forces.¹¹⁷ These examples abound while the number of assassinated terrorists stands at 32 during the past two years. This would seem to show that Israel does attempt to limit bloodshed when possible and attempt to capture and subdue terrorists rather than kill them.

Despite the large number of deaths, and opposition assessment that Israelis try to take as many terrorist lives as possible, that is not the case. The IDF has engaged in justifiable killings. They have also limited bloodshed where possible. In regard to wartime assassinations, the Israeli government has only engaged in justifiable homicide, has only attacked those culpable, and has limited the use of murder to the minimum. Therefore, they have Halachic sanction to engage in the assassinations of terrorists in the war against the Palestinians.

3. Justifications for Taking and Destruction of Property Under the Laws of War

One of the most disputed tactics that Israel has engaged in during their war against terrorism is the taking and destruction of homes of terrorists, their families, and associates. While it is commonly thought in the world community that these actions are done at the whim of various individuals, that is not the case. The Israeli government has legislative authority to destroy homes in accordance with Regulation 119(1):

A Military Commander may by direct order the forfeiture to the Government... of any house, structure or land from which he has reason to believe that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, detonated, exploded or otherwise discharged, or of any house, structure or land in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed or attempted to

commit or abetted the commission or have been accessories after the fact to the commission of any offence against these Regulations involving violence or intimidation or any Military Court offence; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or structure or anything in or on the house, the structure or the land.¹¹⁸

In summary, Regulation 119(1) provides that if a house or structure (a) was the source from where an attack was made; or (b) was inhabited by anyone who committed a violent offense or violated a military law; then the Military Commander may destroy the house or structure. Chief Justice Meir Shamgar noted that the purpose was to pose an ultimate deterrent effect in the face of restrictions on capital punishment imposed on terrorists.¹¹⁹ It should be noted that international law permits destruction of real or personal property in occupied territories when necessary for military operations.¹²⁰ In the face of this measure, permitting destruction of homes and structures if they have been the source of an attack or the residence of an attacker, does Jewish Law preclude their destruction?

The biblical commandment most often cited with regard to destruction of property in time of war is Deuteronomy 20:19-20,

When you . . . wage war against [a city] . . . you must not destroy its trees, wielding an ax against any food producing tree. Do not cut down a tree in the field, unless it is being used by the men who confront you in the siege. However, if you know that a tree does not produce food, then until you have subjugated [the city], you may destroy [the tree] or cut off [what you need] to build siege machinery against the city waging war with you.¹²¹

On its face, the ideals set forth in this passage seem to emulate Regulation 119(1). The passage provides that property (*a tree*) may not be destroyed (*cut down*) unless it is used by your enemies to attack you (*by the men who confront you*). The second sentence provides that you may destroy property (*the tree*) if it is required to fight your war (*cut off what you need*).

Under Jewish law, the following issues arise in regard to this debate: (1) When may property be destroyed or taken; and (2) What is the extent of property that may be destroyed in wartime? The Talmudic sages have remarked on the applicability of the commandment “thou shalt not destroy.”

Talmudic commentators have spoken explicitly as to the subject of when property may be destroyed. Maimonides interpreted this passage to mean that property may not be destroyed for the “mere purpose of afflicting the civil population and causing suffering.”¹²² Nahmanides explained the comment further saying: “for direct military advantage, anything and everything may be destroyed.”¹²³ This applicability in biblical

times was noted by Josephus, the famous Roman historian, stating that “it was enjoined . . . to not destroy their land by fire and not kill beasts employed in labor.”¹²⁴ These comments may be summarized by asserting that anything that is only used for general human well being is prohibited from being destroyed.¹²⁵

So how would Israel’s actions be viewed in this context? Destruction of property that is used as the base for terrorist attacks seems well within the guidelines proposed by the commentators. Clearly, if a structure is used to attack Israel or IDF forces, or to construct weapons, then its destruction would be for “direct military advantage.” The issue of destruction, then, seems clear. When the property in question is used for actions that would endanger Israel or Israelis, its destruction is not only permissible, but it is the duty of the military to destroy such property. As long as the purpose of the intent is military advantage, rather than to cause suffering, the destruction of the property would be permissible under the Halachic code. The deterrent effect, although applicable under the criminal code, does not seem to have bearing when viewing these destructions as acts of war.

Considering the permissibility of when property may be destroyed, and whose property may be destroyed, to what extent may property be destroyed? Nahmanides noted “destruction was forbidden only if it was wanton mischief of no possible advantage, or even a disadvantage.”¹²⁶ The admonition against destruction of property only covers that which is used for the use of the population with no military use. However, Nahmanides noted that property may be destroyed if there was any possible advantage. Note that he used the word possible to describe the advantage that must be gained. It can be assumed that that he meant that there are few limits that may be placed on the destruction of property if it will aid in the military effort. It must also be noted, that Ramban specifically mentioned that even a possible disadvantage would be enough.¹²⁷ This strengthens the previous point by illustrating the weight given to the military in making these decisions to lead to an ultimate military victory.

Israel, thus, would be well within their rights to destroy homes under the procedures of Regulation 119(1). The Military, under the Regulation, like Nahmanides’ view, must look to the military advantage that may be gained. When a terrorist uses their home as a base of attack, destruction then is well within the bounds of the Talmudic pronouncements. In terms of destruction of the homes of residents, it may be viewed as a deterrent effect to other military operatives thereby ensuring that there will be no military disadvantage. Another view would show that if this was or even could be the base of planning attacks, and the least possible advantage is enough to permit destruction, then the demolition would be permitted under Halachic law.

By engaging only in necessary or permissible destruction of property, Israel has not violated Jewish Law. They have not violated their Halachic sanction. Property is not destroyed based on arbitrary determinations; rather, it is done to reflect a need for military advantage and save Jewish lives.

4. Limitations on Infliction of Collateral Damage During Wartime

While not an actual response of the Israeli government, the impact of collateral damage has clear ramifications in the fight against terrorism. Often, in order to effectively assassinate terrorist planners, respond to attacks, or otherwise protect the populace, Israel will engage in some action which leads to civilian casualties. These civilian casualties are the cause of much of the negative public opinion that exists against Israel's responses to terror. Every legal system in the world permits some element of collateral damage in wartime. Under Jewish law, then, what limitations exist in Israel's responses so that they may effectively fight terror, yet still maintain some limitation on civilian casualties? Is public opinion correct in condemning Israel's actions as inhumane and unjust?

How do we begin to analyze this problem in the context of Israel's actions in the Intifada? Views of collateral damage vary depending on the type of action in which one was killed, the degree of innocence of those inadvertently killed, and the ability to attack in a way that would better limit casualties. The Halacha understands both the moral problems associated with killing innocents as well as the need to permit innocent casualties in defense of the nation. In order to answer these questions, I will attempt to justify collateral damage by answering the following questions: (1) How and when does the Halacha, generally, permit collateral damage; (2) Does Jewish Law distinguish between collateral damage of those who voluntarily remain in the field of combat and those who do not; and (3) To what extent must collateral damage be limited under Jewish Law.

The Jewish belief has always held life in the highest regard. In the same vein, saving lives of the Jewish people is one of the overriding principles of Jewish Law. The ambivalence that Judaism has held towards the taking of life can be understood in Jacob's reaction before he was to encounter Esau for the first time in 20 years:

20 years after robbing his brother of his birthright, it came to pass that Jacob was to leave Haran. Esau, along with 400 others, was en route to find Jacob.¹²⁸ Unsure exactly of what the encounter would hold, Jacob prepared to defend himself if the need would arise. In acknowledging the possibilities in their encounter, it was written "Then Jacob was greatly afraid and was distressed."¹²⁹

What does this passage have to do with collateral damage? Rashi suggests that Jacob, unsure whether Esau and his followers had come to kill, was fearful that he himself would be killed. His distress, however, was based in the possibility he might kill others, perhaps unlawfully.¹³⁰ The distress refers to a moral anxiety. This ambivalence towards the prospect of inflicting undue harm is further illustrated with the Talmudic dictum that only minimum necessary force shall be used.¹³¹ Despite this, it is also true that war destroys the basic standards of morality. It is because of this that Jacob is distressed.¹³²

This introduction to the Jewish ideas on the sanctity of life identifies the context in which a discussion on collateral damage must be discussed. The idea that we should inflict the minimum necessary harm led to Maimonides' comment that it was permitted to only surround a city on three sides so that they might flee from the beleaguered city."¹³³ Even in wartime, the Jewish people did not want innocent people to be accidentally killed, therefore, a means of escape must be provided. Ranban too agrees that life is of overriding importance requiring that one have mercy on one's enemies as they would have mercy on one's own.¹³⁴ In response to these sages, more recent commentators have extended these thoughts to the issue of collateral damage.

Rabbi Michael Broyde noted that "Jewish law would allow the unintentional killing of civilians as a necessary (but undesired byproduct) of the moral license of war."¹³⁵ Rabbi Bleich agrees with this sentiment. He asserts that "no . . . Rabbinic source takes cognizance of the likelihood of causing civilian problems in the course of hostilities legitimately undertaken as posing a Halachic or moral problem."¹³⁶ In the context of war, it would seem that inadvertent civilian deaths would be permissible when the goals themselves of war are legitimate.

Israel then has Halachic sanction for collateral damage sustained during the course of normal wartime responses. In the realm of hand to hand combat and responses to actual attacks, Israel's inadvertent civilian deaths caused are morally, and legally, permissible. When situations such as the recent fighting in Jenin are considered, this is viewed as legitimate:

On April 2, 2002, in response to multiple suicide bomb attacks and knowledge of terrorist planning and preparation, The IDF entered Jenin in order to round up militant terrorists. Jenin, the home of top Islamic Jihad officers, was a haven of terrorist activity. The IDF had specific targets in mind, top Islamic Jihad terrorists known to have planned and committed numerous atrocities, killing many Israelis. Seeking merely to take captive the terrorists, Israel knew at least some violence was likely. It turned out that even the mild hopes of minimal violence would turn out to be wishful thinking. Violent fighting broke out between the Palestinian militants and the IDF troops. Many of the residents of Jenin fled, while others opted to stay. The IDF stopped no civilian from leaving the territory, in fact they encouraged them to do so. However, in the nine days of fighting, 22 civilians who stayed were killed when used as human shields by Palestinian terrorists or caught in the crossfire of the gunfire between terrorists and IDF troops.¹³⁷

In the case of Jenin, and similar instances, Israel followed the law as laid down by Maimonides, permitting and encouraging civilians to flee the field of battle. Yet, for those who stayed, knowing the circumstances, and that fighting is ongoing, they are no longer considered innocents under Jewish Law, but have changed their status to that of combatants.¹³⁸ Warning of impending attacks, using even bullhorns and public displays

to encourage civilians to leave dangerous areas are just part of the responsibility that Israel has undertaken in their quest to eliminate civilian casualties. However, would we distinguish between these civilians, killed in the hand to hand combat, from those who are killed because of their proximity to a terrorist assassinated by guided missiles, targeted bombs, and other similar means?

On its face, these deaths would seem to be distinguishable. The Jewish tradition discusses the field of battle. After all, those who remain in the field of battle are “classified as combatants because the opportunity to leave is continuously present.”¹³⁹ It would seem then that one who is killed by the mere circumstance of being nearby to a terrorist target would fall outside of the realm of permissible collateral damage. However, that is not the case when dealt with from the perspective of this war.

The commentators discussing the field of battle only dealt with traditional war fought on the battlefield. It is not so clear when we are dealing with a war that cannot be fought in an organized manner. We have defined the field of battle in this war as being unconfined, unbounded, and unknown to the public. The streets and homes themselves are military targets because of their occupants. After all, it is from there they do all of their planning, and some of their attacking. By judging the terrorist actions to be an act of war, the terrorists, wherever they are, are deemed on the extended battlefield.¹⁴⁰ The occupants with them, with few exceptions, have been associates of these terrorists who knew full well the dangers and the possibility that an attack could come at any moment.

Even in the case of Saleh Shehada¹⁴¹, the civilians killed, including children, were members of his own family.¹⁴² Yet it was known that he traveled with his family in order to make himself less of a target. In fact, he was known to never sleep in the same place for more than a single night. So were those members of Shehada’s family in the line of fire? Not only would we consider them to be in the field of battle but it was Shehada himself who had put them there. He attempted to use his own family as a human shield. Just as the Jewish people would have sanction to kill a commander fighting in the plains of Jericho even if his family was standing alongside him, Israel had moral sanction, when other methods proved futile, to kill him despite the inevitable civilian casualties that would, and did result.

Because the civilians killed are in the field of battle, has Israel abided by the Halachic limitations on permissible collateral damage? While Israel has an obligation to limit collateral damage, the deaths that do result in lawful fighting are permissible under the Halacha. While some specific instances could prove questionable or even show liability, we must judge Israel’s actions on the whole to determine if any breach of Halacha sanction has occurred. We do know that Israel has encouraged civilians to leave the field of battle, encouraged the Palestinian people to stay away from known and wanted terrorists, and have used many safeguards to prevent civilian casualties. While the Palestinian people have some cause to complain over the approximately 400 civilians killed, the number of Palestinian civilians killed is below the number of Jewish civilians killed, many of the civilians were killed during traditional fighting, many Palestinian civilians killed have been later found to be terrorists themselves (or children and

teenagers attacking Israeli troops), and the remainder are justified in order to save further lives.

Judging actions against terrorism to be an act of war proves to be a difficult task. The Intifada has many components, some which mimic traditional battlefield encounters while others seem far removed from any classic definition of war.¹⁴³ For that reason it is difficult at best to understand responding to terrorism solely as an act of war. While that Talmud provides invaluable advice on how to approach these problems, the sages can in no way have foreseen how warfare, and terrorism, would be waged in the 20th century. It is my contention that many of the facets of this conflict may be correctly viewed, and justified, under the laws of war. These would include the legitimacy of acting at all, engaging in assassinations of military leaders, and having Halakhic sanction to permit a minimal amount of collateral damage. In comparison, other actions taken by the government, including deportations, certain killing of terrorists, and destruction of property in many circumstances are not correctly viewed as acts of war, nor can they be justified as such. Therefore, only by further analyzing this conflict using other aspects of the Halacha can Israel's actions against terrorism be fully justified.

III. Responding to Terrorism as a Criminal Act

By responding to terrorism under criminal law, Israel would be forced to treat terrorists in a similar manner that they do other criminals. Some of the components of terrorism including the political purpose, the organization, and the intent to put fear in the populace must be functionally disregarded and the State must instead apply the rule of law to these terrorists.¹⁴⁴ However, justifying government actions in response to these activities requires an analysis of analogous acts that the sages have discussed throughout the centuries.

To discuss responses to terrorism under criminal law, this paper will analyze the following: (1) Is terrorism a criminal act; (2) How should Palestinian terrorists be punished under the criminal law and what law should apply to them; (3) What is the court's jurisdiction to impose criminal law; and (4) Can the government responses to terrorism, assuming they are criminal acts, be justified.

A. Is Terrorism a Criminal Act?

Are acts of terrorism, and responses thereto, correctly treated under the criminal laws defined in the Talmud? The specific actions taken by terrorists have been traditionally treated under the criminal law. From random murders and bombings to stone throwing, the acts of terrorism undertaken by the Palestinians facially appear to be criminal acts. Because the acts themselves are taken not under the authority (at least not publicly stated authority) of a state, and the members are not a member of any recognized military force, criminal law would seem to be the correct measure with which to judge these acts.

The key difference between criminal and military actions is the distinction between public and private acts. Because the terrorist actions do not have explicit public sanction, they would be viewed as criminal acts. This seems even more true when the terrorists are actually citizens of the country they are attacking. In the case of the Israel Palestinian conflict, this distinction is less clear because the Palestinians are not citizens of the state of Israel. The terrorist actions taken may be viewed as private acts, although this is not as clear as it would seem. If we placed terrorist acts on a continuum between acts of war and criminal acts, it would seem that acts of terrorism would fall in the middle. The question is then whether terrorist acts would be more akin to the criminal acts than to acts of war; it would not be difficult to see them as such. In the same vein that terrorist acts have been viewed to be quasi-military acts,¹⁴⁵ we could also see them as quasi-criminal acts and thus viewed under the criminal laws of the Halacha.

The key questions in analyzing terrorist acts under criminal law involve the rules that govern criminal acts as opposed to the rules that govern the State's response to criminality. So when is something a crime? In the Halacha, crimes are identified explicitly. These crimes have been extended through Talmudic interpretations and the application of common law in the Jewish Law system. From laws governing murder to commercial transactions, the Halacha delineates what constitutes a crime in Jewish Law. Most of the crimes in American law parallel their counterpart in Jewish law. There is, however, a larger emphasis on civil law and restitution that would entail many of the crimes that are described in American law to be punishable by restitution and civil penalties rather than penal sanction. Furthermore, unlike a secular system, the laws of obligation in Jewish law specifically prohibit certain acts and prescribe a duty to engage in others. The affirmative act/omission dichotomy dominates how Jewish law treats criminal acts.

For the purposes of this discussion, describing terrorist acts, the acts for which terrorists are complicit are crimes under the Halacha. Murder, stone throwing, planting bombs, abetting murder, etc. would all be individual crimes under the Halacha. Therefore, the individual acts that terrorists engage in are criminal acts and Israeli government responses may be treated as responses to those acts.

B. Punishing Terrorists Under Criminal Law

One of the difficulties in analyzing terrorist actions under the Halacha is that Halachic law does not apply to non-Jews. While we must gauge Israel's actions under Jewish law, how do we handle Palestinian actions? Throughout history, Jews have treated gentiles (non-Jews) under a different standard of law.¹⁴⁶ In order to determine how we can correctly assess the culpability as well as appropriate sanctions for terrorism under criminal law, I will discuss (1) What is the correct law that applies to Palestinian Terrorists; (2) What are the Palestinian obligations under that set of laws; and (3) Whether Israel has the ability, and/or the obligation to impose punishment on Palestinians.

1. Law Applicable to Palestinian Terrorists

What Law is applicable to Palestinian terrorists? Jews are judged under the Halacha. The Torah states: “Judges and officers shall you make in all your gates . . . and they shall judge the people with righteous judgment.”¹⁴⁷ Rabbi Nissim ben Reuven Gerondi (Ran) commented that Israel, unlike other nations, is required to “render just and true judgment” and only then will “divine grace will be visited upon our people.”¹⁴⁸ This comment illustrates that Jews are judged under a different standard than are other peoples. As Rabbi Bleich notes, Judaism posits a parallel legal code that is binding on all humanity, the Noahide Code.¹⁴⁹

The Noahide code describes the seven commandments that were binding on the sons of Noah: the prohibitions of idolatry, blasphemy, sexual offenses, bloodshed, theft, and eating the flesh of a living animal as well as the affirmative obligation of dinim, to establish courts.¹⁵⁰ Rabbi Bleich notes that these laws are applicable to all mankind.¹⁵¹ While these laws differ from obligations under Jewish law, Rabbi Kook states that while the Halacha as administered to Jews is based on the Torah, the Noahide laws are based on “fundamental human honesty.”¹⁵²

Some commentators have expanded on the Noahide laws inferring greater requirements than just the facial prohibitions. Nahmanides found that many of the Halachic laws including those as pertaining to extortion, commercial transactions, rape and seduction, overreaching, and personal injuries among others also apply to the “descendants of Noah.”¹⁵³ He notes that these obligations are inherent because human society, even prior to the Revelation at Sinai, followed many established legal norms.¹⁵⁴

Despite the expansion of the Noahide code as it pertains to non-Jews, it has been noted that the Noahide code is less restrictive than the Halacha. In criminal law, punishment may be imposed by a court using testimony from a single witness and the court may be composed of a single judge.¹⁵⁵ Rabbi Kook asserts that the laws don’t follow the same stringent standards of the Halacha because they “are rooted in common decency, an affinity for justice . . . in everyday matters, an abhorrence of blatant evil . . . common to all men on earth” and not in the holiness of the Torah.¹⁵⁶

In sum, the laws of Noah provide that apply to non-Jews are the natural law inherent in mankind.¹⁵⁷ The Torah views that all men must be governed by some laws. While less restrictive, the Noahide law still provides a way to ensure that non-Jews may be governed and punished in a Jewish legal system. The common sense approach to creating these laws shows that all people should have the internal desire to affirmatively do certain acts and more importantly, not engage in those acts that are “blatant evil.”¹⁵⁸ All non-Jews, in fact all people on earth (including Jews), must abide by the Noahide laws.¹⁵⁹ The Halacha incorporates the Noahide law, so these laws would apply to Jews as well, but in many cases are more stringently defined for the Jewish people.

Because the Palestinians are defined in Jewish law as “descendants of Noah” they must abide by the Noahide code. All the restrictions, obligations, and requirements inherent in the Noahide laws would, and should, apply to the Palestinians. Because these

laws are less restrictive than Halachic standards, applying the Halachic standards would be incorrect. Furthermore, while it would seem that Jews are applying a system of laws on the Palestinians, these laws in fact “bind all humanity” and the Palestinians are treated no differently than any other group.¹⁶⁰ The purpose behind enacting the Noahide code is that law governs man, and all men must be governed by some law in order to ensure that there is no lawless society. So too, the Jewish nation, like all nations, must have some standard with which to apply to non-citizens in order to correctly implement their own standards on those with whom they have contact. By applying the Noahide code on the Palestinian terrorists, we can correctly ascertain the degree of culpability and the proper punishment for those who violate the law.

2. Obligations of Palestinians Under the Noahide Code

The Palestinians, like all other peoples, have obligations under the Noahide code. These obligations are separated in two main components, the prohibitions under the law including the prohibition against murder and theft, and the affirmative obligation of *dinim*, to create a just legal system.¹⁶¹ I will describe the requirements of Noahide commandments by showing the obligations under the laws of Noah and how these obligations have been upheld or defied by the Palestinians.

The Talmud describes the six negative commandments of the Laws of Noah as prohibiting (1) murder; (2) blasphemy; (3) theft; (4) sexual immorality; (5) idolatry; and (6) eating the flesh of a living animal.¹⁶² For the purposes of this discussion, and acknowledging that the Palestinians are Muslims, the requirements of blasphemy, sexual immorality, idolatry, and eating the flesh of a living animal are upheld by the Palestinian society. These too are the requirements that many secular societies do not see as unlawful. The prohibitions of murder and theft, though, are universal in their acceptance by the peoples of the world.

The other main requirement of the Noahide code is the requirement of *dinim* (laws). *Dinim* refers to the requirement of nations to impose a set of laws to create a “just legal system” in order to create an orderly society.¹⁶³ Rahum Nakover asserts that “just as the Jewish People are commanded to establish courts, so too are the descendants of Noah required to establish courts.”¹⁶⁴ This requirement is due to the emphasis that the Torah places on establishment of a legal system. As Rabbi Jacob Anotoli notes, the requirement of *dinim* is imperative because “wholeness cannot be attained until men are possessed of regulations that govern social discourse.”¹⁶⁵ As Maimonides remarked, requiring *dinim* would ensure that “the world would not be destroyed.”¹⁶⁶

The Talmudic sages have also noted that the requirement of *dinim* was not just to create a legal system but a just legal system. As Rabbi Moshe Isserles (Rema) explained: “Noahides are commanded to keep the local conventions, and to judge justly between man and stranger.”¹⁶⁷ This point is further underscored by the comments of Rabbi A.Y. Karelitz (Hazon Ish) commenting that “the Noahides became obliged to establish laws of honesty and right behavior.”¹⁶⁸ Only by enacting laws that lead to a just society can the Noahide pursuit of justice be maintained.¹⁶⁹

Maimonides noted that the unstated requirements necessary in a legal system are embedded in the requirement of dinim.¹⁷⁰ Further, the obligations of dinim do not just require the appointing of judges but the laws of dinim include such matters as theft and extortion.¹⁷¹ A dissenting voice can be heard by Rashi as he understood the laws of dinim to be not even the enacting of laws but just the appointment of dayanim and shofetim (judges and priests).¹⁷² As Rahum Nakover explains, this is because Rashi felt that only by appointing judges can the commandments be promulgated throughout the land.¹⁷³ By appointing a system of judges, who adjudicate over the land, and do so to create a just society, with the pursuit of justice, the Palestinians would fulfill the requirement of dinim as handed down to Moses at Sinai.

The Palestinians must abide by the Noahide prohibitions against murder and theft in order to be free of blame in the ongoing conflict. While there have been relatively few reports of stealing and theft related to the Intifada, the prohibition against murder weighs heavily in the forthcoming discussion when specific acts are analyzed according to Jewish law principles. By committing acts of murder, the Palestinians are liable under Jewish law to be penalized under Halachic criminal law.

Despite the acts for which they are liable under the Halacha, have the Palestinians fulfilled the biblical commandment to appoint Dayanim or, similarly, imposed a set of just laws? There is no dispute that, at least recently, the Palestinian Authority has created a court system and imposed a system of laws which, at least facially, appears to meet the requirements of dinim. But have these laws led to a just society? Have their laws been in the pursuit of honesty and right behavior? The Palestinian Authority basic laws have not been put in final form but an International team of lawyers drafted a set of laws so that they may have a just society.¹⁷⁴ To date, though, the Palestinian Authority has not enforced these laws in a manner as required to be judged to have fulfilled their Noahide obligation.

A multitude of violations of even their own laws have been decreed by various international organizations. From lack of enforcement in the realm of intellectual property and pirated media,¹⁷⁵ arbitrary arrests,¹⁷⁶ political prisoners,¹⁷⁷ to the imposition of capital punishment¹⁷⁸ the Palestinian Authority has become a den of lawlessness not enforcing even their own basic laws. The Palestinian Authority may have the infamous distinction as the country with fewer capital punishments imposed by the court then have defendants standing trial for capital crimes be murdered during the proceedings.¹⁷⁹ Even the Human Rights Watch, which regularly decries Israel's use of "extreme" violence, has found numerous instances of accused collaborators being sentenced to death in court sessions lasting less than 90 minutes with no right to appeal.¹⁸⁰ Israel too has rejected the trial of the Palestinian terrorists who killed the Israeli Defense Minister, Rehavam Zeevi, when they were sentenced to one year in prison.¹⁸¹ These examples illustrate that it is clearly disputable whether the Palestinian Authority has enacted dinim to the standards required by the Halacha.

In comparison, other countries have enacted just laws that parallel closely not only the Halacha, but international law standards as well. Examples of these countries would include most of the countries in the world, including Israel. It must be noted that very few, if any, countries have legal systems that parallel the Halacha or international law standards exactly and they all have some of their own “spin” on enacting a “just law.” However the only way to determine whether a system is in fact just and lawful is to gauge the system on the whole.

My contention is that the Palestinian Authority legal system does not meet the requirement of dinim. Words such as corrupt, arbitrary, and inconsistent dominate the discourse on the Palestinian Authority legal system. The Palestinian Authority has not effectively prosecuted criminals nor enforced the laws they have enacted. So the question becomes whether Israel has the ability or the obligation to enforce the Noahide laws on the Palestinians.

3. Ability and Obligation of Israel to Enforce the Noahide Obligations

There is a dispute in the Halacha over whether there is an obligation or just the mere ability to enforce the Noahide laws. Some commentators even dispute that the Jewish people can enforce laws of dinim at all. Rabbi Gershuni points out that Jews do not have an obligation to bring a non-Jew to justice.¹⁸² He does not, however, limit the possibility that Jews may bring a non-Jew to justice.¹⁸³ Comparatively, Rabbi Gershuni understands Maimonides to say that in cases of capital crimes, a Jew does have an obligation to impose the death penalty on non-Jewish transgressors.¹⁸⁴ Other commentators disagree on the obligations of Jews to judge the sons of Noah. Maharam Shik finds that Jewish courts do have an obligation to bring Gentiles to Justice.¹⁸⁵ He notes that reason for this is that “judging transgressors, even descendents of Noah, is our concern, for others will learn from any evil done in public and follow suit.”¹⁸⁶ He also finds that any person within the jurisdiction of the Jewish nation is within the jurisdiction of its courts.¹⁸⁷

This dispute may best be analyzed by recounting the biblical story of Shechem:

When Dinah, daughter of Jacob, went into the city Shechem to become acquainted with her neighbors, Shechem, the son of Hamor the Hivite took her and defiled her. He refused to let her leave. When he wished to make her his son’s wife, Jacob upon confronting Hamor “held his peace.” While the people of Shechem, thieves themselves, knew of the incident, they did nothing. They did not try Shechem nor did they permit Dinah to leave. Tricking the people of Shechem that they would make peace, Jacob and his sons convinced the people to join with the Jews and abide by the laws. They convinced them to show that they will become Jews they must circumcise themselves. Upon doing this, two of Jacob’s sons, Simeon and Levi, went into the city of Shechem and slew all the males and rescued their sister. Simeon and Levi attributed their act

to the rampant criminality and lawlessness prevalent in the city evidenced by the lack of culpability attributed to Shechem son of Hamor and that no individual had done anything to prevent the act or rescue Dinah afterward. It seems omniscient that this vein of lawlessness flows through Shechem to this day where the ancient city of Shechem, now known as Nablus, is considered a den of terrorist activity. Perhaps this is why Shechem, and now Nablus has been cited as Makom muchan l'furanut: A place predestined for misfortune.¹⁸⁸

Some Commentators often cite the story of Shechem to understand how the Noachide laws may be applied.¹⁸⁹ They understand that even Dinah's name comes from the same root as dinim, meaning justice. It has been asked though "how the righteous sons of Jacob could spill innocent blood?"¹⁹⁰ According to Nahmanides, he understands Maimonides to find that Simeon and Levi were obliged to punish the people of Shechem.¹⁹¹ It does appear, however, that Nahmanides expresses reservations that all the people should be murdered.¹⁹² Maimonides view would limit no such action as he states "All the residents of the city were guilty, deserving of capital punishment. After all, Shechem seized and raped Dinah; they saw it, they knew it, and yet did not bring him to trial."¹⁹³ His reasoning was simple, the Torah commands that the Jewish People have an obligation: "you shall destroy the evil from your midst."¹⁹⁴

It is thus a difficult question. Do the Jewish people have an obligation to impose laws on others? May they inflict punishment without trial? When could Israel then try the Palestinians under the laws of Noah? As it applies to the Palestinians, the ability of Israel to bring the terrorists to justice seems to be permitted. Limits of judicial authority are less simple to understand. Most commentators require that the Noahide laws are upheld by the courts. This would mean that Simeon and Levi's actions then would not be permitted under Jewish law. This makes sense when we consider that the extreme Jewish groups would use the story of Shechem to justify the actions of Baruch Goldstein, where he opened fire in a mosque in Hebron, killing many Muslims.¹⁹⁵ However, the other view would hold that the creation of a just society is so important that even mass murder would be justified when the society is so corrupt that they do nothing to rein in lawlessness. Assuming an intermediate position, where Israel may impose punishment, but cannot do so without individual culpability, we can gauge whether Israel's responses to terrorism are justifiable under criminal law.

C. Authority of the Court to Impose and Enact Criminal Law

In determining whether terrorist masterminds who send their emissaries to perform their deadly tasks are liable, we must determine what requirements Israel must undertake in order to impose the criminal law. Generally Jewish Law requires that one who is to be put to death must be tried in a court of law. Does Israel comply with these requirements? The issue becomes (1) What are the requirements for the court to impose capital punishment; (2) When may the court impose capital punishment without following classic torah rules; and (3) are there any limitations on the ability of the court to impose such punishment.

As Maimonides stated, one who is liable for a capital crime “is liable to death . . . upon judgment of the court.”¹⁹⁶ Classic Torah rules require two eyewitnesses in order to impose capital punishment.¹⁹⁷ The court also prescribed that capital punishment was only to be invoked for one who directly killed another.¹⁹⁸ The terrorist actions would suffice to meet the direct requirement.¹⁹⁹ The accused was also entitled to prior warning, if possible, from witnesses before the accused committed his crime.²⁰⁰ Clearly, in the context of assassinations, the accused is not tried in a court of law. Often these people are not able to be brought before the court. So then how may the court go outside of Biblical law in order to impose punishment?

Rabbi Judah ben Asher (“Rabbi Judah”) declares that Jewish courts do not always follow Talmudic rules in capital cases.²⁰¹ Rabbi Elazar ben Yosef agrees and finds that punishment may be imposed as not provided for “even in the case of a zimzum (buzz).”²⁰² These extrajudicial punishments are permitted because there is an “emergency clause” in Talmudic Jurisprudence that allowed for flexibility and adaptability in the Jewish Legal system.²⁰³ Various reasons for these emergency clauses in criminal jurisdiction have been raised including : (1) To prevent violation of the Torah; (2) For the benefit of society; and (3) In emergency situations due to exigencies of the time.

Rabbi Eliezer ben Jacob stated that “the court may impose punishment not proscribed in the Torah – not to transgress the law but in order to preserve the Torah.”²⁰⁴ This statement has been shown that the intent was to safeguard the law in order to preserve it from future transgressions. As he continued, these enactments may be used “to seep out evil from your midst.”²⁰⁵ By permitting a court to violate the biblical commandments in order to prevent further transgressions, courts are granted a large degree of autonomy in determining when these decisions may be made. This assessment is agreed upon by Rabbi Judah when he found that measures, even extreme measures, may be taken by the courts in order to curb behavior that is injurious to the Torah therefore harming the Jewish people.²⁰⁶ By permitting the court to deviate from the Halacha and rule contrary to it, courts may lawfully render decisions and impose punishments that depart from the law.²⁰⁷

In addition to imposing punishments to safeguard the Torah, courts may also do so for the benefit and welfare of society. To fulfill the ultimate purpose of Jewish Law, courts may even permit individual rights to suffer for the greater good of the community.²⁰⁸ The courts, though, would enact laws not to promote suffering but to maintain law and order so that the courts could restore order to the community when in disarray.²⁰⁹

Rabbi Judah explains the reason why courts have the power to make laws not in the Halacha for the benefit of the community is because the judge is characterized as the father in the community and, in that role, is charged with maintaining law and order through whatever means possible.²¹⁰ Another purpose correlated to the idea of maintaining law and order is that extrajudicial punishment may have to be imposed n

order to demonstrate the force of the law to the people. As R. Yom Tov b. Abraham Ashbili (Ritba) stated: “The people would hear (of the crime and punishment) and fear (to commit such crimes). Also, the (person convicted) would no longer have (means) with which he could continue to perform such an evil deed as this ever again.²¹¹ By issuing rulings to increase law and order, the judge would do so to better the community as a whole even if the Halacha would have to be violated.

The sages have also permitted the courts to have extrajudicial authority in emergency situations. Even in biblical times the Sanhedrin was “empowered to deviate from classical criminal procedure as an emergency measure.²¹² What would define an emergency measure under Jewish Law? Rabbi Judah suggested that it was up to the courts to determine what defined an emergency measure.²¹³ He further noted that the exigent jurisdiction would apply based on “the needs of the hour” when there was an urgent and pressing need to apply them.²¹⁴

Given then that judges may impose emergency jurisdiction when it is required by the needs of the time, and it is up to the judges to decree such acts, the only remaining question is how long these emergency measures may last. There are two views of this concept: 1) a temporary measure and 2) a measure taken because the times demand it. A temporary measure is defined by the rule from Deuteronomy 4:2 as “one taken for a limited amount of time because a deviation may never be decreed for limitless time because it would violate Torah law.”²¹⁵ In comparison, Maimonides finds that a measure taken because the times demand it does not limit the amount of time a measure may extend as long as it is still required due to exigent circumstances.²¹⁶ By analyzing how the Talmud has treated situations in this sense we can understand how to apply these rules in modern day Israel. The following exigent jurisdiction circumstance has been discussed at length by the commentators:

“Once a man rode his horse on the Sabbath in the time of the Greeks. At the time sinfulness was rife and obedience of the Torah was becoming common. In response the judges decreed that he shall be stoned to death so he was.”²¹⁷

In typical times, violation of the Sabbath would entail a just punishment, one befitting such a violation. Yet in this case, the court decided that the man should be stoned to death and the court adjudicated him so that he was. Why would the court permit it? Rashi stated that he was stoned “because sinfulness was rife, for, seeing the oppression and persecution of Israel by the Greeks, people were contemptuous of the commandments.”²¹⁸ Rabbi ben Jacob when he made his comment about prescribing punishment not permitted by the Halacha directly referred to this case because the stoning of the man would help provide a deterrence from future violations of the Torah.²¹⁹ This illustrates that even for relatively minor violations,²²⁰ when the times demand it, the courts may impose a harsher punishment than decreed by the Talmud.

In the case of Israel and their responses to terror, they have decreed that they are in a “State of Emergency.”²²¹ So may the courts make judgments outside the bounds of

criminal law? Following the three possible purposes in imposing extrajudicial punishment, Israel would have Halachic authority to impose punishment that is outside Jewish law.

Would Israel protect the Jewish people from violations of the Torah? Since the Intifada began, violence by Jews against Arabs has risen dramatically. Many living in Judea and Samaria have even rioted and lynched Arabs after attacks. These violations of the Torah may be stopped by enacting harsh punishments to stop the violence that leads to these acts. The courts may decide that assassinating leaders and stopping future violence will prevent further violations of the Torah.

In the same sense, the judges may decree that for the benefit of society, punishments disallowed by the Torah may be permitted. Is there a benefit to society by these kinds of punishments? One can argue that these are used to maintain law and order to better the welfare of society as a whole. Besides the obvious deterrent factor of assassinations, deportations, and destruction of homes, these may benefit society in other ways as well. Assassinating a killer may save lives and would in fact impose the capital punishment that would have been an obligation of the court had the terrorist been available for capture or arrest. The threat of deportation may prevent a suicide bomber and the destruction of a home could be one less base for terrorist attacks. Thus, the courts would have authority to impose these punishments for the benefit of society and the maintenance of law and order.

The final purpose was in emergency situations. The emergency measure here would be deemed to be of the second type as described by Maimonides that it is a measure taken because the times demand it and is thus for a limitless amount of time. Israel has undertaken some of these acts since the terrorists began to use unimaginable methods to attack Israeli citizens. Are terrorist attacks as much an emergency as frequent violations of the Sabbath? Besides that terrorist attacks cause constant violations of the Sabbath because of the extra security required, the constant terror and murder would easily be enough to impose extrajudicial punishment. When the people are being attacked on a daily basis, living in constant fear, there are few who would argue that the courts would not have the requisite authority to declare an exigent circumstance permitting Halachic violation.

D. Government Responses to Terrorism as a Criminal Act

The responses of Israel in reaction to terrorism are not traditional responses in international legal systems. However, there has never been a country that has been consistently racked by terrorism, especially those with such disregard for their own lives let alone others lives. How can a state that operates under a system of penal laws impose those laws on a people who so openly defy them? Perhaps the well worn cliché “desperate times call for desperate measures” would fit this situation. This, though, does not solve the problem because Israel does operate under a structured penal code. For years, Israel has punished crimes from murder to fraud when committed in the State.

Traditional purposes of punishment though, cannot be applied to the terrorists in question. With a conscious disregard for life, an inability to care about personal penal sanction, and knowledge that the government must operate within a framework of laws, the Palestinian terrorists have maneuvered around the mainstay of the Israeli penitentiary system, possible imprisonment.

To find a way to deter terrorist acts, then, the government willingly assassinates terrorist leaders, deports families of terrorists, and destroys their homes. These are now justified under Israeli law. But how does Jewish law resolve this dilemma? In order to understand how the Halacha can deal with these problems, Talmudic justification must be found for assassinations and destruction of homes.

1. Justification to Assassinate Terrorists Under Criminal Law

Assassination is the preeminent method that Israel uses to combat terrorism at its head. When Israel finds that individual terrorist leader's whereabouts are known and they are wanted by the authorities for planning murders of citizens, assassination may be used to prevent their commission of further crimes. Jewish law, though, maintains specific offenses for which one may be held capital liable. How do we determine whether assassinations should be permitted by the government of Israel? The analysis begs the following questions: (1) When is one held liable for a capital crime; and (2) What are the justifications for Israel to kill a terrorist.

Talmudic law not only permits but requires the state to impose capital punishment on transgressors of specific laws. While various crimes are capital crimes under Jewish law, the only crime that is dealt with in this section is the biblical proclamation: "Thou shalt not murder."²²² Of course murder is a broad proposition. Direct, premeditated murder of an individual is an easy case in Jewish law.²²³ The more difficult cases involve indirect killings. Such crimes as accessory to murder, abetting a murder, third party murders such as hiring a killer, criminal negligence, and unpremeditated homicide present difficulties in prescribing capital punishment. In order to make one liable for capital punishment though, they must come "presumptuously upon [their] neighbor, to slay him with guile."²²⁴ The question is whether the actions of terrorists fit within the accepted categories of culpable crimes for which capital punishment may be administered.

The starting point of any discussion on murder emerges from Maimonides concise definitions of murder that he reveals in his commentary on the Mishnah:²²⁵

1. "If one person kills another himself, such as by striking him with a sword or with a deadly stone, or by strangling him, or by thrusting him into a fire, he must be put to death by the court, seeing that he himself killed another in some manner"
2. "If, however, one hires an assassin to kill another, or sends his slaves to kill him, or ties up another and leaves him in front of a lion...the rule

in each of these cases is that he is a shedder of blood, has committed the crime of murder, and is liable for death at the hands of Heaven but there is no capital punishment at the hands of the court"

3. "If the king of Israel wishes to put them to death by royal decree or for the benefit of society, he has a right to do so. Similarly, if the court deems it proper to put them to death as an emergency measure, it has the authority to do as it deems fit, provide that circumstances warrant such action."

For the purposes of this section, the third comment by Maimonides, regarding the royal prerogative, falls outside the bounds of traditional criminal law and will be considered later.²²⁶ We can see, however, that capital punishment is not permitted in cases where causation is indirect and not premeditated. So how can we justify, under criminal law, killing terrorists who have engaged in planning and ordering of others? Dealing with these topics under criminal law and not the laws of war limits the ability of Jewish law to impose such punishment. Also with no concept of transferred intent, the idea that the murderer must have killed a specific individual is necessary for a terrorist to be culpable.²²⁷ To identify when one may be considered liable for a capital crime, the Mishnah and Gemara have dealt with numerous case studies to identify capital culpability. I will analyze these cases and describe their analogous counterparts in Israel's fight against terrorists.

The first case expounded in the Mishnah describes the following:

"A perpetrator hits and kills the victim with a stone or iron implement" ²²⁸

The Mishnah finds the murderer culpable in this instance.²²⁹ In their article,²³⁰ Irena Rosenberg, Yale Rosenberg, and Bentzion Turin, discuss this and other cases to determine causation and culpability of individuals under the Halacha. They find that all the elements of the crime are present: they place the victim in a life threatening situation, performed the murderous act with intent, and clearly and directly caused the victim's demise.²³¹ They note that because the act, intent, and result are simultaneous, this case is clear illustrating the perpetrator's liability.²³²

An analogous situation in modern Israel would be when an assassin enters the home of an individual and murders them. Here the elements are set out. A murderous implement is used, they place the victim in a life threatening situation, have intent to murder, and individually cause the victim's death. The assassin has done little different from the situation described in the Mishnah. Culpability for a capital crime is clear in this case. The terrorist in question, by directly causing the death of the victim, is liable for capital punishment. Maimonides would agree (assuming the criminal is convicted in a court of law) because this instance fits directly with his definition of capital murder.²³³ We must also note that Maimonides would find not only is it permissible that capital

punishment be imposed but that it is an obligation of the court that “they must be put to death.”²³⁴

The next case study begins to blur the lines of culpability:

“The perpetrator chances upon a victim under water or in a fire, a life-threatening situation that the perpetrator did not create. The perpetrator thereafter prevents the victim from saving himself, causing his death.”

Here the article describes this as an “opportunistic homicide.”²³⁵ While this case is not actually stated in the Mishnah, the article notes that it would follow “a fortiori” from the result in the first. This would also be analogous to Maimonides’ commentary in the Code of Maimonides.²³⁶ The authors note that while the perpetrator did not place the victim in the life threatening situation, the perpetrator did not cause the death through direct contact but affirmatively prevented the victim from saving himself.²³⁷ The Mishnah notes that by taking advantage of a pre-existing situation, and preventing one from saving himself, makes him liable for capital punishment under Jewish law.²³⁸ The Gemara comments on this case, concurring that “even though the perpetrator did not push the victim into the water or fire, since the victim was not able to escape, and he died, the perpetrator is liable to execution.”²³⁹

In regard to terrorist actions, when would a terrorist be liable under this scenario? One situation that would seem to be comparable is when, after a suicide bomber detonates the bomb on a bus, often accomplice terrorists are nearby, standing outside the bus with guns, aiming to kill anyone who would leave the burning bus. Here these actual terrorists (arguably) do not create the life threatening situation but prevent victims from saving themselves from ultimate death by burning and asphyxiation. Of course, if they do kill anyone coming off the bus they will be culpable for direct homicide, but the threat that keeps an individual on the bus would make them culpable as well for capital punishment. By capitalizing on the dangerous situation, the terrorists would be held capitally liable.

The Mishnah also refers to the following circumstance:

“A perpetrator incites a dog or a snake to attack the victim.”²⁴⁰

In this circumstance, some of the elements of the crime are in place, but others are not present as in the second situation mentioned above. Here the property has created the life threatening context. However, the intervention of a third party, the dog or snake, is required in order for the killing to be complete. Does this make one culpable? The article finds that the Halacha would not hold culpability in this case. The intervention of a superceding cause with an “independent will” would release the defendant from capital crime liability.²⁴¹ The Mishnah considers the animal to have an independent will similar to a victim who would be able to escape but does not do so of their own accord.²⁴² Under Maimonides view, this circumstance is similar to one soliciting another and would ~~th~~ not be held liable.²⁴³

Many countries have attempted to hold people liable for inciting violence. Just recently, on February 24, 2003, the United Kingdom arrested a Muslim cleric for inciting people to commit mass murder.²⁴⁴ In the same way that the perpetrator incited a wild animal to attack the potential victim, Palestinian clerics often do the same, inciting the populace to engage in terrorist acts such as suicide bombing in order to wage a Jihad against the Jewish people. Under the Mishnah, however, these clerics may be liable for a crime, but capital punishment would not be permissible.

Another instance that subscribes to the same tenets is when a terrorist leader may engage another to perform a terrorist act resulting in the death of civilians. The hired party would be a third party intervener with their own free will. Because they have the ability to change their mind or change the eventual result, the terrorist leader in this case, the liability for the crime of murder, would not be guilty of the premeditated murder required to impose capital punishment.

The final of the Mishnah cases, before I move on to the Gemara cases, recounts a similar circumstance:

“The perpetrator places a snake on the victim’s body, holding it so that his fangs are on the victim’s flesh.”²⁴⁵

In this case, there is a dispute whether capital liability would be imposed. Rabbi Judah would find liability because he finds that the murderous animal has no exercise of free will in this circumstance.²⁴⁶ However, other sages disagree. The Mishnah recounts that if any free will may be exercised on the part of another, even an iota, then liability will not be imposed.²⁴⁷ The Gemara view has a less strict definition of culpability. As Rabbi Judah noted “the poison of snake is between his fangs” and by placing the snake in position to kill, then one is capitally liable.²⁴⁸ The article also notes the similarity between this circumstance and that as recounted in the bible, where capital punishment is to be imposed when one does not contain a wild oxen and they bore another to death.²⁴⁹ The Torah then, like the Gemara, allows a third party to have the ability to exercise free will, but when they are placed by another in position to kill, that person may be held capitally liable.

So how would the Gemara deal with a situation in modern day Israel where a terrorist leader provides a suicide bomber with the bomb, instructs them where to carry it, how to carry it, how to detonate it, and when to detonate it. They also instruct the bomber that they must do this to wage Jihad, they will be rewarded for this act in the afterlife, their family will be provided for, and in effect brainwash that bomber into performing this task. An argument can be made that this situation is no different from placing the snake on the victim’s back. The Mishnah may argue that the bomber themselves can exercise free will to change the intended result, so the terrorist leader would not be culpable of a capital crime. However, the Gemara may argue the reverse. In this circumstance the suicide bomber himself becomes the weapon rather than a person blessed with free will. Because they have been instructed to do this by an authority they

deem to be issuing the words of G-d, they have become the instrument of the killing. By sending them off to a specific area to detonate the bomb in a specific way, just as the owner of the dangerous oxen may be put to death, so may the terrorist be put to death for unleashing a dangerous object into a crowded area of civilians.

Some empirical evidence may support this conclusion. It is instructive to note that suicide bombers, even if they end up in an uncrowded area still set off their charge as planned on many occasions. It will be difficult to argue that these people have exercised the free will to even salvage their own life. The functional brainwashing done by the terrorist leaders have eliminated the free will from the bomber and transferred their own will unto them. Thus, just as the Bible would find the owner of the oxen liable, the Gemara too would find these terrorists liable for capital punishment.

The most analogous case illuminated in the Gemara illustrates a parallel situation in Gemara Case M:

"The perpetrator throws up a stone at a 45 degree angle and kills someone as it descends." ²⁵⁰

The Gemarah notes that although the perpetrator only created part of the force that led to the ensuing death, the perpetrator is capitally liable. The discussion hinges on the fact that part of the force that leads to the stone traveling downward, gravity, makes up a large part of the force of the object.²⁵¹ Because the perpetrator remains responsible for propelling the stone, even if other forces may affect the outcome, the perpetrator is liable.²⁵²

By using the same situation just described, would the terrorist be liable for sending the suicide bomber in a path towards other's deaths? This seems to show even more that the terrorist would be liable. The terrorist has in effect propelled the suicide bomber in the direction of the killing, yet other forces are at work. Despite this, the Gemara would find the perpetrator liable. Had the suicide bomber not been instructed where to kill, how to kill, or why to kill, the result may be different. But in this situation the terrorist did all these things. Therefore, the terrorist, like the perpetrator in Case M, would be capitally liable and would be subject to the death penalty.

Rashi notes that one of the key distinctions between one held to capitally liable and one who is not is whether they are the direct cause of death.²⁵³ The Gemara distinguishes between whether one's death is caused by a force that is the direct result of the perpetrator's actions or if the victim is killed only as a result of the wrongdoer's secondary force.²⁵⁴ Rashi remarks that the difference between the direct (primary) and secondary force is often a function of time and distance.²⁵⁵ So how much time and distance is required in order to affix culpability?

Unfortunately, the Talmud does not define the specific requirements of time and distance required. The main distinction that the Talmud notes is the difference between direct and indirect force as opposed to intended manner of killing. For one to have

caused another's death, they must have used some force to send the fatal object towards the victim. The time and distance may only be inhibited by an intervener.²⁵⁶ So how can we conclude whether one is culpable?

In the case of terrorists, it is my view that when one sends a suicide bomber directly to a specific site at a specific time then they have caused the force necessary to be guilty of direct causation. The functional equivalent of free will has been erased from the scenario. If a terrorist were to instruct a terrorist to engage in this activity at some time a week later, then an intervening cause may be considered. However, when the bomber is strapped by others with bombs and sent to specified locations to commit their atrocities, those who sent him are the force that propelled that bomber toward their destructive end.

These views are ratified by the biblical pronouncements which address aggravating factors in assessing capital liability. The Torah finds that those who use a deadly instrument to kill another are shown to have the requisite premeditation and intent.²⁵⁷ The use of a bomb strapped to a willing bomber killing would clearly satisfy any definition of a deadly weapon. So too the bible finds that those who harbor hatred toward the victim are also more likely to be liable for capital punishment²⁵⁸ There is no dispute that terrorists who profess as their goal the liquidation of the Jewish people harbor hatred towards the intended victim. These terrorists are criminally and capitally liable for their terrorist activities and Israel may impose capital punishment upon them. However, can we justify Israel's use of assassination?

Having decided that terrorists are capitally liable the only question is how they may be put to death. In criminal law, the requirements to impose capital punishment are clearly set forth. Yet how can we justify Israel's actions in response to the formal procedures that cannot be followed in the case of terrorists who are not easily captured? There is a distinction that criminal law holds in justifying killing a terrorist prior to their act of murder and after they kill another. For the purpose of this section, we will assume that while the court has given legal permission to engage in assassination generally based on the court's exigent jurisdiction, we must determine whether Israel may justify the killing of an actual terrorist in various situations.

To find whether an act of assassination is justifiable, we must analyze these actions as they take place (1) prior to their terrorist actions and (2) after their terrorist actions. Within this analysis, I will consider, in regard to prior actions, the justifications of self defense and that of the pursuer rationale. For post-crime analysis, I will justify Israel's action by discussing when capital punishment may be imposed for murder. So using this analysis, how can Israel's actions be justified under criminal law?

The law of rodef as it applies to criminal law holds basically the same premises defined in rodef under the laws of war.²⁵⁹ As Maimonides notes, "it is justifiable . . . to take the life of the pursuer only to prevent commission of the crime [murder]."²⁶⁰ While the laws of rodef apply also to one who intends to rape another, for the purposes of this discussion it is only relevant that it also applies when one pursues another with the intent

to kill them.²⁶¹ However, even if one pursues another with the intent to kill them, if the pursuer may be stopped without killing him, then it is not permissible to kill the pursuer.²⁶²

It should be noted that the laws of rodef are considered obligations. As the Baraita states “If one pursues another with the intent to take his life, it is the duty of everyone seeing the attempted crime to prevent it even if it necessitates taking the pursuer’s life.”²⁶³ To not rescue would be to transgress the commandment that “Neither shall thou not stand idly by the blood of thy neighbor.”²⁶⁴ The obligation to use force to protect another in danger is an extension of the principle that one must help another in distress.²⁶⁵

Knowing that under the Halacha, we have an obligation to rescue the life one being pursued, what is the standard to kill that individual who is pursuing? When is the threat enough to justify their killing? The sages have disputed the correct standard. The strictest standard posited has been that of a contemporary authority, Rabbi Moshe Feinstein, who would determine that a pursuer may only be killed when the threat was “approaching certainty.”²⁶⁶ A much looser standard, however, was put forth by Rabbi Elijah of Vilna (Gra) finding that execution may be the proper punishment when the threat is only “feared.”²⁶⁷ Gra found that execution of counterfeiters was appropriate when they were sought after and the danger to the community was unknown.²⁶⁸ However, a balance between these two poles has been found in the writings of Rabbi Eleazar ben Simeon who, while not invoking it only when the danger is only feared, he maintained that a significantly less degree of certainty was required than that of virtual certainty.²⁶⁹

There are two ways we could use the standards outlined by the rabbis as to the degree of threat required. On one hand we could judge the standard to be absolute. A single standard would apply to any and all situations, no matter the extraneous circumstances present. A better method would be to judge the standards set forth as dependent on the times. In times of tranquility, the stricter standard, that of “approaching certainty” would seem to be correct, because a greater harm would be done possibly killing an innocent person. However in times of danger, and emergency situations, the mere threat is enough to have the obligation to kill the pursuer.

So when we apply this to Israel’s actions when it comes to combating terrorism, it is easy to reach the conclusion that a terrorist is pursuing an individual in order to kill them. Terrorist leaders do not have a day job. Their entire livelihood is spent focusing their energies on planning the events that will lead to the death of Jews. When a member of Hamas is seeking out potential crowded spots with poor security, seeking out potential Palestinians who will be willing to strap a large bomb to their chest, and seek out weapons dealers willing to sell them tons of plastic explosive, they are doing so with the intent of killing another. This intent is not a mere hope. They will try to use these weapons. Under the laws of rodef then, they are pursuing the Jewish people in order to kill them and it is the obligation of the government to kill them before they succeed.

Of course, this view could change depending on the standard set. Is it approaching certainty that these terrorists will kill another? Empirical evidence would show that a majority of terrorists acts fail to kill anyone due to security forces, inept actions, incorrectly made weapons, etc. So for a particular planning activity, it is not certain that it will lead to civilian deaths. However, when dealing with over 16,000 attacks in barely two years, this translates to almost 40 attacks per day. So if we judge this to be an emergency situation, and knowing that so many attacks are planned, Gra would probably assess this situation to deem that the mere threat of death is enough when we know for certain that the attacks are being planned. Israel, then, even under Rabbi ben Simeon's middle standard, would have justification to find that the terrorists are pursuers and may be killed to prevent them from killing their intended target.

Similar to the pursuer rationale is the law of self defense. The Talmud applies the same maxim for self defense in the area of criminality as it does to war: "If someone comes to kill you, rise up and kill him first."²⁷⁰ Every individual has the right to defend his or her person against wrongful aggression and, if necessary, kill the aggressor.²⁷¹ While the distinction between the public right of punishment and the private right of self defense must be kept distinct,²⁷² these methods may overlap when it comes to the state acting in self defense of itself and its citizens. It is noted that Talmud posits that use of force in self defense is not a personal obligation but a unitary responsibility.²⁷³ The law of self defense retains the same elements of the law of pursuer and are conceptually identical with rodef being merely to protect others while self defense applies the same criteria to defense of oneself. There is dispute over whether the state may actually act in self defense or if all actions by the state in this sense are in fact under the law of pursuer.²⁷⁴ We should also note that the same standards that apply and are discussed regarding the law of pursuer are identical in the discussion for self defense.

By applying the laws of self defense to Israel's defense of itself and its citizens, we must view the government as acting as an agent for the individuals who will be attacked. This conclusion is not hard to reach because, as Rabbi Samuel ben Meir (Rashbam) notes that the government itself serves at the consent of the governed.²⁷⁵ The logical conclusion will be that if the government operates under the consent of the people, they also act on behalf of the people, and assassinating a terrorist or inflicting any other form of punishment to protect them could be seen as an act of self defense because the people are, in essence, an extension of the state. It is therefore perfectly permissible, if not obligatory, for the government, when they know of a dangerous terrorist planning deadly attacks, that they act in self defense by killing him before he kills the people. Following too the standards of proof necessary under the laws of the rodef, Israel would be justified to assassinate a terrorist under the "threat" or "approaching certainty" standards depending, of course, on the information available as to attacks planned.

Israel is justified in assassinating a terrorist leader before they commit their terrible crime. Under the standards available, only the standard "approaching certainty" may not be enough to punish these terrorists in this manner. If we consider Israel to be in a state of emergency, it is clear then that the standard would be much lower than certain and would only require a mere threat or other similar standard. The laws of pursuer and

self defense not only permit, but obligate the government to protect the people and kill the enemy before he himself kills. Therefore, assassination is not only a permissible form of punishment under criminal law, but would be obligatory when the government knows of planned attacks.

In addition to pre-crime remedies, Israel may also punish terrorists after they commit their acts. In criminal law, this may be accomplished by imposing capital punishment in the courts of law. For the purposes of this section, we must affirm that the terrorists would be culpable of a capital crime, that assassination is equivalent to capital punishment when the terrorist cannot be captured, and the court has permitted the action that is to be taken by the Israeli government. With these assumptions in place, then, are Israel's assassination of terrorists permissible after the commission of their crime?

The roots of capital punishment in Jewish Law stem from the biblical commandment "Whoever sheds the blood of man so shall his blood be shed."²⁷⁶ Prescribing capital punishment though is not absolute and is only permitted for willful murder of another.²⁷⁷ Not only is the imposition of capital punishment not absolute but death sentences may only be handed out by the judgment of the court.²⁷⁸ Using the death penalty is, however, an obligation to be administered by the court in cases of capital murder.²⁷⁹ This obligation is limited to capital punishment, noting that there is no capital murder in Jewish law unless death is caused by the direct physical act of the assailant.²⁸⁰

Homicide was justifiable, or in capital punishment permissibly done, when carried out under the lawful mandate of the court by their appointed officer.²⁸¹ In biblical times, the Sanhedrin could only carry out capital punishment in a court composed of not less than 23 members.²⁸² It was said that the Sanhedrin who inflicted capital punishment once every seven years was considered a "bloody Sanhedrin."²⁸³ However, the Jewish view of capital punishment, however, is not so tame. The famous debate between Rabbi Tarfon, Rabbi Akiva, and Rabbi Gamliel illustrate the opposing views. As the discussion is remembered, 'Rabbi Tarfon and Rabbi Akiva say 'were we in the Sanhedrin (during the period when it possessed capital punishment jurisdiction), no man would have been killed.' Rabbi Simeon ben Gamliel says 'They, too, would multiply spillers of blood in Israel.'"²⁸⁴ The meaning of these statements are clear, just as capital punishment is something that the Jewish people abhor, it may be necessary to protect lives.

Despite the ambivalence of the sages, capital punishment was used more frequently in various time periods. The justification for capital punishment, even after the end of the Sanhedrin, was found in the biblical commandment that laws shall be decided "by the judges found in those days."²⁸⁵ Maimonides agrees that the courts have the power to inflict capital punishment outside the bounds of biblical law finding that courts were empowered to impose capital punishment even if the offender would not be liable to be put to death.²⁸⁶ The justifications for this stems from the justifications for the court under emergency measures and to maintain law and order. As Maimonides sums up his argument, he decrees that a regular court may execute such person as a temporary measure "for if the emergency requires it they may do as they see fit."²⁸⁷

Considering the evolution and use of capital punishment, Israel has the Halachic authority to impose capital punishment. Assuming that an assassination order comes from the court and that the assassin is under the authority of the court, they have the lawful ability to impose this punishment on offenders. It is true that the Halacha is not endeared with the concept of capital punishment. However, it does permit and even obligate its use when the times demand it. Because of the obligation to save lives, the times demand that Israel engage in these actions.

When it comes to combating terrorism, assassination is obligatory for the Israeli government. All assassination orders come from the government. The procedures are not known in detail whether the orders derive from the courts or from the executive branch. However, the orders from the court would be lawful. But would they be necessary and befitting of the Jewish tradition?

I assert that the assassination orders would be necessary. In order to save lives, the government must do whatever they must in order to protect the citizens. It is well known, and well documented that terrorists in groups such as Yasir Arafat's Fatah movement, Islamic Jihad, and Hamas actively engage in assassinations. So too it is known, often, who has planned these attacks. Judging that these individuals are culpable under Jewish law, they may be put to death. The justifications for capital punishment in this situation differ from the laws of pursuer and self defense which is to prevent those individuals from committing future acts. They instead act as a deterrent. So Israel may follow Rabbi ben Gamliel's logic in decreeing that not imposing capital punishment "would multiply spillers of blood in Israel."²⁸⁸ It is noted that the bible may also be deemed to permit this under the logic of *lex talionis*, "an eye for an eye, a tooth for a tooth, an arm for an arm, a life for a life."²⁸⁹ There is some thought that the retribution aspect meant to impose a monetary value for these acts, but the idea of deterrence, as well as restraint (not permitting one to commit such crimes again) remains strong in the Jewish tradition. As Rabbi Judah noted "The people would hear (of the crime) and fear (to commit such crimes). Also (the person convicted) would no longer have (means) with which he could continue to perform such an evil deed again."²⁹⁰

In order to deter future crimes and ensure that the evildoers in the nation were well aware of the ramifications of their evil deeds, capital punishment was, and is necessary. Israel has the authority to use these measures and because they will save future lives through the ideas set forth in the Halacha, these acts become obligatory for the government.

Assassination is justified under Jewish Law. Whether the justifications are found in the laws of *rodef*, self defense, or proper imposition of capital punishment, the law still provides that these terrorists may be assassinated to prevent the greater evil: their reckless and wanton murder of the Jewish people.

2. Criminal Law Justification of Destruction of Property

Israel has engaged in a systematic method to deter and combat terrorism: destroying the homes of suicide bombers, convicted terrorists, and places used to plan terrorist acts. Are these actions justified in the Halacha? These categories must be delineated into two distinct groups, those that are imposed on living terrorists, and those that are imposed on terrorists after they have been killed either at the hands of bombs they willingly strapped on their person or those that have been killed at the hands of the IDF. It must be noted, however, that any destruction of property discussed under this section refer to penal penalties and not to Military Regulation 119(1)²⁹¹ which is under military law.

When it comes to destruction of homes for living terrorists, these actions seem easy to justify under Jewish Law. The bible mentions confiscation of property as a criminal sanction when one disobeys lawful orders.²⁹² It is not hard to permit one to permit, once they have taken property, to destroy it at their whim. The Talmud too agrees that courts, relying on the biblical commandment, have the power to expropriate property.²⁹³ Under the authority given to Ezra, the power to expropriate property was necessary to impose punishment.²⁹⁴ The justification given for these actions was decreed by the sages to be that the courts have the power to take property, “in the manner of kings . . . for the promotion of public welfare and the furtherance of peace and tranquility.”²⁹⁵

Therefore in determining the court’s power to destroy homes of terrorists convicted of crimes, to punish them, is permitted under Halachic authority. The court, under the biblical commandment, may expropriate property in order to promote the public welfare. Sometimes this may be deemed, generally to include civil expropriation, but promotion of public welfare may also be enhanced by deterring criminal acts. Because destruction of property is permitted as a criminal sanction, Israel is well within their rights to destroy homes of terrorists to punish them. Also, the justification that courts have to destroy property to further peace and tranquility clearly qualifies the taking of homes from terrorists. While I am not one to judge the effectiveness of this technique, it has been allowed by the government that destruction of homes acts as a deterrent. Therefore, destroying the homes of living, convicted terrorists has Halachic authority.

The destruction of homes of deceased terrorists seems to be a different matter. While the same general rules apply, Jewish Law does not punish the dead. The only ones punished would be the other residents of the home. This would seem impermissible as the Bible commands “fathers shall not be put to death for their children, neither shall children be put to death for fathers: every man shall be put to death for his own sin.”²⁹⁶ The logic of this argument has been extended to include not only capital punishment but to include all punishment imposed for all transgressions. So if the families of the deceased terrorists are the ones who suffer, how can Israel be justified in these actions?

Chief Justice Barak of the Israeli Supreme Court in *Ajuri v. IDF Commander*²⁹⁷ found that the destruction of homes was permissible even under penal law because the petitioner, Amtassar Muhammed Ahmed Ajuri, knew of the terrorist activities her brother was perpetrating. Her brother, a suicide bomber, was by all definitions a terrorist.²⁹⁸ The court found that she had even aided and abetted his terrorist acts by among other

activities, sewing on an explosive belt, not informing authorities when she knew terrorist associates had weapons and plans to kill Jews, and aided in other ways as well.²⁹⁹ The court cited various cases where the relatives did not know of the terrorist activities and the actions were unlawful under penal law.³⁰⁰

It can thus be inferred that when the other residents had in some way been aware of, or abetted the terrorist activities, then destruction would be appropriate.³⁰¹ It is the degree of involvement of the other residents that would determine whether destruction would be permissible.³⁰² Because expropriation is permissible upon disobedience of lawful orders, the courts have the authority to order or permit destruction of property when lawful orders, such as not relaying information of terrorist activities, are not obeyed. Even under Jewish law, not disclosing information that one plans to kill another transgresses the biblical command that “one shall not stand idly by the blood of their brother.”³⁰³ Of course the Palestinians do not have to abide by Jewish law, but the failure to obey simple laws such as aiding in terrorist activities violates the law of *dinim*. Therefore, the lawful orders are not obeyed and the government has Halachic authority to engage in destruction of property for the families of terrorists, as long as they have violated the lawful orders of the State of Israel.

Just as deciding governmental responses to terrorism do not fit neatly under the laws of war nor do they fit neatly under criminal law. This is even more instructive by considering the issues not discussed in this section such as deportations of Palestinians. There is little authority that would support those actions under the criminal law. Yet the criminal law does help solve some of the problems associated with terrorism.

Criminal law would permit the terrorists to be deemed culpable in a variety of ways and permit the government to respond. The flexibility of criminal law in the Talmud can be understood when we consider the multiple possible justifications found for engaging in assassinations as well as destroying homes. The justifications are not limitless, but they would permit a Jewish court to look towards the more important criteria which is the prevention of future acts of violence and the saving of human lives. We can see the overriding importance of life in Jewish law evidenced by the great attitude awarded the court to go outside Talmudic law “if the times demand it.”

Criminal law then does solve many of the problems in bringing terrorists to justice because of the flexibility of the system. But it is still disputable whether terrorist acts should even fall under criminal law. While some instances seem to fit, others seem so horrific that criminal law could not even begin to apply. Still, however, Halachic criminal law does permit the Israeli government to justify assassinations and destruction of property against the Palestinian terrorists.

Criminal law on the whole would be a valid source to consider how to punish terrorist acts. There is a set law that applies to Palestinians, the Noahide code. Culpability may be readily determined, set methods are in place to impose capital punishment, and the actions of Israel would be justified. There are also problems because criminal law does not plan for the array of actions perpetrated by terrorists. Halachic law

also has never dealt with some of the horrific circumstances that arise in the way these terrorist actions are performed. However, criminal law would aid in the analysis of these problems and I would be willing to assess many of the terrorist acts as criminal acts and allowing punishment to be imposed under those rules.

IV. Responding to Terrorism Under the “King’s Justice”

Unlike justifications under criminal law or the laws of war, the King’s Justice, which derives from the monarch’s royal prerogative, is a much broader method that the government may use to permit their actions. Specificity that is required for the most part to analyze the actions under traditional laws gives way to a broad granting of authority in biblical law to the king to do, in effect, whatever he so chooses. However, does the royal prerogative give Israel the Halachic authority to respond to all forms of terrorism?

Using the King’s Justice will permit Israel to do many things they would not be permitted to under traditional Jewish law. In order to see how this operates, I will discuss (1) what the royal prerogative is; (2) whether the King’s Talmudic authority equates to the government’s authority in modern times; (3) the reasons and authority for the King’s Justice to be applied; and (4) how the specific responses to terrorism are justifiable under the royal prerogative.

A. What is the Royal Prerogative?

In biblical times, the king, or sovereign, was granted very broad powers to govern the nation of Israel. Under Halachic law, the monarchy exists as an independent legal category.³⁰⁴ The monarchy had special rights and privileges under Jewish law, sometimes referred to as the royal prerogative. The monarch is vested with the right to promulgate the laws of the kingdom and, in doing so, they are vested with certain legal authority to enforce those laws.³⁰⁵ According to Ritva, one of the powers granted to the king under Talmudic law is the ability to impose punishment.³⁰⁶

While Ritva limits the imposition of punishment by a king to those acts that conform with the “law of the land.”³⁰⁷ There are two possible explanations of this limitation. First, as Rabbi Bleich seems to suggest, Ritva’s limitation is only in regard to non-Jewish monarchs governing the Jewish people. The second limitation is that the King could not order one to do what even the court could not.³⁰⁸ This is shown by his support of the King’s authority to impose capital punishment without following the procedural guidelines set forth in classical Talmudic law.³⁰⁹ However, Ritva is not the only commentator to agree that the King may impose punishment outside of the court system.

Maimonides too believes that extrajudicial punishment may be handed down by the king “by virtue of the law of monarchy and the perfection of the world.”³¹⁰ Even the Torah itself, in the book of Samuel, suggests that the monarch may impose “the King’s Justice” as it states “appoint for us a King to judge us like all nations.”³¹¹ As Rabbi Nissim explained during this time, the monarch served two purposes: 1) as commander

chief of the army and 2) as magistrate in chief who could order extrastatutory laws when necessary.³¹² He would agree then that the King had the authority to issue laws or impose punishment in order for the needs of the Jewish people.

Thus, the royal prerogative allows the king to impose punishment and enforce laws in order to govern over the people. There have been times when the King's authority was necessary to impose punishment on those who were unable to be tried in the courts. However, just because the King was granted the authority to impose punishment, do those same rights have any application today?

B. How the King's Authority Translates to Israeli Governmental Authority

After the destruction of the temple, the Jews were exiled to Babylonia, beginning their existence in the diaspora, and were left without a king. How were they to be governed? The Halachic authorities established that "the exilarchs in Babylonia stand in place of the king."³¹³ The exilarch in Babylonia, like the king, "were vested with the power to deviate from the rules of the Halacha, even in judicial matters."³¹⁴ In finding a logical concurrence between the Babylonian exilarch and modern governments, the Talmud authorities noted during the middle ages that the doctrine of "The Law of the Land is the Law" would not apply to a Jewish government.³¹⁵ Instead, a Jewish State would be "governed by the King's Law, which applies to all forms of Jewish government as they continue to develop over the course of time."³¹⁶

As this pertains to a modern Israel, Rabbi Abraham Kook has spoken directly on the subject. His comments seem to be derived from the Talmudic passage which reads "The king's law applies at all times and in every generation to the leaders of the time in their respective countries."³¹⁷ Rabbi Kook notes that the royal prerogative governs the nation stating that the "king's law-making prerogatives revert to the nation as a whole."³¹⁸ The king's law applies to the government where they have flexibility to maintain order because the government is responsible for "the totality of the needs of the people at any time for the general security."³¹⁹ Noting the comparison with the biblical story, Rabbi Kook explains "the duly constituted leaders of the nation, whatever their caliber . . . are certainly not inferior to the exilarchs in Babylonia."³²⁰ He concludes, "a fortiori . . . the leader certainly stands in place of the king with regard to king's law, which concerns the leadership of the public [and general administration of the nation]."³²¹

Under these standards, the government of Israel has authority to rule the Jewish people under King's law. They do not have to abide by the Halacha when the interest to society would require stepping around the bounds of Jewish law. In an emergency situation, when it comes to maintaining law and order, and imposing punishment on those deemed dangerous to society, the Knesset is thus granted the same powers that King David would have been granted. In matters of general administration for the public good, these powers are necessary to improve the welfare of the Jewish people.

C. Authority for the Government to Apply King's Justice

Having ascertained that the government may follow the King's law, when may they apply it? What are the proper circumstances when the government may exercise power that is not specifically permitted under the Halacha? There are three main circumstances when the government has such power: (1) To maintain law and order; (2) for the benefit of society or welfare of the community; (3) in an emergency situation. I will also discuss the limitations on superceding Talmudic law.

One of the purposes behind granting the king extrajudicial powers is to maintain law and order in society. The king could, in biblical times, "exercise his royal prerogative when the times call for it."³²² Ran refers to the principle of *hasidur hamedini*, "the maintenance of law and order" as one of the primary purposes behind the authority of the government under the king's law.³²³ The judicial powers granted to the king were in part granted to ensure that strict reliance on Talmudic procedure would not endanger society as in those times when "killing becomes commonplace and there is no fear of punishment."³²⁴

Ran finds that non-Jewish law may better serve this goal in some circumstances and remarked that "it is possible to find some of the laws and ordinances of the nation measures more effective for the establishment and maintenance of law and order than in the laws of the Torah. This is not to our detriment, for whatever is lacking with regard to law and order may be filled by the king."³²⁵ He notes that the king must have this authority because the administration of criminal justice is "practical in nature" and must cope with the "everyday ordering of society."³²⁶ These comments echo the intent of Maimonides when he noted that the "king of Israel has the lawful authority" to maintain law and order "for the sake of social order and stability."³²⁷

Under this doctrine, the government of Israel has the lawful authority to go against Jewish law to maintain law and order. Especially at a time "when killings are commonplace" and "there is no fear of punishment," more drastic measures must be taken to ensure a law-abiding nation. By granting the king the Talmudic authority, we see this as a granting of the same authority to the Israeli government and they may do what they must to maintain law and order and protect the people from criminals.

Authority granted for the purpose of benefiting society acts almost as a corollary to the purpose of maintaining law and order. Ran agrees, noting that the prerogative of *hasidur hamedini* (maintaining law and order) has "as its avowed purpose *yishuvo shel olam* (the benefit of society)".³²⁸ Because some authorities base the king's authority solely on the basis of a contract between the people and government,³²⁹ the king has as their ultimate duty the protection of populace and to better the welfare of society as a whole. It is clearly, though, within the government's authority to "issue decrees for the common good."³³⁰

Under this rationale it is easy to realize that the Israeli government has the lawful authority to issue orders outside of Halachic tradition. The benefit to society is the primary and perhaps only reason that any extrajudicial punishments are imposed. There is no bloodlust or religious superiority that has been publicly announced as a motive

behind imposing punishment on Palestinians, rather, the public purposes behind every act has been the same: to protect the Jewish people and create a better country so that the Jews may live in security and prosperity.

The third purpose identified for the granting of authority to the government is also related to the first to but identifies a time period rather than an overriding rationale: the king may impose extrajudicial punishment as an emergency measure as the times demand. Maimonides specifically decrees, that the death penalty may be imposed when not permitted under the Halacha in situations of emergency at the hands of the king.³³¹

It should be noted that the emergency measure acts not only as a purpose but as a limitation. Because the emergency measure is by its nature, temporary, the king's authority would naturally be removed when the emergency has ended.³³² However, this argument could seem to be circular because it was left to the king to decide what constitutes an emergency measure.³³³ Despite this possibly limitless limitation, the Talmud describes one firm rule in regard to the royal prerogative. The king's decree may go outside the letter of the law, but if actually goes against the Talmud, and the purpose of Talmudic law, then the decree is extortionate and is not lawful.³³⁴

Understanding these points, when is Israel justified to call an emergency situation? The government may, as the king could, determine when that emergency situation was. There would be little dispute that Israel is currently in a crisis period. With hundreds of attacks each month, that could clearly justify the declaring of an emergency situation. However, has Israel went beyond the letter of the law or actually against the purposes? In imposing punishment on terrorists, who are criminals themselves, to save lives, the government has upheld the purposes of Talmudic law even if they have had to bend the laws in order to achieve their goals. Some of the specific instances will be discussed in more detail in the next section.

D. Application of the King's Justice to Israeli Responses to Terrorism

Having determined that the Royal prerogative is a legitimate form of extrajudicial authority under Halachic law, the king's authority translates to the authority of the state of Israel, and having found when the king's justice may be imposed, the question becomes, how would this apply to the specific responses to terrorism that Israel has used? I will discuss how the application of the royal prerogative is justifiable in instances of assassinations of terrorists, destruction of homes, and other responses used by the Israeli government.

1. Permissibility of Assassinations under the King's Judicial Authority

Maimonides ruled on capital punishment by the king, stating "If the king of Israel wishes to put them to death by royal decree or for the benefit of society, he has the right to do so."³³⁵ Maimonides mentions an example when the king lawfully issued capital punishment decrees. The king, in Maimonides' view, is permitted to kill any person who disobeys his orders or slanders him.³³⁶ Continuing, he noted that the king has the

authority not only to go outside the bounds of formal Talmudic procedure but also that the king may even order the death of one acquitted if he considers it for the public good.³³⁷ Maimonides is not the only commentator to hold these views. Ritva, despite some hesitancy in allowing such a broad decree, acknowledges the king's authority to impose capital punishment as long as it is within the bounds Talmudic law.³³⁸

What does this mean for terrorists? In simple terms, they have no recourse to complain that Israel would not comply with Jewish law. The king, in this case, the government, has the authority, and the right to issue those capital decrees instructing death for those who plan murders. How do the assassinations of terrorists fit under the categories discussed earlier?

The king has the power to maintain law and order. There is little doubt that killing those who violate the law and disrupt order would fall under the category of maintaining law and order. The Knesset must deal with the everyday functioning of society. Society works better when people are not in fear of terrorist attacks, and society is not disrupted by rampant use of suicide bombers. While some may wish that other methods would be used, that does not take away from the lawful ability to assassinate terrorists to further law and order in Israeli society.³³⁹

Would the assassination of terrorists be permitted for the benefit of society? Maimonides would find that they would as he would allow even the imposition of capital punishment for a slanderer if it was for the benefit of society. When a terrorist actively incites people to kill, actively plans murders, and actively evades justice, his death would benefit the Israeli society. The people of Israel frightened about the possibility of more terrorist attacks. On the other hand they feel incapable of protecting themselves. With a swift action to eliminate these killers, Israel can allay the people's fears and also provide the justice that is badly needed in order to show terrorists that they will not get away with their rampant acts of murder. Assassinating top terrorists are a benefit to Israeli society and they are indeed justified.

2. Destruction of Property under the Royal Prerogative

The ability to impose criminal punishment extends also to the taking of property. Under biblical law, the king was permitted to expropriate property only for military necessity and for the building of roads.³⁴⁰ These powers were expanded in the Talmudic period permitting unlimited expropriatory powers.³⁴¹ Of course, when the king takes title to the property in question, he has the right to destroy it as it is his own. Furthermore, when it comes to terrorists who have been killed, Talmudic law states that "property of a person executed for an offense against the king reverted to the king."³⁴²

In this vein, then the property of terrorists is justifiably taken and destroyed by the state. If the state has basically unlimited authority to expropriate property, then the justification is not even required. Of course, were further justification required, similar justification to assassinations could be found by appealing to the benefit to society and maintenance of law and order that are both improved by the taking of terrorists' property.

After all, the deterrent measure alone could prevent terrorist bombings. If the terrorist had been killed, the under this law, their property would be forfeited to Israel anyway and Israel would have perfect right to destroy the property.

Is the royal prerogative the method then that all responses to terrorism can be safely viewed under Jewish law? It depends in many cases on the actual response, who gave the order, and how it was carried out. More importantly, though, the actual response is more dependent not on what the act was but why. If it can be shown that any particular act was intended for the benefit of society or to maintain law and order, and does not go against Talmudic law (even if it does not actually coincide with Halachic law) then these actions would be justified under Jewish law. Based on a facial examination, it would appear that all actions can be brought under the broad sweep of the King's Justice. However, only by looking at a particular act and analyzing it under criminal law or the laws of war can one determine whether that act does go against the Torah, or merely oversteps the boundaries of Jewish Law.

3. Justification of Deportations using the "King's Justice"

There are no real justifications for deportations of individuals under criminal law or the laws of war. In the Jewish tradition, deportation and banishment was reserved strictly for manslaughter.³⁴³ The royal prerogative may be able to sidestep this requirement, however. The "king's justice" gives the monarch (and the government) wide latitude in determining when one may be permitted to be punished, what the punishment will be, and how the punishment will be carried out. In order to determine whether deportations are permitted, it is necessary to justify them under the criteria used to determine punishment under the royal prerogative.

The first of the criteria I discussed was that of maintaining law and order. Does deportation suit this cause? Israel has stated that their purpose in deporting relatives of terrorists would be to deter future terrorist attacks.³⁴⁴ If deporting family members of terrorists would potentially save human life, and would deter future attacks, there is little that would prevent these from being permissible under the Halacha. One of the purposes stated was when there was no fear of punishment. Yet, the terrorists do not fear their own death. Because of this direct punishment would have no recourse and would lead to no result. However, if a suicide bomber would reconsider their horrific action in order to prevent harm to their family, then there is no reason that these acts by the government would not be permitted. While the Talmud specifically decries capital punishment for conspirators against his throne,³⁴⁵ deportations would not kill the party. Instead, deportation seems relatively minor compared to some other possible punishments that could be meted out.

Would the deportations lead to a benefit to society? There would seem to be evidence that it would. Besides the deterrent factor alone creating fewer future murders, the benefit to society could also be inferred from deporting those who may have collaborated to aid in a terrorist attack. The benefit would be gained when these collaborators would no longer be able to work with their associates and aid in another

family member committing horrific acts. Most of the family members of terrorists support their relative's choice. From proclaiming them a martyr to idolizing them on playing cards, these terrorist acts are lauded in the Palestinian community. The benefit to society as a whole would be obtained by making these acts deemed to cause harm rather than good. If deporting a relative would serve this purpose there can be no excuse for not permitting these actions under the Halacha.

Finally, the extenuating circumstances would allow these acts to take place. In times of emergency, the king may resort to actions that would have little justification in normal situations. We note that the rule remains whether the act perpetrated by the government goes against the Torah or merely is not permitted by it. Banishment is used in Biblical law. Manslayers have not purposefully committed any harm yet they are punished. So too, the deportees may not have purposefully caused any harm, or at least have not directly created any harm, but they know that this fate may befall them if their relative performs such a horrible deed. After all, Israel has not deported individuals unless they have at least knowledge of the terrorist attack so the deportees are not innocents. Israel would be justified to engage in these acts in order to prevent further transgressions of the law.

The King's justice is broad, but it seems to be intentionally so. There must be some means for a ruler to adjust for circumstances that the law does not address. There are still specific reasons when such actions may be used. The power is not unlimited. Yet the power does go far beyond the strictures of criminal and wartime laws. But dealing with terrorism seems to be exactly the type of situation the sages had in mind when they permitted such stretching of the law. After all, who could disagree that a Jew murdering Hitler, who never killed anyone himself and never declared war on the Jews, would be justified in doing so? The same justifications would apply to Israeli government actions in regard to terrorism. These actions would be justified under Jewish law.

V. Conclusion

There is much debate in Jewish community, and even greater debate in the world community, over justifications for many of Israeli actions in responding to the terrorist acts that have plagued the nation of Israel. While much of the criticism is attributed to anti-Semitic groups that would (and do) criticize any action undertaken by the Jewish people, criticism has also been levied by many Jews and Israel supporters. From the religious community to civil rights activists, Israel's deportations and assassinations garner intense scrutiny.

Despite this, the Jewish people support Ariel Sharon's tough stand against the Palestinians. Relatively few Israelis believe that conceding land and rights will lead to peace. Instead they feel that the only way to prevent future acts is to take a forceful position when it comes to responding to terrorism.

I agree with the majority of Israelis in deciding that the State's responses should be justified. I also feel that the actions are justified under Jewish law. It is true that some of the justifications are made through broad interpretation of the Halacha. However, in trying times that have never been dealt with before in Jewish history, broad interpretation is not only permissible but necessary.

It is true that a narrow interpretation of the same laws I have described throughout this paper may lead to a lack of justification for Israel's action. But I believe that the Sages would approve of Israel's actions. I do not think a narrow interpretation would be appropriate. A broad view is necessary to consider the extreme variation of terrorist actions from anything before dealt with under Talmudic law.

My view is that the primary purpose behind the Talmudic laws are to promote the values that we hold dear. These values, in essence, are the upholding of Talmudic principles. The Talmud places an incredibly high value on life, especially innocent life. They also place a great deal of value on upholding just laws. It is in these areas that the terrorists strike right at the heart of Jewish ideals. When a terrorist has as his supreme goal to take innocent lives, the Talmud requires that any and all means must be taken to stop that killing. When the terrorist lives by rules of law that directly contradict even the basic Noachide commandments, it is our obligation to ensure that these laws do not interfere with the Jewish dedication to follow the rules of the Torah.

Would I prefer that Israel did not have to engage in any of these actions? Of course. I would love to see Israel and Palestinians live side by side in a just society devoid of violence and mayhem. Unfortunately, that is not that case.

It is to ensure a just society that the Talmud provides flexibility. The sages have permitted interpretation of the Torah as a living document, not unlike the United States Constitution. These decrees then must be used with the current times, and the current dilemmas in order to resolve them in the way that will best benefit the Jewish people and still be lawful.

The flexibility was broadened many times by permitting courts, governments, and individuals to break the biblical laws for the greater good or to prevent the greater evil. Is this not the goal of Israel's actions? Israel is not trying to start a war against the Muslim people, after all, on .1% of the land and barely 1% of the population in the Middle East, a war would be extremely difficult at best. Israel is trying to maintain peace and order in a difficult time.

And because these desperate times call for desperate measures, Israel has resorted to such. The Jewish people have attempted cease-fires to encourage peace on numerous occasions. Every single cease fire was broken by the murder of more Jewish people. So at some point, the Talmudic rules must be suspended and other actions must be taken. It is only because of dire need that assassinations, deportations, and expropriation has been used.

And so, while we all pray that the violence ends, in the mean time, the violence of Israel is justified. I hope that Israel uses restraint in continuing these actions but is not unwillingly to save every life they can. In the future, the creation of a just Palestinian society is a noble goal. In the meantime, as the Noahide commandments continue to be defied and the sanctity of life is rendered meaningless, Israel has an obligation to engage in whatever actions necessary to maintain law and order and protect the Jewish people from danger, wherever and however it may arise.

¹ Israel Ministry of Foreign Affairs, <http://www.mfa.gov.il/mfa/go.asp?>

² In Memoriam; <http://www.mfa.gov.il/mfa/go.asp?MFAH01ud0> Government web site dedicated to the memory of victims of Palestinian Terrorism since September, 2000.

³ Id. Other victims of that terrorist attack were: Boaz Aluf, 54, of Jerusalem; Shani Avi-Zedek, 15, of Jerusalem; Leah Baruch, 59, of Jerusalem; Mendel Bereson, 72, of Jerusalem; Rafael Berger, 28, of Jerusalem; Michal Biazi, 24, of Jerusalem; Tatiana Braslavsky, 41, of Jerusalem; Galila Bugala, 11, of Jerusalem; Raisa Dikstein, 67, of Jerusalem; Baruch Gruani, 60, of Jerusalem; Orit Hayla, 21, of Jerusalem; Helena Ivan, 63, of Jerusalem; Iman Kabha, 26, of Barta; Shiri Negari, 21, of Jerusalem; Gila Nakav, 55, of Jerusalem; Yelena Plagov, 42, of Jerusalem; Liat Yagen, 24 of Jerusalem; Rahamim Zidkiyahu, 51, of Jerusalem.

⁴ Hamas was formed in 1987. The group engages in various forms of terrorism against Israel including suicide bombings, assassinations, and random shootings of civilians.

⁵ *Israeli Defense Forces website* (http://www.idf.il/daily_statistics/english/1.gif) provides the following figures: 5071 people injured including 3,595 civilians and 731 persons killed including 506 civilians. The 16,442 attacks include 665 inside Israel not including the West Bank and Gaza Strip.

⁶ W. Laqueur, "Reflections on Terrorism," 64 *Foreign Affairs* 86, 88 (1986).

⁷ K. Skubiszewski, "Definition of Terrorism," 19 *Israeli Yearbook on Human Rights* 39, 42 (1989).

⁸ Id. at 43

⁹ Id. at 42

¹⁰ Id. at 44

¹¹ Deuteronomy 4:2; See Also Deut. 12:32 "What thing soever I command you, observe to do it: thou shalt not add thereto, nor diminish from it."

¹² January 27, 2002, Broadcast on Al Jazeera

¹³ *Al-Hayat Al-Jadeeda*, July 30, 1998

¹⁴ See Hamas Charter <http://www.acpr.org.il/resources/hamascharter.html>

¹⁵ Id.

¹⁶ Gross, Emanuel. "Democracy in the War Against Terrorism – The Israeli Experience," 35 *Loyola L. Rev.* 1161, 1189 (2002).

¹⁷ Id. at 1191

¹⁸ See Id. at 1992

¹⁹ Id. at 1190

²⁰ Id.

²¹ Broyde, Michael J. "Fighting the War and the Peace: Battlefield Ethics, Peace Talks, Treaties, and Pacifism in the Jewish Tradition" <http://www.jlaw.com/Articles/war1.html>.

²² Horowitz, George. *Spirit of Jewish Law*, §86 Kinds of War, p. 146 (1993).

²³ Ibid.

²⁴ Broyde, *supra* note 21

²⁵ Id. These wars are no longer possible because the seven Canaanite nations mentioned in the Bible as those who Israel must defeat have all been defeated or they no longer exist as distinct peoples in the way they are identified in the Torah. *But See* discussion, *infra* at 12, on Amalek encompassing all who embrace the goal of destroying the Jewish nation.

²⁶ Broyde, *supra* note 21

²⁷ Id.

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- ²⁸ Id.
- ²⁹ Id. One of the problems associated with this view is that it would be difficult to determine if fighting has ceased or has merely been interrupted. This issue has not been discussed, but it would seem that some could view this statement as referring to a gap such as the months at a time when no fighting continued during the Hundred Years War and others could view it as referring to the recurring disputes between India and Pakistan over the state of Kashmir where the countries are not deemed, technically, to be at war. I believe this should be viewed on a case by case basis, a bright line test would not aid in this analysis.
- ³⁰ PLO Charter, Resolutions of the Palestine National Council, July 1-17, 1968
- ³¹ See *Horowitz*, *supra* note 22 at §74 Duty to Rescue p. 124
- ³² Palestinian Authority Chairman, Yasser Arafat, at a speech at the Palestine General Confederation of Trade Unions in Gaza, October 27, 2001
- ³³ <http://www.mfa.gov.il/mfa/go.asp?MFAH0ldc0>
- ³⁴ Broyde, *supra* note 21
- ³⁵ See *supra* note 5
- ³⁶ Broyde, *supra* note 21
- ³⁷ See *Horowitz*, *supra* note 22 at §86 Kinds of War p.146
- ³⁸ Deut. 20:10-11
- ³⁹ See *Horowitz*, *supra* note 22 at §86 Kinds of War p.149
- ⁴⁰ *Ibid.* at 149-150
- ⁴¹ Maimonides, *Mishna Torah, Kings* 6:1
- ⁴² See *Horowitz*, *supra* note 22 at §88 Conduct of Military Operations, p.149-150
- ⁴³ Broyde, *supra* note 21
- ⁴⁴ Id.
- ⁴⁵ Financial Times, *Palestinians Accuse Israel of Declaring War*, October 12, 2000.
- ⁴⁶ *From Revolution to Reconstruction*, Chapter 13 (1994)
- ⁴⁷ Rahover, Nahum, *Jewish Law and Noahide Obligation to Preserve Social Order* 12 Cardozo L. Rev. 1073, 1090-1091 (1991).
- ⁴⁸ <http://usembassy-israel.org.il/publish/peace/peace1.htm>
- ⁴⁹ *Ibid.*
- ⁵⁰ http://abcnews.go.com/sections/world/DailyNews/mideast020328_arabsummit.html
- ⁵¹ The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip; September 29, 1995; Agreement on Preparatory Transfer of Powers and Responsibilities, May 4, 1994, Agreement on the Gaza Strip and Jericho Areas, May 4, 1994; Sharm el-Sheikh Fact Finding Committee, April 30, 2001
- ⁵² Broyde, *supra* note 21 at n.19
- ⁵³ Broyde, *supra* note 21
- ⁵⁴ Bleich, J. David, *Contemporary Halachic Problems*, 17 ***FULL CITE***
- ⁵⁵ Broyde, *supra* note 21
- ⁵⁶ Sanhedrin 29b
- ⁵⁷ Sanhedrin 20a
- ⁵⁸ J. D. Bleich, *supra* note 54 at 13. This statement was made prior to the 1973 Yom Kippur War. Rabbi Zevin referred to the three wars Israel had engaged in to that point: the 1948 War for Independence, the 1956 Suez Canal War, and the 1967 Six Day War. He found that the consent of the Sanhedrin was not needed and the formal procedures not applicable for these wars and they were thus permissible by Jewish Law.
- ⁵⁹ Id at 17
- ⁶⁰ Id.
- ⁶¹ Id.
- ⁶² Ramban, addendum to Maimonides Sefer ha-Mitzvot, no. 17. Note also that Ramban would require the consent of the Sanhedrin although the presence of the king is itself not necessary.
- ⁶³ J. D. Bleich, *supra* note 54 at 15
- ⁶⁴ Broyde, *supra* note 21 at n.19
- ⁶⁵ Id.
- ⁶⁶ J. D. Bleich, *supra* note 54 at 16

⁶⁷ Id. at 13. Rabbi Bleich states that he would follow Rabbi Zevin's analysis (that consent of Sanhedrin not needed for wars in self defense) and find sanction of the 1973 war. I am extending this analysis to the current conflict with the Palestinians.

⁶⁸ Sanhedrin 72a

⁶⁹ Broyde, *supra* note 21

⁷⁰ Fletcher, George P., *Self Defense as a Justification for Punishment*, 12 Cardozo L. Rev. 859 at 862-863.

⁷¹ See PLO Charter *supra* note 30, Article 15.

⁷² Deut. 25:19

⁷³ Exodus 17:16 And he said: 'The hand upon the throne of HaShem: HaShem will have war with Amalek from generation to generation.'

⁷⁴ J. D. Bleich, *supra* note 54 at 17; Bleich is noting the statements from Hilkhhot Melakhim 5:4-5.

⁷⁵ Id.

⁷⁶ Id. at n.6

⁷⁷ Id. at 17

⁷⁸ See Hamas Charter, PLO Charter *supra* note 30

⁷⁹ J. D. Bleich, *supra* note 54 at 17. This seems to suggest that the requirement to destroy Amalek does not refer to an enemy who fulfills *both* requirements but to destroy any enemy who fulfills *either* of these requirements.

⁸⁰ Id.

⁸¹ Broyde, *supra* note 21

⁸² Id.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Israel's opponents and critics do feel that Israel has been reckless in regard to their actions but judged under the standards of any war in history, these claims would be extremely exaggerated at best.

⁸⁸ http://www.palestinecenter.org/cpap/stats/dist_pop_67.html

⁸⁹ Broyde, *supra* note 21. Rabbi Broyde notes that the scope of wartime justifications is broader than those in times of peace.

⁹⁰ Sanhedrin 72a

⁹¹ See Fletcher, *supra*, note 70 at 862-863. This logic would require the community to defend themselves in the same manner that an individual must.

⁹² Shulcan Aruch, Orach Chaim 329:6

⁹³ Ex. 20:13

⁹⁴ Deut. 27:24

⁹⁵ I Kings 2:31; I Samuel 25:31

⁹⁶ Rosenberg, Irena Merker; Rosenberg Yale; and Turin, Bentzion, *Murder by Gruma: Causation in Homicide Cases Under Jewish Law*, 80 B.U.L. 1017, 1028-1029 (2000).

⁹⁷ Deut. 19:10

⁹⁸ Sokol, Moshe. *Some Tensions in the Jewish Law Attitude Toward the Taking of Human Life* 7 Jewish Law Annual 97, 99. For this section, the justifications of execution does not apply and will not be discussed. Rescue too is related to the criminal law aspect and will be discussed in Part III.

⁹⁹ Leviticus 21:2; 24:14

¹⁰⁰ Sanhedrin 72a

¹⁰¹ Sanhedrin 8:7

¹⁰² Lev 20:2; Lev. 24:14

¹⁰³ Maim. Yad Roze'ah, 1:15-16

¹⁰⁴ See *Spirit of Jewish Law*, *supra* note 22 at p. 177

¹⁰⁵ See *Head of Hamas Military Wing Killed in Military Strike* <http://www.ict.org.il/spotlight/det.cfm?id=808>

¹⁰⁶ Id.

¹⁰⁷ Broyde, *supra* note 21

¹⁰⁸ Maimonides, *Commentary*, 1:13

¹⁰⁹ See Fletcher, *supra*, note 70 at 862-863. Following the self-defense maxim to “if someone comes to kill you, rise up and kill him first.”

¹¹⁰ Sokol, Moshe. *Some Tensions in the Jewish Law Attitude Toward the Taking of Human Life* 7 Jewish Law Annual 97, 99

¹¹¹ Lev. 19:16

¹¹² Broyde, *supra* note 21

¹¹³ <http://www.un.org/peace/jenin/>

¹¹⁴ Maimonides, *Yad Roze'ah* 10

¹¹⁵ www.biblenews1.com/history2/20020821.htm

¹¹⁶ *42 terrorists with direct connections to terrorist actions arrested in action by the IDF and security forces since the assassination of the late Minister Rechavam Ze'evy on Oct 17* <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0km60>

¹¹⁷ *IDF commandos kill Hamas military commander in Gaza*, Jerusalem Post, February 17, 2003

¹¹⁸ *The Rule of Law in the Areas Administered by Israel*, Israel National Section of the International Commission of Jurists, 1981

¹¹⁹ *The Observance of International Law in the Administered Territories* (1971). Shamgar is referring to the lack of deterrence because Israel does not generally impose capital punishment under their criminal law code.

¹²⁰ Article 53 of the 4th Geneva Convention (Aug 12, 1949)

See Pictet, J.S., "Commentary, IV Geneva Convention" (1958). Pictet states that the prohibition against destruction would not apply if there is an “imperative military requirement.” Pictet also notes that Article 78 of the 4th Geneva Convention which restricts doing anything except “at most placing protected person in an internment camp” only applies to innocent people.

¹²¹ Deut. 20:19-20

¹²² Maimonides, *Book of Commandments*, Negative No. 57

¹²³ See *Horowitz*, *supra* note 22 at §88 *Conduct of Military Operations*, p. 148

¹²⁴ *Contra Apion*, II, 29. Josephus wrote these words when accompanying the Roman legions in their conquest of the Holy Land.

¹²⁵ See *Horowitz*, *supra* note 22 at §73 *Public Safety* “Thou Shalt Not Destroy,” p. 123

¹²⁶ See *Horowitz*, *supra* note 22 at §88 *Conduct of Military Operations*, p. 148

¹²⁷ *Id.*

¹²⁸ Genesis 32:6-7

¹²⁹ Genesis 32:8

¹³⁰ Genesis Rabbah 76:2; See Also Lekach Tov in *Torah Shelemah*, VI, 1266, n.9 "If he overpowers me, that is bad; and if I overpower him, that is bad."

¹³¹ *Sanhedrin* 74a.

¹³² *Sifte Hachamim*, Gen. 32:8

¹³³ *Mishna Torah*, *Kings*, 6:7

¹³⁴ Broyde, *supra* note 21

¹³⁵ *Id.*

¹³⁶ Bleich, J. David, “*Preemptive War in Jewish Law*.”

¹³⁷ *Time Magazine* at <http://www.time.com/time/2002/jenin/story.html>

¹³⁸ See Broyde, *supra* note 21. Finding that those who stay to fight or stay in the battlefield are no longer innocents and are considered combatants under Jewish law and their killing would not be considered collateral damage.

¹³⁹ *Id.*

¹⁴⁰ This is analogous to a naval or air battle. If country A and Country B were at war, and Country A had a Destroyer in the ocean, then the field of battle would include wherever that Destroyer is at the present time. Similarly, in an air war, the field of battle is wherever the planes are.

¹⁴¹ *Supra*, at 16-17.

¹⁴² *Supra* note 105

¹⁴³ See *American Heritage Dictionary of the English Language*, 4th Edition, Houghton Mifflin Company, (2000) which defines war as a “A state of open, armed, often prolonged conflict carried on between nations, states, or parties”

¹⁴⁴ See K. Skubiszewski *supra* note 7 at 42-44.

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- ¹⁴⁵ See Gross, *supra* note 16 at 1190 describing members of terrorist groups as members of a para-military organization and their actions can be seen in some ways as military actions although that would not encompass all the acts of terrorists.
- ¹⁴⁶ See Bleich, J. David; *Jewish Law and the State's Authority to Punish Crime*, 12 *Cardozo L. Rev.* 829, 831 (1991).
- ¹⁴⁷ Deut. 16:18. Righteous judgment refers to the laws of the Torah that the Jewish people must abide by.
- ¹⁴⁸ Rakover, *supra* note 47 at 1080.
- ¹⁴⁹ Bleich, *supra* note 146 at 831.
- ¹⁵⁰ Rakover, *supra* note 47 at 1077; See Also Sanhedrin 56a
- ¹⁵¹ Bleich, *supra* note 146 at 831.
- ¹⁵² A. Kook, *Etz Hadar* 38, 40, n. 16 (Y. Zoldan ed. 1986)
- ¹⁵³ Nachmanides, *Commentary on Genesis* 34:13. Note that he referred to all non-Jews as “descendants of Noah” because all people after the Flood were descendants of Noah.
- ¹⁵⁴ *History and Elements of Jewish Law*, p. 194
- ¹⁵⁵ Bleich, *supra* note 146 at 831. Compare to requirements for Jewish trials where two eyewitnesses are required and a single judge may never make a judgment.
- ¹⁵⁶ Rakover, *supra* note 47 at 1087.
- ¹⁵⁷ Bleich, *supra* note 146 at 831. Bleich’s describes the Noahide code as an extension of “natural law” where he notes that all the aspects of the Noahide Code should be followed even if not explicitly addressed because they are common to all peoples.
- ¹⁵⁸ *Id.*
- ¹⁵⁹ *Id.*
- ¹⁶⁰ Bleich, *supra* note 146 at 831. See also Bleich’s description of the Noahide code as an extension of “natural law” where he notes that all the aspects of the Noahide Code should be followed even if not explicitly addressed because they are common to all peoples.
- ¹⁶¹ Rakover, *supra* note 47 at 1074.
- ¹⁶² Sanhedrin 58a.
- ¹⁶³ Rakover, *supra* note 47 at 1089-1090.
- ¹⁶⁴ *Id.* at 1074.
- ¹⁶⁵ J. ben Abba Mari Anatoli, *Malmud haTalmudin* 71b (1866)
- ¹⁶⁶ See Y.D. Bleich, *Hasgarot Poshe’a Yehudi, sheBarah leEretz Yisroel, Or haMizrah*, XXXV:3-4, 262-263 (1987).
- ¹⁶⁷ Responsa Rema, Responsa No. 10 explaining the requirement of dinim required by Genesis 2:16.
- ¹⁶⁸ A.Y. Karelitz commenting on the Babylonian Talmud, *Bava Kama* 10:3.
- ¹⁶⁹ Rakover, *supra* note 47 at 1092.
- ¹⁷⁰ See Bleich, *supra* note 146
- ¹⁷¹ *Lehum Mishnah, Hilcot Melakhim* 9:14 illustrating a correlation with Nahmanides view: *Commentary on Genesis* 34:16.
- ¹⁷² Sanhedrin 56b. Note that this would not really change the effect of following the laws, just that the laws themselves do not have to be codified in a some set manner as seems to be required under the views explicated by the other commentators.
- ¹⁷³ Rakover, *supra* note 47 at 1122.
- ¹⁷⁴ *Legal Review of the Palestinian Authority*, <http://www.infoprod.co.il/country/palest2g.htm>
- ¹⁷⁵ International Intellectual Property Alliance
http://www.iipa.com/rbc/2000/Palestinian_Authority_2000.Pdf
- ¹⁷⁶ <http://www.addameer.org/pa/#arbitrary>
- ¹⁷⁷ *Ibid.* at <http://www.addameer.org/pa/#conscience>
- ¹⁷⁸ *Ibid.* at <http://www.addameer.org/pa/#capital>
- ¹⁷⁹ Jerusalem Post, *Accused Collaborator Killed in Palestinian Authority Courthouse*, (July 15, 2002) <http://www.jpost.com/servlet/Satellite?pagename=JPost/A/JPArticle/Full&cid=1025787784072> In this situation, Hamas gunmen stormed the courthouse and murdered the defendant as he was on trial for collaborating with Israel (a capital offense). The gunmen remain free.
- ¹⁸⁰ Palestinian Authority: Arafat Urged to Commute Death Sentences
<http://www.hrw.org/press/2001/08/arafat-0802-ltr.htm>
- ¹⁸¹ Israel Rejects Palestinian Trial http://news.bbc.co.uk/1/hi/world/middle_east/1950292.stm

¹⁸² J. D. Bleich, *supra* note 54 at 26
¹⁸³ *Id.*
¹⁸⁴ *Id.* citing Maimonides, *Hilkhot Milah* 1:6.
¹⁸⁵ Rakover, *supra* note 47 at 1122.
¹⁸⁶ M. Shik, *Orah Hayyim* 144
¹⁸⁷ *Id.*
¹⁸⁸ Genesis 34:1-31
¹⁸⁹ Note that other commentators attribute blame to Dinah herself. In the Midrash, Dinah is referred to as a “yatzanit” illustrating that she acted in a way unbecoming a daughter of Israel. Other commentators, though, use the story to show the lawlessness of the people of Shechem.
¹⁹⁰ Rakover, *supra* note 47 at 1123.
¹⁹¹ Nahmanides, *Parshat Vayishlah*, Genesis 34:13.
¹⁹² *Id.* Nahmanides noted that Jacob cursed them on his deathbed illustrating his distaste at their act of murder.
¹⁹³ http://www.aish.com/societyWork/society/The_Innocent_Bystander_.asp
¹⁹⁴ Genesis 13:6
¹⁹⁵ http://www.geocities.com/covtnoah/maimonides_mishneh_torah.htm
¹⁹⁶ Maimonides, *Mishnah Torah*, *Murder*, 19:2
¹⁹⁷ *Sanhedrin* 9:1
¹⁹⁸ *Id.*
¹⁹⁹ See discussion, *Infra*, at 35-37
²⁰⁰ *Id.*
²⁰¹ Passamaneck, Stephen, R. *Judah on Capital Penalties*, 7 *Jewish Law Association Studies* 153, 163.
²⁰² *History & Elements of Jewish Law* at 517. The text notes that this could be whether there is merely circumstantial evidence, fewer than two witnesses, or for reasons other than traditional capital punishment.
²⁰³ Kirschenbaum, Aaron, *Self Incrimination in Jewish Law*, p. 82
²⁰⁴ B. *Sanhedrin* 46a. The literal translation reads “the court may impose punishment not proscribed in the Torah – not to transgress the law but in order to put a fence around the Torah”
²⁰⁵ *Id.*
²⁰⁶ See Passamaneck, *supra* note 201 at 159.
²⁰⁷ *Id.* at 160.
²⁰⁸ *Id.* at 160, n.1
²⁰⁹ *Id.* at 160.
²¹⁰ *Id.*
²¹¹ *Id.* at n.3
²¹² Kirschenbaum, Aaron, *Punishment in Jewish Criminal Law*, p. 134
²¹³ See Passamaneck, *supra* note 201 at 160, n.1
²¹⁴ *Id.*
²¹⁵ See Kirschenbaum, *supra*, note 212 at 134.
²¹⁶ Maimonides, *Knowledge*, 9:3; *Judges*, *Sanhedrin* 24:4
²¹⁷ B. *Sanhedrin* 46a. Note that the other exigent jurisdiction situation described at length in the Talmud is when a man engages in public intercourse with his wife is flogged by the court.
²¹⁸ *History & Elements of Jewish Law*, p. 516.
²¹⁹ B. *Sanhedrin* 46a.
²²⁰ Of course not following the Sabbath is not minor in Jewish Law, but this offense has never been punishable by death.
²²¹ See *Financial Times*, *supra*, note 45
²²² Exodus 20:13; See Also Deuteronomy 19:10 (“Blood unlawfully shed is innocent blood”).
²²³ Exodus 21:12 “He that smiteth a man, so that he dieth, shall surely be put to death”
²²⁴ Exodus 21:14
²²⁵ Maimonides, *Mishnah Torah*, 19:2 (*Nezikin: Murder*)
²²⁶ See discussion *infra* beginning at page 46
²²⁷ See Rosenberg, *Supra* note 96 at 1033.
²²⁸ *Mishnah*, *Sanhedrin* 9:1; reprinted at *Sanhedrin* 76b

²²⁹ Id. Culpability refers to culpability for capital murder allowing the person to be liable for capital punishment where they may be put to death.

²³⁰ See Rosenberg, *Supra* note 96.

²³¹ Id. at 1035-1036.

²³² Id. at 1036

²³³ Maimonides, Mishnah Torah, 19:2 (Nezikin: Murder)

²³⁴ Id.

²³⁵ Rosenberg, *supra* note 230 at 1036.

²³⁶ Maimonides, Code of Maimonides, Murder and Preservation of Life 3:9. Maimonides also notes an analogous example: “if one places there hand over another’s mouth and nose and releases him when the latter is convulsive and unable to live . . . the offender must be put to death . . . inasmuch as he himself is deemed to have suffocated the victim.”

²³⁷ Id.

²³⁸ Babylonian Talmud, Babba Kuma 10a

²³⁹ Rosenberg, *supra* note 230 at 1036.

²⁴⁰ Mishnah, Sanhedrin 9:1; Sanhedrin 76b

²⁴¹ Rosenberg, *supra* note 230 at 1038.

²⁴² Id.

²⁴³ Maimonides, Code of Maimonides, Murder and Preservation of Life 2:2

²⁴⁴ *Cleric Guilty of Spreading Hate* February 24, 2003, http://news.bbc.co.uk/2/hi/uk_news/england/2782987.stm

²⁴⁵ Sanhedrin 76b. Note that the Gemara understands this hypothetical to be that the perpetrator actual presses the snakes’ fangs into the victim’s flesh as opposed to merely placing the snake’s fangs on the victim. (Sanhedrin 78a(4))

²⁴⁶ Rosenberg, *supra* note 230 at 1039.

²⁴⁷ Id. at 1038-1039.

²⁴⁸ Babylonian Talmud, Sanhedrin 78a(4)

²⁴⁹ Exodus 21:28-29. And if an ox gore a man or a woman, that they die, the ox shall be surely stoned, and its flesh shall not be eaten; but the owner of the ox shall be quit. But if the ox was wont to gore in time past, and warning hath been given to its owner, and he hath not kept it in, but it hathkilled a man or a woman; the ox shall be stoned, and its owner also shall be put to death.

²⁵⁰ Babylonian Talmud, Sanhedrin 77b(3)

²⁵¹ Id.

²⁵² Id. at 78a(1) n.1

²⁵³ Id. at 77b(3) nn. 38-39

²⁵⁴ Id. at 77b(3)

²⁵⁵ Rosenberg, *supra* note 230 at 1050.

²⁵⁶ Id. at 1049.

²⁵⁷ Numbers 25:16-18.

²⁵⁸ Deuteronomy 19:11

²⁵⁹ See discussion *infra* at 17.

²⁶⁰ Maimonides, *Commentary*, 1:13.

²⁶¹ Gemara, 73a

²⁶² Gemara, 74a

²⁶³ Quoted in Gemara, 73a

²⁶⁴ Lev. 19:16

²⁶⁵ See Fletcher, *supra*, note 70 at 860..

²⁶⁶ Bleich, *supra* note 146 at 851.

²⁶⁷ Bleich, *supra* note 146 at 851 citing Bi’ur ha-Gra, Hoshen Mishpat 388:74.

²⁶⁸ Id.

²⁶⁹ Id. at 852.

²⁷⁰ Sanhedrin 72a

²⁷¹ See Fletcher, *supra*, note 70 at 859.

²⁷² Id.

²⁷³ Id. at 862-863.

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- ²⁷⁴ Id. at 865-866.
- ²⁷⁵ Talmud, Bava Batra, 54b
- ²⁷⁶ Genesis 9:6
- ²⁷⁷ Exodus 21:12
- ²⁷⁸ See *Spirit of Jewish Law*, supra note 22 at p. 124
- ²⁷⁹ J. D. Bleich, supra note 54 at 25. Rabbi Bleich, citing Maimonides, Sefer Ha-mitzvot, notes that it “was obligatory upon the Bet Din to sit in judgment. . . . and impose the death penalty upon those convicted of a capital crime.”
- ²⁸⁰ Maimonides, Yad Roze’ah, 3:10-13
- ²⁸¹ See *Spirit of Jewish Law*, supra note 22 at p. 192
- ²⁸² Dimont, Max. Jews, Jews, God and History. New York: The New American Library, 1962
- ²⁸³ Makkot 7a. Some commentators have even considered the seven years to be incorrect and one execution every seven years was the actual meaning.
- ²⁸⁴ Id.
- ²⁸⁵ Deuteronomy 17:9
- ²⁸⁶ Maimonides Yad. Sanhedrin 24:4.
- ²⁸⁷ Maimonides, Mishnah Torah, Murder, 4:5
- ²⁸⁸ Makkot 7a
- ²⁸⁹ Leviticus 24:17-22
- ²⁹⁰ See Passamaneck, supra note 201 at 169
- ²⁹¹ Supra note 19
- ²⁹² Ezra 10:8 “and that whosoever came not within three days, according to the counsel of the princes and the elders, all his substance should be forfeited, and himself separated from the congregation of the captivity.”
- ²⁹³ Hefker bet din, Git. 36b, Yev. 89b
- ²⁹⁴ Ezra 7:26 “And whosoever will not do the law of thy G-d, and the law of the king, let judgment be executed upon him with all diligence, whether it be unto death, or to banishment, or to confiscation of goods, or to imprisonment.”
- ²⁹⁵ *History and Elements of Jewish law*, supra note 202, p. 517.
- ²⁹⁶ Deuteronomy 24:16
- ²⁹⁷ H CJ 7015/02 (1992)
- ²⁹⁸ Id. at 31. Ajuri planned attacks, made bombs, and engineered murders of Jews.
- ²⁹⁹ Id.
- ³⁰⁰ Id. at 23.
- ³⁰¹ Gross, Emanuel, *Democracy’s Struggle Against Terrorism: The Powers of Military Commanders to Decide Upon the Demolition of Houses, the Imposition of Curfews, Blockades, Encirclements and the Declaration of an Area As a Closed Military Area* , 30 Georgia Journal of International and Comparative Law 165, 197 (2002).
- ³⁰² Id.
- ³⁰³ See *Spirit of Jewish Law*, supra note 22 at p. 177
- ³⁰⁴ Bleich, supra note 146 at 834.
- ³⁰⁵ Id. at 836.
- ³⁰⁶ Id. at 838. Note that Ritva finds that punishment must conform with the laws of the kingdom. He is not clear as to the extrajudicial authority a king is granted under Talmudic principles. However, he does not seem to suggest that the king has to follow the procedural rules but just the results.
- ³⁰⁷ Id.
- ³⁰⁸ Id. at 839. This passage states notes that Ritva “asserts, strictly as a matter of law, the king may order execution only in accordance with the laws of the land, but should he order execution in violation of established law one must suffer martyrdom rather than carry out an illicit directive.”
- ³⁰⁹ Id. at 837. Ritva noted that the king had the authority to issue judgment without witnesses or a trial. The king’s judgment in that sense took the place of the court’s authority.
- ³¹⁰ Maimonides, Mishnah Torah, Sefer Nezikin,,Hilkhot Rotzeah 2:4
- ³¹¹ 1 Samuel 8:5
- ³¹² Bleich, supra note 146 at 831-832.

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- ³¹³ Maimonides, Mishnah Torah, Sanhedrin 4:13.
- ³¹⁴ History and Elements of Jewish law, *supra* note 202, p. 59, n.28.
- ³¹⁵ *Id.* at p. 64-65.
- ³¹⁶ *Id.* at 65. The book cites for their authority on this point Resp. Basis'alei ha-Tosafot (ed. Agus) #12, p. 58. The editors note that Ran and Rashba follow this view that king's law applies to the Jewish government. The editors also note a minority view exists where the doctrine of the "Law of the Land" would apply to even Jewish government.
- ³¹⁷ Sanhedrin 52b.
- ³¹⁸ History and Elements of Jewish law, *supra* note 202, p. 59 citing Rabbi A. Kook, Mishpat Kohne #144 (ed. Jerusalem 1937, p. 337).
- ³¹⁹ *Id.*
- ³²⁰ *Id.*
- ³²¹ *Id.* citing Rabbi A. Kook, Mishpat Kohne #144 (ed. Jerusalem 1937, p. 337-338); See also *Id.* at n.31 which provides the full text of the statement and rationale behind making these statements. Rabbi Kook notes that just as the king had consent of the governed so too does the leader and government of the Jewish people also have consent to govern and therefore may govern under the king's law.
- ³²² See Kirschenbaum, *supra*, note 212 at 133. Kirschenbaum cites this from various Talmudic sources including Maimonides, Murder, 2:1-4 and Judges, Kings, 3:1.
- ³²³ *Id.* at 134.
- ³²⁴ See Rakover, *supra* note 47 at 1081. Rakover cites Ran's comments from Derashot haRan, Deus, 11, 54 (1954).
- ³²⁵ Derashot haRan, ed. E.L. Feldman (Jerusalem: Makhan Shalem, 1977), 11, personal property. 190-191 (Translation Aaron Kirschenbaum at: Kirschenbaum, *supra*, note 212 at 127).
- ³²⁶ See Kirschenbaum, *supra*, note 212 at 127.
- ³²⁷ Mishnah Torah, Murder, 4:5
- ³²⁸ See Kirschenbaum, *supra*, note 212 at 134.
- ³²⁹ History and Elements of Jewish law, *supra* note 202, p. 65, n. 46.
- ³³⁰ See Rakover, *supra* note 47 at 1090.
- ³³¹ See Maimonides, Murder, 2:4.
- ³³² See discussion on temporary measures, *supra*, at 32
- ³³³ See Kirschenbaum, *supra*, note 212 at 135.
- ³³⁴ See Rakover, *supra* note 47 at 1090.
- ³³⁵ Maimonides, Murder, 2:4. See also Bleich, *supra*, 146 at 831-832. (Translating this same passage has also been translated as saying "[criminals] may be put to death by virtue of the law of monarchy and the perfection of the world, he has the right to do so.")
- ³³⁶ Maimonides, Yad Melakhim, 3:8
- ³³⁷ *Ibid.* at 3:10.
- ³³⁸ Bleich, *supra* note 146 at 834.
- ³³⁹ Maimonides, Yad Melakhim, 3:8
- ³⁴⁰ Sanhedrin 2:4
- ³⁴¹ See e.g. I Samuel 8:14; Eccl. 2:4; Ezek. 46:18.
- ³⁴² Sanhedrin 4:6
- ³⁴³ See e.g. Gemara 8a; Talmud Baba Kama 32b; Maimonides, *Hilkot Rotzeah* 6:6.
- ³⁴⁴ USA Today, *Israel May Expel Relatives of Militants*, July 19, 2002.
http://www.usatoday.com/news/world/2002-07-19-israel-arrests_x.htm
- ³⁴⁵ History and Elements of Jewish law, *supra* note 202, p. 1026.