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# The Effect of Military Conquest on Private Ownership: Jewish and Islamic law

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# The Effects of Military Conquest on Private Ownership: in Jewish and Islamic law

Israel Z. Gilat & Amal Jabareen

## *Abstract*

This article presents the legal outlooks of two fundamental religious judicial systems – Jewish (*Halakha*) and Muslim (*Shari'a*) – on the effect of war on private ownership. To be precise, this is when the conquered inhabitants are Jews or Muslims and *halakhah* or *shari'a* are their religion, respectively, but the conqueror is a non-believer or secular sovereign. Such situations evoke the following questions: To what extent the transfer of ownership by the conquering sovereign is recognized by the religious laws of the conquered population? May a member of the conquered religion acquire property that was seized by the non-believer sovereign from a member of the conquered religion? Is transfer of ownership by virtue of conquest permanent or reversible, so once the conquest ends, ownership reverts to the pre-conquest owner? Various approaches to those questions within each of two religious legal systems, are presented. Some of the similarities and the differences between *Halakha* and *Shari'a* are pointed out.

## *Table of content*

### **1. Introduction**

**2. The Approach of *Halakhah*:** 2.1 The Public Legal Aspect of the Validity of Military Conquest: 'State Succession' - Talmudic interpretation of Biblical conquests 2.2 The Private Aspects of the Validity of Military Conquest: Transfer of Ownership; 2.2.1 The Talmud's Approach to the Transfer of Ownership through Conquest; 2.2.2 Two Approaches to the Transfer of Ownership through Conquest in Rabbinic Literature: *yi'ush* ("Despair") and *kibbush milhama* (Conquest by war); 2.2.3 Insights into the Two Approaches to the Transfer of Ownership through Conquest: (a) *The Identity of the Conqueror/Plunderer*; (b) *The Nature of the Booty*; (c) *The Grounds for the Confiscation of Property*; (d) *When is the acquisition of confiscated property regarded as acquisition through military conquest?*; (e) *Is transfer of ownership by virtue of conquest permanent or reversible?*

**3. The Approach of *Shari'a*:** 3.1 General background; 3.2 Non-Muslim ownership of Muslim private property seized in war: two views; 3.2.1 The first view: non-Muslims cannot acquire ownership of Muslim private property: (a) *Qur'anic sources*; (b) *Sunni sources*; 3.2.2

The second view: Non-Muslims can acquire ownership over Muslim property during war: (a) *Qur'anic sources*; (b) *Sunni sources* (c) *The arguments presented by jurists of the second view against those of the first view*; 3.3 The ability and right of the original owner to regain ownership of his property; 3.3.1 The property was returned to the Muslim owner as a result of a subsequent war between Muslims and the non-Muslims who possess the property: (a) *The original owner identifies his property prior to it being distributed among the warriors*; (b) *The owner identifies his property after it was divided up among the warriors*; 3.3.2 Returning Muslim property taken by a non-Muslim who then converted to Islam; 3.3.3. The property is sold to a Muslim

#### 4. Similarities and Differences in the Effects of Military Conquest on Private Ownership in *Halakhah* and *Shari'a*

## 1. Introduction

War has been part of the human situation since the dawn of history. War has many aims: destroying the enemy, territorial annexation, obtaining spoils of war, and subjugating the conquered population. Religions have added religious overtones to wars – “commanded war” (*milhemet mitzvah*), crusade, and *jihad* – to glorify God’s name.<sup>1</sup>

By nature, war raises serious questions from many standpoints, including the transfer of property from one of the warring sides to the other, and in particular, the legal aspects of the transfer of ownership rights from the conquered population to the conqueror: How does a unilateral act of conquest on the part of a conqueror affect the ownership rights of the parties involved in the war?

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<sup>1</sup> To the Biblical approach see: G. Von Rad *War in Ancient Israel* (Trans. M.J. Dawn, Grand Rapids, Michigan 1991); J.A. Wood *Perspectives on wars in the Bible*, Macon, Georgia Mercer University Press 1998) Ch. 6; To the Jewish approach, see: J. David Bleich, "Preemptive War in Jewish Law" *Tradition*, 21 (1983) p. 3; Michael Walzer "War and Peace in the Jewish Tradition" in (T. Nardin Ed.) *The Ethics of War and Peace – Religious and Secular Perspectives* (Princeton: Princeton University Press, 1993)(herein: *Nardin*) pp. 95-114; Reuven Firestone, "Holy War in Modern Judaism? 'Mitzva War' and the Problem of the 'Three Vows'", *Journal of the American Academy of Religion* 74, 4 (2006), pp. 954; Arye Edrei, "Law, Interpretation, and Ideology: The Renewal of the Jewish Laws of War in the State of Israel", *Cardozo Law Review* 28, 1 (2006), p. 187. To the Islamic approach, see: Majid Khadduri, *War and Peace In The Law Of Islam* 52 (1955); Rassam Tibi "War and Peace In Islam" *Nardin*, pp. 128-145; Paul L. Heck "Jihad Revisited" *Journal of Religious Ethics* 32, 1 (2004) p. 95. To the Christian approach, see: Frederick H. Russel *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975), pp. 16-39; John Finnis "The Ethics of War and Peace in the Catholic Natural Law" *Nardin*, pp. 16-39; John Langan "The Elements of St. Augustine's Just War Theory" *Journal of Religious Ethics* 32, 1 (2004) p. 19

This question applies on two levels. One is the state level, between the conquering state and the conquered state. (In public international law this is known as "state succession.") Does the successor state acquire ownership of the predecessor state's assets?<sup>2</sup> The other level is the relationship between the successor state and the individual inhabitants of the predecessor state: Does the successor state acquire ownership over private property owned by private individuals in the predecessor state (hereafter: private property)? This article deals solely with the second level, that is, the effect of an act of war on private property.

It should be stated immediately that modern laws of war provide a clear, decisive answer to the question addressed on the second level. These laws unequivocally prohibit the successor state from harming the private property of citizens of the predecessor state.<sup>3</sup> Today, this is governed by international custom and the Fourth Geneva Convention, which is declarative in nature and binding upon all nations, without exception.<sup>4</sup>

The present article presents the legal outlooks of two religious judicial systems – Jewish and Muslim – on the effect of war on private ownership. Our objective is to review the purely legal views of these religions, without the intervention or qualifications of the international laws that are in effect today. It would seem that despite the political tension between the two religions or among the members of each religion, they are both dogmatic religions with prescribed rules, and in particular, with norms that bind and regulate every aspect of the lives of its

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<sup>2</sup> Malcolm N. Shaw, *International Law* (Cambridge 2008<sup>6</sup>), pp. 956-1009. To the historic approaches toward "state succession" see: Hugo Grotius *De Jure Belli ac Pacis* (=The Rights of War and Peace), (trans. by A.C. Campbell (New York: 1901, The Online Library of Liberty), Book III Chapter VI: "On the Acquisition of Territory and Property By Right of Conquest"; C. Emanuelli, "State Succession, Then and Now, With Special Reference to the Louisiana Purchase (1803)", *Louisiana Law Review* 63 (2004), p. 1277.

<sup>3</sup> For the historical background of the legal approach in the Middle Ages, see: M.H. Keen *The Laws of War in the Late Middle Ages* (London: Routledge&Kegan Paul 1965) pp. 137-155; Eyal Benevenisty "The Origins of the Concept of Belligerent Occupation" *Law and History Review* 26 (2008) p. 621

<sup>4</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 *International Humanitarian Law - Treaties & Documents*  
<http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>.

members, both as a group and as individuals.<sup>5</sup> The normative laws of the Jewish religion are termed “*halakhah*,” and those of the Muslim religion – “*shari’a*.” Even today, in the eyes of their believers, both *halakhah* and *shari’a* are autonomic codices that override any other codex, whether of another religion, a sovereign state or international law. This is the reason for the modern-day, as well as historical, importance of exploring the impact of military conquest on private ownership according to *halakhah* and *shari’a*.

The issue addressed in this article has practical implications today. For example, a question arose in the Jerusalem Rabbinical Court<sup>6</sup> several years after the end of World War II regarding Jewish property that had been plundered by the Nazis, transferred at the end of the war to the U.S. Occupation Authority, and then sold to the State of Israel (as a Jewish religious-sacramental object). Does this property belong to the Israeli government or to the heirs of the original owners?

A further question arose with the establishment of the State of Israel and the fleeing of its Arab inhabitants. Israel declared them absentee landlords and appointed an overseer for the property. The 'Absentees Property Law' 1950, established the transfer of ownership of the property of absentee landlords to the state, which then leased these properties to its citizens.<sup>7</sup> Rabbis addressed the question of whether,

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<sup>5</sup> To the traditional orthodox Judaistic approach, see: Menachem Elon *Jewish Law : History, sources, principles* (translated by B. Auerbach and M.J. Sykes. Philadelphia : Jewish Publication Society of America, 1994) ; To the differentiations between approaches of Judaism, Christianity and Islam, see: "Islamic Religious Law" " in (J. Schacht and C.E. Bosworth eds.) *The Legacy of Islam* ( 2<sup>nd</sup>. Edition, Oxford: Clarendon Press 1974) pp. 392-403; Bernard Lewis "Politics and War" *Ibid.* pp. 156-209. See also: Asifa Quraishi "Interpreting the Qur'an and the Constitution: Similarities in the use of Text, Tradition, and Reason in Islamic and American Jurisprudence" *Cardoso Law Review* 28 (2006) pp. 67-128

<sup>6</sup> District Rabbinical Court (Jerusalem) 517\5754(1954), *Landesman v. Mount Zion Committee* 1 PDR 169

<sup>7</sup> See: Meron Benvenisti (2002): *Sacred Landscape* (University of California Press, 2002) p.201. As a result, some villeges were confiscated and given to the custodian, who later transferred the land to the development authority. This law created the novel citizenship category of "present absentees" (*nifkadim nohahim*), persons present at the time but considered absent for the purpose of the law. These Israeli Arabs enjoyed all civil rights-including the right to vote in the Knesset elections-except one: the right to use and dispose of their property. According to Benvenisti about 30,000-35,000 Palestinians became "present absentees"; Alexandre (Sandi) Kedar "The Legal Transformation of Ethnic Geography: Israei Law and the Palestinians Landholder 1948-1967" *N.Y.U. J. Int'l L. & Pol.* 33 (2000-2001) p. 923; Haim Sandberg *The Lands of Israel – Zionism and Post Zionism* (Heb.) (Jerusalem: Sacher Institute for Legislation Research and Comparative Law, 2007) pp. 15-22.

according to *halakhah*, this property is really considered to be under Jewish ownership or whether it remains the property of the non-Jewish owners who abandoned it.<sup>8</sup> Rabbis were interested in this matter because of religious questions which arose with regard to eating fruit that is grown on non-Jewish land in the *shmittah* year, exemption from the obligation of tithes, and observing the commandment of bitter herbs (*marror*) using lettuce grown on land that was abandoned by its non-Jewish owners. In addition to the perspective of *halakhah*, we will deal with hypothetical questions from the Muslim perspective. Let us assume a situation wherein the State of Israel announces a tender for the sale of flats or land or other property abandoned by Muslims. According to *shari'a*, may a Muslim purchase property that once belonged to another Muslim? And if he did purchase it, is he obligated, according to *shari'a*, to return the property to its original owners? Answers to these questions are inferred from *shari'a's* view of the ability of the State of Israel to expropriate private property.<sup>9</sup>

As mentioned, according to modern laws of war, the successor state is totally prohibited from causing harm to the private property of the inhabitants of the predecessor state. This is because modern international law regards war as an event that takes place between states, and not between a state and the individual inhabitants of the other state, nor between the individuals of the fighting states. Therefore, individuals do not have to suffer its consequences, and the successor state must protect their ownership rights.<sup>10</sup> This does not hold true in *halakhah* or in *shari'a*. Neither of these legal systems makes a distinction between the warring states and their inhabitants, conceivably because the laws of war in each of these religions were formulated before the conceptualization of a modern state that is distinct from the private individuals who reside in it. War in Judaism and Islam is perceived as an act of rivalry between the warring nations themselves, without differentiating between

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<sup>8</sup> See *infra* Fn. 47 and the text: 2.2.3(d).

<sup>9</sup> See *infra* chapter 3.3.3

<sup>10</sup> *Supra* n. 3-4.

defense and policing forces on the one hand, and the citizens on the other.<sup>11</sup> Therefore, and as will be discussed in this article, *halakhah* and *shari'a* each have different schools of thought which hold differing views, and which recognize the ability of the conqueror to acquire ownership of private property through an act of war, in contradiction to modern laws of war.

There is another fundamental difference between modern laws of war and the laws of war according to *halakhah* and *shari'a*. Whereas modern laws of war apply equally to each of the warring parties, irrespective of their religions or nationalities, the laws of war according to *halakhah* and *shari'a* differ according to the religion of the successor or predecessor party: Halakhic laws of war differ according to whether the ruling regime is Jewish and the conquered regime is non-Jewish, or whether the ruling regime is non-Jewish and the conquered regime is Jewish. Similarly, *shari'a* distinguishes between laws which apply to a successor Muslim regime and a conquered population that is non-Muslim and the opposite circumstance of a non-Muslim successor regime and a conquered population that is Muslim.

The laws of war of the “successor” religion address questions such as: Is seizing booty and spoils of war a legitimate practice in the eyes of the successor religion? To what extent would it be proper for the successor religion to annex and plunder property of individuals who are members of another religion and transfer ownership of that property to a member of the successor religion? To what extent may non-members of the successor religion buy from the successor regime the property of another non-member that it seized and plundered?

The laws of war of the “predecessor” religion primarily address questions of the extent to which the transfer of ownership of the booty seized by the conquering sovereign who is not a member of the predecessor religion is recognized by the religious laws of the conquered population? To what extent may the non-believer conqueror seize the property of members of the conquered religion? To what extent

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<sup>11</sup> In the modern era, and after the concept of the state developed, with its distinction between the state and the individual aspect, there are Jewish and Muslim legal authorities who maintain that this perception should be changed, and war should be regarded as an act between states and not between nations, and consequently, to distinguish between the state level and the private level. See Walzer *supra* n. 2; Firestone *supra* n. 2; Tibi *supra* n. 2. To the historical approaches, see: Hugo Grotius *supra* n. 2; C. Emanuelli, *supra* n. 2.

may a member of the predecessor religion acquire property from the non-believer sovereign which that sovereign seized from members of the predecessor religion?

This article addresses the view of *halakhah* and *shari'a* with regard to these issues when they are the predecessor religion, that is, when the conquered inhabitants are Jews or Muslims, respectively. In other words, can ownership of the private property of a Jew that was seized by a non-Jew be transferred to another Jew who purchases it from a non-Jewish conqueror? Can ownership of the private property of a Muslim that was seized by a non-Muslim state be transferred to a Muslim who purchases it? And what happens, according to *halakhah* and *shari'a*, when the foreign conquest ends? Does the situation revert to the original situation and the original owners reclaim their ownership?

We would like to make two methodological comments:

- (1) This is not a historical-chronological article, but rather a conceptual-legal one. However, since the Jewish and Muslim religions have their roots in antiquity and the Middle Ages, and their basic norms, by nature, are rooted in the monarchies and feudal regimes of Europe and the caliphate in Muslim countries, the ancient sources are presented only as a basis for discussion of the legal conclusions. As mentioned, *halakhah* and *shari'a* still occupy a place in the consciousness of many of their believers, and the ancient sources, which reflect the views of the legal authorities of *halakhah* and *shari'a* hundreds and thousands of years ago, play an important role in resolving conflicts over the validity of contemporary acts of war and their impact on private ownership.
- (2) Since *halakhah* and *shari'a* did not copy or assimilate each other's laws, but each developed from within, based on the theological and metaphysical precepts of each, they will be presented separately in the next two sections, and then compared in the fourth section.

## **2. The Approach of *Halakhah***

## 2.1 The Public Legal Aspect of the Validity of Military Conquest: 'State Succession' - Talmudic Interpretation of Biblical Conquests

Reference to the public aspect of the halakhic validity of the confiscation of land as a consequence of war may be found in the Bible. In the Book of Numbers, we learn about the war between the Israelites and Sihon, King of the Amorites, and the conquest of the town of Heshbon, which had originally belonged to Moab. The Bible adds the following codicil: "For Heshbon was the city of Sihon the king of the Amorites, who had fought against the former king of Moab, and taken all his land out of his hand, even unto the Arnon."<sup>12</sup>

This verse, which deals with the history of the wars between two gentile nations – Moab and the Amorites – seems to be so irrelevant that the sages regard it as one of the “verses which to all appearances ought to be burnt but they are really essential elements in the Torah.”<sup>13</sup> The "essential elements" in this case are biblical principles of public international principles of war. Waging war against God's will is prohibited because it is "unjust".<sup>14</sup> A Divine prohibition forbade the Israelites from conquering land belonging to Moab and Ammon.<sup>15</sup> However, this prohibition did not apply to Moabite land which was annexed by Sihon, and which the Israelites later conquered from Sihon. In the Book of Judges, Jephthah discusses with the king of Ammon the same point about the validity of the Israelite conquest of Ammon's land:<sup>16</sup>

And the king of the children of Ammon answered unto the messengers of Jephthah: “Because Israel took away my land, when he came up out of Egypt, from the Arnon even unto the Jabbok, and unto the Jordan; now therefore restore those cities peaceably.” ...Thus saith Jephthah: “Israel took not away the land of Moab, nor the land of the children of Ammon. ... The Lord, the God of

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<sup>12</sup> Num. 21: 26.

<sup>13</sup> Hullin 60b

<sup>14</sup> Deut. 2: 5-7, 9, 19. To the influence of this prohibition on the western thought, see: Grotius *supra* n. 11

<sup>15</sup> *Ibid.*

<sup>16</sup> Judg. 11: 13- 22

Israel, delivered Sihon and all his people into the hand of Israel, and they smote them; so Israel possessed all the land of the Amorites, the inhabitants of that country. And they possessed all the border of the Amorites, from Arnon even unto the Jabbok, and from the wilderness even unto Jordan.”

Jephthah's reply to the king of Ammon is based upon the public international biblical principles of war cited above in the Book of Numbers.

Similarly, the talmudic sages discuss the legal status of David's wars against the Philistines. When David attacked the Philistines, they produced the treaty concluded between Abraham and Abimelech, in which Abimelech demands of Abraham, "Now therefore swear unto me here by God, that thou wilt not deal falsely with me, nor with my son, nor with my son's son: but according to the kindness that I have done unto thee, thou shalt do unto me, and to the land wherein thou hast sojourned."<sup>17</sup> David raised the legal validity of the treaty between Abraham and Abimelech with the Sanhedrin and received the following response:

The Holy One, Blessed be He, said, Let the Caphtorim come first and conquer this land from the Avim, who are Philistines, and let the Israelites come and conquer it from the Caphtorim.<sup>18</sup>

## **2.2 The Private Aspects of the Validity of Military Conquest: Transfer of Ownership**

### **2.2.1 The Talmud's Approach to the Transfer of Ownership through Conquest**

The validity of military conquest may also be considered on the private or individual level, as it regards the acquisition of legal rights in private property after acts of war and conquest. This is the main focus of our discussion. Talmudic references to private ownership after conquest usually appear as part of the exegesis of a biblical verse. For example, the Babylonian Talmud states the following with regard to a prophecy by the Prophet Isaiah:<sup>19</sup>

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<sup>17</sup> Gen 21:23, 31

<sup>18</sup> *Hulin*, 60b.

<sup>19</sup> *Sanhedrin*, 94b:

And your spoil shall be gathered like the gathering of a caterpillar. The prophet said unto Israel (Isa. 33:4): "Gather your spoil." ... "But," objected they, "the wealth of the Ten Tribes is mixed up therein." He answered, "As the watering of pools doth he water it." Just as pools purify the unclean, so are the possessions of Israel, which having fallen into the hands of heathens, become clean [i.e., legitimate].

The metaphor of a pool (i.e., *mikve* = ritual bath) may be understood in three ways:

(1) Just as a *mikve* completely purifies unclean vessels, so conquest creates a real acquisition and effects full ownership of the possessions of the conquered. It constitutes a stronger form of acquisition than the usual mode of acquisition, which entails the owner's agreement to the acquisition, despite the fact that the confiscation of possessions from their original owners could be regarded simply as theft.

(2) Just as a *mikve* purifies an object that was contaminated by the most extreme level of impurity but does not purify the source of the uncleanness, and just as a person who immerses himself in a *mikve* while holding an insect in his hand cannot be purified, thus money belonging to a Jew cannot be transferred through conquest by a Jewish conqueror since he himself is bound by Torah Law and this transfer would therefore be regarded as theft.<sup>20</sup> Thus, in the above citation, only the

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<sup>20</sup> In 1Sam 8:11 Samuel detailed the Israeli King's prerogatives: "And he said, This will be the manner of the king that shall reign over you....And he will take your fields, and your vineyards, and your oliveyards, even the best of them, and give them to his servants.And he will take the tenth of your seed, and of your vineyards, and give to his officers,and to his servants.And he will take your menservants, and your maidservants, and your goodliest young men, and your asses, and put them to his work.He will take the tenth of your sheep: and ye shall be his servants. And ye shall cry out in that day because of your king which ye shall have chosen you" Eventhough the Talmudic sages (*Sanhedrin* 20b) R. Judah said: That section was stated only to inspire them with awe (*i.e.* By indicating the extent of his authority, but not implying that he is permitted to abuse his power). R. S.Z. Auerbach, in his book *Ma'adanei Eretz*, Chap. 3, 20:12, s.v. *akh efshar* summarizes the positions of the early halakhic authorities that a Jewish king (or today, a Jewish government) is bound by the laws of *halakhah*. A non-Jewish king or government is not required to follow Jewish *halakhah*, but like any non-Jew, is bound only by the accepted laws, regulations and norms of the world at that time. A non-Jewish king has the prerogative to act as he wishes, and may create laws and rules for his own benefit at the expense of the citizens of his kingdom. But this prerogative must be in accordance with accepted world norms. R. Auerbach does not restrict this differentiation to a Jewish king or Jewish government in a

acquisition by a non-Jew who is not bound by Torah law could effect the transfer of property from the Ten Tribes to the Babylonian exiles.

(3) (With some reservations), in the same way that a *mikve* removes uncleanness, and it is as if the uncleanness had never existed and the unclean vessel is as if reborn, so conquest obviates the need to compensate the original owners for their losses.

Similarly to the talmudic exegesis of the biblical verse from Isaiah's prophecy, the Babylonian Talmud cites R. Pappa, who states that “Ammon and Moab were purified by Sihon.”<sup>21</sup> R. Pappa applies a principle of public international law, as reflected in the biblical verse regarding the town of Heshbon cited above,<sup>22</sup> to private international law. Just as Sihon’s purification of Ammonite territory was a total purification, making it possible for the Israelites to acquire the town of Heshbon, according to *halakhah* Jews may acquire possessions which have changed hands through foreign conquest without being concerned that the acquisition is regarded as theft. It should be noted that the terms “public international law” and “private international law” are used here for the sake of convenience, as the talmudic sages were not concerned with the laws of non-Jewish nations, and were not interested in the validity of the legal relationships between conquering and conquered nations. From the sages’ perspective, the only relevant issue regarding the “purification” of Jewish property and the possibility of it being purchased by a fellow Jew is the internal Jewish *halakhic* question of whether a Jew who purchases property from a non-Jewish conqueror is liable towards the original Jewish owner? The property referred to in the rabbinic literature is not only land and movable goods, but also concessions to engage in banking, including lending with interest, and also slaves. Conquest effects a complete transfer of ownership of property from the original owner to the new owner.

The issue of the transfer of ownership in a war situation is discussed in several talmudic sources, none of which uses the term “military conquest.” Even the famous

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conquered area of Erez Israel, but applies it to any place in the world. There too, a Jewish king is bound by *halakhah* (8, s.v. *atah*).

<sup>21</sup> T *Gittin* 38a.

<sup>22</sup> See *supra* n. 4.

*mishnah* in *Gittin*<sup>23</sup> and its parallel in the *Tosefta*<sup>24</sup> which discuss ownership of land during time of war, use the term “war” and other similes as a description of a situation of war – but not in a legal context. Thus the *Tosefta* (Lieberman edition) states:

The *sikarikon* law (which annuls ownership by the Jewish acquirer) does not apply to the Land of Judah, so that the country may be populated. Under what circumstances? In the case of [the estate of] those who were slain before the war and during the war. But in the case of those who were slain from the war and onward, the law of *sikarikon* does apply.

The *Tosefta* is referring to a time when the Land of Israel was entirely in the hands of the Roman government, and Jews refrained from buying the confiscated land from the conqueror because, according to *halakhah*, the purchaser would have had to return the land to its original owner. To prevent the alienation of land in Judea from Jewish ownership, the law of *sikarikon* was not applied there. The reference to war, or to use the *Tosefta's* terminology, “during the war,” does not invoke a set of laws which differs from those of peacetime. According to the *Tosefta*, during the Bar Kochba Revolt the special *sikarikon* law concerning the annulment of Jewish ownership of confiscated Jewish property was not invoked. Instead, the original Torah laws remained in effect, and a Jew who bought land from the conqueror that had been taken by force from its original Jewish owners did not have to worry about returning it to its original owners or compensating them. It was only after the war, in order to protect Jewish property, that the sages enacted the *sikarikon* law, according to which a Jew who purchased confiscated property from a conqueror had to return it to its original owner, unless he acted in a particular way to compensate the original owner, as specified in the *Mishnah*.<sup>25</sup> The term “during the war” simply describes the point in time in which the original owner despairs of retrieving his possessions that were

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<sup>23</sup> *Mishnah. Gittin* 5:8.

<sup>24</sup> *Tosefta Gittin* 3:10

<sup>25</sup> *Supra* n. 23.

confiscated by force (*yi'ush*).<sup>26</sup> Shaul Lieberman explains this briefly, based on a commentary to the Babylonian Talmud:<sup>27</sup>

During the war, the soldiers were ordered to kill the inhabitants and the Jew was happy to save his life by giving up his land, and was forced to transfer ownership. Therefore, whoever buys from the conqueror acquires the land legally.

### **2.2.2 Two Approaches to the Transfer of Ownership through Conquest in Rabbinic Literature: *yi'ush* ("Despair") and *kibbush milhama* (Conquest by war)**

Unlike the monolithic approach in the talmudic literature to the transfer of ownership through war, some medieval rabbinic scholars adopted a new approach to “conquest by war” that gave the word “war” a halakhic meaning. War was no longer simply a factual point in time but a legal concept. “Military conquest” and “acquisition by war” became autonomous legal terms with a life of their own. As we as was mentioned above,<sup>28</sup> war is a point in time wherein a Jew begins to “despair,” (*y'iush*) which leads to the loss of his rights in land and goods confiscated by soldiers in return for not taking his life. By contrast, in some of the medieval rabbinical literature, “conquest by war” and “acquisition by war” became autonomous means for nullifying the ownership of the property’s original owner, and a forceful means of acquisition without legal complications. The legitimacy of “conquest by war” is based on the halakhic “public-international” laws of war between nations, as described above, in which one nation annexes the land of another nation. However, in some of the medieval rabbinic literature, conquest by war refers not only to the transfer of ownership of land, but *halakhah* adapts it to the private domain of the transfer of ownership of any property between individuals without it entailing any legal hindrance.

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<sup>26</sup> The terms despair, resignation, abandonment, relinquishing, and giving up right to ownership are used interchangeably in this paper to describe the halakhic concept of *yi'ush*.

<sup>27</sup> *Tosefta Ki-fshutah* Order Nashim, Part VIII (N.Y.: The Jewish Theological Seminary, 1973), p. 842.

<sup>28</sup> *Ibid.*

Other medieval rabbinic scholars do not view conquest by war as a halakhic concept. Rather, they view it in the talmudic sense, as the point in time when the original owner despairs of recovering his property, in which case the property is regarded as abandoned.

Below are examples of different approaches of medieval rabbinic talmudic scholars to R. Pappa's statement that "Ammon and Moab were purified by Sihon."

R. Crescas Vidal, a thirteenth-century Spanish talmudic scholar, explains in his *novellae*:<sup>29</sup>

... although it is impossible to steal land ... we have learned about acquisition by means of war which grants full legal possession, as in the case of the Children of Israel who conquered the land from Sihon and "acquired" it (by the Lord's will), because Sihon had conquered it from Moab and his acquisition by means of war was recognized as a real acquisition.

R. Menahem ben Shlomo Meiri, a thirteenth- to early fourteenth-century scholar from Provence, follows the same approach after summarizing the talmudic discussion of R. Pappa's statement:<sup>30</sup>

Where one kingdom invades another kingdom and destroys it ... and other inhabitants replace the original inhabitants, this is a new kingdom and it *acquires the possessions outright*, as is stated: "Ammon and Moab were purified by Sihon"; the transaction is valid and the original owners have no claim *even if they did not despair of their claim*.

R. Shlomo ben Abraham Aderet (*Rashba*) from Barcelona, a thirteenth-century scholar, openly supports this approach in his commentary on the Talmud:<sup>31</sup>

... If you compare acquisition through war to acquisition through theft, then how did Sihon purify Ammon and Moab? ... and if Sihon had not acquired

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<sup>29</sup> *Khiddushei Rabbenu Karaskas* 8b (Lichtenstein ed., p. 331)

<sup>30</sup> *Beith Habekhira, Gittin 59<sup>a</sup> s.v. ge'onei Ma'rav* (Shlesinger ed., p. 244)

<sup>31</sup> *Hidushei Ha-Rashba Gittin 37b* (Sekler ed., p. 363-364).

ownership from Ammon, then the Children of Israel for whom the possessions were purified would not have been able to possess it. .... However, as we said, any property taken from the original owner by force through *military conquest* belongs to the conqueror and to every person who is given this booty.

In contrast to the above rabbinic scholars, and others whom we have not mentioned, R. Yishayahu (the elder) of Tirani, (*Rid*), an Italian rabbinic sage who lived one hundred years earlier, explains as follows:<sup>32</sup>

Rav Pappa said, “Ammon and Moab were purified by Sihon.” This means that their land was forbidden to Israel, but when Sihon came and took it, it was then permitted for Israel. Sihon acquired it by force and Ammon and Moab despaired of their claim and because they despaired, Israel came and took it from Sihon.

Similarly, R. Meir Abulafia of Toledo (*Rema* – twelfth-thirteenth centuries) adopts the same position as *Rid* regarding the prophet Isaiah’s command to collect booty from Sennacherib:<sup>33</sup>

Say to them “As the watering of pools doth he water it.” Just as one uses a *mikveh* to purify an unclean person, raising him from uncleanness to purity by covering him with water, so cover them with money. Since the possessions fell into the hands of non-Jews, they were purified. We can assume that the original owners despaired of their claim. ... However, where a non-Jew steals a Jew's money, however much the original owner despairs of his claim – it still remains stolen property.

The medieval rabbinic authorities hold differing halakhic positions in this regard. *Rif*,<sup>34</sup> Maimonides,<sup>35</sup> and *Rashba*<sup>36</sup> all view “conquest by war” as a legal autonomic

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<sup>32</sup> *Tosafot Rid Gittin* 38a (Lis ed., p. 104).

<sup>33</sup> *Yad Ramah, Sanhedrin* 94b, s.v. *akhar ha-devarim*.

<sup>34</sup> *Rif* responsum in *Sefer Ha-Itur* Part 40: *Moda'ah* (R. MY, 41a)

concept, and use it as a basis for their halakhic rulings, while R. Yosef ha-Levi ibn Migash<sup>37</sup> and seemingly some of the Geonim,<sup>38</sup> base their rulings on the original owner's despair and his relinquishing his claim (*yi'ush*). Some of the medieval rabbinic authorities had no clear cut approach and used both *yi'ush* and "conquest" as a basis for their halakhic rulings. R. Meir ben Barukh (*Maharam*) of Rottenburg (thirteenth century)<sup>39</sup> offers two ways of reconciling the contradiction between the prohibition of purchasing goods known to be stolen and the command of the prophet Isaiah to "collect booty" despite the fact that it included money taken from the Ten Tribes: money taken from the Ten Tribes is regarded as "conquest by war"; and money taken from the Ten Tribes may be compared to property which had been lost when swept away by a river, where it is clear that the original owner has despaired of his claim. In contrast, R. Shimon ben Zemah of Duran (*Rashbaz* – fourteenth to fifteenth centuries)<sup>40</sup> deliberates between the two approaches in his discussion of the validity of the ownership of a book, *Hilkhot*, written by *Rif*, which had been purchased by Jews from booty taken by Christians from its original Jewish owners. He concludes that the two approaches lead to the same ruling.

Even in the nineteenth and twentieth centuries there are theoretical discussions among the rabbis of Eastern Europe and Erez Israel concerning the distinction between conquest and the owner's resignation over the loss of his property. R. Avraham Duber Kahanna-Shapira, Chief Rabbi of Kovno, Lithuania before the Holocaust,<sup>41</sup> addressed the subject in considerable detail and is often cited by contemporary halakhic decisors. According to him, the dispute between the early authorities appears to be based upon two different conceptions of conquest, but he does not rule as to which approach to follow.

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<sup>35</sup> Maimonides Responsa, 209 (Blau ed., 370-371).

<sup>36</sup> *Rashba* Responsa 1: 637.

<sup>37</sup> See: *Shitta Me-kubezet Baba Metzi'ah* 24b, s.v. *ve R. Yosef Ha-levi Ibn Migash*.

<sup>38</sup> *Ge'onim* Responsum in *Sefer Ha-Itur* Part 40: *Moda'ah* (R. MY, 41a).

<sup>39</sup> 4: 1009. (Prague print).

<sup>40</sup> *Tashbetz* 2:136-137.

<sup>41</sup> *Dvar Avraham* Responsa (Warsaw, 1906) Part I, Ch. 1:6-12; Ch 6-12. Part II, Ch. 6:3-4.

At this point, it should be mentioned that differences of opinion exist among contemporary halakhic decisors with regard to the validity of the purchase of property plundered or confiscated by the Nazis from their original owners during World War II. In their ruling in the *Landesman* case, which will be discussed in greater detail below,<sup>42</sup> rabbinical judges R. Yaakov Adas, R. Yosef Shalom Elyashiv and R. Bezalel Zolty use the concept of conquest to resolve the issue; by contrast, R. Meshulam Rath,<sup>43</sup> R. Yitzhak Ya'akov Weiss<sup>44</sup> and R. Menashe Klein<sup>45</sup> and apparently R. Ya'akov Yehiel Weinberg<sup>46</sup> base their ruling on the principle of the owners' resignation of ownership rights.

The validity of transferring to the State of Israel land belonging to Arabs who fled Israel, and which the State in turn transferred to Jews, was addressed at the time by Israel's Chief Rabbis. Sephardic Chief Rabbi Ben Zion Meir Hai Uziel<sup>47</sup> apparently ruled on the basis of conquest, whereas Ashkenazi Chief Rabbi Yitzhak Isaac Herzog<sup>48</sup> preferred to resolve the issue based on the principle of the owners' resignation of ownership. In the following section, we will present the rationale behind their different approaches to the transfer of ownership through conquest.

### **2.2.3 Insights into the Two Approaches to the Transfer of Ownership through Conquest**

Why did the medieval rabbinic authorities have two different theoretical approaches to the transfer of ownership through conquest? What is the practical difference between “conquest” and the owner's “*yi'ush*”? The medieval halakhic authorities did

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<sup>42</sup> District Rabbinical Court (Jerusalem) 517\5754 *Landesman vs Mount Zion Committee* 1 PDR 169.

<sup>43</sup> *Kol Mevasser* Responsa 1:57.

<sup>44</sup> *Minkhat Yitzkhak* Responsa 4:76; 8:69.

<sup>45</sup> *Mishneh Halakhot* Responsa 17:150.

<sup>46</sup> *Seridei Esh* 1:147.

<sup>47</sup> R. Uziel responsum is cited in R. Pesakh Tzvi Frank, *Har Tzvi* Responsa 18.

<sup>48</sup> *Psakim U'Ketavim* (1990) III Pra. 36-37.

not provide the reasons for their rulings, and the early later halakhic authorities, who also used the concept “conquest” and explained its significance, did not juxtapose it to the traditional halakhic *yi’ush*.

Are there practical differences between these two approaches? We would like to suggest a number of fundamental points of disagreement between the two. These differences have practical ramifications for resolving problems arising between Jews with regard to property that had been plundered or nationalized during a war, as shall be discussed below.

(a) *The Identity of the Conqueror/Plunderer*

One of the differences between the two approaches to the transfer of ownership through conquest can be determined by comparing the responsa of Maimonides and R. Yoseph Ibn Migash, although they themselves do not supply reasons for their rulings.

Maimonides was asked “whether religious books purchased from a plunderer, but which had belonged to a synagogue in the town, become the property of the purchaser or whether the purchaser should be forced to return them?” He replied as follows:<sup>49</sup>

If the plunder had been carried out by order of the Sultan, then the sale is valid and the law of *hekdesh* (sacred property) does not apply. And even if we were talking about the Temple vessels, their sanctity would be nullified. ... However, if they were plundered without the Sultan's permission, he should swear how much he paid for them and take the money, and return the book to its place.

We can infer that Maimonides extends the validity of conquest to encompass any acquisition under the Sultan's "royal prerogative," and not only an acquisition through war.

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<sup>49</sup> No. 209 (Blau, 370-371).

Maimonides' teacher's teacher, R. Yoseph Ibn Migash<sup>50</sup> appears to hold the opposite opinion. He too was asked if it is permissible to buy holy books plundered by order of the Sultan, and if bought, must they be returned to the original owners? From his responsum we learn that the answer depends on an assessment of what was in the mind of the original owners. In his opinion, “even though the deed was carried out by order of the king, and there is no possibility of appealing his decision,” the owner has not despaired, since “the books are of no use to anybody but Jews and only Jews would buy them.” The original owners therefore expect “that if a Jew acquires the holy books, he will easily find the owners and the holy books will be returned.” In R. Ibn Migash’s opinion, not only does conquest not “purify” ownership of holy books by virtue of the owner's *yi'ush*, but whoever buys assets from the Sultan is not protected by the "market-overt rule" because “the buyer knew that the king stole them and sold them, and it has already been established that in the case of a ‘famous thief’ there is no protection for the buyer.”

R. Ibn Migash appears to be of the opinion that theft remains within the compass of private law. The opposite is the case when holy books are stolen on the king's orders. The king himself is then regarded as “a famous thief” and there is no protection for the buyer.

### (b) *The Nature of the Booty*

The distinction regarding the identity of the conqueror/plunderer leads to another distinction – the nature of different classes of plunder. If we view conquest as a royal prerogative, then there is no distinction between the different types of plundered property. Acquisition by war is simply a function of the king's royal power. Maimonides, therefore, did not distinguish between holy books and other possessions confiscated with the sultan's permission. But if we take *yi'ush* into account, then the validity of the transfer of ownership is not determined by royal prerogative, but rather by the intent of the original owner, that is, whether he has relinquished his rights or not. Therefore Ibn Migash, who bases his halakhic rulings on the laws of *yi'ush*,

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<sup>50</sup> In *Shita Mekubezet, Bava Mezia*, 24b.

distinguishes between different sorts of possessions. Possessions which may be used by anyone are despaired of, whereas the original owners might not despair of getting back Jewish religious objects, which are of no use to a non-Jew.

*Rashbaz* (author of *Tashbez*) deliberates between both approaches – “conquest” and *yi’ush* on the part of the original owners – and tries to differentiate between their application. With regard to the question of whether one must distinguish between plundered Jewish goods of a general nature which a Jew purchased from a non-Jew, and plundered religious books which he purchased from a non-Jew, *Rashbaz* maintains that the distinction made by the *Tosafists*<sup>51</sup> between plundered religious books and other plundered property is based on the concept of *yi’ush*. However, *Rashbaz* reaches the conclusion that the above distinction between just any property and religious books can be justified according to the “conquest” approach as well, using the following reasoning:<sup>52</sup>

If one examines the situation carefully, one should distinguish between plundered [holy] books and other plundered property. [Holy] books are always worth more than the price a Jew pays a non-Jew, as the non-Jew did not acquire this added plunder value but only acquired the known value which he intended to acquire. The Sabaeen did not value the [holy] books at more than the value of unused paper, and was therefore prepared to sell the books to a Jew at the price of unused paper. And since the non-Jew is not aware of the added value, he has not acquired the added value by virtue of conquest. [Consequently, a Jew who purchases holy books from a conqueror is actually purchasing property that still belongs to the original Jewish owner.]

Thus, those rabbinic authorities who follow the “conquest” approach can also make a distinction between religious books and other possessions. However, this distinction is not based on an assessment of the intent of the original owners who were robbed (as the *yi’ush* concept does), but on an assessment of the conquerors' intent, as to which property he intended to apply royal prerogative and to which he did not.

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<sup>51</sup> *Tosafists Baba Kama* 114b, s.v. *hamakir*.

<sup>52</sup> *Tashbez* 2:136-137.

(c) *The Grounds for the Confiscation of Property*

A further difference between the two views, in my opinion, lies in the grounds for the confiscation of the property. If we say that transfer of ownership is effected because of *yi'ush*, then the reasons for the war that led to the confiscation of property is irrelevant. The more evil and arbitrary the reasons for the confiscation of property, the greater the owners' *yi'ush* and their subsequent relinquishing of their rights. But if we say that transfer of ownership is effected by virtue of military conquest, that is, "royal prerogative," then one can discuss the scope of this prerogative as accepted among the nations of the world. In other words, transfer of ownership is effected if the conquest and the plundering were carried out according to universally accepted norms.

In addition, the differences in approach can be presented as follows: Whereas transfer of ownership that is effected by virtue of the classical laws of *yi'ush* is subject to later-day rabbinic monetary enactments, such as the obligation to return the property for moral reasons, despite the original owner's *yiush*, "military conquest" releases the property purchased by the new owner from any later-day rabbinic enactment, and the new owner is not obligated to return property that was acquired from the conquering authorities to its original owners.

A case was brought before an Israeli rabbinical court soon after the establishment of the State of Israel. The Ministry of Religion purchased various ritual objects from the U.S. Forces of Occupation. These objects had been confiscated from Jewish homes and synagogues by the Nazis. A crown which adorns a Torah scroll was purchased in this way and placed in King David's tomb on Mount Zion. A Mr. Zvi Landsman happened to visit the tomb and identified the crown, which had been donated by his father to the Jewish community in his town, Makov, in Hungary. Mr. Landsman claimed ownership. His intention was to donate the crown to a synagogue of his choosing.

The case, known as "*Landsman v. the Committee for Mount Zion*"<sup>53</sup> (hereafter: the Landsman case), was published in a collection of rabbinical rulings. R.

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<sup>53</sup> *Supra* n.41.

Ya'akov Adas (presiding judge), R. Yosef Shalom Elyashiv, and R. Bezalel Zolty, all rabbinical judges of the Jerusalem Regional Rabbinical Court at the time, ruled that the Torah crown should be returned to Mr. Landsman. At the same time, however, R. Meshulam Rath, an advisor to the rabbinical courts and a member of the Chief Rabbinic Council, also wrote a responsum on the subject, which appeared in *Kol Mevasser*,<sup>54</sup> in which he ruled that the crown should remain the property of the Ministry of Religion. Apparently, the judges and R. Rath knowingly disagreed with each other. R. Rath even wrote to R. Adas, "Begging your honor's pardon, but I believe that your honor has made a serious mistake and has lost sight of a talmudic ruling." The rabbinical judges, on their part, debated R. Rath without mentioning him by name, claiming that his ruling was wrong.

Where did they differ? R. Rath regarded the Nazi confiscation of the Torah crown during World War II in terms of the ruling in *Shulhan Arukh, Hoshen Mishpat*, chapter 259: "Whoever saves property from the lion and the bear and the sea ... or from the current of a river ... they belong to the finder, even if the original owner protests. Comment: It would be the right thing to do to return the property." The author of the book *Meirat Enayim* adds: "Even if [the original owner] states that he has not despaired and even if he pursued his property, his views are ignored in favor of those of the average person, and it is as if he is crying out after his house has already fallen."

Based on these sources, R. Rath ruled that "in this case, the Nazis may be compared to a lion or bear or worse, as nothing could be rescued from them."

R. Rath was of the opinion that even if there is a rabbinical decree which states that lost property should be returned, it does not apply to the complainant, as he is the bequest's son. The Torah crown is a bequest of a sacred object and the person who bequests it no longer owns it. Were the person who bequested it still alive, he could claim the right to decide where to donate it, but as he is deceased, the son does not inherit this right.

According to R. Rath, the fate of the Torah crown must be decided on the grounds of classical private law (i.e., *yi'ush*), irrespective of the question of conquest.

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<sup>54</sup> *Supra* n.42.

War is simply another cause of the owner's *yi'ush* and the end of ownership. Clearly, if a Jew or non-Jew confiscates property belonging to a Jew, it is regarded as theft. It is also clear that if the original owner had not relinquished his claim prior to the transfer of ownership to the new owner and there was no intermediate transfer of ownership, then the new owner must return the property. That is why *yi'ush* generally does not apply in the case of land because land cannot be stolen and therefore the owner's *yi'ush* does not apply. But in wartime, it is assumed that the original owner even relinquishes his claim to land, and even if he stands up and claims that he has not given up his claim, “we rule according to the average person.” As we have seen, R. Rath disagrees with R. Adas, who he believes has seemingly forgotten the classical laws regarding an owner who has lost hope of retrieving his property. In R. Rath's opinion, Rema's decree<sup>55</sup> regarding the duty to return property to the original owner is not an absolute duty but rather an act of piety. The Rema's decree most certainly does not apply to the right to choose the recipient of a benefaction.<sup>56</sup>

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<sup>55</sup> *Shulkan Arukh, Khoshen Mishpat 356:7*. Rema's decree is based on R. Yisrael Isserline *Trumat Ha'Deshen* Responsa No. 309.

<sup>56</sup> R. Ovadiah Hadiah disagrees with R. Rath's assumption regarding an owner who has given up hope of retrieving his property because the Nazis may be compared to a lion or bear and maybe even worse, as nobody is capable of defending their property against them. In his responsa, *Yaskil Avdi*, part 6, chapter 20, he writes: “With all due respect, nobody would deny that they are worse than a lion or bear, but everybody knows that their major concern was to murder ... and that the financial aspect was incidental. And I have even heard that many of the victims' relatives who returned after the war found their possessions intact, but in some cases the neighbors had plundered the house... And I would not compare the situation to that of the lion and bear... even if they did take property, since they were fighting a war and could be defeated, as was the case. Therefore I do not think that the owner relinquished his rights.”

Similarly, R. Yaakov Yehiel Weinberg, himself a holocaust survivor, is not of the opinion that the owner definitely gave up all hope of recovering property from the Nazis. In his responsa, *Seride Esh*, part 1, chapter 147, he was asked whether rescuing books from the library of the Rabbinical Seminar in Berlin during the Second World War could be compared to rescuing jetsam from the sea and the rescuer thus becoming the owner of the books? He answers: “I have my doubts about the comparison, since we know that evil men took all the books from the libraries and preserved them in a safe place... and we did not give up hope that the evil would disperse like smoke and the reign of evil would disappear... Thus the owners never gave up hope.”

However, R. Menashe Klein, also a holocaust survivor, maintains that the owner had resigned himself to his loss. In his responsum, *Mishane Halakhot*, part 17, chapter 140, he documents his personal experiences as a refugee, describing what he thought and felt at each stage until he reached the United States. He rules: “It is therefore evident when the Jews left their houses and property together with everything they owned, without any protection, that they gave up hope immediately because they knew what would happen to their property... and certainly when they reached the ghetto and from the ghetto moved on to the concentration camp, who would not give up hope? They not only relinquished their possessions but also were resigned to giving up their lives and indeed they were proven right. Only one from a town and two from a family survived, and the survivors after the war did not think about their possessions. Most of them did not even try to go back to their houses, since they knew that there would be nothing to find.”

Ironically, in their halakhic ruling, the rabbinical judges begin by following the line of thinking laid down by R. Rath, without mentioning his name, and point out that even according to classical *halakhah* there is no obligation to return the object as an act of piety, as R. Rath ruled based on the laws regarding the return of lost property. However, in this case we are dealing with a matter of theft. Therefore, the stolen property must be returned by virtue of the relevant rabbinic enactment, which is a particularly important and forceful rabbinic enactment that applies equally to all thieves and is enforceable in a rabbinical court. Thus, the crown must be returned by law, and the rights of the original owner are inherited by the son.

However, the judges then immediately proceed to discuss what, in their opinion, is the main issue: Is *The Committee for Mount Zion* exempt from the obligation to return the crown since it constitutes an acquisition through conquest?

The Rabbinical Court ruled on this issue as follows:<sup>57</sup>

But if soldiers plundered the owners, then this is a special case of acquisition through conquest which is considered in the Babylonian Talmud, *Gittin*, 38, and we should eliminate the possibility that this is relevant to the case discussed in *Sulkhan Arukh* chapter 356, and that it is possible that there is no decree requiring the new owner to return the property. See Tractate Sanhedrin 94b: And your spoil shall be gathered like the gathering of a caterpillar. Just as pools purify the unclean, so are the possessions of Israel, which having fallen into the hands of heathens, become clean (i.e. legitimate).

However, it would seem that in this case, conquest is not relevant, since the Hungarian Nazis attacked those Jews who were living safely in their country under their government, and stole everything of value in their possession. This is not booty, but rather theft and evil-doing. Even afterwards, when, the possessions fell into the hands of the Americans, we cannot claim that they acquired them by conquest, since they had neither the desire nor the intention

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<sup>57</sup> *Supra* n. 42, p. 171.

of keeping them, but rather wished to return them to representatives of the Jewish people.

It seems to me that the rabbinical judges disputed R. Rath on two issues. First, they were of the opinion that an evil act carried out intentionally does not constitute “lost property.” The passage in the Babylonian Talmud that refers to “jetsam from the sea or a river”<sup>58</sup> is not referring to property confiscated by military conquest. By lost property, the Talmud is referring to property that was seized by the forces of nature without human intervention. Intentionally taking another person's property is theft, and a powerful rabbinic enactment requires the return of stolen property. However, in wartime, *halakhah* recognizes the existence of particular laws relating to conquest, which are based on “royal prerogative.” Secondly, the judges present a revolutionary approach based on a responsum by R. David Ben Zimra,<sup>59</sup> that royal prerogative with regard to conquest by war is based upon the Torah's recognition of the power of the king to rule, and just as in times of peace civil law is halakhically valid if “the king enacts a law that treats all equally and does not treat anyone unfairly,” similarly, the validity of ownership by virtue of conquest is dependent upon the fairness of the conquest process. Since Nazi behavior was totally discriminatory, their conquest is not regarded as conquest but as theft, and the Torah crown thus belongs to the original owner and is inherited by his son upon his death. They state:<sup>60</sup>

The entire reason for recognizing [the halakhic validity of] civil law is because the ruling authorities allow Jews to live in their country, as Rabbenu Nissim explains in his commentary to Tractate *Nedarim*. Therefore, in this case, where the enemy intended to totally destroy the Jewish people and to confiscate their property, it is obvious that civil law does not apply. And therefore, in this case, the rabbinical decree that stolen property be returned to the original owner applies, and the person who acquires it must return the property even if the original owner has despaired of it.

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<sup>58</sup> *B. Baba Metzi'ah* 24a.

<sup>59</sup> *Radbaz* Responsa 3:123.

<sup>60</sup> *Supra* n. 42 pp. 171-172.

**(d) *When is the acquisition of confiscated property regarded as acquisition through military conquest?***

Is acquisition during war dependent upon the intentions or actions of the original owner? If one assumes that the halakhic validity of acquisition of confiscated property is based solely on classical private law, then transfer of ownership would be dependent upon the ability or lack of ability of the original owners to hold on to their possessions. *Yi'ush* is determined by the behavior of the original owner, which is a factual state. Clearly, the more determined the conqueror is to seize the property of the citizens of the conquered nation, the more likely is the original owner to despair. Thus, for example, the point in time that the original owner flees his village would be considered the time of transfer of ownership. However, if the acquisition of confiscated property is regarded as “royal prerogative,” then the transfer of ownership is effected at the time of the royal decree, even if the conquered citizens did not in fact despair of their property.<sup>61</sup>

**(e) *Is transfer of ownership by virtue of conquest permanent or reversible?***

Is the conqueror's ownership permanent or reversible? Here again there is a difference between the perspective of classical private law and that of royal prerogative. Classical private law regards conquest as a factual state which leads the original owners to abandon their title to their property (*yi'ush*), which then becomes the property of the conqueror. The conqueror is the ruler, and he decides whether the property will be given to individuals, such as the plundering soldiers, or to the nation's treasury, which will then redistribute it. Since conquest is a fact, transfer of property from conquered to conqueror is irreversible, just like the transfer of property from seller to buyer or the purchase from a thief after the original owner abandons his claim out of despair of the likelihood that it will be returned.

However, if we view conquest in terms of “royal prerogative,” then conquest does not effect a transfer of property from conquered to conqueror, but rather, it is a “floating charge” of private property. The conqueror maintains ownership of the property that he seized only as long as a state of conquest exists. Once the state of

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<sup>61</sup> See: R. Issac Herzog *Supra* n. 47.

conquest ends, ownership reverts to the pre-conquest owner. In addition, ownership by anyone who purchased property from the conqueror is valid only as long as the state of conquest exists.

Furthermore, conquest is not an autonomous mode of acquisition which determines a dispute over ownership between two Jews – the original Jewish owner who was plundered and another Jew who purchased the property from a non-Jew – but is dependent upon the practices followed by enlightened nations.

This matter was first raised by R. Eliyahu Barukh Kamai, one of the leading early-nineteenth-century rabbinic authorities in Lithuania, rabbi of Mir, and founder of its famous talmudical academy. R. Kamai was of the opinion that acquisition through conquest does not confer ownership unless international law recognizes the war and justifies it. He writes as follows:<sup>62</sup>

The validity of acquisition through conquest is based on the accepted practices of enlightened nations with regard to war; and anything which is not accepted practice by enlightened nations is simply theft.

The thievery mentioned by R. Eliyahu Kamai does not refer to the ruler who conquered the land in defiance of international law, as the Torah does not instruct a non-Jewish ruler to adopt its ways, nor would the non-Jewish king or ruler be interested in adopting Torah law. The thief is the Jew who purchased the confiscated property from the conqueror according to the conqueror's law. Thus, a Jew who buys goods under the conqueror's law, does not necessarily gain halakhic legal possession by virtue of “conquest,” but is subject to the status of the conquest under international law. If the conquest is not recognized “by enlightened countries,” then even though the conquering nation recognizes the conquest under its own law, the purchase is nevertheless regarded as theft. Therefore, the end of the conquest under international law would lead to the transfer of the possessions from the purchaser back to the original owner.

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<sup>62</sup> R. Kamai is cited in *Dvar Avraham*, *Supra* n. 40.

A question arose with the establishment of the State of Israel and the fleeing of its Arab inhabitants. Israel declared them absentee landlords and appointed an overseer for the property. The State Property Law, 1951, determined that ownership of the property of absentee landlords is transferred to the State, which may then lease these properties to its citizens. Rabbis addressed the question of whether, according to *halakhah*, this property is considered to be under Jewish ownership or whether it remains the property of the abandoning non-Jewish owners. This matter was of interest to them because of religious questions which arose with regard to eating fruit that is grown on non-Jewish land in the *shmittah* year, exemption from the obligation of tithes, and observing the commandment of bitter herbs (*marror*) using lettuce grown on land that was abandoned by its non-Jewish owners. R. Uziel and R. Pesah Zvi Frank, Chief Rabbi of Jerusalem, held different views on this issue. One of the questions raised was the extent to which the halakhic laws of conquest applied.

In his letter to R. Frank, R. Uziel writes that the Israeli government does not regard the abandoned property as conquered property because the very word “abandoned” indicates that it was never Israel’s intention to confiscate property from Arab refugees, unlike the intention of Sihon to conquer the lands of Moab and Ammon and annex them. Therefore Jews may not regard this abandoned property as property that was transferred to their ownership, as the Israelites regarded the land they conquered from Sihon. R. Uziel also uses the modern concept of military conquest in international law. He writes as follows:<sup>63</sup>

... with regard to their property (of the Arab inhabitants who fled during Israel’s War of Independence), there is no doubt that the government will have to compensate them. Until they are compensated, the property and the fruit belong to them [the previous Arab inhabitants], in accordance with international law, that prior to the signing of a peace treaty, the property of enemy aliens and of refugees or prisoners remains their property.

R. Frank claims, however, that in actuality, the abandoned property is under the administration of the State of Israel and harvested by Jews, and should the previous Arab owner take any of the fruit, he would be considered a thief. Meanwhile The

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<sup>63</sup> R. Uziel is cited in R. Pessakh Z. Frank's Responso (*Har Tzvi*) *Zera'im* 18.

'Absentees Property Law' was passed in 1950 in accordance with Rabbi Frank's approach.

### **3. The Approach of *Shari'a***

#### **3.1 General Background**

Islam is not just a religion and a system of theological thought. It is also a jurisprudential system whose primary sources are religious texts – the Qur'an and Sunnah – which serve as the basis for deriving Islam's legal norms.

Islam has been in a state of continuous struggle with neighboring peoples since its inception. Islamic tradition records eleven battles waged by the Prophet Muhammad. Like other aspects of Islamic law, the sources for its laws of war are the injunctions, prohibitions, and guidance appearing in the Qur'an and in the Sunnah, laid down by the Prophet Muhammad in his conduct of war and statecraft during his lifetime. These two sources are primary and universally applied in all cases by all Muslim jurists, *inter alia*, with regard to the legal norms governing different aspects of the impact of war on Muslim private property.

The Qur'an and the Sunnah are not free of ambiguities, and wide-ranging interpretations lead to a variety of views among jurists with regard to the impact of war on Muslim private property. It is not the objective of this article to resolve these competing views, but rather, to introduce the reader to the diversity and legitimacy of views regarding two major questions: (1) Can a non-Muslim acquire ownership of Muslim private property as a result of an act of war? (2) If so, when and under what circumstances can this Muslim regain ownership of his property?

### 3.2 Non-Muslim ownership of Muslim private property seized in war: two views

In the course of an act of war, a non-Muslim seizes private property belonging to a Muslim. The question that arises is whether ownership of the seized property is transferred, de jure, to the non-Muslim? Can a non-Muslim acquire ownership of Muslim property by means of an act of war? There are two main views on this issue.

#### 3.2.1 The first view: non-Muslims cannot acquire ownership of Muslim private property

The first view completely rejects any possibility of a non-Muslim acquiring ownership of any Muslim property as a result of war.<sup>64</sup> This view is prevalent mainly amongst jurists of the Shafi'i school, the Zahiri school, al-imamiyya (Twelver Shia), one of the approaches of the Hanbali school, and one branch of the Zaydiyyah school. Al-Mawardi<sup>65</sup>, one of the pillars of the Shafi'i school, states: "Any property taken over and held by non-Muslims is not considered under their ownership and remains under Muslim ownership."<sup>66</sup> Ibn hazm, a Zahiri jurist<sup>67</sup>, states: "The infidels of Dar al-Harb have no ownership rights over Muslim property unless it is sold or given to them as a gift. Any property acquired as a result of war remains the property of the original Muslim owner."<sup>68</sup> This view is based on two verses of the Qur'an and two stories from the Sunnah.

#### (a) *Qur'anic sources*

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<sup>64</sup> It should be mentioned that Islamic law establishes certain methods of acquiring private ownership. See: Imam Muhammad Abu Zuhra, *al-Mulkiyya wa-Nazariyyat al-'Aqd fi al-Shari'a al-Islamiyya* (Dar al-Fikr al-'Arabi, 1976).

<sup>65</sup> Abu al-Hasan 'Ali b. Muhammad b. Habib al-Mawardi (972-1058 CE).

<sup>66</sup> Al-Mawardi, *Al-Ahkam al-Sultaniyya*, p. 136.

<sup>67</sup> Abū Muḥammad Ḥalī ibn Ahmad ibn Saʿīd ibn ʿAzīm (Died 456 AH)

<sup>68</sup> Ibn Hazm *Al Kitab al-Muhallā bi'l Athār*, vol. 7, p. 200.

As mentioned, the view that a non-Muslim cannot acquire ownership over Muslim property is based on two Qur'anic verses. Verse 4:141 states: “**God shall never grant non-believers a way (to triumph) over believers**”<sup>69</sup> Jurists who adhere to the first view interpret this verse to mean that if God does not allow non-Muslims to gain control and triumph over Muslims, then they certainly will not be allowed to control Muslim property. Furthermore, these jurists regard this verse as a command addressed to non-Muslims prohibiting them from taking control of Muslim property. Assuming a *de facto* scenario in which non-Muslims physically seized control of Muslim property, they may not be allowed *de jure* to enjoy the fruits of their forbidden actions and therefore must be denied ownership so as not to reward them for their sins.

Verse 33:27 states: “**And he caused you to inherit their lands, and their houses, and their riches, and a land which you have not trodden (before). And Allah is able to do all things.**”<sup>70</sup> The jurists interpreted this verse as meaning that Muslims can gain ownership over property belonging to non-Muslims but not vice versa.<sup>71</sup>

The jurists arrive at several conclusions based on these two verses:

(1) It is incumbent upon non-Muslims to uphold God’s commandments stated in these verses. Therefore, if God prohibits them from gaining control over Muslim property in any manner, they must obey this Divine decree and refrain from doing so.

(2) If a non-Muslim disobeys the aforementioned decree and does, in fact, seize control of Muslim property, the result is a complete nullification of any legal outcome of these actions, even on the individual level.

(3) The property rights of a Muslim that are infringed upon by a non-Muslim are not lost and supersede any rights of others who may have gained possession of the property.

(4) A Muslim may gain ownership of non-Muslim property through an act of war.

<sup>69</sup> In Arabic: { **قوله تعالى : ولن يجعل الله للكافرين على المؤمنين سبيلا** }

<sup>70</sup> In Arabic { **قوله تعالى : وأورثكم أرضهم وديارهم وأموالهم وأرضا لم تطؤوها** }

<sup>71</sup> Al-Mawardi, *Kitab al-Dahaya min al-Hawi al-kabir*, vol. 14, p. 217.

(5) The outcome is that God grants *a priori* preference to Muslims; hence, there is no equality between believers and non-believers. Consequently, there is also no equality with regard to the legal outcome of act of war on the individual level.

(b) *Sunni sources*

In addition to the Qur'anic references, this view is also based on two stories in the Sunnah which recount events from the life of the Prophet Muhammad.

The first story (hereafter: the story of the slave) was reported by the second caliph Umar Ibn al Khattab.<sup>72</sup> It is about a slave who belonged to a Muslim and fled to a non-Muslim tribe. He was subsequently captured in battle by Muslims. The Prophet refrained from including him in the booty to be divided up among the warriors. The jurists view the Prophet's refusal to treat the slave like other spoils of war which are to be divided up as proof that the Prophet regarded the slave as the property of the original Muslim owner and never as the property of the non-Muslims. The jurists deduce from this story that non-Muslims may not gain ownership over Muslim property, otherwise the slave would have been considered part of the spoils of war which are divided up among the warriors.

Jurists also base their view on another event brought down in the Sunnah (hereafter: the story of ala'dbaa). At one point non-Muslims invaded al-Madina (the city to which the Prophet immigrated after leaving Mecca) and seized a woman and the Prophet's dromedary (named ala'dbaa), among other things. During the night the woman tried to escape from captivity, but each time she placed her hand on a dromedary, it cried out. This continued until she found the Prophet's dromedary, which remained silent as she mounted it. The woman then vowed that if she returned safely to al-Madina she would slaughter the dromedary and eat it. When the woman arrived in al-Madina, the townsfolk recognized the dromedary and returned it to its owner, the Prophet. The woman told the Prophet of her vow. Rebuking her for being ungrateful to the dromedary, the Prophet informed her that her vow was null and void since the animal had never been hers in the first place.<sup>73</sup>

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<sup>72</sup> *Sunan Abi Dawud, Kitab al-Jihad*, vol. 3, p. 64, hadith 2986.

<sup>73</sup> *Sahih Muslim, Kitab al-Nudhur*, vol. 2, p. 18; *Musnad al-Imam Ahmad*, vol. 4, p. 432.

According to the jurists, the normative lesson to be drawn from this event is that non-Muslims cannot acquire ownership of Muslim property by means of war.<sup>74</sup>

Jurists of the Shafi'i school interpreted the Prophet's statement to mean that the animal had remained under the ownership of the Prophet Muhammad and the infidels had never acquired ownership over it. Therefore, the woman could not acquire ownership over it either. The Prophet's statement that "An individual cannot make a vow or carry out an action regarding something he does not own and if he does so it has no validity," coincides with one of the basic laws of property and ownership: "nemo dat quod non haber."

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<sup>74</sup> Al-Shafi'i, *Kitab al-Um*, vol. 4, p. 284.

### 3.2.2 The second view: Non-Muslims can acquire ownership over Muslim property during war

According to the second view, a non-Muslim's conquest of Muslim property effects ownership. This view recognizes the "reciprocity principle" in the laws of war and rejects the distinction between a Muslim and a non-Muslim conqueror.<sup>75</sup> Proponents of this view are members of the Maliki and Hanafi madhahib (schools of jurisprudence), and it is the general stance of the Hanbali madhhab and Zayidiyya madhab. Thus, for example, Sarakhsi<sup>76</sup>, a leading Hanafi jurist, states: "The infidels shall become the owners of Muslim property taken by force if this occurred in their (the infidel's) land."<sup>77</sup> In addition, Ibn Qudama<sup>78</sup>, a Hanbali jurist, said: "The Qadi has said: the infidels shall become the owners of Muslim property if taken by force."<sup>79</sup>

The jurists who hold the second view disagree with those of the first view and the way in which they reach their conclusions, and cite several sources supporting their own conclusion. We shall first discuss the sources from the Qur'an and Sunnah cited by the former, and then discuss their refutation of the first view.

#### (a) *Qur'anic sources*

Proponents of the second view base their opinion on verse 59:8: "For the poor emigrants, who were expelled from their homes and their property, seeking bounties

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<sup>75</sup> Al-Zuhaili is one of the modernist jurists who hold this view. Zuhaili holds revolutionary views regarding the Islamic laws of war, attempting to reconcile Islamic laws of war to modern laws. Zuhaili strongly held view is that non-Muslims actually can acquire ownership over a Muslim asset seized in war. But unlike the classical jurists who hold the same view, Al-Zuhaili does not view conquest as a legal phenomenon which causes a change in legal rights, but a phenomenon which denies the original owner the ability to benefit from the asset and which leads to the expiration of ownership. Thus, the non-Muslim can acquire ownership over it by seizing it, which is one of the classical ways of acquiring ownership. See: Wahba al-Zuhaili, *Athar al-Harb* (Dar al-fikr al-Arabi 1981).

<sup>76</sup> Shams al-Din al-Sarakhsi (Died 490 AH).

<sup>77</sup> Shams al-Din al-Sarakhsi, *Kitab al-Mabsut* (Beirut: Dar al-Kutub al-'Ilmiyya, 1993), Vol. 10, P.54

<sup>78</sup> Imam Mawaffaq ad-Din Abdullah Ibn Ahmad Ibn Qudama al-Maqdisi (Died 620 AH)

<sup>79</sup> Ibn Qudama, *Al-Mughni*, vol. 9, p. 261

from Allah and to please him, and helping Allah and his messenger. Such are indeed the truthful to what they say."<sup>80</sup>

The Qur'an uses the term poor in this verse to describe people who do not own any property.<sup>81</sup> According to this verse, God describes the Muslims who left Mecca and left their belongings behind as poor. Describing them as such is consistent with the conclusion that non-Muslims had acquired Muslim property, since had they not, the Muslims would not have been considered poor, as they in fact own property.

### (b) *Sunni sources*

The jurists of the second view base their opinion also on two stories from the Prophetic Sunnah. One of the stories is about a man who found a female dromedary that he owned in the possession of another man. They both turned to the Prophet Muhammad to judge the case. The man who claimed ownership proved that he was the original owner; the other party, however, claimed and proved that he had bought the animal from a non-Muslim who apparently had captured or plundered the animal from the owner. The prophet ruled that if, in fact, this was the case, the original owner could reclaim the animal if he so wished, but he must then compensate the other party and pay him the sum that he had paid the infidel.<sup>82</sup>

Based on this story, jurists of the second view conclude that non-Muslims had acquired ownership of the dromedary; therefore, once they sold the animal to the Muslim, the transaction was valid and the buyer is the legal owner. However, the original owner has the right to reclaim the animal if he fully compensates the buyer. We can therefore conclude that a non-Muslim may acquire ownership of Muslim property.

The jurists of the first view (who reject the opinion that a non-believer may acquire property) maintain that it is doubtful that this incident ever occurred. A close inspection of this hadith shows that its chain of transmission is flawed since it does

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<sup>80</sup> In Arabic: **لِلْفُقَرَاءِ الْمُهَاجِرِينَ الَّذِينَ أُخْرِجُوا مِنْ دِيَارِهِمْ وَأَمْوَالِهِمْ يَبْتَغُونَ فَضْلًا مِنَ اللَّهِ وَرِضْوَانًا وَيَنْصُرُونَ اللَّهَ وَرَسُولَهُ أُولَئِكَ هُمُ الصَّادِقُونَ**

<sup>81</sup> Ahmad b. Mahmud al-Nasafi, *Tafsir al-Nasafi*, vol. 4, p. 141.

<sup>82</sup> *Musannaf Ibn Abi Shayba, Kitab al-Jihad*, vol. 7, p. 686, hadith no. 14.

not reach the individual to whom the hadith is attributed. In technical terms, the hadith is “*maqtu*” (fragmented), i.e. one link or more in the chain of transmission is missing.<sup>83</sup>

A further incident on which jurists of the second view base their opinion occurred when the Prophet returned to Mecca in 632 after leaving it for al-Madina in 621. In this story, one of the Prophet’s companions, Osama Ibn Zaid, asked him: “Where will you live? The Prophet replied: “Has ‘Uqayl (an infidel who lived in Mecca) left us a home?”<sup>84</sup>

The jurists conclude from this hadith that the Prophet, who is asking a rhetorical question (“has ‘Uqayl left us a home?”), had no home when he returned to Mecca because his home was now owned by the infidel ‘Uqayl. Thus, infidels (in this case ‘Uqayl) have the ability to acquire Muslim property (in this case, the Prophet’s).

The jurists of the first view accept the validity of this incident, but argue that the acquisition was not a result of war, nor did Uqayl gain ownership against the Prophet’s will. Instead, there were other reasons for the acquisition: Uqayl had either purchased the Prophet’s home from him before the Prophet left Mecca, or he had inherited it from Abu Talib (the Prophet’s uncle and ‘Ali’s father). Abu Talib remained an infidel, and according to the laws of inheritance of infidels at the time, the Prophet had no right to inherit property from infidels and they could not inherit him.<sup>85</sup>

***(c) The arguments presented by jurists of the second view against those of the first view***

As mentioned above, the jurists of the second view concluded, based on Qur’anic and Sunni sources, that non-Muslims may acquire ownership over Muslim private property via an act of war. This raises the question of how these jurists reconcile their conclusion with the Qur’anic and Sunni sources on which the jurists of the first view based their opinion.

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<sup>83</sup> Ibn Hazm, *Al Kitab al-Muhallā bi'l Athār*, vol. 7, p. 202.

<sup>84</sup> *Sahih al-Bukhari, Kitab al-Jihad*, vol. 5, p. 443.

<sup>85</sup> Al-Mawardi, *Kitab al-Dahaya min al-Hawi al-kabir* vol. 14, p. 217.

The jurists who hold the second view argue that the two verses cited by the jurists of the first view do not contradict their conclusion, as the commandments derived from these verses, i.e. God's decrees, are not directed at non-Muslims but rather at Muslims, even on an individual level. Muslims and only Muslims are obligated to fulfill God's will in this case. Since non-Muslims are not commanded to refrain from acquiring Muslim property (تكليفي) they need not obey such a decree. Consequently, no sanctions, at the legal level, are brought against them as a result of such an acquisition. In actuality, the main point of contention between the two opinions is to whom the decrees derived from the verses of the Qur'an are addressed, and in particular, whether these decrees are intended also for non-Muslims.<sup>86</sup>

Jurists of the second view also relate to the hadiths cited by jurists of the first view. They agree that the story of the slave did in fact occur, but they claim that the Prophet's reluctance to transfer the slave to the new owners was based on the laws of slavery that were in effect at the time, according to which a slave who is found in the public domain must be returned to his original owners. Given this explanation, they claim that this incident has no relevance to the laws of war and therefore no bearing on the laws of booty. It is merely an implementation of the existing rules and laws of slavery.

In addition, these jurists argue that the story of ala'dbaa – the prophet's dromedary – supports their view that non-Muslims may acquire ownership over Muslim private property taken in war. They give reasons for the prophet's nullification of the woman's vow to slaughter the ala'dbaa:

a. Ownership of property confiscated in war is acquired by infidels only if the property reaches infidel territory (Dar al-Harb). In this case, the animal had not yet reached infidel territory, thus, never officially becoming infidel property and therefore remaining the property of the Prophet.<sup>87</sup>

B. Even if the animal had in fact become infidel property, once it is returned whole and identified by its original owner, ownership reverts to him.<sup>88</sup>

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<sup>86</sup> See Wahba al-Zuhaili, *Athar al-Harb*, *supra* n. 75, p. 615-620.

<sup>87</sup> See Sarakhsi, *Kitab al-Mabsut*, *supra* n.77, vol. 10, p. 53.

<sup>88</sup> Ibn Qudama, *Al-Mughni*, vol. 9, p. 261

### **3.3 The ability and right of the original owner to regain ownership of his property**

Muslim private property that was captured by non-Muslims can revert to Muslim ownership in one of the following scenarios: 1. during a subsequent battle; 2. following the current non-Muslim owner's conversion to Islam; 3. following a sale transaction between the non-Muslim and another Muslim, as part of which the property is turned over to the other Muslim.

In all of the above scenarios, the original Muslim owner may claim that he is still the owner of the property and therefore it must be returned to him. The question arises as to whether the property should be returned to the original owner or whether it should remain with the current owner (the warrior, the convert, or the Muslim who purchased it).

According to jurists who support the first view, the answer is obvious and simple, and applies in all of the aforementioned scenarios. This view is maintained by Al-Mawardi, a 10<sup>th</sup> century pillar of the Shafi'i school, who states: "Any property taken over and held by infidels is not considered under their ownership and remains under Muslim ownership, and if Muslims capture it, it must be returned to the original Muslim owner without compensation."<sup>89</sup>

In contrast, the jurists who hold the second view have no clear and definitive answer to this question. Within the second view we find several approaches to each scenario. In the following section we will introduce the different approaches and opinions with regard to each scenario.

#### **3.3.1 The property was returned to the Muslim owner as a result of a subsequent war between Muslims and the non-Muslims who possess the property**

Muslims may acquire property as spoils of war. If some of this property was previously owned by Muslims who lost it when it was taken as booty by a non-Muslim, what is the legal status of this property? Should it be split up like all property

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<sup>89</sup> Al-Mawardi, *Kitab al-Dahaya min al-Hawi al-kabir* vol. 14, p. 136

taken in war, according to Muslim law regarding spoils of war,<sup>90</sup> or must it be returned to the original Muslim owner?

Muslim jurisprudence distinguishes between two situations:

- (a) ***The original owner identifies his property prior to it being distributed among the warriors***

In this case we identify two separate approaches:

One approach states that the property must be returned to its owner unconditionally.<sup>91</sup> This is supported by most jurists, including the leading jurists of the various Sunni schools of law. For instance, Sarakhasi states that “If this property [taken from a Muslim] is found to be part of the spoils of war previously held by the enemy, and the owner found it before it was divided up, he may take it without any conditions.”<sup>92</sup> This approach is based primarily on the tradition of the Sunnah and Sahaba. Thus, for example, the story is told with regard to Ibn Omar (the son of Omar Ibn Al Khatab) that “the enemy had taken his horse and this was revealed to the Muslims, who returned it to him, this in the time of the Prophet Muhammad.”<sup>93</sup> The jurists regard this action by the Prophet, which constitutes a binding decision, to be a special ruling which establishes that property taken from a Muslim by a non-Muslim and then taken back by Muslims must then be returned to the original owner and not divided up like other spoils of war.<sup>94</sup> Jurists who advocate this approach argue that this ruling is pure common sense and logic, since before the distribution of the spoils, warriors have no rights over the spoils, but only the expectation to receive a share of them. Therefore, in this instance, the rights of the owner override the mere expectations of the warriors.<sup>95</sup>

According to the second approach, the property taken by a non-Muslim in war has the same status as any other booty taken in war, and the original owner has no

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<sup>90</sup> *Sunan al-Bayhaqi* vol. 6 p.324.

<sup>91</sup> ‘Ali al-Abyani, *Spoils of War in Islamic law*, p. 102.

<sup>92</sup> See Sarakhsi, *Kitab al-Mabsut*, *supra* n. 77, P.54.

<sup>93</sup> *Sahih al-Bukhari, Kitab al-Jihad wal-Siyar*, vol. 4, p. 94,

<sup>94</sup> Sahaba held this practice, as Khalid b. al-Walid returned a slave who fled to Byzantium to his original owner. Bukhari, *ibid*, vol. 4, p. 91.

<sup>95</sup> See Sarakhsi, *Kitab al-Mabsut*, *supra* n. 77, P. 153.

special rights over them.<sup>96</sup> One of the proponents of this opinion is the fourth caliph, ‘Ali Ibn Abi Talib. The jurist Ibn Al-Rushd supports this approach, stating: “Whatever property the Muslims retrieved is considered spoils of war and the owners have no claims over them.”<sup>97</sup> The jurists supporting this approach do not cite any specific explanations for it and seem to agree that this property must have the same status as any other property taken in war and must be divided up among the warriors irrespective of it being identified by the original owner.

**(b) *The owner identifies his property after it was divided up among the warriors***

In this case we can identify four different approaches:

(1) The property must be returned to the original owner without compensation. So as to not infringe upon the warriors’ rights, they may be compensated from public funds (Bait El Mal).<sup>98</sup> Thus, for example, Jurist al Shukani states: “A Muslim does not lose his ownership rights if the property is taken by a non-Muslim, and it therefore must be returned to him. However if the spoils have already been divided up among the warriors, the warrior who received it must be compensated from public funds.”<sup>99</sup> Proponents of this approach rely mostly on the story of the ala'dbaa cited above,<sup>100</sup> in which the Prophet rebuked the woman for her vow to slaughter the animal, telling her that she did not in fact own the animal but rather he did, thus rendering her vow invalid. The jurists infer from this case that property belonging to a Muslim taken by non-Muslims and then taken back by Muslims must be returned to the original owner. This approach is accepted by most jurists because it provides a fair balance of the rights of the warriors and those of the owner. On the one hand, the property is returned to its rightful owner, and on the other hand, the warriors receive the value of the property from public funds as compensation for their efforts in battle.

(2) The owner reserves the right to redeem his property in exchange for payment. This attitude is common in Maliki rulings and among some of the Hanbali

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<sup>96</sup> See al-Abyani, *Spoils of War in Islamic law*, *supra* n. 91, p. 102-103.

<sup>97</sup> Ibn Rushd, *Bidayat al-Mujtahid*, vol. 1, p. 291.

<sup>98</sup> This exists in Shafi'i, Zahiri and Zaydi fiqh; see: al-Abyani, *supra* n.91, *Spoils of War in Islamic law*, p. 106.

<sup>99</sup> Al-Shukani, *al-Sail al-Jarar*, vol. 4, p. 548.

<sup>100</sup> See *supra* n. 73 and accompanying text.

jurists.<sup>101</sup> The jurist As Sawi states: “If the Imam (Sultan) divided the property among the warriors as prescribed by law, the owner has no right to it unless he pays for it.”<sup>102</sup> Proponents of this approach cite a story from the Sunnah told by Ibn ‘Abbas: “A man recognized his horse which had been plundered by non-Muslims. The Prophet said to him that if he identified it before the division of goods, then it belonged to him, but if he identified it after the division, he would have to redeem it for a price.”<sup>103</sup> According to these jurists, this approach presents a fair balance between the rights of both parties. Those opposing this approach claim it has no support in legal sources, that is, neither in the Qur’an, the Sunnah, nor the stories of the Sahaba. An opponent of this approach, ibn Hazm claims that the above incident never occurred and the individual who told it cannot be relied upon.<sup>104</sup>

(3) The third approach distinguishes between two cases: (a) The property is something that is commonly found in the marketplace. In this case, the rights of the warriors take precedence and the property should not be returned. (b) The property is unique and cannot be found in the marketplace or perhaps not at all (لا مثل له). In this case it may be returned to the original owner in exchange for compensation. This is the opinion of Hanafi jurists<sup>105</sup> and the Imamiyya school.<sup>106</sup> However, these jurists disagree over who is responsible for compensating the warriors in the first case. The Hanafi jurist Sarkhasi states: “If it is a case where the property is unique, then he may redeem it with payment, but if it is commonly found, then it shall remain with the warriors.”<sup>107</sup> By contrast, the Imamiyya school (الامامية) states that in any case the Muslim treasury must compensate the warriors. Thus, for example, the jurist Ja’far Ibn al-Hasan states: “If he identified it after the division, the owner receives its worth from the Muslim treasury.”<sup>108</sup>

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<sup>101</sup> See: *Hashiyat al-Dasuqi 'ala al-Sharh al-Kabir*, vol. 2, p. 194; *Kashif al-qina'a* vol. 2 p. 78

<sup>102</sup> See: *Balghat al-saik 'ala al-Sharh al-saghir*, vol. 1, p. 769.

<sup>103</sup> ‘Ali al-Abyani, *Spoils of War in Islamic law*, p. 1.

<sup>104</sup> Ibn Hazm *Al Kitab al-Muhallā bi'l Athār*, vol. 7, p. 200.

<sup>105</sup> Al-Kassani, *Badaa'i' al-Sanaa'i'*, vol. 2, p. 128.

<sup>106</sup> Ja’far Ibn al-Hasan, *Shara’I al Islam*, vol. 1 p. 266.

<sup>107</sup> See Sarakhsi, *supra* n.77, *Kitab al-Mabsut*, Vol. 10. P.54.

<sup>108</sup> Ja’far Ibn al-Hasan, *Shara’I al Islam*, vol. 1 p. 266.

(4) The property that was plundered and then given to the warriors becomes theirs, and the original owner has no rights over it. This opinion can be found among the Maliki and Hanbali schools. The famous Maliki jurist known as al-bagi<sup>109</sup> states: “Yihya said, ‘I heard a Maliki say about property plundered from Muslims by non-Muslims that if it is identified before division it must be returned to the original owner, and if it was divided, it shall not be returned.’”<sup>110</sup> The proponents of this approach base themselves on a story from the Sunnah told by Marwa Ibn Omar, who maintains that the Prophet said: “If one finds his property in the spoils before division then it is his, and if one finds it after it was divided, he has no claim.”<sup>111</sup> Ibn Hazm, who opposes this approach, claims it has no basis in the Qur’an or Sunnah and doubts the story’s credibility.<sup>112</sup>

### 3.3.2 Returning Muslim property taken by a non-Muslim who then converted to Islam

What is the law pertaining to property once owned by a Muslim, then seized by a non-Muslim conqueror, and then sold or given to another non-Muslim who subsequently converts to Islam? Must the convert return the property to its original owner?

There are two main approaches to this question:

The *first approach* states that, in this case, the property must be returned to the original Muslim owner. This is the opinion of the Imam Shafi’i himself: “If the infidel captured a Muslim, be he a free man or slave, or other property, and took possession of it, and afterwards converted to Islam, he then has no rights over it.”<sup>113</sup> The jurist Ibn Hazm, as well, states: “If they became Muslims, then anything in their possession belonging to another Muslim shall be taken from them and returned to the original owner without compensation”<sup>114</sup>. The *second approach* to this question states that the property remains in the current owner’s hands and his right supersedes that of the

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<sup>109</sup> Abu Alwaleed Soliman ben Khalf al-Bagi (Died 494 AH).

<sup>110</sup> Al-Bagi, *Muntaqa fe Sharh al-Muwataa’*, vol. 2, p. 185.

<sup>111</sup> *Sunan al-Dar Qutni, Kitab al-Siyar*, vol. 4, p. 112, hadith 26.

<sup>112</sup> Ibn Hazm, *Al Kitab al-Muhallā bi'l Athār*, vol. 7, p. 200.

<sup>113</sup> Al-Shafi’i, *Kitab al-Um*, vol. 4, p. 282

<sup>114</sup> Ibn Hazm *Al Kitab al-Muhallā bi'l Athār*, vol. 7, p. 206.

original owner. The jurist Al-Kasani<sup>115</sup> for instance states: “If the enemy converted to Islam and is in possession of Muslim property, it remains his and the old owners have no rights over it.”<sup>116</sup> Those who support this approach cite an explicit hadith from the Prophet which states: “One who has become Muslim, everything that was his belongs to him.”<sup>117</sup> Zuhaili, a contemporary jurist, is an avid proponent of this approach. According to him, converting to Islam is a lofty cause, and therefore all obstacles must be removed from the road to conversion. Hence, we must uphold a ruling according to which a convert’s property remains his even if it once belonged to a Muslim.<sup>118</sup>

### 3.3.3. The property is sold to a Muslim

What is the law in the case of property plundered in war by a non-Muslim who then sold it to another Muslim? Must the new owner – the buyer – now return it to the original owner or may he keep it?

Here, too, we find no unified position, and we can point to two main approaches:

According to the *first approach*, ownership lies with the new buyer, but the original owner has the right to redeem the property. In other words, the buyer retains ownership pending the original owner’s ability to redeem the property for a price. This is the opinion of most jurists of the Maliki, Hanafi, Hanbali and Zaidi schools of law.<sup>119</sup> For example, the jurist Ibn Juz’a states: “If a Muslim purchases [property] from the enemy, the [original] owner has no right over it unless he pays for it.”<sup>120</sup> It should be noted that these jurists did not prescribe a deadline by when the original owners must redeem their property, nor the price that must be paid for it. The legal source for this approach is an incident involving Omar Ibn Al-Khattab and reported by Ash

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<sup>115</sup> Abu-Bakr Ibn Mas'ud al-kassani, (Died 1191 BC).

<sup>116</sup> Al-Kassani, *Badaa'i' al-Sanaa'i'*, vol. 7, p. 120

<sup>117</sup> *Bayhai Kitab al-Siyar* vol. 9, p. 122.

<sup>118</sup> Wahba al-Zuhaili, *Athar al-Harb* Wahba al-Zuhaili, *Athar al-Harb*, P.626.

<sup>119</sup> See ‘Ali al-Abyani, *Spoils of War in Islamic law*, p. 121; al-Sarakhsi, *Kitab al-Mabsut*, *supra* n.77, vol. 10, p. 62.

<sup>120</sup> Ibn-Juza, *Al-Qawanin al-Fiqhiyya*, p. 123.

sha'bi: "The inhabitants of Maah and Jalulaah (infidel tribes) attacked the Arabs and plundered women, slaves, and property. Afterwards, a Muslim named Ibn Alaqra'a, who worked for Omar, attacked them and conquered Maah. Omar wrote to him: 'a Muslim is the brother of a Muslim and shall not betray him. If a Muslim captured slaves or property – he has the right over them; if he found them in the hands of merchants after division, he has no rights over them. If a merchant bought free men, they shall be returned and they shall be paid what they paid, for free men are not sold nor bought.'"<sup>121</sup> Jurists inferred the following from this: Firstly, non-Muslims can acquire ownership through warfare over any property which belonged to Muslims, including slaves. Secondly, if Muslims gain control over non-Muslim property, including property previously taken from Muslims in war, they shall return said property to the original owners as long as the property was not distributed. Thirdly, if the property was divided and sold to merchants, the rights of the original owner override those of the merchants or whoever possesses the property, on condition that he compensates them for it.

*A second approach*, found only in the Zahiriya school, states that, in this case, the original owner takes precedence, and the property must be returned to him without compensation. The jurists supporting this approach provide no explanation.

This issue has been discussed also by modern jurists. A perusal of modern Shari'a literature shows that a considerable number of modern jurists advocate the first approach, which recognizes the original owner's right to redeem his property.<sup>122</sup> Several arguments are brought in contemporary Muslim legal literature supporting this approach: Firstly, the ruling ascribing ownership to the buyer, and subjecting it to the redemption rights of the original owner, provides a balanced approach to the interests of both parties. On the one hand, providing absolute ownership to the new buyer without subjecting it to the redemption rights of the original owner infringes upon the rights of the original owner. On the other hand, returning it to the original owner without compensation infringes upon the reliance interests of the buyer and may damage commerce.

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<sup>121</sup> See 'Ali al-Abyani, *Spoils of War in Islamic law*, p. 122.

<sup>122</sup> Wahba al-Zuhaili, *Athar al-Harb* Wahba al-Zuhaili, *Athar al-Harb*, P.620.

Secondly, we can learn about this matter from a different matter discussed in Muslim jurisprudence concerning Muslim property captured by a non-Muslim in war, after which the non-Muslim arrives in Muslim land (*dar al-Islam*). Does the property remain in the hands of the non-Muslim or should it be taken from him and returned to the original owner? In this case, the ruling accepted by most classical jurists,<sup>123</sup> with the exception of the Dhahiriya school, is that the property remains in the hands of the non-Muslim and must not be taken from him. The main reasoning behind the first approach is that prior to the non-Muslim entering Muslim land, he received assurance of his physical and financial A (*amman*). In other words, a binding Muslim promise was made to that non-Muslim. A breach of that promise is deceitful and is forbidden by *shari'a*.

#### **4. Similarities and Differences in the Effects of Military Conquest on Private Ownership in *Halakhah* and *Shari'a***

This article does not claim to present an exhaustive review of the religious traditions of *halakhah* and *shari'ah* as they relate to military conquest and the subsequent expropriation of the land and possessions of the inhabitants of the predecessor state on the one hand, and the transfer of ownership to the conquering regime, its faithful soldiers, or to any other individual that the regime or the king wishes, on the other. Historically, in Jewish *halakhah* and Muslim *shari'a*, the division of spoils and booty was not a one-time occurrence, but a recurring and threatening reality from ancient times through the Middle Ages and almost until the present.<sup>124</sup> Not only have the religious traditions of *shari'a* been in existence for some one thousand five hundred years, and of *halakhah*, for over two thousand years, but within each of these legal systems the correct and proper interpretation of the religious traditions regarding military conquest and its consequences have been fiercely disputed among the religious authorities of each. We have therefore limited our discussion to a description of the approaches of halakhic authorities and *shari'a* jurists to the effects

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<sup>123</sup> Sarakhsi, *Kitab al-Mabsut*, *supra* n.77, vol. 2, p. 276; Ibn Qudama, *Al-Mughni*, vol. 9, p. 262.

<sup>124</sup> Schacht *supra* n. 5.

of military conquest on private ownership from the perspective of the predecessor religion – that is, what is the approach of *halakhah* when the conquered population is Jewish and the successor king or regime is not Jewish, and what is the approach of *shari'a* when the conquered population is Muslim and the successor king or regime is not Muslim.

As stated in the preface, the laws of military conquest in *halakhah* and *shari'a* did not develop in synchrony, nor does there appear to have been any direct or implied mutual influence between the two. In the absence of direct or implied comparisons, we will suffice with presenting several cardinal and irreconcilable differences between *halakhah* and *Shari'a* on several important issues:

- A. One of the schools of thought in *shari'a* rejects the validity of expropriating Muslim property that was taken as booty by a non-Muslim king. Therefore, a Muslim who purchases property that was confiscated and plundered by a non-Muslim king must return the property to the original Muslim owner. In *halakhah*, by contrast, all Jewish rabbinic authorities recognize the sovereignty of a non-Jewish successor king, who by virtue of this sovereignty may confiscate Jewish property and transfer ownership of it to whomever he desires, including to another Jew; the original owner cannot demand the return of his property from a Jew who received the property from the successor king.
  
- B. However, the second school of thought in *shari'a*, which grants validity to military conquest and the expropriation of Muslim property by a non-Muslim king, and subsequently to its transfer to another Muslim, is not completely identical to the halakhic tradition. According to the second school of thought in *shari'a*, the forced transfer of Muslim property to a non-Muslim regime as a result of war is effected only by virtue of the royal prerogative of the non-Muslim conqueror, whereas halakhic authorities disagree over the reasons why the ownership of Jewish property that was expropriated by a non-Jewish conqueror may be transferred to another Jew who purchased it from the conquering king or regime. As we have seen in Section 2, according to one school of thought, the power of a successor king does not necessarily derive from royal prerogative but only from an estimation of the readiness of the Jewish owner to relinquish his property in wartime in order to save his life.

This readiness to relinquish ownership under such circumstances is referred to in *halakhah* as *yi'ush*.

- C. Yet, even the second school of thought in *halakhah*, which regards military conquest as a royal prerogative, is not identical to the second school of thought in *shari'a*. According to the second school of thought in *halakhah*, the royal prerogative of the non-Jewish successor king to expropriate the ownership rights of conquered Jews is conditional upon it being conducted according to the accepted standards of decency among the nations of that period – expropriating property while allowing the inhabitants of the predecessor state the opportunity of continuing to live under the successor regime. An evil regime that confiscates Jewish property while at the same time taking their lives, without affording them any opportunity of remaining alive, has no such prerogative. Thus, a Jew who purchases property that was confiscated by a non-Jewish king in a manner that does not meet the above standards of decency, must return the property to its original owner. By contrast, the second view of *shari'a* jurists does not take into account the mode of behavior of the foreign conqueror. The booty of a conqueror who is a capricious murderer and unjust robber is still regarded as booty.
- D. Both *halakhah* and *shari'a* discuss the issue of returning confiscated property acquired by a third party who purchased it from the conquering king after the conquest ends. In *halakhah*, the matter depends on the two schools of thought which we have discussed. According to the school of thought that regards the loss of property in wartime as the domain of private law, *yi'ush* is final and cannot be reversed. However, if the confiscation and plundering of property is valid by virtue of the successor king's royal prerogative, then the prerogative to plunder becomes void when the conquest ends, and any transfer of ownership by the successor king to another Jew becomes void and the property reverts to its original owner. By contrast, according to *shari'a*, the return of property to its original owner is not absolute, and depends upon a balance of interests between the original owner and the new owner. Nevertheless, we can distinguish between two fundamental approaches. According to one approach, ownership of the property is transferred to the purchaser, but the original owner has the right to redeem the property from

him. According to the second approach, which apparently is accepted by only one stream in *shari'a*, the property is returned to its original owner.

- E. According to the above two legal systems, there is no dichotomy between the public aspect – that is, the relationship between the successor state and the predecessor state – and the private level with regard to the approach of the successor state to the property of the conquered population. The laws of military conquest in *shari'a* focus more on the laws of waging war, when to declare war, and the proper conduct towards non-believers during the war, and less so on the consequences of the war, particularly when the victors are non-Muslim.<sup>125</sup> *Halakhah*, by contrast, focuses on the consequences of war and plundered Jewish property; it is far less concerned with the reasons for going to war and the behavior of a Jewish successor king towards a conquered population during wartime. This is due to the fact that Muslims largely regarded themselves as the victorious party in most of the wars in which they were involved during that period. By contrast, dealing with laws for declaring war would have been regarded by *halakhah* as a utopian state of affairs; *halakhah* therefore focused entirely on the consequences of war – the validity of transferring ownership of Jewish spoils of war to another Jew.
- F. We will mention one further difference. *Shari'a* pertains to a religion which, in theory and in practice, wishes to dominate the world. Therefore the behavior of a non-believing conqueror must be governed by the laws of *shari'a*, or at least be consistent with its ways. *Halakhah*, by contrast, regards itself as applying only to members of the Mosaic faith. *Halakhah's* concern is not with members of other faiths and it does not demand that they observe its practices. Therefore, a successor king may impose his laws on Jews, and his laws apply also to Jews who are in a state of conflict with non-Jews, on condition that the king's laws are accepted as reasonable and fair.

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<sup>125</sup> Lewis *supra* n. 5

