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THE EFFECT OF MILITARY CONQUEST ON PRIVATE OWNERSHIP IN JEWISH AND ISLAMIC LAW

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ABSTRACT

This article presents the legal outlooks of two fundamental religious judicial systems—the halakha of Judaism and the shari'a of Islam—on the effect of war on private ownership. Specifically, we address the situation in which the conquered inhabitants are Jews or Muslims and halakha or shari'a are the legal systems of their religions, respectively, but the conqueror is a nonbeliever 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 nonbeliever 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.

KEYWORDS: military conquest, conquest by war, Jewish law, halakha, Islamic law, shari'a

PREFACE

War has been part of the human situation since the dawn of history. War has many aims: destroying the enemy, annexing territory, obtaining spoils of war, and subjugating the conquered population. Wars were overtly about concrete gains for the winner until religions reframed them in religious terms—"commanded war" (*milhemet mitzvah*),[1] crusade,[2] and jihad or *qital fi sabil*

1 With regard to the biblical approach, see GERHARD VON RAD, HOLY WAR IN ANCIENT ISRAEL (Marva J. Dawn trans., 1991); JOHN A. WOOD, PERSPECTIVES ON WARS IN THE BIBLE, chapter 6 (Mercer University Press, 1998). For the Jewish approach, see J. David Bleich, *Preemptive War in Jewish Law*, 21 TRADITION 3 (1983); Michael Walzer, *War and Peace in the Jewish Tradition*, *in* THE ETHICS OF WAR AND PEACE: RELIGIOUS AND SECULAR PERSPECTIVES 95–114 (Terry Nardin ed., Princeton University Press, 1993). For Reuven Firestone's unique approach, see *Holy War in Modern Judaism? "Mitzva War" and the Problem of the "Three Vows,"* 74 JOURNAL OF THE AMERICAN ACADEMY OF RELIGION 954 (2006); *idem*., HOLY WAR IN JUDAISM: THE FALL AND RISE OF A CONTROVERSIAL IDEA 17–139 (Oxford University Press, 2012) [hereinafter FIRESTONE, JUDAISM]. For the contemporary context of the State of Israel, see FIRESTONE, JUDAISM, 202–318; Arye Edrei, *Law, Interpretation, and Ideology: The Renewal of the Jewish Laws of War in the State of Israel*, 28 CARDOZO LAW REVIEW 187 (2006); Michael J. Broyde, *Military Ethics in Jewish Law*, 16 JEWISH LAW ASSOCIATION STUDIES 1 (2007). All dates reference the common era (CE) unless otherwise indicated. Unless otherwise indicated translations are those of the authors.

2 For the Christian approach, see FREDERICK H. RUSSEL, THE JUST WAR IN THE MIDDLE AGES 16–39 (Cambridge University Press, 1975); John Finnis, *The Ethics of War and Peace in the Catholic Natural Law*, *in* THE ETHICS OF WAR AND PEACE, *supra* note 1, at 16–39; John Langan, *The Elements of St. Augustine's Just War Theory*, 32

Allah[3]—to glorify God's name.[4] 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?

This question applies on two levels. One level is the relationship 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?[5]

An illuminating historical example in the annals of international jurisprudential history is that of independent Poland after the treaty of Versailles. Poland attempted to annul the lease rights of the German minority in Silesia, arguing that the German settlers had arrived following the division of Poland and the annexation of Polish territory to the Kingdom of Prussia at the end of the eighteenth century. Starting in 1871, the German government encouraged Germans to settle in Silesia, leasing them large estates for extended periods of time. When Silesia was returned to Poland, it was argued that the situation should be reversed and the German minority's land leases revoked. The International Court at The Hague ruled against the Polish government, drawing on the Polish government's own decision to preserve German law in Silesia. Hence, had the Polish government decided to apply Polish law in the territories returned to Polish sovereignty, the German land leases might well have been revoked.[6]

The other level has to do with 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")? Examples of this are often encountered in news items about art objects acquired by private collectors and museums, which earlier had been confiscated by Third Reich authorities and sold or given to private German citizens. The question of returning these art objects to the legal heirs of their original owners touches on further legal principles deep in the inner legal culture of each country, regarding issues of market regulations and the bona fide principle.

Journal of Religious Ethics 1, 19 (2004); James Brundage, *Holy War and the Medieval Lawyers*, *in* The Holy War, 99–140 (Thomas Patrick Murphy ed., Ohio State University Press, 1974).

3 For the Islamic approach, see Majid Khadduri, War and Peace in the Law of Islam 52 (1955); Rassam Tibi, *War and Peace in Islam*, The Ethics of War and Peace, *supra* note 1, 128–45; W. Montgomery Watt, *Islamic Conceptions of the Holy War*, *in* The Holy War, *supra* note 2, at 141–56; Paul L. Heck, *Jihad Revisited*, 32 Journal of Religious Ethics 1, 95 (2004). For a unique approach, see Reuven Firestone, Jihad: The Origin of Holy War in Islam (Oxford University Press, 1999) [hereinafter Firestone, Jihad]. According to Firestone, *jihad* and "*jihad* of the sword" are not equivalent to the common Western understanding of holy war, "while *qital* in the path of God (*fi sabil Allah*) is virtually synonymous with *jihad* when it is understood as warring in the path of God." *Id*. at 13–18.

4 On the relations between a "commanded war" and the fear of idolatry, see Deuteronomy 7:1–7, 16; 12:1–5. An analysis of Maimonides's position on the subject can be found in Gerald Blidstein, Political Concepts in Maimonidean Halakha 253–63 (Ramat–Gan: Bar-Ilan University, 2nd ed., 2001); Firestone, Judaism, *supra* note 1, at 108–26.

5 Malcolm N. Shaw, International Law 956–1009 (Cambridge University Press, 6th ed., 2008). On the historic approaches to state succession, *see* Hugo Grotius, *On the Acquisition of Territory and Property by Right of Conquest, in* De Jure Belli ac Pacis (The Rights of War and Peace), book 3, chapter 6 (A.C. Campbell trans., The Online Library of Liberty 1901); C. Emanuelli, *State Succession, Then and Now, with Special Reference to the Louisiana Purchase (1803)*, 63 Louisiana Law Review 1277 (2004).

6 *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland*, PCIJ Series B6 (1923); PCIJ Series A7 (1926); 1 D.P. O'Connell, International Law 365–91 (London, Stevens & Sons, 2nd ed., 1970); Shaw, *supra* note 5, at 1001–03.

This article deals solely with the second level, that is, the effect of an act of war on private ownership of property.[7] Hence, a short introduction is in order to clarify the topic that concerns us. Contemporary international law recognizes a dichotomy between the effects of war on combatants and noncombatants. A government at war can loot the property only of the enemy government and its armed forces, while civilian property is protected. The law of belligerent occupation as ultimately expressed in the 1899 Hague Regulation imposes on any army that seizes control of enemy property during war the obligation to protect the property of the inhabitants. The principle of protecting individual property evolved from an earlier distinction between combatants and noncombatants and the duty to spare the latter from the scourges of the war.[8] This distinction is based on the concept of war as conflict "not between man and man, but between state and state, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders."[9] This distinction evolved into a general theory of war in the nineteenth century, to be known later as the Rousseau-Portalis doctrine, reflected in military manuals and international conventions and producing rules protecting against the taking of private property in a conquered area (hereafter "the private property protection principle or rule").[10]

This article addresses the legal position of two religious legal systems—Judaism and Islam—on the private property protection principle. Specifically, we address the question of whether, according to each of these religious legal systems, the conqueror can legally acquire ownership over the private property owned by inhabitants of the conquered. In other words, the question is whether these two religious legal systems recognize the private property protection principle.[11] Judaism and Islam are both religions with prescribed rules and, in particular, with norms that bind and regulate every aspect of the lives of their respective members, both as a group and as individuals.[12] The normative laws of the Jewish religion are termed *halakha* (Jewish law) and those of the Muslim religion *shari'a* (Islamic law). As discussed below, halakha and shari'a have each developed a body of rules governing different aspects of armed conflicts, including issues related to the private property seized during the conflict.

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7 For the legal meaning of "private ownership" of property and its rights and duties, especially the power to transfer it, see JOSEPH W. SINGER, INTRODUCTION TO PROPERTY 2–8 (Aspen Law & Business, 2001). For the historical background of "ownership" of lands in the feudal system, see 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1765–69, chapter 4.

8 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 137–55 (Routledge & Kegan Paul 1965); Eyal Benvenisty, *The Origins of the Concept of Belligerent Occupation*, 26 LAW & HISTORY REVIEW 621 (2008) (describing the history of this distinction).

9 JEAN-JACQUES ROUSSEAU, 1 THE SOCIAL CONTRACT 6 (G.D.H. Cole trans., Dover 2003) (1762). In the seventeenth century, the rights of conquest and the limits to those rights were the principal issues over which Protestant and Catholic loyalists contended. We note that premodern armies also had an interest in protecting private property in order to show they were just in their dealings.

10 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 75 U.N.T.S. 287.

11 For another type of "ownership" in halakha see Israel Z. Gilat, *"Conquest by War": Influences on Personal Status*, *in* 20 JEWISH LAW ASSOCIATION STUDIES: THE MANCHESTER CONFERENCE 83–95 (2008).

12 For the traditional orthodox Jewish approach, see 1 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 1–45 (Bernard Auerbach and Melvin J. Sykes trans., Jewish Publication Society of America 1994). On the differentiations between approaches of Judaism, Christianity, and Islam, see Joseph Schacht, *Islamic Religious Law, in* THE LEGACY OF ISLAM 392–403 (Joseph Schacht and C.E. Bosworth eds., Clarendon Press, 2nd ed., 1974); BERNARD LEWIS, ISLAM: POLITICS AND WAR 156–209 (Oxford University Press, 1987). *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*, 28 CARDOZO LAW REVIEW 67–128 (2006).

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As stated above, the position of the contemporary law of war, which regulates the conduct of the warring sides during war time, is clear and totally prohibits the warring sides from causing harm to the private property of the inhabitants, including any kind of taking, seizing, or transferring of ownership. This clear rule is based on the notion that war is a relation between states and not a relation between the subjects of the states (individuals). This notion, however, does not hold true in halakha and shari'a laws of war. 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 within it. War in halakha and shari'a is perceived as an act of rivalry between the warring nations themselves, and no differentiation is made between defense and policing forces on the one hand and the citizens on the other.[13] Therefore, as discussed in this article, in contradiction to modern laws of war, halakha and shari'a each recognize the conqueror's ability to acquire ownership of private property through an act of war.

We are not concerned here with the license to conquer that a ruler's religion confers on him, a topic that would require a separate article. Instead, we limit our discussion to a description of the approaches of halakhic authorities and shari'a jurists to the effects of military conquest on private ownership from the perspective of the predecessor religion: What is the approach of halakha when the conquered population is Jewish and the successor king or regime is not Jewish? What is the approach of shari'a when the conquered population is Muslim and the successor king or regime is not Muslim? The warring schools of thought of Jewish and Muslim sages focus, therefore, not on legislating or interpreting the laws for a foreign king, but rather on intra-religious rules. In other words, we confine our interest to how halakha obligates a Jew who acquired looted property to respond to a claim by the original owners for its return, and, correspondingly, what shari'a obligates a Muslim to do regarding a fellow Muslim who claims he possesses his looted goods.

A few preliminary points on methodology may be in order. First, our approach is not historical-chronological, but rather conceptual-jurisprudential. 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 as a basis for discussion of the legal conclusions. We did not compare halakha and shari'a to natural law or other forms of law that were prevalent in antiquity in ancient Greece, the Roman Empire, or the Byzantine Empire, a task that would require a separate historical study. Second, as mentioned above, halakha and shari'a still dominate the consciousness of many of their believers, and the ancient sources, although they reflect the views of the legal authorities of halakha and shari'a hundreds and thousands of years ago, can play an important role in resolving conflicts over the validity of contemporary acts of war and their impact on private ownership. Hence, our focus in this article is on the Orthodox denomination, whose members are more inclined to align their lives with strict readings of ancient sources than are those of the Conservative or Reform denominations. Third, we remain unconvinced by the hypothesis of a possible mutual influence between halakha and shari'a. As Islamic law scholar Gideon Libson pointed out in his studies, the nature of the contacts between the two religions led to mutual influence

13 In the modern era, after the concept of the state developed with its distinction between the state and the individual, 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, not between nations. Consequently, according to these authorities, one must distinguish between the state level and the private level. *See* Walzer, *supra* note 1; FIRESTONE, JUDAISM, *supra* note 1; Tibi, *supra* note 3. For the historical approaches, see Hugo Grotius, *supra* note 5; C. Emanuelli, *supra* note 5.

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between these two legal systems, although it is limited in scope and does not affect major issues.[14] Regarding the issue we address in this article, we did not find adequate historical and legal documentation from which we are able to draw conclusions as to a possible mutual influence. Therefore, the position of each religion is presented separately.

The conclusions we reach in this article apply only in a theoretical academic sphere. This is especially true for our investigation of differences of approach taken by scholars from the two religious traditions. Some of the ideas proposed in our article may be helpful in resolving disputes between individuals of the same religion over ownership of property taken during war, such as the question that arose in the Jerusalem Rabbinic Court[15] 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 United States Occupation Authority, and then sold to the state of Israel. However, given the abundant disputes between religious authorities, it lies beyond the scope of our article to reach a final decision, and hence we do not imply that any political or practical assumptions should be inferred from our article.

The structure of our argument is as follows: We begin the discussion with a presentation of the halakhic view on private property and war. We continue with a presentation of the shari'a view on private property and war. We then assess the similarities and differences in the effects of military conquest on private ownership in halakha and shari'a. We conclude that in stark contrast to the contemporary stringent image of halakha and shari'a portrayed by representatives of both religions who tout the supremacy of religious laws over those of the secular sovereign, the reader will find that in the case of war conquest, both halakha and shari'a produced flexible laws that helped their followers adapt to the civil laws of the foreign conqueror.

THE POSITIONS OF JEWISH LAW

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."[16]

This verse, which deals with the history of the wars between two gentile nations—Moab and the Amorites—seems to be so irrelevant that Rabbi Shimon ben Lakish regarded it as one of the "verses which to all appearances ought to be burnt but they are really essential elements in the Torah."[17] 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."[18] A Divine prohibition forbade

14 *See* Gideon Libson, Jewish and Islamic Law: A Comparative Study of Custom During the Geonic Period 10–11 (Harvard University Press, 2003).

15 District Rabbinic Court (Jerusalem) 517\5754 (1954), *Landesman v. Mount Zion Committee* 1 PDR 169.

16 Numbers 21:26.

17 BT *Hullin* 60b. *BT* stands for the Babylonian Talmud.

18 Deuteronomy 2:5–7, 9, 19. To the influence of this prohibition on Western thought, see Grotius, *supra* note 5.

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the Israelites from conquering land belonging to Moab and Ammon.[19] 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:

> 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 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."[20]

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. The sages describe David's conduct differently from that in the biblical account. When David attacked the Philistines, the Philistines 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."[21] 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.[22]

The Private Aspects of the Validity of Military Conquest: Transfer of Ownership

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 to the Jews of Jerusalem about Sennacherib's defeat:

19 Deuteronomy 2:5–7, 9, 19.

20 See Judges 11:13–22.

21 Genesis 21:23, 31.

22 BT *Hullin* 60b. The paragraph suggests an argument different from that made at notes 8–10 as to why modern international law and premodern religious law differ: The earlier texts suggest that God is the real owner of the land, and conquest is a sign that he has decided to transfer ownership. Consequently, appropriating enemy property becomes a divine commandment. At the same time, according to the sages, God, too, must obey his laws. The Sanhedrin do not tell David that this is God's will, and so he was allowed to conquer the Philistines, but rather that the original covenant sealed between the Philistines and Abimelech does not apply to them, since they are Caphtorim.

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> "And your spoil shall be gathered like the gathering of a caterpillar." The prophet said unto Israel [Isaiah 33:4]: "Gather your spoil." … "But," they objected, "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].[23]

The metaphor of a pool (that is, *mikve*, or ritual bath) may be understood in three ways. First, 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. The second possible interpretation is that 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.[24] Thus, only confiscation by a non-Jewish ruler who is not bound by Torah law could effect, just as a mikve, purification. The transfer of property from the Ten Tribes to the Jews of Jerusalem was allowed only because of "purification" by the non-Jewish ruler. The third interpretation would be that 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 Rabbi Pappa, an Amoraic scholar living in Babylon, c. 296–376, who states that "Ammon and Moab were purified by Sihon."[25] Rabbi Pappa applies a principle of public international law, as reflected in the biblical verse regarding the town of Heshbon cited above,[26] 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 halakha Jews may acquire possessions that belong to Jews but which changed hands through foreign conquest, without being concerned if 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

23 BT *Sanhedrin* 94b.

24 In 1 Samuel 8:11, Samuel detailed the Israelite 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 olive yards, 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 yourselves." However, the Talmudic sage (*Sanhedrin* 20b) Rabbi Judah said: "That section was stated only to inspire them with awe" (that is, by indicating the extent of his authority, but not implying that he is permitted to abuse his power). *See* YAIR LORBERBAUM, SUBORDINATE KING: KINGSHIP IN CLASSICAL JEWISH LITERATURE 67–74 (Hebrew) (Ramat-Gan: Bar-Ilan University, 2008). But see BLIDSTEIN, *supra* note 4, at 160–68, who considers the Jewish king's authority as a source for recognizing the gentile king's authority.

25 *Tosefta Gittin* 38a.

26 *See supra* note 16.

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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.[27] 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 *mishnah* in *Gittin*[28] and its parallel in the *Tosefta*,[29] which discuss ownership of land during wartime, 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.[30]

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 halakha, 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 that 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.[31] The term *during the war* simply describes the point in time in which the original owner despairs (*ye'ush*) of retrieving his possessions that were confiscated by force.[32] As a result of despair of the original owner, the buyer of the confiscated property from the *sikarikon* has a real proprietary right. Shaul Lieberman explains this briefly, based on a commentary to the Babylonian Talmud: "During 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 bought from the conqueror acquired the land legally."[33]

27 *See infra* note 35.
28 *Mishnah Gittin* 5:8.
29 *Tosefta Gittin* 3:10.
30 *Id.*
31 *Supra* note 28.
32 We use the terms *despair*, *resignation*, *abandonment*, *relinquishing*, and *giving up right to ownership* interchangeably to describe the halakhic concept of ye'ush.
33 8 Tosefta Ki-fshutah, Order Nashim 842 (Jewish Theological Seminary 1973).

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Two Approaches to the Transfer of Ownership through Conquest in Rabbinic Literature: *Ye'ush* (Despair) and *Kibbush Milhama* (Conquest by War)

Unlike the monolithic approach in the Talmudic literature to the transfer of ownership through war, in the post-Talmudic literature two controversial approaches were adopted by the Rishonim, the medieval rabbinic scholars. Some Rishonim view war as an event causing a Jew to despair, ye'ush, which leads to the loss of his rights to the land and goods confiscated by soldiers in return for not taking his life.[34] By contrast, according to other Rishonim from the beginning of the tenth century, 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 or international laws of war between nations, as described above, in which one nation annexes the land of another nation. However, the term *conquest by war* refers not only to the transfer of ownership of land (like the Talmudic *sikarikon* law), but is also adapted by halakha to the private domain of the transfer of ownership of any property—both real estate and chattel—between individuals without it entailing any legal hindrance.[35] Conquest by war and acquisition by war are no longer simply factual temporal events, but rather autonomous legal concepts with a life of their own.

What is the practical difference between conquest and the owner's ye'ush? The medieval halakhic authorities did not provide the reasons for their rulings, and the early modern period halakhic authorities, who also used the concept "conquest" and explained its significance, did not juxtapose it to the traditional halakhic ye'ush.

But before addressing this crucial issue, in order to prove that the two approaches come from a doctrinarian point of view rather than a chronological one, it is necessary to review the rabbinic literature from the early medieval authorities to the contemporary decisors. For that purpose, we examine the different approaches of medieval rabbinic Talmudic scholars to Rabbi Pappa's statement that "Ammon and Moab were purified by Sihon." One of these medieval Talmudic scholars, Rabbi Crescas Vidal,[36] explains in his novellae:

> 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.[37]

It appears, therefore, that Rabbi Crescas Vidal sees in "acquisition by means of war" an autonomous means for nullifying the ownership of the property's original owner, and a forceful means of acquisition without legal complications.

After summarizing the Talmudic discussion of Rabbi Pappa's statement, Rabbi Menachem ben Shlomo Meiri expresses the same idea that conquest by war is an autonomous concept:

34 *Id.*

35 *Hidushei Ha-Rashba*, BT *Gittin* 37b, 363–64 (Sekler edition) (dealing with slaves); Maimonides Responsa, 209, 2:370–71 (Blau edition, 1986) (dealing with sacred books and other objects); *Tashbetz* 2:136–37 (regarding Jewish holy books); Radbaz Responsa 3:523 (regarding a moneylending business).

36 A thirteenth-century Spanish Talmudic scholar. He studied in Barcelona, then moved to Marseilles and Perpignan, where he wrote Talmudic novellae.

37 *Hidushei R. Karaskas* on Gittin 38b (Lichtenstein edition, at 331).

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> 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*.[38]

Rabbi Shlomo ben Abraham Aderet (Rashba) openly supports this approach in his commentary on the Talmud:[39]

> If you compare acquisition through war to acquisition through theft, then how did Sihon purify Ammon and Moab? . . . and if Sihon had not acquired 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.[40]

We see, therefore, how all three rabbis consider "military conquest" an autonomous legal concept, according to which ownership of the property is transferred from the original, looted owners, to those who received this property directly or indirectly through the king's conquest.

In contrast to the above rabbinic scholars, and others whom we have not mentioned, Rabbi Yishayahu the elder, of Tirani (who is also called Rid),[41] considers conquest by war as an event causing a Jew to despair, ye'ush, which leads to the loss of his rights to the land and goods confiscated by soldiers, as he explains:

> Rav Pappa said, "Ammon and Moab were purified by Sihon." This means that their land was [originally] 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 [legitimately] took it from Sihon.[42]

Similarly, Rabbi Meir Abulafia of Toledo (Rema) adopts the same position as Rid regarding the prophet Isaiah's command to collect booty from Sennacherib:[43]

> 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.

38 *Beith Habekhira*, BT *Gittin* 59a, *s.v.* "*ge'onei Ma'rav*" 244 (Shlesinger edition) (our emphasis). A Talmudic scholar from Provence who served as a rabbi in Perpignan for most of his life, he composed this comprehensive commentary on the Talmud. He died in 1315.

39 A medieval Talmudic scholar, born in Barcelona, where he served as a rabbi until his death in 1310, he was considered the religious leader of Spanish Jewry in his day, but his responsa were disseminated throughout the Diaspora—in Germany, France, Bohemia, Sicily, Herakleion, Morrocco, Algiers, Israel, and of course the entire Iberian peninsula. He also wrote novellae for many Talmudic tractates, and several halachic monographs.

40 *Hidushei Ha-Rashba*, BT *Gittin* 37b, 363–64 (Sekler edition).

41 In traditional Jewish sources, rabbis are often referred to by acronyms, and we use these when applicable. The name Rid stands for Rabbi Yishayahu of Tirani. This Italian rabbinic sage was born in Tirani and later lived in Venice and Verona in Italy and Lyons in Provence, and died in 1250. He left behind extensive novellae on many Talmudic tractates, called *Tosafot Harid*. He is called "the elder" to distinguish him from his grandson, Rabbi Yishayahu Mitrani (known as Riaz).

42 *Tosafot Rid*, BT *Gittin* 38a, 104 (Lis edition).

43 After the death of his father, this Spanish scholar was appointed rabbi of Toledo and even given the title *Nasi* (president). He headed a large yeshiva and corresponded with other sages of his generation, including Nachmanides. He died in 1244. His novellae are extant today only for several tractates.

> 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 does not despair of his claim—it still remains stolen property.[44]

The medieval rabbinic authorities hold differing halakhic positions in this regard. Rabbi Isaac Alfasi (Rif),[45] Rabbi Moses Maimonides,[46] and Rashba,[47] all view "conquest by war" as a legal autonomic concept, and use it as a basis for their halakhic rulings, while Rabbi Yosef ha-Levi Ibn Migash (Ri Migash)[48] and seemingly some of the Geonim[49] base their rulings on the original owner's despair and his relinquishing his claim—ye'ush. Some of the medieval rabbinic authorities had no clear-cut approach and used the concepts of both ye'ush and conquest as a basis for their halakhic rulings. Rabbi Meir ben Barukh (Maharam) of Rottenburg 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 that had been lost when swept away by a river, where it is clear that the original owner has despaired of his claim.[50] In contrast, Rabbi Shimon ben Zemah of Duran (Tashbez)[51] 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.

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44 *Yad Ramah*, BT *Sanhedrin* 94b, s.v. "*akhar ha-devarim*."

45 Born in Constantine, in Algiers, he studied in the Kairouan yeshiva, then settled in Fes and taught Torah for many years. After a false denunciation he was compelled to escape to Spain and settled in Aliciana, where he headed a yeshiva. Died 1103. Besides his responsa, which appeared in the writings of his students and their students, he was known for his *Hilkhot* ("Book of Halacha"), which was considered a foundational learning text by all medieval scholars. Rif responsum in *Sefer Ha-Itur*, Part 40: *Moda'ah* 41a (Rabbi Meir Yona ed.).

46 The greatest Jewish sage in the medieval period. Born in Cordoba, he escaped Almohad persecutions together with his family and settled first in Fes, then traveled to Israel, and finally settled in Egypt. In Egypt he settled in Postat, near Cairo. He made his living as a doctor, serving also in the royal court. He died in 1204. He wrote on diverse subjects, covering the Talmud, rabbinic halakha, and philosophy. Besides his codex, he also wrote hundreds of responsa. Maimonides Responsa, *supra* note 35.

47 *Rashba* Responsa 1:637.

48 Born in Seville, studied in Aliciana under Rabbi Isaac Alfasi, who considered him his spiritual heir and appointed him to succeed him as head of the yeshiva. He remained at this post until his death in 1141. His responsa exist as quotations in other rabbis' writing. *See Shitta Me-kubezet* BT *Baba Metzi'ah* 24b, s.v. "*ve-Rabi Yosef Ha-levi Ibn Migash*."

49 *Ge'onim* Responsum in *Sefer Ha-Itur*, *supra* note 45, at 41a.

50 One of the last Tosafists, he was born in Worms and studied in French yeshivot under various Tosafist sages. Later he returned to serve in the rabbinate in several German communities, and especially Rottenburg, where he founded a yeshiva and was considered the chief rabbi of all German communities. Persecuted in Germany, he escaped to Lombardy and planned to immigrate to Israel. He was denounced for attempting to escape and imprisoned by Emperor Rudolf for seven years, until his death in 1293. The emperor was willing to release him for a handsome ransom, but Maharam forbade the community to ransom him. See Maharam of Rothenburg, Responsa number 1009, SHE'ELOT U-TESHUVOT (Moses Bloch ed., 1895) (1608).

51 Born in Majorca, where he learned Torah, he later moved to Spain. He was driven from Spain by the religious persecutions of 1391 and settled in Duran in Algiers, where he served as the community's rabbi and leader. His extensive and numerous responsa have been collected into three volumes. He died in 1444. *Tashbetz* 2:136–37.

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From the Akhronim, Jewish legal decisors from roughly the sixteenth century to the present, we can point out Rabbi David ben Zimra (Radbaz).[52] 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. Rabbi Eliyahu Barukh Kamai (d. 1917), one of the leading rabbinic authorities in Lithuania, rabbi of Mir, and founder of its famous Talmudic academy, views "conquest by war" as a legal autonomic concept. However, Rabbi Avraham Duber Kahanna-Shapira[53] 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.

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 is discussed in greater detail below,[54] rabbinic judges Rabbi Yaakov Hai Zion Adas (d. 1963), Rabbi Yosef Shalom Elyashiv (d. 2012), and Rabbi Bezalel Ya'akov Zolty (d. 1982) use the concept of conquest to resolve the issue; by contrast, Rabbi Meshulam Rath (d. 1962),[55] Rabbi Yitzhak Ya'akov Weiss (d. 1989),[56] Rabbi Menashe Klein (d. 2011),[57] and, apparently, Rabbi Ya'akov Yehiel Weinberg (d. 1966)[58] base their ruling on the principle of the owners' resignation of ownership rights.

The sources brought above show a clear dichotomy between two schools of thought among Jewish sages from medieval times to our day in understanding the concept of conquest by war. One school of thought holds that conquest by war is a case of "despair," that is, a psychological state induced when a crisis causes a person to give up on retaining his property. The other school of thought considers conquest by war to be an autonomous concept for the transfer of ownership of property, without dwelling on the property owner's subjective feeling.

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52 Born in Spain in 1480, he settled after the exile from Spain in Israel, living in Safed and Jerusalem. Later he moved to Egypt, first to Alexandria and then to Cairo, where he was recognized by the authorities as the chief rabbi of Egypt. He founded a large yeshiva in Egypt. He spent the final two decades of his life in Israel again, where he died at a ripe old age in 1573. He wrote thousands of responsa, which fill several volumes. Radbaz Responsa 3:523.

53 Chief Rabbi of Kovno, Lithuania, before the Holocaust. He died in 1943. *Dvar Avraham* Responsa volume I, chapter 1:6–12, chapters 10–11; volume II, chapter 6:3–4 (Warsaw, 1906).

54 The responsa, *supra* note 15, was written by Rabbi Elyashiv, considered the most charismatic rabbinical figure in the entire Orthodox Jewish world for the last fifty years of his life.

55 Born in Galicia, he served as rabbi in a few of its towns. In 1936, he was appointed rabbi at Czernowitz, until it was taken over by the Nazis. After immigrating to Israel, he served for a certain period of time as a member of the Grand Rabbinical Court and as a member of the central rabbinate's committee, but finally resigned. *Kol Mevasser* Responsa 1:57.

56 Born in Galicia and educated in Munkacs, after his marriage, he served as head of the Jewish Court of Grosswardein, Transylvania. He survived the Nazi actions, moved to Manchester, England, in 1948, where he was appointed head of the Jewish court and head of a yeshiva. In 1970, he moved to Israel, and since then has been considered the spiritual leader of the Eida Charedit, which rejects the existence of the State of Israel. *Minkhat Yitzkhak* Responsa 4:76; 8:69.

57 Born in Ungvar, he just barely survived the war and made it to the United States. He founded a yeshiva there, and was considered the greatest halachic decisor in the United States and later in Israel, where he lived in his final years. He wrote thousands of responsa on contemporary issues. *Mishneh Halakhot* Responsa 17:150.

58 Born in Russia and educated in Lithuanian yeshivot, he later studied at universities in Giessen and Berlin, and he headed the Berlin Rabbinical Seminary. During World War II, he spent time, among other places, in the Slobodka ghetto in Kovno and in the Warsaw ghetto and was considered a rabbinical leader there. After the war, former students helped him move to Switzerland, where he headed the Montreux yeshiva. His responsa include many answers to questions dating from the war years and their aftermath. *Seridei Esh* 1:147.

Insights into the Two Approaches to the Transfer of Ownership through Conquest

Are there practical differences between these two approaches? As we said above the medieval halakhic authorities did 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 ye'ush. We suggest that there are a number of fundamental points of disagreement between the two. Even today these differences have practical ramifications for resolving problems arising between Jews with regard to property that has been plundered during a war.

Hence, we stop to reflect on the differences between the following: the identity of the conqueror or plunderer; the nature of the booty; the grounds for the confiscation of property; the question of when the acquisition of confiscated property is regarded as acquisition through military conquest; and the question of whether transfer of ownership by virtue of conquest is permanent or reversible.

THE IDENTITY OF THE CONQUEROR OR 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 Ri Migash, although they themselves do not provide reasons for their rulings.

Maimonides was asked "whether religious books purchased from a plunderer, but which had belonged to a synagogue in another town, have become the property of the purchaser or whether the purchaser should be forced to return them." He replied as follows:

> 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 [the purchaser] should swear how much he paid for them and take the money, and return the book.[59]

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.

Maimonides's teacher's teacher, Ri Migash, 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, whether they must 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 Ri Migash's opinion, not only does conquest not "purify" ownership of holy books by virtue of the owner's ye'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."[60]

Ri Migash appears to be of the opinion that plunder remains within the scope of fundamental halakhic private law. Laws of despair establish that property owners lose ownership of their property in certain cases of looting, even if they do not acknowledge the fact explicitly. Hence, when

59 Maimonides Responsa, *supra* note 35.

60 In *Shita Mekubezet*, *supra* note 48.

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looting is committed by an anonymous group, the bona fide argument by the buyers of the looted goods will be as good as any market-overt rule.

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" of the books, and as in any such case, the buyers will not be able to buy the books in "good faith," protected by the "market-overt" rule.

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. Let us examine again the difference between the positions staked out by Maimonides and Ri Migash. If we view conquest as a royal prerogative, as per Maimonides, 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 ye'ush into account, as per Ri Migash, 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 Ri Migash distinguishes between different sorts of possessions. Possessions that 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, the author of *Tashbez*, deliberates between both approaches—conquest and ye'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 that a Jew had purchased from a non-Jew, and plundered religious books that he purchased from a non-Jew, Rashbaz maintains that the distinction made by the Tosafists[61] between plundered religious books and other plundered property is based on the concept of ye'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:

> 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 Sabaean 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.[62]

Consequently, a Jew who purchases holy books from a conqueror is actually purchasing property that still belongs to the original Jewish owner.

To fully appreciate this point, we note that 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 ye'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.

61 *Tosafists* BT *Baba Kama* 114b, s.v. "*hamakir.*"

62 *Tashbetz*, 2:136–37.

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THE GROUNDS FOR THE CONFISCATION OF PROPERTY

A further difference between the two views, lies in the grounds for the confiscation of the property. If we say that transfer of ownership is effected because of ye'ush, then the reasons for the war that led to the confiscation of property is not decisive. The more evil and arbitrary the reasons for the confiscation of property, the greater the owners' ye'ush and their subsequent relinquishing of their rights. But if we say that transfer of ownership is affected 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 affected 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 classic laws of ye'ush is subject to other rabbinic monetary enactments (such as the obligation to return the property or at least its equivalent value to the original owner), for moral reasons, despite the original owner's ye'ush, the fact of military conquest releases the property purchased by the new owner from any other rabbinic enactment, and the new owner is not obligated to return property that was acquired from the conquering authorities to its original owners.

A contemporary application of these points can be seen in the case known as *Landesman v. the Committee for Mount Zion* (hereafter the *Landesman* case),[63] which was brought before an Israeli rabbinic court soon after the establishment of the State of Israel. The Ministry of Religion purchased various ritual objects from the United States forces of occupation in Germany. 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. Zvi Landesman, an Israeli citizen, happened to visit the tomb and was suddenly surprised to identify the crown, which had been donated by his late father to the Jewish community in his home town, Makov, Hungary. Landesman claimed ownership. His intention was to donate the crown to a synagogue of his own choosing.

Rabbi Jacob Adas, Rabbi Joseph S. Elyashiv, and Rabbi Betzalel J. Zolty, all rabbinic judges of the Jerusalem Regional Rabbinic Court at the time, ruled that the Torah crown should be returned to Mr. Landesman. At the same time, however, Rabbi Meshulam Rath, a halakhic advisor to the rabbinic courts and a member of the Chief Rabbinate Council, also wrote a responsum on the subject, which appeared in his book *Kol Mevasser*,[64] in which he ruled that the crown should remain the property of the Ministry of Religion. Apparently, the judges and Rabbi Rath knowingly disagreed with each other. Rabbi Rath even wrote to Rabbi 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."[65] The rabbinic judges, on their part, debated Rabbi Rath without mentioning him by name, claiming that his ruling was wrong.

Where did the judges and Rabbi Rath differ? Rabbi Rath regarded the Nazi confiscation of the Torah crown during World War II in terms of a natural disaster: "Whoever saves property from the lion and the bear and jetsam from the sea or a river . . . they belong to the finder, even if the original owner protests."[66] As some of the rabbis add, "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

63 *Supra* note 15.
64 *Supra* note 55.
65 *Id.*
66 The ruling in *Shulhan Arukh, Hoshen Mishpat*, chapter 259.

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reasonable person, and it is as if he is crying out after his house has already fallen down."[67] Based on these sources, Rabbi 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."

We can presume that Rabbi Rath's reasoning was that the fate of the Torah crown must be decided on the grounds of classic Torah law (that is, ye'ush), irrespective of the question of conquest. War is simply another cause of the owner's ye'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 ye'ush generally does not apply in the case of land because land cannot be "stolen" and therefore the owner's ye'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 reasonable person." As we have seen, Rabbi Rath disagrees with Rabbi Adas, who, he believes, has seemingly forgotten the classic Torah laws regarding an owner who has lost hope of retrieving his property.

However, in his response, Rabbi Rath was aware of Rabbi Moses Isserlish's (Rema) qualification that even though the property owners had despaired and "relinquished their property," "nevertheless it would be the right thing to return the property to the original owner."[68] However, here the situation is different, and the Ministry of Religion is not obligated to return the crown, since the donor has died, and the litigant is the donor's son. The Torah crown is a donation of a sacred object and the person who donated it no longer owns it. Were the donor still alive, he could claim the right to decide where to re-donate it, but as he is deceased, the son does not inherit this right.[69] 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 gift.[70]

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67 See Rabbi Yosha Falk Katz, *Sefer Meirat Enayim* commentary on *Shulhan Arukh Hoshen Mishpat* 259:16. A sixteenth-century Polish sage, he wrote one of the most important commentaries on the *Shulhan Arukh*.

68 Rabbi Moses Isserlish (Rema), *Mapa* on *Shulhan Arukh, Hoshen Mishpat* 259. Rema, who died in 1572, was one of the greatest Polish Torah sages. His life's work involved comments on Rabbi Yosef Karo's works, which belonged to the Sfardi halakhic tradition, by bringing to bear on them the Ashkenazi halakhic tradition and ruling accordingly. He interwove his editorial comments into Rabbi Karo's text. Metaphorically, his work was described as follows: if Rabbi Yosef Karo created the "set table" (the Hebrew meaning of *Shulhan Arukh*), then Rabbi Moses Isserlish spread the tablecloth (*Mapa*).

69 *Shulkan Arukh, Hoshen Mishpat* 356:7. Rema's decree is based on Rabbi Yisrael Isserline *Trumat Ha'Deshen* Responsa §309.

70 Rabbi Ovadiah Hadiah disagrees with Rabbi 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 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." *Yaskil Avdi*, 6:20.

Similarly, Rabbi 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, he was asked whether rescuing books from the library of the Rabbinic Seminar in Berlin during the Second World War could be compared to rescuing jetsam from the sea and the rescuer thus becomes 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

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Ironically, in their halakhic ruling, the rabbinic judges begin by following the line of thinking laid down by Rabbi Rath, without mentioning his name, and point out that even according to classic halakha there is no obligation to return the object as an act of piety, as Rabbi 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 rabbinic 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, the main issue might be: is the Committee for Mount Zion exempt from the obligation to return the crown since it constitutes an acquisition through conquest? The Rabbinic Court ruled on this issue as follows:

> But if soldiers plundered the owners, then this is a special case of acquisition through conquest which is discussed in the Babylonian Talmud, *Gittin*, 38, and we should eliminate the possibility that this is relevant to the case discussed in *Sulhan 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 of keeping them, but rather wished to return them to representatives of the Jewish people.[71]

It seems to us that the rabbinic judges disputed Rabbi 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"[72] does not refer to property confiscated by military conquest. By lost property, the Talmud refers 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, the halakhic authorities' approach is to recognize the existence of particular laws relating to

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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." *Seride Esh*, 1:147.

However, Rabbi Menashe Klein, also a Holocaust survivor, maintains that the owner had resigned himself to his loss. In his responsum, 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.

Mishane Halakhot, 17:140.

71 *Supra* note 15, at 171.

72 BT *Baba Metzi'ah* 24a.

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conquest, which are based on "royal prerogative." Secondly, the judges present a revolutionary approach based on a responsum by Rabbi David Ben Zimra (Radbaz),[73] 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 the king's law is halakhically valid, as *dinah de'malkhuta dinah* holds so long as "the king enacts a law that treats all equally and does not treat anyone unfairly," similarly, the validity of ownership by virtue of conquest by war 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,

> The entire reason for recognizing [the halakhic validity of] King's 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 conquest does not apply. And therefore, in this case, the rabbinic 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.[74]

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 classic Torah 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. Ye'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.[75]

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 classic Torah law and that of royal prerogative. Some halakhic decisors, who interpret conquest through the perspective of classic Torah law, regard conquest as a factual state which leads the original owners to abandon their title to their property, ye'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.[76] Since conquest is a factual state, presupposing the original owner's despair,

73 *Radbaz* Responsa 3:523.

74 *Supra* note 15, at 171–72.

75 *See* Isaac Herzog, Psakim U'Ketavim (1990), III, §36–37.

76 In order to obtain insights into the gentile king's prerogative and its implications with respect to the ownership rights of his Jewish subjects, some post-Talmudic authorities have put forward an interpretation that the prerogative of the gentile king is derived from the Jewish king's royal prerogative. The Jewish royal prerogative relies on

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ye'ush of retrieving his possessions that were confiscated by force, 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 ownership" of private property similar to a "floating charge" in modern terminology. The conqueror maintains ownership of the property that he seized only as long as a state of conquest exists. Once the state of 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 that 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 the ruler.

Rabbi Eliyahu B. Kamai, in the beginning of the twentieth century, was the first to advance an elaborate approach that acquisition through conquest does not confer ownership merely through the recognition of the local king, but only if international law recognizes the war and justifies it. He writes as follows:

> 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.[77]

The "theft" mentioned by Rabbi 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

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"the king's custom," which was declared by Samuel the prophet. But some others differentiate between a Jewish king and a non-Jewish king: "The principle of King's Law (*dina de-malkhuta dina*) pertains in particular to a non-Jewish king, as he can say 'If you do not obey my laws, I will expel you,' as the land belongs to him. But this principle does not apply to a Jewish king. A Jewish king cannot take anything from them that is theirs, as the Land of Israel belongs to all Jews, and he has no greater share in it than anyone else" (Rabbi Eliezer of Metz's view, cited in *Hidushei Ha-Rashba*, BT *Nedarim* 28b). Even though there are other rabbinic authorities that contended that the principle of king's law applied also to a Jewish king, his prerogative to confiscate and tax his subjects' property is not by virtue of the fact that he is the "lord of the land," but because of the crucial need to provide for the upkeep of his kingdom, for his officials, especially his courtyard. Anyway, the medieval halakhic authorities maintain that even according to Samuel, the scope of the royal prerogative is not so wide ranging as to allow a king to expropriate his subjects' property and distribute it among his servants permanently as he sees fit. Thus, Rabbenu Tam distinguishes between a king's license to take from his subjects and give to his soldiers on the one hand, and to take for himself to increase his own fortune on the other hand, which is forbidden. In his Code (Mishneh Torah) Maimonides, however, determines that "He may seize fields, oliveyards, and vineyards and give them to his servants when they go forth to war and are encamped around those places and have no other supply of food, and he pays for what he seizes, as it is said: '*And he will take your fields, and your vineyards, and your oliveyards, even the best of them, and give them to his servants*' (I Sam. 8:14)." This refers only to wartime and only in return for payment. Moses Maimonides, *Kings and Their Wars*, chapter 4, paragraph 6, at 216, *in* THE CODE OF MAIMONIDES, BOOK 14, THE BOOK OF JUDGES (Abraham M. Hershman trans., Yale Judaica Series 3, 1949).

77 Rabbi Kamai is cited in *Dvar Avraham*, *supra* note 53.

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international law. If the king's 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.

THE POSITIONS OF ISLAMIC LAW

Prior to beginning a discussion on how Islamic law regards private ownership of property seized in war, a very basic summary regarding the Islamic law of war is in order.[78] Islamic law of war has a history whose normative foundation and development stretch from the seventh century to the present. Like other aspects of Islamic law, the highest source for the Islamic law of war is the Qur'ān—the holy book of Islam that is believed by Muslims to be the word of God revealed to the Prophet Muhammad (d. 632) in the seventh century.[79] The second highest source for the Islamic law of war is the Sunna—the practices of the Prophet Muhammad as expressed in his sayings, his actions, and his concurrence with the actions of others. These two primary-textual sources, the Qur'ān and the Sunna, lay the foundation from which Islamic jurists extract legal norms that govern the different aspects of war.[80] However, in the specific case of the law of war, the majority of laws are derived from the Sunna, rather than the Qur'ān, because the battles fought by the Prophet and his practices regarding different aspects of such battles presented Islamic jurists with a wide base of rich material to mine for such rules.[81]

The Islamic law of war deals with several issues concerning the act of war: inter alia, justifications for engaging in war (*jus ad bellum*), treatment of prisoners of war, the type of weapons that might be allowed, and the acceptability of surrender. Our goal in this article is to introduce the reader to the diversity and legitimacy of the relevant views regarding one major question: Can a non-Muslim acquire ownership of Muslim private property as a result of an act of war?[82] This section presents the legal rulings of several classical Islamic jurists.[83] Furthermore, the relevant legal rulings of two contemporary Islamic scholars will be presented. It should be noted, however,

78 It should be noted that the most influential jurist, who laid the foundation of Islamic law of war, was Muḥammad Ibn Al-Ḥasan Al-Shaybānī (محمد بن الحسن الشيباني; AH 749/50–805). He has detailed discussions of the effects of war on property rights, especially in his treatise *Al-Siyar Al-Kabir*, which was also the subject of an important commentary by Al-Sarakhasi in his work *Sharh Al-Siyar Al-Kabir*. We refer to the commentary made by Al-Sarakhasi as he wrote at length about the issue discussed in this article.

79 The Qur'ān comprises 114 chapters and 6235 verses (each chapter consists of an unequal number of verses).

80 M. Cherif Bassiounni & Gamal M. Badr, *The Shari'h: Sources, Interpretation and Rule-Making*, 1 UCLA JOURNAL OF ISLAMIC & NEAR EASTERN LAW 135 (2002). It should be noted that whenever the two primary sources do not cover a certain situation, Islamic jurists developed secondary sources of law, namely consensus (*ijmā'*), analogy (*qiyas*), custom (*'urf*), and common good (*maslaha*). All Muslims jurists agree that no rules derived from the secondary sources may abrogate a rule contained in the two primary sources. Since the subject discussed in this article is covered by the primary sources, the secondary sources are beyond the scope of this article.

81 Islamic tradition records eleven battles waged by the Prophet Muhammad. *See* MUHAMMAD IBN ISHĀQ, THE LIFE OF MUHAMMAD: A TRANSLATION OF ISHĀQ'S SĪRAT RASŪL ALLAH, 659–60 (Alfred Guillaume trans., Oxford University Press 1955) (2004); MUHAMMAD HAMIDULLAH, THE BATTLEFIELDS OF THE PROPHET (Woking 1953).

82 All schools of thought agree on the general rule that spoils of war obtained by Muslims from non-Muslims in war belong to the Muslims, and should be divided between the warriors. In this section we will focus only on situations where a non-Muslim seized private property owned by a Muslim.

83 In the present article, classical Islamic jurists are considered those who lived between the eighth and fifteenth centuries. Thus, besides the works of the real classical jurists, the works of jurists who are normally classified as post-classical by many experts of Islamic law are exceptionally referred to here as classical. See, for example, the classification of CHAFIK CHEHATA, ÉTUDES DE DROIT MUSULMAN 20–27 (Paris, 1971).

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that these contemporary Islamic legal scholars did not place much emphasis on the views of the classic jurists and instead supported their views with novel arguments. Therefore, we prefer to present their views apart from the classic jurists.

Non-Muslim Ownership of Muslim Private Property Seized in War: Classic Views

If a non-Muslim seizes private property belonging to a Muslim during the course of war, the question arises: can a non-Muslim acquire ownership of such property?[84] In their legal treatises, classic jurists expressed their views on the matter based on their interpretation of the Qur'ān and the traditions of the Prophet, the primary sources of Islamic legislation, with significant differences between them. Our summary below reveals that there are two main conflicting views.[85]

The First View: Non-Muslims Cannot Acquire Ownership of Muslim Private Property

The first view completely rejects any possibility of non-Muslim ownership acquisition of any Muslim property as a result of war. This view is prevalent mainly amongst jurists of the Shāfi'ī and Ẓāhirī schools.[86] Al-Imam Al-Shāfi'ī (d. 820) is the first jurist to express this view in his famous book, *Al-Umm*.[87] He based his view on two relevant stories reported from the Sunna attributed to events from the life of the Prophet Muhammad. The first story, the "Slave Story," was reported by the second caliph 'Umar Ibn al Khattab.[88] It is about a slave who belonged to a Muslim and fled to a non-Muslim tribe, and was thereafter captured in a battlefield by Muslims. According to Islamic law, property acquired in battle by Muslims from non-Muslims is considered as spoils of war (*ghanīma*) that belongs to those Muslims who take part in the battle.[89] In this case, the Prophet refrained from including the slave in the spoils of war to be divided up among the warriors. Al-Shāfi'ī views the Prophet's refraining to treat the slave like other spoils of war, as evidence that the Prophet regarded the slave as property of the original Muslim owner and never as the property of the non-Muslims. He deduced from this story that non-Muslims cannot gain ownership over Muslim property; otherwise, the slave would have been considered part of the spoils of war which are to be divided up among the warriors.[90]

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84 It should be mentioned that Islamic law establishes certain methods of acquiring private ownership which apply also to non-Muslims, but an act of war is not considered to be one of such methods. *See* Muhammad Abu Zuhra, Al-Mulkiyya wa-Nazariyyat Al-'Aqd fi Al-Shari'a al-Islamiyya (Dar Al-Fikr Al-'Arabi 1976).

85 In this context we should make two notes, limiting the discussion: first, this article focuses only on the question of the non-Muslim conqueror's ability to acquire conquered Muslim property. This question is very different from that of whether a non-Muslim ruler can usurp ownership of property belonging to a Muslim resident of that country. A second note is that the present article deals with a non-Muslim conqueror's power to acquire Muslim property, rather than the opposite situation, where the conqueror is himself Muslim. Hence, the *Ahl Al-Dhimma* issue is not relevant to the present discussion.

86 Among Shī'ī schools this view is prevalent among Twelver Shī'a and one jurist of Zaydiya. *See* 1 Ja'far Ibn Al-Hasan, Sharāī' al Islam 226 (1978).

87 4 Muhammad ibn Idrīs Al- Shāfi'ī, Kitab Al-Umm 284 (Dar al-Fikr 1983). Muhammad ibn Idrīs al-Shāfi'ī (Arabic: ابو عبدالله محمد بن إدريس الشافعي) was a Muslim jurist who died in 820. He was active in juridical matters and his teaching eventually led to the Shāfi'ī school of *fiqh* (or Madh'hab) named after him. Hence, he is often called Imam Al-Shāfi'ī. Al-Umm is the earliest extant juristic Islamic text discussing the matter addressed in this article.

88 3 Sunan Abī Dāwūd, Kitab Al-Jihad, at 64, hādith number 2986.

89 Majid Khadduri, The Law of War and Peace in Islam: A Study in Muslim International Law 116 (1940).

90 *See* ibn Idrīs Al- Shāfi'ī, *supra* note 87, at 286.

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The second story, the "Al'dba Story," from the Sunna, is about the Prophet's dromedary named Al'dba. At one point, non-Muslims invaded Al-Medina (the city to which the Prophet immigrated after leaving Mecca) and seized, among other things, a woman and the Prophet's dromedary. 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-Medina she would slaughter the dromedary and distribute the meat among Muslims. When the woman arrived at Al-Medina, 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.[91] Al-Shāfi'ī interpreted the Prophet's statement to mean that the non-Muslims[92] had never acquired ownership over the Prophet's dromedary as it remained under the ownership of the Prophet Muhammad. Therefore, the woman could not acquire ownership over the dromedary by simply taking it from the non-Muslims. According to Al-Shāfi'ī, the normative lesson to be drawn from this event is that non-Muslims cannot acquire ownership of Muslim property by means of war.[93]

Classic Shāfi'ī jurists subscribe to Al-Imam Al-Shāfi'ī's view.[94] Al-Māwardī, one of the pillars of the Shāfi'ī school (1058), states, "Any property taken over and held by non-Muslims is not considered under their ownership and remains under Muslim ownership."[95] In addition to the two abovementioned stories reported from the Sunna, Al-Māwardī based his view on two Qur'ānic verses. The first verse (4:141) states, "God shall never grant non-believers a way (to triumph) over believers."[96] Al-Māwardī interpreted 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. The second verse (33:27) states, "And he caused you to inherit their lands, and their houses,

91 2 SAHIH MUSLIM, KITAB AL-NUDHUR, at 18; 4 MUSNAD AL-IMAM AHMAD, at 432.

92 The concept "non-Muslim" includes two categories. One is fellow monotheists, that is, Christians and Jews. Islam refers to the latter as *Ahl al-Kitāb* (People of the Book), or *Al-Dhimma* (اهل الذمة). The other is non-monotheists, or pagans. These are referred to as *infidels* (كفار). Regarding the question broached by the present article—the power of non-Muslims to acquire Muslim possessions through acts of war—an analysis of the Muslim sources shows there is no difference between the two categories of non-Muslims. Hence, we do not distinguish between the two categories, but rather consider them a single, non-Muslim group. It should be emphasized that in other aspects of war Muslim law does recognize differences between the two groups. See FIRESTONE, JIHAD, *supra* note 3, at 127–34.

93 *See* IBN IDRĪS AL- SHĀFI'Ī, *supra* note 87, at 287.

94 Abu Zakaria Mohiuddin Yahya Ibn Sharaf Al-Nawawi (d. 1278) (Arabic: أبو زكريا يحيى بن شرف النووي), popularly known as Al-Nawawi, an-Nawawi or Imam Nawawi, was a Sunni Muslim author on fiqh and hādith. His position on legal matters is considered the authoritative one in the Shāfi'ī Madhhab. In his book, 5 RAWDHAT AL-TALIBEEN 327 (Dar Al-Kotob, 1981), he summarized the views of the Shāfi'ī jurists on the matter.

95 AL-MĀWARDĪ, AL-AHKAM AL-SULTANIYYA (The Ordinances of Government), 136 (Dar al-Kotob, 1982). Abu Al-Hasan Ali Ibn Muhammad Ibn Habib Al-Māwardī (أبو الحسن علي بن محمد بن حبيب البصري الماوردي), known in Latin as Alboacen (972–1058), was an Arab Muslim jurist of the Shāfi'ī school most remembered for his works on religion, government, the caliphate, and public and constitutional law during a time of political turmoil. Appointed as the chief judge over several Khorasani districts near Nishapur, and Baghdad itself, Al-Māwardī also served as a diplomat for the Abbasid caliphs Al-Qa'im and Al-Qadir in negotiations with the Buyid emirs. A symbol of his contributions here, he is well remembered for his treatise "The Ordinances of Government." The Ordinances, *Al-Ahkam Al-Sultaniyya*, provide a detailed definition of the functions of caliphate government that appeared to be rather indefinite and ambiguous.

96 In Arabic: قوله تعالى : { ولن يجعل الله للكافرين على المؤمنين سبيلا }

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and their riches, and a land which you have not trodden (before). And Allah is able to do all things."[97] Al-Māwardī interpreted this verse to mean that Muslims can gain ownership over property belonging to non-Muslims but not vice versa.[98] Furthermore, Al-Māwardī perceived these verses as a command addressed to non-Muslims prohibiting them therefore from taking Muslim property. Assuming a de facto scenario in which non-Muslims physically seized Muslim property, they must be denied ownership so as not to reward them for their sins.[99]

Al-Ẓāhirī jurisprudence shared the abovementioned view, as presented by one of the leading proponents of this school Ibn Ḥazm (d. 1064),[100] who 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."[101] Like Al-Māwardī, Ibn Hazm premises his view on the two above-mentioned verses. He drew from these verses the following conclusions: first, in these verses God prohibits the non-Muslims from gaining control over Muslim's property in any manner. It is incumbent upon non-Muslims to uphold God's commandments as stated in these verses, and they must obey this Divine decree. Second, 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 at the individual level.[102]

The Second View: Non-Muslims Can Acquire Ownership over Muslim Property during War

As discussed above, the jurists within the Shāfi'ī school hold the view that non-Muslims cannot acquire ownership over a Muslim's private property taken in battle. The three remaining major Sunni schools—Hanbalī, Mālikī, and Hanafī—hold an opposite view to the effect that non-Muslims can acquire ownership over Muslims' private property taken in battle.[103] It should be noted that classic jurists' (within these schools) attention to the matter had varied across schools. Generally speaking, it can be stated that among the three schools, the Hanafī jurists gave much attention to the matter and provided the legal discourse with significant works, while the Hanbalī and Mālikī jurists gave little attention to the matter, and much of their analysis merely repeats that of the Hanafī.[104]

97 In Arabic: { وأورثكم أرضهم وديارهم وأموالهم وأرضا لم تطؤوها } : قوله تعالى

98 14 Al-Mawardi, Kitab Al-Dahaya min Al-Hawi Al-kabir 217.

99 *Id.*

100 Abū Muḥammad ʿAlī ibn Aḥmad ibn Saʿīd ibn Ḥazm (d. 1064) was an Andalusian philosopher, litterateur, psychologist, historian, jurist, and theologian born in Córdoba, present-day Spain. He produced a reported 400 works of which only 40 still survive, covering a range of topics such as Islamic jurisprudence, logic, history, ethics, comparative religion, and theology. In his book *Al Kitab Al-Muhallā bi'l Athār* there is an extensive discourse regarding different aspects of the law of war including some issues that our article deals with. In his jurisprudence he chose to account on the apparent meanings and purport of Qur'ānic verses and the hādith.

101 7 Ibn Hazm, Al Kitab Al-Muhallā bi'l Athār 200.

102 *Id.* at 207.

103 Of all Shī'ī schools, this view is prevalent among the Zaydiya school. See Fakhrāddīn Abū Muhammad ibn al Qasim Ibn Miftah, Sharh Elazhār (Dar al-Fikr Publishers 1988). Ibn Miftah is a Zaydi scholar who died in 1455.

104 Leading Hanbalī scholars who addressed the matter are Imam Mawaffaq ad-Din Abdullah Ibn Ahmad Ibn Qudama Al-Maqdisi (d. 1223), 9 Al-Mughīī fi Fiqh Al-Imam Ahmad ibn Hanbal al-Shaybaniy 261 (Dar al-Fikr Publishers 1985); Mansour Albahoti (d. 1519), Kashaf Alqina 'an Matn Aliqna (Eastern Press, 1999). Leading Mālikī scholars who addressed the matter are Al-Bājī Abū l-Walīd Sulaymān ibn Khalaf ibn Saʿd Al-Tujībī l-Bājī l-Qurṭubī l-Dhahabī (d. 1081), 3 Al-Muntaqa Sharh Al-Muwatta 185 (Dar al Kitab Al Arabi 1982); Al-Maghribiy, Abu-'Abdullah Muhammad ibn 'Abd Al-Rahman (d.1547), 2 Mawahib al-Jalil Li-Sharh Mukhtasar Khalil 275 (Dar Al-Fikr Publishers, 2nd ed. 1977).

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Therefore, in our discussion we concentrate on the Hanafī school. One of the first Hanafī jurists to introduce the Hanafī view on the matter and to write about the difference of opinions among the jurists of different schools is the eleventh-century central Asian commentator Shams Al-Din Al-Sarakhasi (d. 1096).[105]

In his famous book *Al-Mabsūt*, Al-Sarakhasi states, "The non-Muslims shall become the owners of Muslim property taken by force."[106] Al-Sarakhasi based his opinion on verse 59:8, which says, "For the poor emigrants, who were expelled from their homes and their property, seeking bounties from Allah and to please him, and helping Allah and his messenger. Such are indeed the truthful to what they say."[107] The Qur'ān uses the term poor in this verse to describe people who do not own any property.[108] Al-Sarakhasi asserts that describing the Muslims who left Mecca and left their belongings behind as "poor" is consistent with the conclusion that non-Muslims had in fact acquired Muslim property. Since, had they not acquired the property, the property would continue to belong to the Muslims who would not then be labeled poor.[109]

Al-Sarakhasi further supported his opinion by citing two stories from the prophetic Sunna. The first story, the "She-Camel Story," is about a man who discovered his she-camel in the possession of another man and claimed its ownership. The men turned to the Prophet Muhammad to judge the case. The man who claimed ownership proved to be the original owner; the other party, however, claimed and proved that he had bought the she-camel from a non-Muslim who apparently had captured it from the owner in battle. The Prophet ruled that if, in fact, this was the case, the original owner could reclaim the she-camel if he so wished, but he must then compensate the other party and pay him the sum that he had paid the infidel.[110] Based on this story, Al-Sarakhasi concluded that the non-Muslims had acquired ownership of the she-camel; therefore, once the non-Muslim has sold the animal to the Muslim, the transaction was valid and the buyer, the legal owner.[111]

The second story, the "'Uqayl Story," upon which Al-Sarakhasi based his opinion occurred when the Prophet returned to Mecca in 632 (after leaving it for Al-Medina in 621). In this story, one of the Prophet's Companions,[112] Osama Ibn Zaid, asked him: "Where will you live? The Prophet replied: 'Has 'Uqayl (an infidel who lived in Mecca) left us a home?'"[113] Al-Sarakhasi interpreted this hādith as the Prophet asking the rhetorical question ("has 'Uqayl

105 Al-Sarakhasi was from Transoxiana. He died sometime around 1096. It is said that Al-Sarakhasi was imprisoned for his opinion on a juristic matter concerning a ruler: he criticized the king by questioning the validity of his marriage to a slave woman. During the fifteen or so years he was imprisoned, he wrote the *Mabsut* and some of his other most important works. Al-Sarakhasi's opinions on law, inter alia, the matter we discuss in this article, have been widely cited, and he has been thought of as a distinctive writer. His main works are the *Usul Al-Fiqh*, the *Kitab Al-Mabsut*, and the *Sharh Al-Siyar Al-Kabir*.

106 10 Shams al-Din Al-Sarakhsi, Kitab Al-Mabsūt 54 (Happiness Publishers 1906).

107 In Arabic: {للفقراء المهاجرين الذين اخرجوا من ديارهم وأموالهم يبتغون فضلا من الله ورضوانا وينصرون الله ورسولهۚ أولئك هم الصادقون}

108 4 Ahmad b. Mahmud Al-Nasafi, Tafsir Al-Nasafi, at 141.

109 Al-Sarakhsi, *supra* note 106 at 55.

110 7 Musannaf Ibn Abi Shayba, Kitab Al-Jihad, 686, hādith number 14.

111 Al-Sarakhsi, *supra* note 106, at 55.

112 The Arabic term is *aṣ-Ṣaḥāba* (Arabic: الصحابة). The most widespread definition of a Companion is someone who saw the Prophet Muhammad, believed in him, and died a Muslim. Anyone who died after rejecting Islam and becoming an apostate is not considered a Companion. According to other definition, Companions are only those individuals who had substantial contact with the Prophet, lived with him, and took part in his campaigns and efforts at proselytizing. See Wilferd Madelung, The Succession of Muhammed (Cambridge University Press 1997).

113 5 Sahih Al-Bukhari, Kitab Al-Jihad, 443.

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left us home?"), implying that he had no home when he returned to Mecca because his home was now owned by the infidel 'Uqayl. Thus, Al-Sarakhasi asserts that non-Muslims (in this case, 'Uqayl) have the ability to acquire Muslim property (in this case, the Prophet's). Al-Māwardī, the classic Shāfi'ī jurist, who held the opposite view, accepted the validity of this incident, while arguing that 'Uqayl did not obtain ownership in war, but either had purchased the Prophet's home from him before the Prophet left Mecca or had inherited it from Abu Tālib, the Prophet's uncle. Therefore, Al-Māwardī argued, one cannot extract from this story the Prophet's acknowledgment that non-Muslims can acquire ownership merely through act of war as Al-Sarakhasi did.[114]

Furthermore, Al-Sarakhasi related the above-mentioned hāditha cited by Al-Imam Al-Shāfi'ī to support the view that non-Muslims cannot acquire ownership over Muslim private property seized in war, and he argued that they do not contradict his own opinion. With respect to the Slave Story, Al-Sarakhasi claimed 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, he claims, this incident has no relevance to the laws of war and therefore no bearing on the laws of booty. Thus, the Prophet's verdict is an implementation of the existing rules and laws of slavery.[115] In addition, Al-Sarakhasi related the Al'dba Story—the Prophet's dromedary—and asserted that this incident does not contradict his view that non-Muslims may acquire ownership over Muslim private property taken in war. He attributed two reasons for the Prophet's nullification of the woman's vow to slaughter the dromedary: first, ownership of property confiscated in war is acquired by infidels only if the property reaches infidel's territory (Dar Al-Harb). In this case, the animal had not yet reached infidel's territory, thus, never officially becoming infidel's property and therefore remaining the Prophet's property.[116] Second, even if the animal had in fact become infidel's property, once returned to the Muslims, it would belong to the original owner—in this case the Prophet.[117]

Non-Muslim Ownership of Muslim Private Property Seized in War: Contemporary Islamic Scholarly Views

Contemporary Islamic scholars address different issues surrounding Islamic law of war. However, little consideration has been given to the effects of war on Muslims' private property seized in war by non-Muslims. The most significant work on the topic was done by two scholars who have different views on the matter. In this section, we present these views, the scholars' legal reasoning, and the potential explanations for the differences.

The first contemporary Islamic scholar to address this issue is Wahba Al-Zuhayli, one of the world's contemporary experts on Islamic international law.[118] In his monumental book *Athār Al-Harb fi Al-Fiqh Al-Islmai* (Results of War in Islamic Jurisprudence: A Comparative Study), he

114 14 Al-Mawardi, *supra* note 95, at 217. It should be noted that Abu Talib remained an infidel until his death, and, according to the laws of inheritance, the heir cannot inherit the deceased if they are of different religions. Therefore, 'Ali Ben Abu-Taleb could not inherit from his father, and the only remaining heir was 'Uqayl.

115 Al-Sarakhsi, *supra* note 106, at 53.

116 *Id.*

117 Ibn Qudama (d. 1223), Hanbalī classic jurist, made the same argument in his book. Ibn Qudama, *supra* note 104, at 261.

118 Wahba Al-Zuhayli (born 1932 in Syria) is one of the world's leading experts on Islamic international law. His works have been quoted in such Western scholarly works as Sohail Hashimi & Steven Lee, Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives (Cambridge University Press 2004), and Reuven Firestone, *Disparity and Resolution in the Qur'ānic Teachings on War: A Reevaluation of a Traditional*

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devoted a chapter to this issue, where he expressed his view that non-Muslims can acquire ownership over Muslim property seized in war.[119] Al-Zuhayli bases his view on three different kinds of arguments. The first kind of argument is synonymous with the arguments brought by the classic jurists who held the same view. Al-Zuhayli lists the two above-mentioned opposing views of the classic jurists and the legal reasoning behind each view. He rejects the view and the legal reasoning expressed by the Shāfiʿī and Ẓāhirī schools that non-Muslims cannot acquire ownership over Muslims' private property seized in war, agreeing with the view and most of the legal reasoning of the Hanbalī, Mālikī, and Hanafī schools that non-Muslim can acquire such ownership.[120] The legal reasoning behind each view is discussed above, but it is worth noting that Al-Zuhayli is considered to be a Shāfiʿī, yet regarding the issue at hand he departs from the traditional opinion of his school and adopts a position identical to that of the Hanbalī, Mālikī, and Hanafī schools.

The second kind of argument is a property-type argument. Mainly, Al-Zuhayli bases his view on an accepted rule in Islamic law of property, which determines that the person who first takes possession (*iḥraz*) of an object which is not the property of anyone else (*mubaḥ*) is considered to be the owner of that thing. This is known as "original acquisition" (حقوق ملكية اصلية). Based on this rule, Islamic jurists agree that Muslims can acquire ownership over the booty that is obtained from the non-Muslims by actual war against them. The legal reasoning behind this rule is that obtaining the booty by Muslims denies the ability of the original owner (the non-Muslim) to use it and benefit from it, which leads to the expiration of his ownership over it. Therefore, the booty is not the property of anyone (*mubaḥ*) and the Muslims can acquire ownership by taking possession of it. Al-Zuhayli asserts that the same reasoning applies when non-Muslims obtain booty from the Muslim by actual war: obtaining booty by non-Muslims denies the ability of the original owner (the Muslim) to use it and benefit from it, which leads to the expiration of his ownership over it. Thus, the non-Muslim can acquire ownership over it by seizing it, which is one of the classic ways of acquiring ownership.[121] It should be noted that Al-Zuhayli, by saying that "the rule of *ihraz*" should apply equally to all sides, Muslims and non-Muslims, participating in war, recognizes a well-founded principle of the modern laws of war known as the equal application principle.[122]

This brings us to arguments of the third kind. As is discussed in further detail below, Al-Zuhayli is considered to be among the modern Islamic scholars who call for the need to recast the Islamic law of warfare and to reconcile it with the modern international law. Recognizing the equal application of law principle in time of war is an additional step taken by Al-Zuhayli to reconciling the norms of premodern Islamic law of war to modern international laws of war.[123]

Applying the equal application principle can easily lead to the conclusion that non-Muslims can acquire ownership over Muslims' property seized in war, as much as the Muslims did acquire ownership over non-Muslims' property seized in war.

The second modern Islamic scholar who addresses the matter is 'Ali Al-Abyani, professor at the Al-Azhar Mosque University. In his book *Spoils of War in Islamic Law*, he devotes a chapter to the

Problem, 56 JOURNAL OF NEAR EASTERN STUDIES 1 (1997). Since 1963 he has taught at Damascus University, where he has been professor since 1975.

119 *See* WAHBA AL-ZUHAYLI, ATHĀR AL-HARB FI AL-FIQH AL-ISLMAI, 613–20 (Dar Al-fikr Al-Arabi 1991).

120 *Id*. at 619.

121 *Id*. at 620.

122 Adam Roberts, *The Equal Application of the Laws of War: A Principle under Pressure*, INTERNATIONAL REVIEW OF THE RED CROSS 872 (2008).

123 *See* WAHBA AL-ZUHAYLI, *supra* note 119, at 621.

issue at hand.[124] Al-Abyani holds the view that non-Muslims cannot acquire ownership over a Muslim asset seized in war.[125] Mainly, he bases his view on the same arguments brought by the classic Shāfiʿī and Ẓāhirī schools who hold the same view.[126] In addition, he rejects the property-type argument brought by Al-Zuhayli, without referring to him. Al-Abyani asserts that it is the act of war that alienates ownership over property from the non-Muslim to the Muslim, as a punishment for persistence in disbelief by all those who refused to adopt Islam (or submit to Islamic rule) and resorted to fight the Muslims.[127] This rule of alienation does not apply the opposite direction from Muslim to non-Muslim. To further support his opinion, he cited verse 4:141, "God shall never grant non-believers a way (to triumph) over believers."[128] Like Al-Māwardī, Al-Abyani regards this verse as a command addressed to non-Muslims prohibiting them from taking Muslim property. Therefore, taking Muslims' property in a war does not lead to the expiration of his ownership over it and should be considered a theft, which grants no title of any kind to the thief (the non-Muslim), who, accordingly, should return the property to the original (Muslim) owner.[129]

At first glance, it appears the methodology, like that used by the classic jurists, used by these two modern Islamic jurists to extract legal ruling from the Islamic sources takes the form of a highly legalistic approach. Yet a broader insight into their reasoning reveals profound political disagreement between them, particularly regarding the need for reconciling the norms of Islamic law to the modern law of wars.[130]

On the one hand, Al-Zuhayli among other jurists, calls for the need to recast the Islamic law of warfare and to reconcile it with the modern international law. According to this approach, the law of Islam, developed by the classic jurists over the course of the ninth through the twelfth centuries, was based on the theory that mankind constituted one community, bound by one law, and governed ultimately by one ruler. The aim of Islam was to proselytize the whole of mankind. Islam's law for the conduct of the state, accordingly, was the law of an imperial state that would recognize no equal status for the party (or parties) with whom it happened to fight or negotiate. It follows, therefore, that the binding force of such a law was not based on mutual consent, equality, or reciprocity, but on the state's own interpretation of its political and religious interests, since Islam regarded its principles of morality and religion as superior to others. With the demise of the Ottoman Empire at the conclusion of World War I, the Islamic conception of one imperial state gave way to the European model of nation-states. In addition, the Islamic world also witnessed the rise of international law and institutions such as the United Nations, which purported to guarantee the independence and equality of all states. In response to this newly emerging order, this group of jurists, including Al-Zuhayli, sought to recast the Islamic law of warfare and to reconcile it with modern international law.

In his 2005 article "Islam and International Law," Al-Zuhayli describes the principles governing international law and international relations from an Islamic viewpoint.[131] After presenting the rules and principles governing international relations from an Islamic viewpoint, he emphasizes

124 ʿAli Al-Abyani, Spoils of War in Islamic Law 87–124 (2003).
125 *Id.* at 98.
126 *Id.* at 87–96.
127 *See* Khadduri, *supra* note 89, at 117.
128 In Arabic: {ولن يجعل الله للكافرين على المؤمنين سبيلا} : قوله تعالى
129 ʿAli Al-Abyani, *supra* note 124, at 98.
130 Rudolph Peters, Jihad in Classical and Modern Islam: A Reader (Markus Weiner Publishers 1996).
131 Wahba Al-Zuhayli, *Islam and International Law*, International Review of the Red Cross 858 (2005).

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the principles of human brotherhood, honoring the human being and preserving human rights, commitment to the rules of ethics and morality, mercy in war, and, most important for our discussion, justice and equality in rights and duties. In regard to the justice and equality principle, Al-Zuhayli says,

> Justice in dealing with others is a natural right; it is also the basis for the survival of the governmental system. Oppression is a harbinger of the destruction of civilizations and prosperity, and of the collapse of the system. Hence, Almighty God says: "*God commands justice, the doing of good* . . ." . . . . The Divine Saying related by the Prophet enjoins: "O My subjects! I forbade injustice to Myself, and forbade it among yourselves. Do not do others injustice." . . . The right to equality in rights and duties are natural rights, and the latter is complementary to and expressive of the right to justice. Hence no group or person, not even a monarch, should be treated with favoritism, with discrimination over others. The Prophet (peace be upon him) says: "People are equal like the teeth of a comb."[132]

Recognizing the equal application principle in time of war was one step, among other steps, taken in that direction. It seems that the equal application principle of war was what caused Al-Zuhayli to hold the view that recognizes the ability of the non-Muslim to acquire ownership over Muslims' property seized in war.

Al-Abyani, on the other hand, represents another approach taken by some modern Muslim jurists who have not attempted to promulgate an alternative conception of modern Islamic international law, but rather focus their attention on whether the rulings in certain matters are consistent with their understanding of Islamic law.[133] For that reason, Al-Abyani rejects the equal application principle for not being consistent with Qur'ānic verses in which the Muslim should always have the upper hand as against the non-Muslim.

Legal Rulings Regarding Muslims' Private Property Seized by Non-Muslims in War and then Sold to Another Muslim

Muslims' private property taken by non-Muslims in a battle, might be sold by the non-Muslim who took it to a Muslim. This situation gives rise to the question of whether this property should be returned to its original Muslim owner or should remain under the ownership of the new owner, who purchased it from the non-Muslim? Classic jurists have two major different opinions on the subject.

The first opinion is held only by the Ẓāhirī jurist Ibn Hazm (d. 1064), who argues that in this case the property should be returned to the original owner. As mentioned above, Ibn Hazm holds the view that any property taken over and held by non-Muslims is not considered under their ownership and remains under Muslim ownership. Consequently, Ibn Hazm asserts that the non-Muslims cannot sell the property to others according to the hādith of the Prophet, who states, "do not sell what you do not have."[134] Such a prohibited transaction, if it occurred, does not affect the original owner's title and the original owner remains the owner of the property, which should therefore be returned to him.

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132 *Id.* at 274.

133 For further discussion regarding the two approaches, see MOHAMMAD FADEL, INTERNATIONAL LAW, REGIONAL DEVELOPMENTS: ISLAM (Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press 2010).

134 9 SUNAN ABĪ DĀWŪD, at 377, hādith number 3041. This hādith is an Islamic expression of the Roman principle *nemo dat quod non habet*.

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The jurists of the second opinion suggest otherwise—that the property belongs to the new buyer, yet the original owner has the right to redeem it in exchange for payment. In other words, the buyer retains ownership pending the original owner's ability to redeem the property for a price. As we discuss in greater detail later, this opinion is held by the jurists of Hanbalī, Mālikī, and the main Hanafī schools. For example, the Mālikī jurist Ibn Juza (d. 1356) states, "If a Muslim purchases [property] from the enemy, the [original] owner has no right over it unless he pays for it."[135] Similarly, Al-Kāsānī (d. 1191), the Hanafī jurist, states, "if the non-Muslim sold the property taken from the Muslim and the original owner recognizes it, then he can only redeem it."[136] These jurists based their opinion on a letter attributed to the second caliph, 'Umar ibn Al-Khattāb, that is believed to have been written by him to one of the commanders in chief of his army: "A Muslim is the brother of a Muslim and shall not betray him. If a Muslim recognizes his property among spoils of war before being divided between the warriors then the property should be returned to him; but if he found it after it being divided and sold to the merchants [Muslim merchants] then he can only redeem it for a price."[137]

Again, it seems that the disagreement regarding the issue stemmed mainly from the disagreement regarding the main issue as to whether the non-Muslim can acquire ownership over Muslims' private property seized in war. As stated above, the predominant view is that of the Hanbalī, Mālikī, and main Hanafī schools. They hold the view that non-Muslims can acquire such ownership that then grants them absolute power to control, use, and sell it to others. By selling the property to a Muslim, the ownership over it transferred fully and cleanly to the purchaser. In contrast, Ibn Hazm holds the view that any property taken over and held by non-Muslims is not considered under their ownership and remains under Muslim ownership. Selling the property to a Muslim does not alienate the ownership of the original owner from it, and therefore, it should be returned.[138]

Reviewing the writing of the contemporary Islamic scholars reveals that the only scholar who addresses this subject explicitly is Al-Abyani. He advocates the second opinion, which recognizes the original owner's right to redeem his property.[139] Several arguments are brought by him supporting this approach: first, 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. Still, returning it to the original owner without compensation infringes upon the reliance interests of the buyer and may damage commerce. Second, to further support his opinion, he made an analogical deduction from a ruling on a somewhat different, yet similar, matter discussed in Muslim jurisprudence regarding a non-Muslim who arrives in Islamic territory carrying with him property which he took earlier from a Muslim during an act of war. This gives rise to the question of whether such property remains in the hands of the non-Muslim or should it be taken from him and returned to the original owner. The majority of classic jurists agree on the matter to the effect that the property remains in the hands of the non-Muslim and should not be taken from him.[140] The legal reasoning behind this rule is that prior to the non-Muslim entering Muslim land, he received assurance (*amman*) that his

135 *See* 'Ali Al-Abyani, *supra* note 124, at 120.

136 *See* Al-Kāsānī (d. 1191), Badā' Al-Sanāi'` fi Tartib Al-Sharāi' 128 (Dar Al-Kitab Al-'Arabiy, 2nd ed. 1984). The price for redemption is the price paid by the purchaser from the plunderer.

137 *See* 'Ali Al-Abyani, *supra* note 124, at 122.

138 Shāfi'ī jurists did not address this matter.

139 *See* 'Ali Al-Abyani, *supra* note 124, at 124.

140 Al-Sarakhsi, *supra* note 106, at 276; Ibn Qudama, *supra* note 104, at 262.

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life and property are secure. Therefore, Muslims cannot breach this assurance and take the property from him or from the purchaser who bought the property from him.[141]

SIMILARITIES AND DIFFERENCES IN THE EFFECTS OF MILITARY CONQUEST ON PRIVATE OWNERSHIP IN HALAKHA AND SHARI'A

This article does not claim to present an exhaustive review of the traditions of halakha and shari'a 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. Accordingly, these two legal systems do not recognize the private property protection principle, which holds that the conqueror can legally acquire ownership over the private property owned by inhabitants of the conquered.

We have limited our discussion to a description of the approaches of halakhic authorities and shari'a jurists to the effects of military conquest on private ownership from the perspective of the predecessor religion—that is, what is the approach of halakha 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 halakha 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 halakha and shari'a on several important issues, which we outline below.

The Degree of Recognition of the Sovereignty of the Foreign Conqueror in Transferring Property

One view of shari'a, prevalent mainly among jurists of the Shāfi'ī and Ẓāhirī schools, 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.[142] In halakha, 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.

Reasons for the Sovereign's Ability to Transfer Property during War or Conquest

However, the second view in shari'a, prevalent mainly amongst jurists of the Hanbalī, Mālikī, and Hanafī schools, grants validity to military conquest and the expropriation of Muslim property by a non-Muslim king, and subsequently to its transfer to another Muslim. This view is not completely

141 *See* 'Ali Al-Abyani, *supra* note 124, at 124.

142 We must emphasize again that the present article deals with the non-Muslim conqueror's power to acquire Muslim property during a war. This question is different from that of whether a non-Muslim ruler may expropriate the possessions of Muslim subjects in his realm. That question, as mentioned before, lies beyond the scope of the present article.

identical to the halakhic traditions. 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 above, 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 halakha as ye'ush (despair). At times, purchasers of property plundered in war must compensate the original owners, due to later rulings calling for the return of stolen property.

Taking into Consideration the Conqueror's Ethical Comportment

Yet, even the second school of thought in halakha, 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 halakha, 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 during the twelfth and thirteenth centuries—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.[143]

The Question of Returning Confiscated Property after Conquest Ends

Both halakha and shari'a scholars discuss the issue of returning confiscated property acquired by a third party who purchased it from the conquering king after the conquest ends. In halakha, 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, ye'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

143 As mentioned above, in the text next to note 122, Al-Zuhayli holds a different view, calling for taking the mode of behavior into account when dealing with justice issues that remain when booty is considered.

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

The Different Approaches to "Conquest by War" in Halakha and Shari'a

According to the above two legal systems, there is no dichotomy between the public level—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 nonbelievers during the war, and less so on the consequences of the war, particularly when the victors are non-Muslim.[144] Halakha authorities, by contrast, focus on the consequences of war and plundered Jewish property; they are 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 from the time of Muhammad through that of the khalifs' empires and even nowadays, Muslims largely regarded themselves as the victorious party in most of the wars in which they were involved. By contrast, dealing with laws for declaring war would have been regarded by halakhic scholars as an unrealistic state of affairs; therefore they focused entirely on the consequences of war—the validity of transferring ownership of Jewish spoils of war to another Jew.

The Question of the Foreign King's Submission to the Rules of the Conquered Religion

We mention one further difference. Shari'a scholars acquired living historical experience as members of the ruling religion of a conquering sovereign, whether in the medieval khalifs' empires or in sovereign states in which shari'a law predominated.

Therefore, these scholars were inclined to examine the behavior of a nonbelieving conqueror if his rules for looting are consistent at least with shari'a ways. By contrast, ever since the destruction of the second Temple, Jewish halakhic scholars saw themselves as in *galut*, or exile, that is, totally incapable of realizing religious law publicly in a sovereign state. Enforcing halakha as state law seemed a utopian dream, and they were in any event never requested by local rulers to give advice based on their halakhic wisdom.

Consequently, the rabbis regarded halakha as applying only to members of the Mosaic faith. Members of other faiths are not expected to observe Torah law, but only seven Noachide commandments—which means that they are allowed to observe their legal practices.[145] Therefore, the halakhic sages were only interested in the question of whether Jews were permitted to acquire property previously possessed by other Jews, while they considered the legality of conquering through the lens of customary international laws, and in practice recognized the medieval king's absolute powers to set and usurp rights.

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144 LEWIS, *supra* note 12.

145 See R. Avrahm Yeshahu Karelitz, *Hazon Ish, Comments on Bava Kama*, 10:3 (Bnei-Brak 1991), who explained the interpretative difference between Maimonides's and Nachmanides's approaches to the concept of gentile law. He explains that gentiles are not obligated to obey Jewish law, but rather other juridical systems that prevail where they live. When a gentile and Jew have a legal dispute between them, the Torah sage must rule in accordance with non-Jewish law, and has no right to use Torah law against the will of the gentile. However, the differentiation between the Talmudic concept of gentile law and Jewish laws is not unanimously accepted, and there have been many scholarly disputes on the subject. For a comprehensive survey, see N. RAKOVER, THE RULE OF LAW IN ISRAEL 34–40 (Hebrew) (Jewish Law Library 1989).

Accordingly, 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.[146]

CONCLUSIONS

Our topic of discussion still needs to be carefully delineated and distinguished from other topics in the relations of religious laws to the actions and enactments of kings and governments who do not act in accordance to religious law. We should note that we are not dealing with governmental appropriation, but rather with wartime spoils and booty by private actors.

Our study presents a dogmatic-juridical description.[147] We do not attempt to proffer an historical explanation for why halakha and shari'a scholars do not consider war a conflict of "sovereign" state entities, but rather an interreligious matter between human beings belonging to different religious communities. Likewise, we refrained from dealing in this article with the historical influence of Roman law on halakha, or with the influence of Christian law on both halakha and shari'a.[148]

We also refrain from making historical comparisons between the attitudes towards spoils and booty in Judaism and Islam despite the fact that historically, in halakha and 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 until the present.[149] Not only has the tradition of shari'a been in existence for some fifteen hundred years, and halakha for more than two thousand years, but within each of these legal systems the correct and proper interpretation of the traditions regarding military conquest and its consequences has been fiercely disputed among religious authorities.

We focus on a specific question, which we pose to both religions. First, as far as Islam is concerned, is the non-Muslims' right to acquire ownership of Muslim property by an act of war or conquest established by a non-Muslim king or ruler, who does not obey shari'a law? Further, what are the implications of his rule on the loot and the expropriation of property, if that property is then transferred from the non-Muslim conqueror to another Muslim? Would the Muslim who receives the looted property from the non-Muslim king be obligated to return it to its original Muslim owner? Accordingly, our paper does not deal with the protection of private property per se in the context of a civil war, especially one waged between fellow Muslims. We are not convinced that shari'a does not recognize the sanctity of property, and assume that if the conquering king who conquered property from a Muslim and then transferred it to another Muslim were himself Muslim, shari'a authorities would not recognize the transaction.

Things are the same in Jewish halakha. Certainly, halakha recognizes the sanctity of property in private law, and it is also clear from rabbinic literature that a Jewish king may not confiscate the property of his Jewish subjects and transfer it to another Jewish or gentile subject. Our argument,

146 BLIDSTEIN, *supra* note 4, at 253–61. On the difference between the Jewish and Muslim approaches, see *id*. For a different theoretical approach regarding shari'a's perspective on imposing religion on non-Muslims, see FIRESTONE, JIHAD, *supra* note 3, at 127–34.

147 On this point, compare the position of Talmudic law scholar Shalom Albeck, *Law and History in Halakhic Research*, *in* MODERN RESEARCH IN JEWISH LAW 1–20 (Bernard S. Jackson ed. 1980). See also the debate spawned by his article: Itzhak Englard, *Research in Jewish Law*, in MODERN RESEARCH IN JEWISH LAW 21; Bernard S. Jackson, *Modern Research in Jewish Law: Some Theoretical Issues*, *in* MODERN RESEARCH IN JEWISH LAW 136–57.

148 We note that Grotius relies heavily on Jewish law, quoting Biblical stories, Talmudic statements, and Maimonides's rulings.

149 Schacht, *supra* note 12.

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which we set forth above in detail, is that Jewish halakha accords only limited powers to the king, who may not transfer property rights arbitrarily—neither from Jew to Jew, Jew to gentile, or even gentile to Jew. We do not take into account biblical wars because they are irrelevant: according to rabbinic teachings, Jews have been in exile since the destruction of the second Temple, and are forbidden by God from having a king.

It is possible that the spread of the private property protection principle or rule, dating to the beginning of the twentieth century, will bring changes in both halakha and shari'a regarding the foreign sovereign's prerogative to loot and confiscate during war conquest, but there are as yet no clear indications of such change. In this article we have preferred to present halakha's and shari'a's classic positions. A particularly fascinating topic in the contemporary context would concern halakha and shari'a attitudes towards events stemming from the Israeli-Palestinian conflict, such as regarding Palestinian property deserted during the Arab-Israeli war of 1948 and later transferred by the Israeli government to new Jewish owners.

Does halakha consider property acquired through war as permanently Jewish, subject to all land-related commandments, such as tithing, which pertain to Jewish property? For example, if the property thus transferred were agricultural and a Jew wished to consume it or use it for the four species required during the holiday of Sukkot, would he be permitted to make a blessing on it? Or would it be considered stolen property, and thus unfit for a blessing? Is a faithful Muslim permitted by shari'a to purchase land from the Israeli government that was abandoned by Muslims during the war of 1948? And if he does make such a purchase, is he required to restore the land to its previous Muslim owner or his heirs?

A discussion of the impact of modern law, through international pacts, on halakha and shari'a would require a separate article.

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