YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**War in Halakha**

**Rav Yishai Jeselsohn**

**Shiur #13: Acquisition of the Spoils of War**

The issue of taking plunder in war is an exceedingly broad one. It must be examined both from a halakhic perspective – including the scope of the prohibition of stealing from a gentile, the parameters of acquisition in situations of conquest and abandonment, the principle of *dina de-malkhuta dina* ("the law of the land is the law)," and other issues – and from a moral-conceptual perspective. Our first *shiur* on the subject will be devoted to the halakhic question of whether and how the plunderer achieves legal title to the spoils of war, and the second *shiur* will be devoted to the question of the permissibility or prohibition of taking those spoils.

We find some Biblical wars in which our forefathers refrained from taking any spoils, e.g.: Avraham's war against the four kings (*Bereishit* 14:21-25); the fighting in the book of *Esther* (chap. 9); the war of Yericho (*Yehoshua* 6-7); and the war against Amalek (I *Shmuel* 15). On the other hand, in some cases the text is explicit that there was no such holding back, e.g., the wars against Sichon and Og (*Devarim* 3) and the war against Midyan (*Bamidbar* 31) – regarding which the Torah goes to great lengths to describe the distribution of the spoils and the dedication of a portion to the needs of the *Mishkan* and those who ministered to God.

It is clear from these stories that ownership is transferred from the conquered to the conquerors, but it is difficult to infer whether the Torah views taking the spoils as a laudable and justified measure, a negative and problematic action, or something in between. As stated, this *shiur* will discuss the question about which there is actually a consensus in the Biblical narratives – the fact that in practice, taking plunder in war does in fact transfer ownership, presumably against the will of the previous owners – and we will try to understand *how* the act of conquest is effective in this regard.

**Stealing from a Gentile**

We must first discuss the basic halakhic issue of theft with respect to gentile property. The Gemara in *Bava Kama* suggests two sources for the prohibition against stealing from a gentile:

Rabbi Shimon said: The following matter was expounded by Rabbi Akiva when he arrived from Zifirin: From where do we know that stealing from a gentile is forbidden? From the verse which states: "After he is sold, he may be redeemed again" (*Vayikra* 25:48), [which implies] that one may not take [a Hebrew slave] by force so that he leaves [the gentile's jurisdiction]. Can it be [that it is permitted] to deceive him? [To prevent this misconception, therefore] the verse states: "And he shall reckon with the one who bought him" (ibid., v. 50) – he must be precise with the purchaser…

Rav Bivi bar Gidel said in the name of Rabbi Shimon Chasida: It is forbidden to steal from a gentile, but it is permitted [to keep] his lost item. It is forbidden to steal from a gentile, as Rav Huna said: From where do we know that stealing from a gentile is prohibited? As it is stated: "And you shall consume all the peoples that the Lord your God shall deliver to you" (*Devarim* 7:16) – when they are delivered into your hand, but not when they are not delivered into your hand. (*Bava Kama* 113a-b)

And indeed, it seems to be the ruling of the Rambam (*Hilkhot Gezeila* 1:2) and the *Shulchan Arukh* (*Choshen Mishpat* 359:1) that stealing from a gentile is forbidden.[[1]](#footnote-1) Yet, in the words of Rav Huna we find a window to an allowance to steal from a gentile – when the surrounding nations are "delivered into your hand" – and it thus becomes necessary to determine the scope of this allowance.

The Ra'avad notes a contradiction between the plain sense of this Gemara and a passage in *Sanhedrin* which, in the course of a discussion of the seven Noachide laws, also addresses the laws of a Jew stealing from a gentile:

And is a gentile executed for stealing? Has it not been taught: "With respect to stealing, if one stole or robbed or [seized] a beautiful woman, or [committed] similar offenses, if [these were perpetrated] by one gentile against another, [the theft, etc.] must not be kept, and likewise [the theft] of an Israelite by a gentile, but that of a gentile by an Israelite may be retained. (*Sanhedrin* 57a)

This passage indicates that an Israelite is permitted to steal from a gentile, but the passage in *Bava Kama* explicitly forbids it! The Ra'avad explains that there is actually no contradiction at all:

The former [= the passage in *Sanhedrin*] is speaking of the conquests (spoils) of war, similar to the case of a captive woman – as it is written: "And you shall consume all the nations," and we expound: "Here, [it refers to] when they are delivered into your hand," that is to say, the conquests of war, when the Holy One, blessed be He, will deliver them into your hand. (Ra'avad, *Bava Kama*, ad loc.)

This explanation is based on Rav Huna’s qualification of the situation, and it elucidates his words – the meaning of "delivered into your hand" is specifically in a time of war; when the people of Israel conquer a gentile enemy, they are permitted to take their property.

The Maharshal takes things one step further:

“When they are delivered into your hand, but not when they are not delivered into your hand” – This does not mean when they are *subjugated* under your hand… Rather, it seems that this is the meaning: “when they are delivered into your hand,” that is to say, when the Holy One, blessed be He, commands you to fight them; or even in a *milchement reshut*, the Holy One, blessed be He, grants you permission to fight your enemies around you. But one who is subjugated under your hand, and is not of the seven nations – it is forbidden to steal from him. (*Yam shel Shlomo*, *Bava Kama*, chap. 1, no. 41)

In his understanding, Rav Huna is not referring to gentiles who are subjugated to us in times of peace and tranquility, when the prohibition of stealing is in full force; the allowance applies specifically in the course of war.

**Acquisition by Conquest**

According to the simple understanding of Rav Huna’s words, it would seem that taking the enemy's property in a time of war is considered "stealing," but is permitted. We must examine whether this is indeed the case, or whether perhaps property taken in war is fully acquired and there is no question of "stealing" at all. This question depends on the topic of acquisition by way of conquest, which is discussed in the Gemara in *Gittin*:

For Reish Lakish said: How do we know that one gentile can acquire another [as a slave] with regard to his labor? For it is stated: "Moreover of the strangers that shall sojourn among you, of them shall you acquire" (*Vayikra* 25:45). [This indicates that] you may acquire from them, but they cannot acquire from you, nor can they acquire from one another. Can it be that they cannot acquire one another?… You may say [that this is not so] by an argument a fortiori: a gentile may acquire an Israelite [for his labor, as in *Vayikra* 25:47]; would it not be all the more so [that a gentile can acquire] another gentile? But I may say that this applies regarding [acquisition through] money, but not with an act of possession [*chazaka*]? Rav Papa said: The territory of Amon and Moav became purified [for acquisition by the Israelites] through [the occupation of] Sichon.[[2]](#footnote-2) We have thus found that a gentile [can acquire] a gentile [with an act of possession]. How do we know that a gentile [can acquire] an Israelite [in the same way]? As it is written: "And he took some of them captive" (*Bamidbar* 21:1). (*Gittin* 37b-38a)

The Gemara explicitly states that a gentile can acquire a Jewish slave with "*chazaka*,"an act of possession, and the *Rishonim* disagree about the nature of this action. According to Rashi, this refers to the same mode of acquisition of “*chazaka*” that applies in any purchase of a slave:

With *chazaka* – Like a captive whom he took possession of and whom he acquired via *yeush* when his owner forfeited ownership of him after giving up hope of recovering him. The *chazaka* by which a gentile slave is acquired is the *chazaka* of slavery, where he dresses, puts shoes on, and washes his master, as is taught in chapter *Ha-isha Nikneit.* (Rashi, ad loc., s.v. *be-chazaka*)

Rashi also explains in this manner the proof from Sichon's acquisition of the land of Amon and Moav:

The territory of Amon and Moav became purified [for acquisition by the Israelites] through [the occupation of] Sichon – Accordingly, a gentile may acquire land from a fellow gentile by way of *chazaka*. And this slave as well; when the Israelite forfeited him in despair, the gentile acquired him by means of *chazaka*. (Rashi, ibid. s.v. *Amon u-Moav taharu be-Sichon*)

The *Tosafot* objected to Rashi’s approach, arguing that a Hebrew slave cannot be acquired by means of *chazaka* at all. Instead, they interpreted the term *chazaka* here in a completely different manner, that has nothing to do with the ordinary realm of halakhic acquisitions:

Rashi explained: The *chazaka* of slavery, where he dresses, puts shoes on, and washes his master, as is taught in the first chapter of *Kiddushin* (22b). This is difficult, for even in the case of two Israelites, a Hebrew slave is acquired only by way of money or a deed… Rather, you must explain that here we are dealing with the *chazaka* of conquest in war. And thus explained Rabbeinu Chananel. (*Tosafot*, ad loc., s.v. *aval be-chazaka*)

That is to say, according to the *Tosafot* (and other *Rishonim*; see, for example, the Rashba, ad loc.), the Gemara introduces here a new mode of acquisition, namely, "the acquisition of conquest," which is considered a valid mode of acquisition even though it is not performed with the consent of both parties.

This understanding may fit in better in the Gemara, but it introduces a new issue we must understand – what is the nature of this mode of acquisition, and how does it work?

**Despair**

Some have connected this mode of acquisition, of conquest in war, to the law of *yeush*,despair, on the part of the owner. In the laws of lost property*, yeush –* i.e., giving up hope of recovering a lost object – removes the object from the owner’s possession even without any positive intention to transfer ownership. In similar fashion, it may be argued that when money is taken as spoils of war, its owner despairs of recovering it; his despair automatically removes his ownership and vests it in the person who currently holds the money. According to this understanding, we are not dealing with a new mode of acquisition of conquest, but a use of the regular system of modes of acquisition – similar to Rashi's approach above (regarding the conquest of Amon and Moav by Sichon), but through the mechanism of despair rather than by means of *chazaka*. The author of *Devar Avraham*[[3]](#footnote-3) mentions several *Acharonim* who connect these two concepts, and argues against them:

And I saw among our Rabbis the *Acharonim* those who have definitely taken the view that our passage is based on conquest in war, and they have equated conquest in war with the despair of the owner; see *Shakh* (*Choshen Mishpat* 363, no. 3), *Bach* (*Yoreh De'a* 267), *Makneh* (*Kiddushin* 14b), *Chatam Sofer* (*Yoreh De'a*, no. 19), and others. But in my humble opinion, there is much to question about this, for it seems that most of the *Rishonim* do not interpret our passage as based on conquest in war, and the matters of the despair of the owner and conquest in war are two separate matters. (*Devar Avraham*,vol. 1, no. 11)

According to him, the idea of despair is not the foundation for the mode of acquisition of conquest in war.

**The Torah Has Granted Us**

The Rashba uses an interesting formulation that may point to the first way of understanding the mode of acquisition of conquest in war, as an independent mode of acquisition:

Rather, it is certainly as we have said, that anything taken in the context of war, whether [the gentile's] body or his money, is acquired, for the Torah granted it to him. And if he fled from him, he too acquired himself from him, as a free man. (Rashba, commentary to *Gittin,* ad loc.)

It is possible that the Rashba sees this as a new mode of acquisition, which the Torah introduced when it taught that Amon and Moav became purified for acquisition by the Israelites through the occupation of Sichon. Although the Torah does not state explicitly that such an acquisition is valid, it may be understood from the story that land that is conquered undergoes a change in ownership; if so, it is possible that we are dealing with a Scriptural decree that introduces a new mode of acquisition.

**The Law of the Land is the Law**

Alternatively, the mode of acquisition of conquest in war can be understood as being based on the principle of "the law of the land is the law" (*dina de-malkhuta dina*). This principle is applied on the individual level in every country, but it may be argued on a more general level that the laws of international law also receive halakhic force by virtue of this principle. This is implied by the Radbaz:

And even though the rule is that [acquisition by virtue of] despair does not apply to land, because land cannot be stolen, we do not come to it from the law of a thief, as it is obvious that a thief has no claim, but rather from the principle of the law of the land. For this is the way of kings, to conquer lands from each other, and they acquire full title to them. For if you do not say this, no king has a claim to his kingdom, for all kingdoms are taken from others, and they are conquered by way of wars and that is their claim. (Radbaz on the Rambam, *Hilkhot Melakhim* 4:10)

According to the Radbaz, "the way of kings" is what makes this mode of acquisition possible. Some have taken this understanding a step further and suggested that the entire principle of "the law of the land is the law" is based on the mode of acquisition of conquest (see at length in *Devar Avraham*, no. 1, 6).

The Radbaz does not suffice with mentioning the principle of "the law of the land is the law," but he also adds an explanation: "For if you do not say this, no king has a claim to his kingdom." From this explanation, it follows that the acquisition is valid here by virtue of "the consent of the world" to the legality of the acquisition, even against the will of the conquered nation. Indeed, with regard to the validity of "the law of the land is the law," we find that the Rambam (*Hilkhot Gezeila va-Aveida* 5:18) explains that it derives from the people's consent to the appointment of the king and consequently to the powers that he wields. The Radbaz explains the mode of acquisition of conquest in war in a similar manner – since the world agrees to conduct itself in this manner, that conquest transfers ownership of the spoils – for even the conquered nations want this practice to be valid for when they become the conquerors – there is full validity to the transfer of ownership.[[4]](#footnote-4)

According to this understanding, it may be that in our day, when there is international law, only a conquest that is sanctioned by international law will validate acquisition by way of conquest, for only in such a case is it backed by "the law of the land" as we have defined it. This question requires further examination.

**The Mode of Acquisition of *Chazaka***

It is also possible that the mode of acquisition of conquest should be seen as a branch and offshoot (and perhaps the root) of the ordinary mode of acquisition of *chazaka.* The source of acquisition by *chazaka* is brought in the Gemara in *Kiddushin*:

And by *chazaka* – from where do we know this? Chizkiya said: The verse states: "And you shall dwell in the cities that you have taken" (*Yirmeyahu* 40:10). How did you take it? By dwelling in it. The school of Rabbi Yishmael taught: "And you shall possess it, and dwell therein" (*Devarim* 11:31) – with what will you possess it? By dwelling in it. (*Kiddushin* 26a)

The first verse, cited by Chizkiya, is from Yirmeyahu’s prophecy to the exiles when they settled in Babylon. There, the dwelling was not by way of conquest, but by actively taking possession of the land. In contrast, the verse cited in the name of the school of Rabbi Yishmael clearly speaks of conquest of the land and sees the active dwelling in the land as a mode of acquisition that expresses and creates the very inheritance, namely, the conquest of the land.

The *Makneh* discusses the relationship between these two derivations and has difficulty understanding that of the school of Rabbi Yishmael – for the verse deals not with the regular mode of acquisition of *chazaka*, but with acquisition by way of conquest. He therefore explains that the derivation is based not on the *conquest* of the land, but upon its division and settlement:

Regarding the Gemara: "And by *chazaka* – from where do we know this? Chizkiya said: The verse states: 'And you shall dwell in the cities.'" The reason he does not bring the verse in the Torah: "And you shall possess it, and dwell therein" is that there, it is impossible to explain that the *chazaka* was to acquire the land from the Canaanites who were there at first, or based on the law of abandoned property, for indeed it was [already] their inheritance from their ancestors, as it is stated in *Bava Batra* (117b). And furthermore, the conquest of war itself does not require any other *chazaka*, as stated in *Gittin* 48a, and therefore the statement of the school of Rabbi Yishmael: "With what will you possess it? By dwelling in it," refers to the division of the land among them, each and every one of them acquiring his portion by way of dwelling in it. (*Makneh*, *Kiddushin*, ad loc.)

The *Makneh*’sobjection is strong. If we still wish to understand the derivation of the school of Rabbi Yishmael in its plain sense, it may be suggested that the modes of acquisition of *chazaka* and of conquest are not two separate mechanisms, but rather that the first is derived and follows from the second. What effects the transfer of ownership in the case of conquest is not the military might, but rather the reality in which something passes from one hand to another. This is the essence of the concept of *chazaka* – that an object is held by someone or that someone conducts himself with respect to a parcel of land as if it were his. The Mishna in *Kiddushin* teaches that this type of acquisition is valid even when it is done in a symbolic manner, but its original and most fundamental form is the *chazaka* of conquest. Accordingly, it turns out that conquest transfers ownership by virtue of the very fact that an object has passed from one hand to another, and nothing further is needed.

**Permitted Theft or Absolute Acquisition**

Rav Huna, in the above passage in *Bava Kama*, does not mention the mode of acquisition of conquest as a way we may take the property of gentiles when we fight them. On the contrary, his words imply, as noted above, that we are talking about theft – but it is not forbidden. In contrast, the second part of this *shiur* discussed the laws of the mode of acquisition of conquest, which imply that we are dealing with absolute acquisition and not theft. This difference opens the door to a question we will address further in the next *shiur* – we have proven in this *shiur* that a transfer of ownership takes place, but is it *permissible* to acquire property in this manner and take booty in war?

Of course, this question may depend on the different understandings of the nature of the mode of acquisition of conquest: If the transfer of ownership is effected by way of *chazaka* or despair, there is as yet no proof that this form of acquisition is permitted; we have merely described how the previous ownership is terminated. On the other hand, if we are dealing with the principle of "the law of the land is the law," as per the Radbaz, it would seem that we are talking about a conventional manner of acquisition, in which case there should be nothing wrong with it. Even from the words of Rav Huna it would seem that there is no problem with taking spoils in war, as the verse he cites, "that the Lord your God shall deliver to you," indicates that God permitted stealing from a gentile in a case of war.

It would be wrong, however, to decide this weighty question solely on the basis of hunches and linguistic subtleties; moreover, the linguistic subtleties we have raised thus far do not address the question of whether taking booty is appropriate and recommended, or merely permissible, and perhaps even problematic and best avoided.[[5]](#footnote-5) In the next *shiur*, we will examine the Torah narratives and the words of *Chazal*, the *Rishonim*,and the *Acharonim*, and try to glean the Torah view on the question of taking spoils in war.

(Translated by David Strauss; edited by Sarah Rudolph)

1. See *Shakh*, ad loc., no. 2, regarding whether the prohibition is by Torah law or by Rabbinic decree. [↑](#footnote-ref-1)
2. Editor’s note: The Jewish people were not permitted to conquer the lands of Amon and Moav; however, once Sichon had conquered their lands, they were considered to belong to him such that the Jewish people could then conquer them in turn. This indicates that conquest by one gentile of another indeed effects a change in ownership. [↑](#footnote-ref-2)
3. It should be noted that this section in the *Devar Avraham* is a fundamental (and very long) source regarding acquisition of conquest, and one who wishes to broaden his understanding of the issue is invited to examine it. [↑](#footnote-ref-3)
4. We find another mode of acquisition that is established by societal coventions in the mode of acquisition known as "*situmta*" (see at length, *Devar Avraham*, vol. 1, no. 1, who based the entire system of the modes of acquistion on this mode), but this is not the forum in which to expand on the matter. [↑](#footnote-ref-4)
5. For as we know, not everything that is permitted is also recommended (the law of a captive woman, the law of a rebellious son, and others). [↑](#footnote-ref-5)