

War and Peace in the Jewish Tradition

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International Law and Halakhah

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“It is a people that shall dwell alone, and shall not be reckoned among the nations.”

(Numbers 23:9)

“In that day shall Israel be the third with Egypt and with Assyria, a blessing in the midst of the earth; for that the Lord of Hosts has blessed him, saying: ‘Blessed be Egypt My people and Assyria the work of My hands, and Israel My inheritance.’”

(Isaiah 19:24–25)

In the current international arena there exists a body of law that governs the relationships between nations as pertain to war and its aftermath. This law exists in two forms: (1) laws that are codified in treaties such as the Geneva Conventions and (2) customary law. The origins of contemporary international law date back to the

nineteenth century, when various groups of citizens in Europe organized and began to push their governments into adopting norms that would lessen the severe impact of war, both on the combatants and civilian population.¹ The question addressed in this paper is to what extent, if any, Halakhah might recognize the validity of such a system of law and its binding nature upon the State of Israel.

Clearly, there are norms of war that are prescribed, or at least alluded to, in Scripture that are halakhically binding. However, there are certainly many actions that are not addressed explicitly or implicitly in the classic sources of Halakhah and are forbidden under international law. The discussion here concerns these actions. It focuses not on the individual conventions and specific laws, but rather on the broader notion that international law should have any meaning within a halakhic framework, other than for pragmatic considerations.²

Engaging this topic presents two difficulties. First, little has been written on the topic. The topic of Halakhah that governs conduct in war has been written about³ but only from an internal perspective, i.e., exploring the halakhic norms that bind us irrespective of what international law might permit. Second, *Hazal* had little or nothing to say about this topic. This lack of discussion can be attributed to two causes. First, the basic formulations of Halakhah as we possess them were laid down in a period in which Jews lacked a sovereign state; the paucity of material in the Mishnah, Bavli and Yerushalmi is a reflection of this reality. Second, the concept of international law, as mentioned above, did not exist in the period of *Hazal*; while there certainly were norms and expectations of war and its aftermath, adherence to these was subject to the whim of the parties involved, and there was no body of nations that claimed jurisdiction over their enforcement. Moreover, any laws governing relations between nations were conceived as the subject of understanding between two nations, not among humanity as a whole.

The discussion here will focus on three issues:

1. Are there any halakhic sources that might serve as a conceptual model for international law?

2. How does Halakhah relate to treaties signed by the halakhic state? If these treaties contravene Halakhah, to what extent are they binding?
3. What pragmatic halakhic considerations might be brought to bear on the question?

I. THE CONCEPT OF INTERNATIONAL LAW IN HALAKAH

Considering rules of war in an international context within a halakhic framework assumes that Halakhah recognizes war as a valid action among Noahides. The historical existence of war among gentile nations is biblically reflected from the prototypical “father of warfare,” *Tuval-Kayin*, in Genesis (4:22) to Daniel’s vision of the wars between the superpowers at the close of the Biblical period. The ubiquity of warfare in human history is perhaps best articulated in Chronicles (II 15:5–6):

At those times, no wayfarer was safe, for there was much tumult among all the inhabitants of the lands. Nation was crushed by nation and city by city, for God threw them into panic with every kind of trouble.

Reality, however, does not automatically confer legitimacy.⁴ With respect to a halakhic state there are clearly delineated categories of war: *hovah*, *mitzvah* and *reshut*.⁵ Presumably, a nation has a right to defend itself from attack by another nation, but is there ever a circumstance in which a nation of Noahides may initiate a war? Even if there is not, there may still be rules that govern the way a nation, attacked in violation of Halakhah, defends itself. It would seem, however, that a war fought for survival would allow the threatened nation to do almost anything necessary to protect itself.⁶ If, however, it is permissible for a gentile nation to initiate a war, it is more likely that there would also be rules that would govern the conduct of defensive warfare.⁷

The Talmud (*Gittin* 38a) cites the dictum of R. Papa that “*Ammon u-Moav taharu be-Sihon*,” i.e., the land that *Sihon* conquered

from the Ammonites and Moabites was no longer subsumed under the prohibition, found in Deuteronomy (2:9, 19), of conquering territory from those two nations. The Bavli here speaks of the notion of *kinyan kibbush*, acquisition by conquest, as distinct from other modes of acquisition. The notion that territory may be acquired through one nation's conquest of another and that the territory is not considered "stolen" or "occupied" does not in itself imply that the actions are legitimate, nor anything about the existence of an international law. It may well be that just as a thief can, under certain circumstances, acquire property illegitimately and yet still be the rightful owner, so too, a nation that conquers territory in war, even illicitly, may acquire legal title to the territory.⁸ This position was adopted by a number of relatively recent *Aharonim*.⁹

Maimonides, however, suggests otherwise. He writes (emphasis mine):

If a heathen king wages war and brings captives for sale, or if he gives permission to anyone who wishes to take captives *from among the people against whom he is warring* and to sell the captives, and also if his law is that he who does not pay the tax shall be sold into slavery or that anyone who does such-and-such or fails to do so shall be sold into slavery, then his law is law, and a slave who is bought according to that law has the status of a heathen slave (*eved kena'ani*) in every respect (*Hilkhhot Avadim* 9:4).

Maimonides, basing himself on the above passage in *Gittin* regarding Ammon and Moab, states that a king who captures prisoners in war or in a war-action by proxy acquires legal title to the people enslaved by such actions. Similarly, when a king's laws dictate that a tax delinquent may be sold into slavery, the enslavement is valid. By implication, however, if the enslavement were not in accordance with his laws, *dinav*, the enslaved individual would not be regarded halakhically as an *eved kena'ani*. Maimonides' presentation suggests that he sees the principle of conquest as falling under the rubric of *dina de-malkhuta*, expanded to fit an international context.

The reason that the king's actions would be invalid during a time of peace or when not following *dinav* is that we draw a distinction between *dina de-malkhuta*, which is valid and binding, and *hamsanuta de-malkhuta*,¹⁰ which is not.¹¹ This analysis yields at least two significant principles:

1. War between two nations, according to Maimonides, is regarded (at least in some circumstances)¹² as legitimate – if Sihon's war on Moab had been illegal, the land would still have been considered the property of Moab and off-limits to the Jews.
2. There are rules that govern the status of property conquered in war and, perhaps by extension, the conduct of war itself.¹³

In a most basic sense then, Halakhah clearly envisions war between gentile nations as a legitimate enterprise, with laws that govern its conduct.¹⁴ The details of these laws, however, remain unclear.

In this vein, the *Netziv*, (*Ha-Emek Davar*, Genesis 9:5) comments (emphasis mine):

“At the hand of a man's brother:” God explained: when is one penalized [for murder]? When he ought to have acted with brotherly love. As opposed to wartime, a time of hatred and a time to kill – there is no penalty for that at all. *For thus was the world established.* As it says in *Shavu'ot* 35: “A regime which kills one-sixth is not penalized.” And even a king of Israel is permitted to wage a *milhemet reshut*, even though Jews will be killed thereby.

While the above Talmudic passage, according to Maimonides' reading, implies the existence of the concept of “international law” in the conduct of warfare, it does not in any way suggest what the conceptual underpinnings of such a system are. Put differently, the Talmud speaks of one specific rule, which we would classify as a detail of a larger concept of international law of warfare. Is this simply an isolated detail, or is there a larger halakhic category that

might encompass all kinds of rules governing warfare, this detail being just one of them?

Two models that could serve as a framework for international law come to mind: 1) *dina de-malkhuta dina*¹⁵ and 2) the precept of *dinim*¹⁶ found among the Noahide laws. While each of these models could potentially serve as the basis, each may have certain limitations. With respect to each it would be necessary to examine three issues:

1. Both of these categories, at first glance, address how individual societies govern themselves internally. Can the scope of either category be expanded beyond national boundaries?
2. Would it mandate a system of international law, or merely suggest it as a possibility, which the nations of the world might choose to adopt?
3. Specifically from the perspective of the Jewish state, would it be applicable to a halakhic state, i.e., does the precept of *dinim* apply to Jews as well (or was the precept of *dinim* supplanted by *Parashat Mishpatim*), and is *dina de-malkhuta* applicable in a Jewish national context?

1. Scope

The principle of the Noahide *dinim* receives limited attention in Rabbinic literature. The Talmud itself says nothing other than that gentiles are commanded to establish courts, without discussing over what matters those courts have jurisdiction. Maimonides assumes that the precept of *dinim* is limited to the enforcement of the other six Noahide laws.¹⁷ Nahmanides, on the other hand, understands that the precept includes not only a judicial function, but also a broader set of rules of civil law (beyond the prohibitions of murder and theft, which exist explicitly in the Noahide code) that a society must have.¹⁸

According to Maimonides' view, the rules of international engagement, if they exist, would have to be subsumed not under *dinim*, but under the categories of two of the other seven Noahide laws – murder and theft. Conceivably, restrictions on killing in war

could be included within the prohibition of murder, and restrictions on treatment of property could fall under the prohibition of theft. The commandment of *dinim* might mandate an attempt to create an international enforcement agency, since Maimonides understands *dinim* as an obligation to enforce the other six Noahide laws. Upon further consideration, however, this model is inadequate for the creation of a full body of international law. According to both opinions (Maimonides and Nahmanides), the other six Noahide laws are divinely legislated laws with specific details located in *Torah she-be-al peh*. One cannot add details or requirements to specific commandments. If they are not included within *Hazal's* description of murder or theft, Halakhah would not recognize the international community's authority to impose any restrictions on unwilling nations. Since Maimonides himself does not see *dinim* as anything beyond the enforcement of the other six Noahide laws, there is no basis for expanding it to include practices accepted as customary by the international community.

Nahmanides' position, on the other hand, allows for the possibility that the international community might be able, from the standpoint of Halakhah, to expand upon those restrictions that are already inherent in the Noahide code. This possibility is dependent on one's understanding of Nahmanides' position. Some argue that his notion of *dinim* includes only those categories of civil law that are found in Halakhah, and therefore apply to Jews, i.e., *Hoshen Mishpat*.¹⁹ Should this be the case, *dinim* would, as in the Maimonidean position, be of limited applicability to the concept of international law. Those strictures that govern behavior of Jews towards enemy combatants and civilians during war would govern Noahide behavior as well, but there would be no room for the international community to legislate further without the agreement of all of its constituents.

The second approach assumes that Noahides are commanded to have a system of laws, but those do not necessarily have to dovetail precisely with Halakhah.²⁰ In the formulation of the *Rema*:

A Noahide is commanded only to adhere to his societal norms, and to judge "between a man and his brother and the stranger"

[Deut. 1:16] justly, but not to follow the Jewish laws Moses transmitted to us at Sinai; it is merely customary law.²¹

If this is the case, then the specific laws of a Noahide society derive from logic and custom, not revelation. And thus, it is possible to posit that these laws that Noahides are required to observe need govern not only internal issues but relations with other political entities, as well. This approach, *per se*, does not prove that the requirement of *dinim* transcends political boundaries, but it allows for the possibility. Nonetheless it should be noted that since, within the halakhic conception, the law of *dinim* was given to mankind (Adam and his family) at a time in which there was no concept of boundaries between nations, it is not clear why Halakhah should recognize the later concept of separate nations that are not collectively bound to each other by *dinim*.

The concept of *dina de-malkhuta dina* suggests greater possibilities for a halakhic conception of a dynamic system of customary international law. Drawing on this concept to formulate a halakhic category for international law would require one of two conceptual adjustments. Either we would need to posit that what defines a *malkhut* can be expanded at times to encompass all of the citizens of the world or to claim that just as there exists a principle that internal matters must, as a demand of the Noahide laws, be governed by some kind of “*din*,” so too, there exists a similar principle with respect to the world as a whole.

There are multiple ways of understanding *dina de-malkhuta dina*, and not all them lend themselves to such expansions. *Ran*, for example, asserts that the premise of *dina de-malkhuta* is that a king owns the land, as evidenced by the fact that he can expel inhabitants at will, and, as a result, his commands must be obeyed.²² This notion cannot be expanded to the international arena unless we were to construe international law as rooted in the principle that “might makes right,” meaning that if a country were powerful enough to destroy the citizens of another country, its law would be binding for the other country.²³ Extrapolating from this model, international laws would apply only to those nations in the world where the ability

to force compliance exists; in nations where no such possibility exists, international law would not be, halakhically speaking, binding.²⁴

There are, however, several formulations of *dina de-malkhuta* that might lend themselves to expansion to the international arena. Two stand out in this context.

1) Beginning with the *Rashbam*,²⁵ there are a number of *Rishonim* who find the underpinnings of *dina de-malkhuta* in the consent of the citizens of the country to the rule of the king. If the citizens would refuse to accept the authority of the ruler, his law would not be treated as binding. According to this position we must ask: what exactly is it that makes one country distinct from another? That is, if one works with the accepted assumption that the consent of every individual is not needed to validate *dina de-malkhuta*, but rather that some type of majority suffices, how does one draw the boundaries? After all, it cannot be simply a question of the domain controlled by the king, since it is not his rulership over a domain that creates law, but the acceptance by a defined group of people of his authority and his laws. What is it, then, that defines the “group of people” as being distinct from another group of people who are not bound by these laws? And what is it that allows a group of nearby citizens in an adjoining country to opt out and not be bound by the law?²⁶ One approach would be to argue that, as a matter of halakhic principle, the world consists of one large country whose inhabitants have agreed to divide it into different areas, each of which may govern itself as it sees fit. If this is the case, situations entailing interaction between two of these “areas” might once again be subject to the collective will of the entire world. Thus, *dina de-malkhuta* might begin with the *malkhut* being the entire world and only subsequently divided into individual countries, which govern themselves internally. The will of the collective entity, however, would remain as a system of law governing the relationships between countries.

This position is adopted by R. Shaul Yisraeli.²⁷ He writes (emphasis mine):

We can therefore conclude that international law (*dina de-malkhuta she-bein medinah u-medinah*) derives from the consent

of the nations' citizens, and even though it relates to matters of life and death, their consent suffices. *This is the basis for the laws of war.* And indeed, if each and every nation would agree to outlaw war, in such a way that war would cease to be practiced among the nations,²⁸ neither war nor conquest would be legal, and a nation which engaged in warfare would be judged murderous. However, as long the practice of warfare is accepted among the nations, war is not prohibited to me, and for this reason even the Jewish people can engage in a *milhemet reshut*.

2) A number of *Aharonim*²⁹ have suggested that the basis for *dina de-malkhuta* can be found in the need for society to be able to function, an argument that suggests some kind of natural law. In the words of the *Maharshal*, "if not for it, the world would not endure but be destroyed." Logically speaking, the same principle applies to the international arena. This is certainly the case in a world where rapid transportation and communication has effectively reduced the size of the world so that frequently events in one place have immediate and powerful ramifications thousands of miles away.³⁰

There is one caveat to the entire discussion of *dina de-malkhuta* and international law. That is, the law can only be considered halakhically binding in situations where it is applied consistently. If it is applied inconsistently it could be construed as *hamsanuta de-malkhuta*, robbery by the government, and not as *dina de-malkhuta*, the law of the government. One of the requirements that the *Rishonim* and *Aharonim* assume to be a *sina qua non* of *dina de-malkhuta* is a "*davar she-yesh lo kitzvah*," a tax that has a limit, i.e., not subject to whim, but fixed by law.³¹ Were the king to apply his law to one city or province and not another, it would not be considered valid. What if international law were applied to some countries and not others? It seems obvious to me that such a distinction would constitute a *davar she-ein lo kitzvah*.³²

2. Mandatory Nature

As we have suggested earlier, if the basis for international law were

the Noahide precept of *dinim*, there would be a mandate upon all nations to create, if possible, a system of enforcement for whatever laws exist. The debate between Maimonides and Nahmanides in their understanding of the obligation relates only to the culpability of the parties involved. Both agree that, when possible, Noahides are obligated to set up courts to enforce the Noahide code. In the international context (as opposed to the context of the Biblical Shekhem), it is probable that Maimonides would acknowledge that no one party could be held culpable for not enforcing *dinim* due to the difficulty in actually doing so. Ideally, however, all would agree that the international community should create such a system.

If one adopts *dina de-malkhuta* as the basis for a system of international law, the mandatory nature of enforcement would depend on which specific model of *dina de-malkhuta* chosen. Of the two theories mentioned above, the theory of consent of the citizens would not mandate an enforcement mechanism. After all, there is no specific obligation that there be *dina de-malkhuta*. Presumably, if the inhabitants of a country decided that they are not interested in having a king or his laws and would prefer to confine themselves to the seven Noahide laws, they would be permitted to do so. The same would hold true for the larger world. If, however, one chooses the model that focuses on the need of the world to function, it is logical that, since people are granted the right to legislate primarily so that society can function, they are also obligated to take advantage of that right. In a sense, it is part of the obligation of “He did not create it a waste, but formed it for habitation” (Isaiah 45:18), and this would apply both in the national and international contexts.

3. Applicability to the Jewish State

With regard to the applicability of *dinim*, there are a number of sources that assume that the precept applies to Jews as well. In its discussion of the Noahide laws, the Talmud (*Sanhedrin* 56b) states:

“Social laws:” Were then the children of Noah bidden to observe these? Surely it has been taught: The Israelites were given ten

precepts at Marah, seven of which had already been accepted by the children of Noah, to which were added at Marah social laws, the Sabbath, and honoring one's parents. "Social laws:" for it is written, "There [at Marah] he made them a statute and an ordinance" [Ex. 15]...But Raba answered thus: the author of this *Baraita* [which states that the social laws were added at Marah] is a *tanna* of the the School of Manassah, who omitted social laws and blasphemy [from the list of Noachian precepts] and substituted emasculation and the forbidden mixture. For a *tanna* of the School of Manassah taught: The sons of Noah were given seven precepts, viz., [prohibition of] idolatry, adultery, murder, robbery, flesh cut from a living animal, emasculation and forbidden mixtures.

The assumption of the Talmud is that the seven Noahide precepts were repeated to the Jews shortly before their arrival at Mount Sinai and that the precept of *dinim* applies to the Jews. Maimonides' presentation is also quite clear:

Six precepts were given to Adam: prohibition of idolatry, of blasphemy, of murder, of adultery, of robbery, and the command to establish courts of justice. Although there is a tradition to this effect – a tradition dating back to Moses, our teacher, and human reason approves of these precepts – it is evident from the general tenor of the Scriptures that he (Adam) was bidden to observe these commandments. An additional commandment was given to Noah: prohibition of eating a limb from a living animal, as it is said: "Only flesh with the life thereof, which is the blood thereof, you shall not eat" (Gen. 9:4). Thus we have seven commandments. So it was not until Abraham appeared who, in addition to the aforementioned commandments, was charged to practice circumcision. Moreover, Abraham instituted the Morning Service. Isaac set apart tithes and instituted the Afternoon Service. Jacob added to the preceding law (prohibiting) the sinew that shrank, and

inaugurated the Evening Service. In Egypt Amram was charged to observe other precepts, until Moses came and the law was completed through him (*Hilkhot Melakhim* 9:1).

It is by no means necessary that the laws that govern the Jewish state internally be identical in all respects to those that may govern other nations (if one adopts the position of the *Netziv* above). But if one assumes that the precept of *dinim* mandates that the other nations of the world create and enforce a body of law to govern international relations, there is no reason that the commandment of *dinim* given to the Jews should not mandate Jewish participation in the said international enterprise, at least as it relates to its international conduct, even if at the same time, rules that govern the Jewish state internally may differ from those in the rest of the world.

With respect to *dina de-malkhuta*, there is long history of debate as to whether or not it applies to Jewish kings in the Land of Israel.³³ The dominant view, that of R. Eliezer of Metz, is that it does not apply. His view stems from the notion that *dina de-malkhuta* is based upon the king's ownership of his land, and since the Land of Israel is owned by the Jewish people, it cannot be owned by a king and hence is not subject to *dina de-malkhuta*. As we noted earlier, if one adopts this view of *dina de-malkhuta*, it cannot serve as the basis for a system of international law anywhere. If, however, one adopts the view that *dina de-malkhuta* stems from the consent of the inhabitants, there is no reason to assume that it should not apply to the Land of Israel, as well.³⁴ Moreover, even if one rejects the applicability of *dina de-malkhuta* within Land of Israel, it would be because it has been supplanted either by *dinei Yisrael* or by the *mishpat ha-melukhah*. To the extent, however, that those may not be applicable outside of the Land of Israel, there is no reason to assume that *dina de-malkhuta* has been supplanted.

Finally, if one assumes that *dina de-malkhuta* is based upon the need for the world to function, it would be intuitive that in the international arena there is no reason that the halakhic state should *a priori* be exempted from being bound by international law.

II. TREATIES IN HALAKAH

As one might expect, *Hazal* do not discuss the issue of treaties, *per se*. There are numerous Biblical examples of *beritot* (treaties) and alliances between nations (although all of them are bilateral), but *Hazal* show little, if any, interest in them. There is only one discussion of a treaty between the Jews and another nation that is discussed, albeit briefly, in the literature of *Hazal*. That is the treaty with the Gibeonites found in the book of Joshua. The Gibeonites, one of the seven Canaanite nations, approached the Jews and presented themselves as members of a foreign nation who wished to conclude a treaty with the Jews. They successfully deceived the leaders of the Jewish nation, who failed to seek divine counsel, and, as a result, we read in Joshua 9:15:

Joshua established friendship with them; he made a pact with them to spare their lives, and the chieftains of the community gave them their oath.

When the people later discovered the deception they wished to renege on their agreement, but the leadership refused to go along. Scripture continues:

But the Israelites did not attack them, *since the chieftains of the community had sworn to them by the Lord, the God of Israel*. The whole community muttered against the chieftains, but all the chieftains answered the whole community, “*We swore to them by the Lord, the God of Israel; therefore we cannot touch them*.” This is what we will do to them: We will spare their lives, *so that there may be no wrath against us because of the oath that we swore to them*.” And the chieftains declared concerning them, “They shall live!” And they became hewers of wood and drawers of water for the whole community, as the chieftains had decreed concerning them. Joshua summoned them and spoke to them thus: “Why did you deceive us and tell us you lived very far from us, when in fact you live among us? Therefore, be accursed! Never shall your descendants cease to be slaves,

hewers of wood, and drawers of water for the House of my God.” But they replied to Joshua, “You see, your servants had heard that the Lord your God had promised His servant Moses to give you the whole land and to wipe out all the inhabitants of the country on your account; so we were in great fear for our lives on your account. That is why we did this thing. And now we are at your mercy; do with us what you consider right and proper.” *And he did so; he saved them from being killed by the Israelites.*

Although we know from other places in scripture that a *berit* typically entailed a ceremonial passing (Genesis 15:9–18, Jeremiah 34:10–11, 19, Deuteronomy 29:31), no such ceremony is recorded here in Joshua. The emphasis appears to be on the oath that accompanied the treaty.³⁵

The discussion in *Hazal* regarding the Gibonite treaty revolves around one question: why was the oath binding if it was undertaken under false pretenses? The Bavli (*Gittin* 46a) records a dispute between R. Yehudah and the Sages on this matter. The Mishnah (*ibid.* 45b) states:

If a man divorces his wife because of ill fame, he must not remarry her. If because she makes a vow, he must not remarry her. R. Yehudah says: [If he divorces her] for vows which she made publicly, he may not remarry her, but if for vows which she did not make publicly, he may remarry her.

The general concern of the Mishnah is that a husband who divorces his wife not be able to claim at a later time that he did so mistakenly because he was unaware of solutions to the problems of the marriage other than divorce, and thereby cast doubt on the validity of the divorce. The *tanna'im* in the Mishnah, as understood by the Bavli, argue as to whether a vow undertaken in public can be annulled under any circumstances. According to the anonymous *tanna kamma*, a public vow may be annulled and hence, one who divorces his wife because of such a vow might claim later that had he known

that the vow could be annulled, he would never have divorced her. Hence, a husband who divorces his wife over a vow is categorically prohibited from remarrying her. R. Yehudah, however, is of the opinion that a publicly taken vow may not be annulled, and hence, there would be no concern over the husband claiming, “if only I had known I would have annulled the vow and not divorced her,” since a publicly taken vow may not be annulled. (Nonetheless, R. Yehudah prohibits remarrying her as a warning to all women, “*she-lo yehiyu benot Yisrael perutzot be-nedarim.*”)

The Bavli then states:

“R. Yehudah says: [If he divorces her] for vows which she made publicly, he may not remarry her, but if for vows which she did not make publicly, he may remarry her.” R. Yehoshua ben Levi says: What is the reason for R. Yehudah? Because Scripture says “But the Israelites did not attack them, since the chieftains of the community had sworn to them” (Joshua 9). And what do the Rabbis [make of this verse]? [They reply:] Did the oath there become binding upon them at all? Since they [the Gibonites] said, “We are come from a far country” whereas they had not come from one, the oath was never binding; and the reason the Israelites did not slay them was because [this would have impaired] the sanctity of God’s name.

According to the *sugya*, there is a basic disagreement as to why the Jews did not simply annul the treaty on the grounds of deception: according to R. Yehudah, the oath taken was binding (despite the deception)³⁶ whereas according to the anonymous *tanna kamma*, the treaty was void, and they refrained from killing the Gibonites only because it would have resulted in a *hillul Hashem*, a desecration of God’s name.

The *tanna'im* never relate to the “treaty” itself but rather to the oath, which comprised part of the larger treaty. It follows, *a fortiori*, from the Talmudic discussion that a treaty with an oath (or one implied), when undertaken without deception, is binding. Abrogating a legitimate treaty would entail violating an oath according to

all views, and even a technically legitimate legal annulment of the oath, *hattarat nedarim*³⁷ would constitute a *hillul Hashem* (at least according to the *tanna kamma*).

A more basic question that emerges from the discussion is why the oath should not have been null and void because it contradicted a precept of Torah-law, “*lo tikhrot lahem berit ve-lo tehanem*,” i.e., not annihilating the seven Canaanite nations. Mishnaic law (*Shevu'ot* 3:6, 8) assumes that an oath that demands violation of a precept of Halakhah is not binding and must be disregarded. If so, the oath should have been void regardless of the considerations of a publicly taken vow and oath taken under mistaken premises. The *Rishonim* propose a number of answers, all assuming that, for one reason or another, there was nothing that violated Halakhah in concluding a treaty with the Gibonites under the circumstances. Had, however, the oath mandated violating Halakhah, it would not have been binding.

Two important questions, which pertain to a situation where there is a conflict between a treaty and Halakhah remain:

1. Would considerations of *hillul Hashem* prevent the abrogation of a treaty that is deemed invalid because it contravenes Halakhah? The discussion of the *Rishonim* focuses on why R. Yehudah considered the oath itself binding on a fundamental level if its contravening of a precept should have invalidated it. They all solve the problem by explaining how the treaty did not require such a contravention. Yet, they do not raise the same consideration within the position of the Sages who posit that they did not kill the Gibonites only because of *hillul Hashem*, i.e. that if the Torah commands “*lo tihayyeh kol neshamah*,” how can considerations of appearances override an explicit precept? This could be because: (a) once they solve the problem for R. Yehudah by explaining that the treaty itself did not contravene Halakhah, the same explanation would apply to the position of the Sages or (b) because it was clear to them that the issue of *hillul Hashem* would have trumped the concern of “they shall not dwell in your land.” According to the former, *hillul*

Hashem would play no role if fulfilling the treaty would violate Halakhah. According to the latter, *hillul Hashem* might dictate observing a treaty's commitment even if it requires violating Halakhah. However, one would still have to determine to which cases this would apply. Following the model of the treaty with the Gibonites, one might cogently argue that *hillul Hashem* would only override violations that are passive in nature, i.e., not wiping out the Gibonites. Perhaps only in such a case would we argue that the passive violation would be preferable to *hillul Hashem*, but in cases where the treaty would require us to actively violate Halakhah, *hillul Hashem* of a passive nature would be preferable.

2. Following the argument above that the halakhic foundation of a treaty is the oath, would a treaty be binding in situations that it violates Halakhah only incidentally, not by definition, i.e., a treaty contravenes Halakhah in some but not all situations? We might further divide this scenario by asking if such a treaty would be valid in those situations (a) when it does not contravene Halakhah and those (b) when it does?

The Yerushalmi (*Shevu'ot* 3:4/34:3) writes:

One who says "I swear that I will not eat *matzah*," is prohibited from eating *matzah* [even] on the nights of Passover. One who says "I swear I will not eat *matzah* on Passover nights," is flogged and [is required] to eat *matzah*. [One who swears,] "I will not sit in the shade," is prohibited from sitting in the shade of a *sukkah*. [One who swears,] "I will not sit in the shade of a *sukkah*," is flogged and [is required] to sit in the shade of a *sukkah*.

According to the Yerushalmi, an oath that contravenes Halakhah in some but not all situations is binding not only in cases where its demands do not conflict with those of Halakhah, but even in those where they do. Thus, if a person swore not to eat *matzah* without any mention of the first night of Passover (when consumption

of *matzah* is mandatory), he would be bound by the oath not only during the rest of the year, but even on the first night of Passover. *Rif*³⁸ and *Rosh*³⁹ cite this Yerushalmi as normative, as does the *Shulhan Arukh*.⁴⁰ The *Rema*⁴¹, however, qualifies this by adding:

The idea that a generalized oath can supercede a *mitzvah* applies only to positive commandments, but not negative commandments.

The *Taz*⁴² understands the *Rema*'s comment as distinguishing between active violation of a prohibition, where his oath would not mandate that he violate the prohibition, and a passive violation of a commandment, where his oath would prevent him from fulfilling the commandment. Thus, according to *Rema* even an oath that occasionally demands active violation of Halakhah (and would not be binding in those circumstances) would be valid in those situations where no violation would be entailed.

Returning to the discussion of treaties, it would follow that if a treaty sometimes, but not by definition, entails passively violating Halakhah it would be binding in all situations. If, however, adherence to the treaty would incidentally demand an active violation of Halakhah, we would, putting aside considerations of *hillul Hashem*, be obligated to ignore its provisions, but only in those circumstances where the conflict exists.

One final issue that merits some consideration in the discussion is the abrogation of treaties. We discussed earlier the question of *neder she-hudar be-rabbim* and *neder she-hudar al da'at rabbim*. Unilaterally annulling a treaty's oath would most likely entail a violation of *hillul Hashem*. Hence, to the extent that the vow might itself be voidable on technical grounds through *she'eilah*, it might still be forbidden to void it. It should also be taken as a given that any explicit or implicit⁴³ rights to withdraw that are contained within the treaty itself would be recognized by Halakhah as a stipulation (*tenai*) in the oath that would limit its application. The question that remains is what if the other party abrogates the treaty? Clearly again, if it was customarily understood that one party's abrogation

creates an automatic right for the other party to abrogate the treaty as well, we would argue that the oath of the treaty contains an implicit stipulation that nullifies it. If there was no clear custom, what would Halakhah say about our right to nullify the oath?

The *Shulhan Arukh* (*Yoreh De'ah* 236:6) writes: "When two parties enter into a joint oath and one of the parties violates the terms, the other party is exempt and does not require *hatarah*." Here the Halakhah clearly acknowledges an implicit stipulation of either party to withdraw pursuant to the abrogation of the treaty by the other party.

Along the same lines, in the context of international relations, there is a discussion of this on the now-famous *aggadah* of the "three oaths," which was, for a time, the primary source used to argue against the Zionistic enterprise. *Ketubot* (111a) posits that there were three oaths taken between the Jews and nations of the world: (1) That the Jews would not attempt to return to the Land of Israel using force. (2) That the Jews would not rebel against their rulers in exile. (3) That the nations of the world would not abuse the Jews in exile. If the oaths here are to (a) be regarded as genuine (not aggadic) and (b) as ordinary oaths (not as a reflection of a divine covenant), one would have a test case for the last questions. There were those who argued that the oaths taken by the Jews were not binding because the gentiles had violated their oath.⁴⁴ Thus, as matter of general rule, Halakhah would treat mutual oaths as conditionally dependent upon the adherence to the oath by the other party unless explicitly stipulated otherwise.

III. OTHER CONSIDERATIONS

There are two other major considerations, which, independent of any theoretical halakhic framework or signed treaty, might mandate the Jewish state's participation in a system of international law in some circumstances. First is the consideration of the danger to life that could potentially arise from the treatment of the Jewish state as a pariah and its isolation if it were to flout international law. There was a time when international trade played a considerably smaller

role in the economy of states. Many states were self-sufficient in developing and producing the resources they needed. For better or worse, that world no longer exists. With the explosion of trade, particularly in the area of food, and the proliferation of advanced weapons systems, which are both expensive to produce and require a good deal of natural resources that many countries do not possess, few countries can choose to exist and turn their backs on the world. Israel is by no means an exception to this rule. Absent clear divine communication to ignore pragmatic considerations and display faith in God, the Jewish state must take prudent action to protect the lives of its citizens. Since it depends upon many other members of the international community for various ingredients that aid in its survival, it may be obligated to take into account international law. This does not mean that international law is actually binding, but simply that the Jewish state must sometimes act as if it is, and since the issue of *pikuah nefesh* is involved, the obligation might theoretically apply even in cases where international law conflicts with other Halakhah considerations.

The other “pragmatic” consideration would be the issue of *hillul Hashem*. There is a notion among some halakhists that practices that are permitted in Halakhah may nonetheless be forbidden when the gentiles regard the practice as immoral or, in a generic sense, religiously inappropriate. The Yerushalmi (*Bava Kamma* 4:1/4b) records an incident in which concerns about *hillul Hashem* prompted a change in Halakhah:

Once the government sent two officials to learn Torah from Rabban Gamliel, and they learned from him Bible, Mishnah, Talmud, *halakhot* and *aggadot*. They said to him, “Your whole Torah is beautiful and praiseworthy except for these two things: (1) That you say, ‘a Jewess may not help a non-Jewish woman give birth, but a non-Jewish woman can help a Jewess give birth; and a Jewess may not nurse the child of a non-Jewish woman, but a non-Jewish woman may nurse the child of a Jewish woman, with her permission. (2) Goods stolen from a Jew are

prohibited but from a non-Jew are permitted.” Immediately, Rabban Gamliel decreed that the stolen goods of a non-Jew are prohibited because of *hillul Hashem*.

Commenting on the theoretical possibility of a synagogue being built on Shabbat by non-Jewish workers who are paid by the job (and not by the hour or day), the *Magen Avraham* states:

It would seem that it is permissible for non-Jews paid on a per-contract basis to build a synagogue on *Shabbat*, however, I have seen that the *gedolim* did not wish to permit it, for in our time the non-Jews do not permit anyone to do public labor on their holy days, and if we permit such, it would be a *hillul Hashem* (*Orah Hayyim* 244, n. 8).

If the international community were to adopt certain practices because they are regarded as morally proper, such practices may, at times, bind the Jewish state as well. That is only the case, however, if such behavior does not contravene Halakhah and if the Jewish tradition does not consider the practice immoral.

IV. PRELIMINARY CONCLUSIONS

The discussion within traditional sources regarding the interaction between nations in the context of war is limited. There are a number of halakhic models that could provide a theoretical framework for Halakhah recognizing the implementation of international law, although none of them are definite enough to be considered compelling and binding. In the absence of such a system, the Jewish state would still be bound by the strictures of war, which are included within the traditional halakhic system, but not to any customary international law. Of course, treaties to which the state chose to be a signatory would be binding; to the extent that such treaties would sometimes mandate practices that contravene Halakhah, they would be subject to the considerations of “*nishba le-vattel et ha-mitzvah*” and *hillul Hashem*.

NOTES

1. Reisman, W. Michael and Chris T. Antoniou, *The Laws of War*, xvii-xvix (Vintage Books, New York 1994).
2. I should emphasize that the possibilities outlined here should not be taken as advocating that a framework of international law should be created. Rather, they should be seen as approaches that might be taken if one has concluded, from a secular viewpoint, that a system of international law is both morally desirable and practically feasible. The possibilities I outline are just that – possibilities, not clear mandates.
3. See R. Zevin, *Le-Or ha-Halakhah (Mossad ha-Rav Kook, 1946)*, pp. 9–84 and R. J. David Bleich, “Pre-emptive War in Jewish Law,” *Tradition* 21 (1983):3–41.
4. It should be noted, though, that in some sense this is really the rationale advanced by the *Netziv* cited below.
5. *Sotah* 8:7. For a full discussion of these categories, see Rabbi Bleich’s “Pre-emptive War in Jewish Law.”
6. Presumably, when its survival is threatened, the nation would be permitted to fight embracing whatever tactics necessary, and once its survival is no longer threatened, it would no longer be considered defensive warfare.
Obviously there is a category of war which, conceptually speaking, falls between blunting the enemy’s attacks and destroying or permanently disabling the enemy and whose status would be unclear. But, in principle, there would probably be a point up until which we would treat military action as defensive warfare but beyond which we would define as offensive warfare.
7. One might even argue that if initiating warfare were permitted, there would be rules governing the behavior of the attacked nation. The permissibility of warfare, presumably, would reflect a view that war is part of the human condition – just as one nation may initiate an attack, so too should it expect to be subject to attack, and hence may also be bound by rules in its response.
8. The case of *sikrikon* in *Gittin* 55b may serve as an example of this, especially in war-time. According to the Bavli, at an early stage in the war of the Destruction (when Roman soldiers who refrained from killing Jews were, themselves, to be executed) property “given” by a Jew as ransom to his potential killer was treated as a binding gift, as it was given with genuine intent (out of fear for his life – *agav onseih gamar u-makni*; cf. *Bava Batra* 48b). Even at the first historic stage of *sikrikon*, where the *sikrikon* gained full title to the property, Halakhah still did not regard his acquisition of the property as anything but theft.
9. *Teshuvot Hatam Sofer, Yoreh De’ah* 19, *Devar Avraham* 1:11, R. Zevin, “*Le-Or ha-Halakhah*,” pp. 17–8.
10. The term first appears in Nahmanides’ discussion of the Talmudic passage in *Bava Batra* 54b.
11. R. Yisraeli, *Amud ha-Yemini* (Moreshet, 1966), 185–6.
12. In the opening part of the *halakhah*, Maimonides speaks of a king who wages war against another nation, suggesting an offensive action; when he speaks of permitting

- somebody to kidnap a member of another nation in a raiding action, he writes “a king who is waging war against him,” suggesting that his role in the war is primarily a response of self-defense.
13. R. Yisraeli, *Amud ha-Yemini*, 185–6, *Shulhan Arukh ha-Rav* vol. v, *Hilkhot Hefker ve-Hasagat Gevul*, and R. Zevin, *Le-Or ha-Halakhah*, 9–84. I presume here that if war itself is a legitimate enterprise and Halakhah expresses opinions about its aftermath, that the conduct of war itself would also be regulated. One might argue, to borrow the colloquial expression, that “all is fair in love and war” and that the Halakhah is concerned only with the aftermath of war when society resumes its civilian mode of operation. I think this to be unlikely since the Halakhah clearly delineates acceptable and unacceptable behavior in the context of a Jewish war and also concerns itself with the general (i.e., non-military) conduct of Noahides. It seems probable, then, that if the Halakhah permits war among gentile nations it would also regulate its conduct.
 14. R. Yisraeli, *Amud ha-Yemini*, p. 186.
 15. *Bava Kamma* 113a.
 16. *Sanhedrin* 56b.
 17. *Hilkhot Melakhim* 9:14. According to Maimonides, the entire thrust of the law is to enforce the other Noahide laws, and, as such, the citizens of Shekhem were liable for capital punishment since they failed to punish Shekhem, the son of their ruler. Nahmanides takes strong exception to the notion that they were liable for passive activity (and to the idea that the townspeople were capable of punishing Shekhem) and limits capital punishment for this precept to active violations, e.g., a judge taking bribes and perverting justice.
 18. Commentary to Genesis 34:13. There is some debate among the *Aharonim* as to whether these laws are the same as those found in *Hoshen Mishpat*, or simply that there must be a full system of civil law, *nimmusim*. See *Teshuvat ha-Rema* #10 and the *Netziv* in *Ha-Emek She’alah*, *She’ilta* #2.
 19. *Teshuvot ha-Rema* #10.
 20. *Netziv*, *ha-Emek She’alah*, *She’ilta* #2.
 21. *Ibid.* However, the *Rema* himself ultimately rejects this approach.
 22. *Ran*, *Nedarim* 28a, s.v. *be-mokhes*, *ha-omed me-elav*.
 23. In some sense, one might argue that this is indeed the current reality. The reason that the Serbs ultimately failed in their ethnic cleansing campaign was that the international community was able (and willing) to use force to prevent it. There is no country, however, that would be capable of stopping China’s behavior in Tibet (at least for a price that such a country would be willing to pay), and hence that has, *de facto*, continued to happen.
 24. R. Henkin adopts a broader approach to this opinion of the *Ran* and posits that the *Ran* means that since the king provides many useful services of which they partake (allowing them to dwell there is just one), the inhabitants are, by exchange, bound by his laws. In the case of international law, this rationale would, for the most part be absent and, hence, *dina de-malkhuta* once again could not serve as its basis.
 25. *Bava Batra* 54b, s.v. *ve-ha-amar Shemuel dina de-malkhuta dina*.

26. The only place in the world that would, in the halakhic system, naturally lend itself to such clear demarcation is the Land of Israel by virtue of *kedushat Eretz Yisrael*, although it is not obvious that the sanctity of the land itself should have an impact on law that is civil, not ritual, in nature.
27. *Amud ha-Yemini*, pp. 196. See also pp. 188–9. The argument of the world as one large subdivided country is my formulation; R. Yisraeli does not explain his extrapolation.
28. R. Yisraeli implies here that this would be the case only if, in fact, the law was observed. A treaty that was signed but not actually implemented would not make war illegal.
29. R. Shlomo Z. Auerbach, *Ma'adanei Eretz*, 20:3. See Shilo, *Dina de-Malkhuta* (Defus Akademi, 1975) 83–4.
30. This type of an argument might have bearing on local environmental issues that have a global impact. This is something for consideration in a discussion about the Kyoto protocols.
31. This is the obvious inference from the Talmud's example of a non-binding tax being *mokhes she-ein lo kitzvah*. For a full collection of the sources, see Shilo, *Dina de-Malkhuta*, pp. 109–14.
32. This point is obviously not merely a theoretical one, but very relevant today, both in the context of Israel's treatment in the international community and in the context of more powerful countries violating international law (e.g., China's behavior in Tibet) and not being censured or certainly punished. While one might argue that enforceability does not indicate that the law is not regarded as law but that the law simply cannot be enforced, it is difficult to understand why, in the context of censure, the international community should remain essentially silent in some cases while extremely vocal in others if the law is anything but the law of the jungle.
 In this context, there is a famous passage in the *Teshuvot* of the *Maharik* (#194) cited by the *Rema* (*Hoshen Mishpat* 369) that a tax only on the Jews is valid since the king's treatment of all his Jewish citizens is consistent. In the modern context, where discrimination among groups based on ethnicity, religion or gender are ostensibly prohibited by international law, the *Maharik's* approach would not be acceptable.
33. Shilo, *Dina de-Malkhuta*, 99–109.
34. See the views of R. Herzog and R. Uziel cited in Shilo, *ibid.*, 107.
35. See Genesis 21:22–32, 26:26–33 and 31:44, 53 where treaties are accompanied by oaths. No oath is referred to in either the *berit bein ha-betarim* (Gen. 15:7–21) or in the *berit* of manumission of Jeremiah (Jer. 34:8–22). The one obvious distinction between the two scenarios is that those that involve two human parties require an oath, whereas those between God and man do not. This may reflect two different kinds of *berit*: covenants vs. treaties. This distinction, however, does not hold in the *berit* recorded at the end of Deuteronomy (29:11) where it is stated “that thou shouldst enter into the covenant of the Lord your God – and into His oath.” (Note that the *berit* at Sinai involved no oath).
36. The *Rishonim* offer a number of suggestions as to why this was so. *Tosafot* (*ibid.*,

- s.v. *keivan*) suggests that R. Yehudah believed the oath must have been binding; had it not, there would have been no *hillul Hashem* in its abrogation, and the Jews would have abrogated it. This does not explain substantively why it was binding, but rather why R. Yehudah felt compelled to see the oath in the biblical account as binding. *Rashba* (*ibid.*, s.v. *ve-Rabbanan*) quotes in the name of the *Tosafot* that, in fact, even R. Yehudah agrees that the Gibonite oath itself was not binding. However, he assumed that if a “*neder she-hudar ba-rabbim*” could be annulled, there would have been no *hillul Hashem* in abrogating the treaty and hence, from the fact that they refused to abrogate the treaty (with the emphasis on “since the chieftains of the community *had sworn to them*”), it is clear that such a vow cannot ordinarily be abrogated. Finally, *Ritva* (*ibid.*) suggests an answer on highly technical grounds: he posits that even though the Gibonites presented themselves as strangers initially, no explicit stipulation was included in the oath, rendering it what we term “*devarim she-ba-lev*,” “unspoken stipulations,” which are not valid in an agreement.
37. The discussion of this matter would revolve around the question of a vow taken “*al da'at aherim*,” i.e. contingent upon or subservient to the interests of others. In the case of a treaty specifically, the issue would relate to the concept of “*neder she-hudar al da'at rabbim*,” a vow undertaken with the consent and understanding of a larger population. For more on this topic, see *Gittin* 36a and *Yoreh De'ah* 228:21.
 38. *Shevu'ot* 12b in the *Rif*.
 39. *Ibid.* 3:26.
 40. *Orah Hayyim* 485:1, *Yoreh De'ah* 236:5. The *Ba'al ha-Ma'or* differs strongly with the position of the *Rif*, arguing that the *sugya* in the Bavli in *Shevu'ot* 24a disagrees with the Yerushalmi and hence, following the normal rules of *pesak*, the Yerushalmi should be disregarded. See the responses of Nahmanides in his *Milkhemet Hashem* and the *Ran* in his commentary on the *Rif*. The *Ran*'s qualification of the Yerushalmi (to harmonize it with the Bavli) is adopted by the *Rema* in *Yoreh De'ah*.
 41. *Yoreh De'ah*, *ibid.*
 42. *Ibid.* 236:5, note 12. The *Shakh* as well comments that the *Rema*'s distinction between positive and negative commandments is imprecise; it is unclear whether he believes that the *Rema* disagrees, or simply used imprecise language for the purposes of brevity.
 43. I assume this with respect to implicit conditions, which would fall under the rubric of *devarim she-be-libbo u-be-lev kol adam*. (See *Tosafot Kiddushin* 49b s.v. *devarim she-ba-lev*).
 44. For a collection of these views, see R. Shlomo Avineri, “*Be-Inyan she-Lo Ya'alu ba-Homah*,” *No'am* 20 (5738).