CHAPTER 19

PUBLIC AND PRIVATE INTERNATIONAL LAW FROM THE PERSPECTIVE OF JEWISH LAW

MICHAEL J. BROYDE

Introduction

Before this article undertakes a systemic analysis of the incorporation of international law into Jewish law, it needs to put forward some global reservations, stemming from the Jewish experience (with emphasis on the past as well as the present) as understood by this writer. Despite wonderful contemporary exceptions such as the United States[1] (and Canada), the Jewish encounter with secular law has been routinely harsh, leading one to question any untempered optimism in an expansive system of world law.[2] International law did not serve as a serious obstacle to the Holocaust in Europe sixty years ago, and even the most casual observer of international law senses that, within the world community, Israel has been a victim of vast discrimination over the last thirty years.

One can suggest that the glaring potential problem of expanded international law is that it might end up being merely another version of legal positivism and

1 For an explanation of why the American experience to date has been unmitigatedly positive, see John Witte, Jr., *Religion and the American Constitutional Experiment* (Boulder, CO: Westview Press, 2005), 143–85.

2 For an example of changes to Jewish law arising from its encounter with the just American system, see Michael J. Broyde, "Informing on Others for Violating American Law: A Jewish Law View," *Journal of Halacha and Contemporary Society* 41 (2002): 5–49.

> peace with them and he signed a treaty with them which was sworn on [ratified by] the presidents of the tribes. And it was at the end of three days after the treaty was signed that [the Jewish nation] heard that [the Gibeonites] were neighbors and lived nearby. The people of Israel traveled and came to their cities on the third day. . . . And the people of Israel did not attack them since the presidents of the tribes had ratified [the treaty]—in the name of God, the God of Israel. The nation [of Israel] complained to the presidents of the tribes. The presidents replied, "We swore [not to attack them] by the name of the God of Israel and thus we cannot touch them."[7]

Though the treaty was entered into under fraudulent pretexts, the Jewish people nonetheless maintained that the treaty was morally binding on them. Indeed, Maimonides (Rambam, Egypt, 1135–1204), in his *Mishneh Torah*, basing himself almost exclusively on this incident in the Bible, codifies the central rule of treaties as follows: "It is prohibited to breach treaties. . . ."[8]

R. David b. Solomon ibn Abi Zimra (Radbaz, Egypt, 1479–1573), in his commentary on Rambam's *Mishneh Torah*, explains that "this is learned from the incident of the *Giv'onim* [the Gibeonites], since breaking one's treaties is a profanation of God's name."[9] According to this rationale, the reason why the Jewish nation felt compelled to honor its treaty with the *Giv'onim*—a treaty that in the very least was entered into under false pretenses—was that others would not have comprehended the entirety of the circumstances under which the treaty was signed, and they would have interpreted the abrogation of the treaty as a sign of moral laxity on the part of the Jewish people. One could argue based on this rationale that, in circumstances when the breach of a treaty would be considered reasonable by others, it would be permissible to abrogate it.

R. Levi b. Gershom (Ralbag, France, 1288–1344) understands the nature of the obligation to observe treaties differently. He claims that the treaty with the *Giv'onim* had to be honored because the Jewish nation "swore" (to God) to observe its obligation, and the nations of the world would have otherwise thought that the Jewish nation does not believe in a God and thus does not take its promises seriously (collectively and individually).[10]

R. David Kimhi (Radak, France, 1160?–1235?) advances an even more radical understanding of the nature of this obligation. Among the possible reasons he suggests to explain why the treaty was honored—even though it was in fact void, as it was entered into based solely on the fraudulent assurances of the *Giv'onim*—is because others would not be aware that the treaty was in fact void and would (incorrectly) identify the Jewish nation as the breaker of the treaty. This fear, that the Jewish nation would be wrongly identified as a treaty breaker, he states, is enough to require that the Jewish nation keep all treaties duly entered into.[11] Views

7 Joshua 9:3–19.

8 Rambam, *Mishneh Torah*, *Melakhim* 6:3.

9 Radbaz, ad loc. Such can also be inferred from Rambam's own comments in *Melakhim* 6:5.

10 Ralbag to Joshua 9:15.

11 Radak to Joshua 9:7. This theory would have relevance to a duly entered into treaty that was breached by one side in a nonpublic manner and that the other side now wishes to abandon based on the private breach of the other side. Radak would state that this is not allowed because most people would think that the second breaker is actually initiating the breach and is not taking the treaty seriously.

similar to each of these three views can be found among many other commentators and decisors.[12]

Each of these theories—whatever the precise parameters of the obligation to honor treaties is based upon—presupposes that treaties are basically binding according to Jewish law.[13] It is only in the case of a visibly obvious breach of the treaty by one party that the second party may decline to honor it. Thus, Halakhah accepts that, when a war is over, the peace that is agreed to is binding. Indeed, even in a situation where there is some unnoticed fraud in its enactment or ratification, such a treaty is still in force.

This broad approach to the binding nature of treaties is fully consistent with the general halakhic conceptualization of universal law for non-Jews (the seven laws of Noah).[14] Jewish law recognizes seven basic frameworks of universal commandments as part of a universal law code.[15] The final commandment is the obligation to create *dinim*—law enforcement or a system of justice. Two different interpretations of this obligation are found among the Rishonim. Rambam rules that the obligation to create laws requires only that the enumerated universal laws be enforced in practice, and that society need not create a more general universal law (although, presumably, it may). He states:

> How are all obligated to create laws? They must create courts and appoint judges in every province to enforce these six commandments . . . for this reason the inhabitants of Shechem [the city] were liable to be killed[16] since Shechem [the person] stole[17] [Dinah], and the inhabitants saw and knew this and did nothing.[18]

According to Rambam, every society bears an obligation to create a system of justice and enforce the first six universal precepts of law that Halakhah believes to be binding upon non-Jews.

12 Compare *Tosafot* (medieval Talmudic glosses, France and Germany, twelfth–fourteenth centuries) to *Gittin* 46a, s.v. "*kinvan*," with Rashba, ad loc., s.v. "*ve-rabbanan*," and R. Yom Tov b. Abraham Ishbili (Ritba, Spain, c. 1250–1330) ad loc., each of whom struggles to resolve certain crucial details. However, each assumes that valid treaties are binding.

It is worth noting that, beyond the short codification of this topic found in Rambam and the occasional explanations of commentators on the Bible, very little has been written on this topic. Thus, for example, the Index (*mafteah*) to Rambam's *Mishneh Torah* found in the Frankel edition shows not a single discussion of this topic among the Aharonim. So, too, R. Yehudah Gershoni's encyclopedic discussion of *Hilkhot Melakhim*, entitled *Mishpat ha-Melukhah* (New York: Safrograph Co., 1949), has not a single reference to this Halakhah.

13 This is also the unstated assumption of BT *Gittin* 45b–46a, which seeks to explain why treaties made in error might still be binding.

14 For more on this, see R. Aharon Lichtenstein, *The Seven Laws of Noah* (2nd ed., New York: Rabbi Jacob Joseph School Press, 1986).

15 The Talmud (BT *Sanhedrin* 56a) recounts seven categories of prohibition: idol worship, taking God's name in vain, murder, prohibited sexual activity, theft, eating flesh from a living animal, and the obligation to enforce laws. As is obvious from this list, these seven commandments are generalities that contain within them many specifications—thus, for example, the single categorical prohibition of sexual promiscuity includes both adultery and the various forms of incest. According to R. Samuel b. Hophni (Babylonia, d. 1013), 30 specific commandments are included; see generally appendix to *Entsiklopedyah Talmudit* 3: 394–96 and supra, note 14.

16 See Genesis 34.

17 As to why Rambam uses the word *gazal* (stole) to describe abduction, see BT *Sanhedrin* 55a and *Hatam Sofer*, *Yoreh De'ah* 19.

18 Rambam, op. cit., *Melakhim* 9:14.

Nahmanides (Ramban, Spain, 1194–1270), argues with this formulation and understands the obligations of *dinim* to be much broader. It encompasses not only the obligations of society to enforce particular regulations of the other six Noahide *mitsvot*, but it also obligates society to create general rules of law governing such cases as fraud, overcharging, repayment of debts, and the like.[19] Within the opinion of Ramban there is a secondary dispute as to what substantive laws Noahides are supposed to adopt. R. Moses b. Israel Isserles (Rema, Poland, 1525/30–1572), writing in a responsum, states that, according to Ramban, in those areas of *dinim* where non-Jews are supposed to create laws, they are obligated to incorporate Jewish law into Noahide law unless it is clear contextually that it is inappropriate.[20] Most authorities reject this interpretation and accept either Rambam's ruling or that according to Ramban those rules created under the rubric of *dinim* need only be generally fair, and need not be identical to Jewish law.[21] This author cannot find even a single Rishon who accepts the ruling of Rema, and one can find many who explicitly disagree.[22]

Rules of War as a Model

World law would, in theory, be a fulfillment of this obligation to create *dinim* according to most Rishonim, both in the view of Rambam as well as most understandings of Ramban. It is clear that Jewish law could well imagine the creation of world law in the field of public international law, grounded in reciprocal treaties, and mandated by society as a fulfillment of the obligation to create an ordered and just society. Treaties to impose international law—if properly entered into and enforced by the many nations of the world—would be fully valid in Jewish law. Halakhah might even smile on a proposal to universalize such justice, if it were properly done.

19 Ramban to Genesis 34:14.

20 *Responsa Rema* 10. His ruling is also accepted by *Hatam Sofer*, *Hoshen Mishpat* 91 (as well as *Likkutim* 14) and R. Jacob Lorbeerbaum of Lissa (Poland, c. 1760–1832), *Nahalat Ya'akov* (*Teshuvot*) 2:3.

21 See R. Isaac Elhanan Spektor (Lithuania, 1817–1896), *Nahal Yitshak*, *Hoshen Mishpat* 91; R. Avraham Yeshayahu Karelitz (Israel, 1878–1953), *Hazon Ish* to *Hilkhot Melakhim* 10:10 and *Bava Kamma* 10:3; R. Isser Zalman Meltzer (Lithuania and Israel, 1870–1953), *Even ha-Azel*, *Hovel u-Mazzik* 8:5; R. Jehiel Michal Epstein (Belarus, 1829–1908), *Arukh ha-Shulhan he-Atid*, *Melakhim* 79:15; R. Naphtali Tsevi Judah Berlin (Lithuania, 1817–1893), *Ha'amek She'eilah* 2:3; R. Abraham Isaac Kook (Lithuania and British Palestine, 1865–1935), *Bts Hadar* 38, 184; R. Tsevi Pesah Frank (Israel, 1873–1960), *Har Tsevi*, *Orah Hayyim* vol. II, *Kunteres Millei di-Berakhot* 2:1; R. Ovadiah Yosef (Israel, contemporary), *Yehavveh Da'at* 4:65; R. Isaac Jacob Weiss (Hungary, England and Israel, 1902–1989), *Minhat Yitshak* 4:52:3. For a more complete analysis of this issue, see Nahum Rakover, "Jewish Law and the Noahide Obligation to Preserve Social Order," *Cardozo Law Review* 12 (1991): 1073, and appendices I and II: 1,098–118.

22 Most authorities do not accept Ramban's opinion; see, for example, Rambam, op. cit., *Melakhim* 10:10; *Responsa Ritba* 14 (quoted in *Beit Yosef*, *Hoshen Mishpat* 66:18); *Tosafot* to *Eruvin* 62a, s.v. "*ben Noah*." The comments of R. Joseph Albo (Spain, fifteenth century) in *Sefer ha-Ikkarim* 1:25 are also worth citing: "One finds that although Torah law and Noahide law differ in the details, the principles used are the same, since they derive from the same source. Moreover, the two systems exist concurrently: while Jews have Torah law, the other peoples abide by the Noahide code."

One model of integrating international law within Halakhah in this way already exists. Most contemporary halakhic decisors rule that international law, rather than Halakhah, governs the rules of war. Although some aver that Halakhah demands a stricter standard, placing more restrictions on the conduct of the Jewish army during war, R. Shaul Yisraeli (Israel, contemporary) demonstrates that the basic framework for the Jewish laws governing war is not found in Halakhah, but instead in secular international law.[23] Understanding why this is so requires a brief foray into the legal theory underlying secular law's role in Halakhah, premised on some basic theological and eschatological assertions.

The Jewish legal tradition wishes neither to proselytize to and convert others nor to be proselytized to and converted. In the grand clash of religious faiths, Judaism desires to be left alone, and to focus on in-reach, the process by which Jews make Jews into better Jews. It does recognize some limited ability to accept proselytes, and thus has a complex mechanism for joining the Jewish faith. But rather than encouraging, Halakhah specifically discourages conversion, and, inversely, there is no right of exit in the Jewish tradition.[24] Jewish law addresses itself predominantly to those born Jewish; its concern with Gentiles is relatively insignificant. Halakhah thus contains parallel, though distinctively sized, tracks of law: a fully fleshed-out system of Jewish law, to constrain and regulate the conduct of Jews; and a skeletal outline of six absolute Noahide rules, with a seventh category, *dinim*, under which rubric non-Jews are to create whatever system of law seems most appropriate to them. This narrow focus of Halakhah is neither universalistic nor particularistic. It does not maintain that only Jews can enter heaven; both Jews and Gentiles can. It does not maintain that Jewish law is binding on all: Jewish law binds Jews; Noahide law binds Gentiles. It does not maintain that all must acknowledge the "Jewish" God; it rather recognizes that monotheism need not be accompanied by recognition of the special role of the Jewish people.[25]

Jewish tradition maintains that even in messianic times there will *and should be* Gentiles—people who are not members of the Jewish faith.[26] The existence of those who are not Jewish is not merely a concession to facts on the ground, but part of the Jewish ideal, wherein all—Jew and Gentile alike—worship the single God differently and distinctly, each in their own mode of worship. Indeed, the Talmud insists that in messianic times conversion into Judaism will not exist: Jews and Gentiles will peacefully coexist.[27]

Several fundamental insights derive from this formulation of the scope of the Jewish tradition. The focus in this context will be on the main topic: the role of

23 R. Shaul Yisraeli, "Military activities of national defense," first published in *Ha-Torah ve-ha-Medinah* 5/6 (19531954): 71–113; reprinted in his *Amud ha-Yemini* (rev. ed., Jerusalem, 1991) as ch. 16., 168–205 (Hebrew).

24 See Michael J. Broyde, "Proselytism and Jewish Law: Inreach, Outreach, and the Jewish Tradition," in John Witte, Jr. and Richard C. Martins (eds.), *Sharing the Book: Religious Perspectives on the Rights and Wrongs of Proselytism* (Mayrknoll, NY: Orbis, 1999), 45–60.

25 Cf., generally, Rambam, op. cit., *Melakhim*, ch. 9 and 10.

26 Ibid., 12:1.

27 BT *Yevamot* 24b.

foreign law, particularly insofar as it regulates war, in the Jewish tradition. Precisely because Jewish tradition does not insist that it be the exclusive source of law governing all of the world's inhabitants, Jewish law has within it doctrines of comity—substantive recognition of the inherent validity of legal rules and systems besides Jewish law—that are encapsulated in the interrelated group of doctrines of *dina de-malkhuta dina*,[28] *dinim*,[29] and *din melekh*.[30,31] In fact, many authorities find some connection between the obligation of Jews to obey *dinim* and the requirement to obey the secular law.[32]

As a direct corollary of not thinking that all people ought to be Jewish, Halakhah does not think that all people ought to obey Jewish law. The rubrics of *dina de-malkhuta dina*, *din melekh*, and *dinim* say to adherents of Halakhah that there will be times and places (almost always outside of ritual law) where Jewish law mandates that Jews obey a legal code besides Jewish law, and that, in certain situations, it can even supplant native Jewish law. The reason these doctrines are so strong in Jewish tradition is obvious: Because we do not think, as a matter of theology, that all people ought to be Jewish, we do not think that all people ought to obey Jewish law. Other legal systems must then be valid, too, and we are called upon to respect and obey these legal systems when they correctly operate in their spheres.

Furthermore, and more to the point here, sometimes those other legal systems will regulate Jews and their conduct. For example, Jewish law maintains that secular courts and secular laws are the proper legal framework for resolving disputes between Jews and Gentiles,[33] and secular criminal law is the proper framework for punishing Jewish or Gentile criminals in the general society.[34] In yet dozens of other such examples Halakhah comfortably and ideally tells its adherents that using secular law as the foundation for one's interactions with the general community is proper.

Of course, ritual law can almost never be affected by these doctrines,[35] and the application of the rules of *dina de-malkhuta dina*, *din melekh*, and *dinim* to cases

28 See infra, The Obligation to Obey the Law of the Land and World Law, section D.

29 See supra, Public International Law as Incorporated into Jewish law.

30 See Rambam, op. cit., *Gezelah va-Avedah*, ch. 5; *Shulhan Arukh*, *Hoshen Mishpat* 225, 369.

31 *Minhag ha-soharim* is a distant cousin of these three doctrines and deals with laws as practiced, a related but different concept. Moreover, *minhag ha-soharim* is essentially contractual in nature, while these three are deeply structural.

32 See, for example, Rashi to *Gittin* 9b. R. Meltzer, *Even ha-Azel*, *Nizkei Mamon* 8:5 freely mixes as near synonyms the terms *dina de-malkhuta dina*, *din melekh*, and *benei Noah metsuvvim al ha-dinim* (Noahides are obligated in *dinim*) in a discussion about why a Jew must return property lost by another when such is required by secular law and not Halakhah.

33 *Shulhan Arukh*, op. cit., 26.

34 Michael J. Broyde, *The Pursuit of Justice and Jewish Law: Halakhic Perspectives on the Legal Profession*, (2nd ed., New York: Yashar Books, 2007), 122–24.

35 One of the very few exceptions is in cases where Jewish law has a number of permissible rituals and one of these secular rubrics seek to curtail one of those options. Some authorities will recognize that as a valid application of *dina de-malkhuta dina* and others will not. Consider for example the question of whether Israeli law can preclude *yibbum* for a Sephardic man living in Israel and insist he only perform *halitsah*. Numerous authorities accept that the state may do so under the rubric of *dina de-malkhuta dina*; R. Ovadiah Yosef (Israel, contemporary) strongly disagrees. For more on this issue, see Elimelech Westreich, "Levirate Marriage in the State of Israel: Ethnic Encounter and the Challenge of a Jewish State," *Israel Law Review* 37, 2–3 (2003–2004): 426–99.

where all parties are Jewish is complex and much more limited.[36] But thinking structurally about Jewish law leads to the obvious conclusion that Jewish law assumes valid legal systems exist independent of Jewish law and that sometimes Jews ought to participate in such legal systems. There might also be cases when the secular legal system is valid as a matter of Jewish law, but still the Talmudic rabbis insisted that Jews ought not participate in the system.[37] More generally, Jewish law is acutely aware of the content of the secular law in any given environment and constantly considers the relationship between Jewish law and secular law.[38]

Our interest is in its application to international law, particularly the laws of war. There is no obvious reason why Halakhah would limit the application of *dina de-malkhuta dina*, *din melekh*, and *dinim* to national, rather than international, law, assuming the international legal system to be both just and impartial. War, in fact, seems almost a perfect case where Halakhah would recognize—assuming war is a legitimate activity[39]—that these legal frameworks would provide the basis for such, as in any activity outside of ritual law, *dina de-malkhuta dina*, *din melekh*, and *dinim* are the touchstones for interactions with the secular world.

Indeed, only a minority of halakhic authorities articulate views wherein the rules governing war derive specifically from Jewish law. R. Elazar Menahem Man Shach (Israel, 1898–2001) is of the view that there are no unique rules of how to fight a war; war is simply the general rules of self-defense writ large.[40] R. Shlomo Goren (Israel, 1917–1994) contends that, though they are covered by layers of dust from generations of disuse, Halakhah in fact does have indigenous rules for waging war that are latent and must be fleshed out.[41] Nevertheless, the vast majority of contemporary authorities agree with R. Shaul Yisraeli that Halakhah has no unique rules of war and that the law of the land determines these matters. Like in many other areas of Halakhah, the rules of war, too, are governed by *dina de-malkhuta dina* writ large.

This majority view is predicated on the famous comments of R. Naphtali Tsevi Judah Berlin (Lithuania, 1817–1893) in his comments in *Ha'amek Davar* regarding Genesis 9:5.[42] Commenting on the verse prohibiting murder to Noahides, R. Berlin writes that a person is only punished for spilling blood "at a time when it is otherwise appropriate to act with brotherhood. But this is not the case during war, when it is a

36 See infra, The Obligation to Obey the Law of the Land and World Law, section D, 12.

37 Thus in the view of R. Feinstein on the prohibition of informing a non-Jewish government of a fellow Jew's violation of the secular law, while the non-Jewish authorities may arrest Jews, Jews are forbidden to assist in the capture or prosecution of nonviolent offenders. See Michael J. Broyde, "Informing on Others," supra, note 2.

38 Such reciprocity would seem to be the very basis of much of Jewish law's exclusionary doctrines in commercial matters. See Michael J. Broyde and Michael Hecht, "The Gentile and Returning Lost Property According to Jewish Law: A Theory of Reciprocity," *Jewish Law Annual* 8 (2000): 31–45.

39 See generally Michael J. Broyde, "Military Ethics in Jewish Law," *Jewish Law Association Studies* 16 (2004): 1–36.

40 R. Elazar Menahem Man Shach, *Be-Zot Ani Boteah* (Benei Berak: Talmidei Maran Shelita, 1969), 10–35.

41 R. Shlomo Goren, "Combat Morality and the Halakhah," *Crossroads* 1 (1987): 211–31; *Responsa Meshiv Milhamah* (3 volumes).

42 See *Tosafot* to *Shevu'ot* 35b, s.v. "*katla had*;" R. Abraham Dov Ber Kahana-Shapiro (Kovno, 1871–1943), *Devar Avraham* 1:11 and *Zera Avraham* 24.

time to hate. Then it is a time to kill and there is no punishment whatsoever for so doing, because this is the way of the world." War has, by its very nature, an element of *hora'at sha'ah* (temporary suspension of law), in which the basic elements of so-called regular Jewish law are suspended. Once killing becomes permitted as a matter of Jewish law, much of the hierarchical values of Jewish law seem to be suspended as well.

Thus, any treaties into which the Jewish state enters fill this legal void and are halakhically binding. So Israel, as a signatory to the Geneva Conventions, for instance, is bound to follow all the dictates thereof. But, to take a contemporary example, there is no doubt that the decision by the government of Israel to ignore the advisory opinion of the International Court of Justice (ICJ) concerning the legality of the separation fence in the West Bank was halakhically permitted. The treaty obligation of Israel to the ICJ requires that Israel only obey decisions of the court in those situations where Israel agrees (at the outset) to accept the judgment of the ICJ on the particular matter.[43] In this case, Israel declined and made no appearance before the International Court of Justice, thus rendering the ICJ opinion without any basis in Halakhah to compel Israel's compliance; indeed, the ICJ recognized Israel's right as a matter of international law to decline to follow this opinion by itself noting that the opinion was advisory.[44] Treaties are limited to their agreed-upon provisions and no more.

Private International Law (*Lex Mercatoria*): Common Commercial Custom

Any analysis of international law through the eyes of Halakhah could not stop at treaties, as treaties would seem to be limited to areas of public international law, where the law is imposed on nations by agreements to which they mutually consent. Most modern proposals go much further than that, in that world law—the expansive term used for international law—aims to bind individuals as well as nations. Jewish law has two distinctly different mechanisms for incorporating private international laws and norms into Jewish law. The first is *minhag ha-soharim*, common commercial custom (lex mercatoria, in Latin), and its application to world law is quite crucial.

Halakhah provides that: (a) any condition that is agreed upon with respect to monetary matters is valid under Jewish law;[45] and (b) customs established among merchants acquire Jewish law validity,[46] provided that the practices stipulated or

43 See *Written Statement of the Government of Israel on Jurisdiction and Propriety* (with cover letter by ambassador and legal advisor Alan Baker) (30 January 2004), at 99–105, available at: www.icj-cij.org.

44 See "*Legal Consequences of the Construction of a Wall . . .*" *(Advisory Opinion)* 2004 I.C.J. 4 (9 July) at 4, noting that this is an advisory opinion, available at: www.icj-cij.org.

45 See, generally, Menachem Elon (Israel, contemporary), *The Principles of Jewish Law* (Jerusalem: Keter, 1973) at columns 880–987.

46 Ibid.

commonly undertaken are not otherwise prohibited by Jewish law.[47] These two principles are arguably interrelated; commercial customs are sometimes said to be binding because business people implicitly agree to abide by them.

The Mishnah pronounces the validity of commercial customs. It states:

> What is the rule concerning one who hires workers and orders them to arrive at work early or to stay late? In a location where the custom is to neither come early nor stay late, the employer is not allowed to compel them [to do so]. . . . All such terms are governed by local custom.[48]

The *Shulhan Arukh*, written by R. Joseph Caro (Ottoman Palestine, 1488–1575), makes it clear that common commercial practices override many default halakhic rules that would otherwise govern a transaction.[49] Moreover, these customs are valid even if the majority of the business people establishing them are not Jewish. In a related responsum, R. Moses Feinstein (New York, 1895–1986) explains:

> It is clear that these rules which depend on custom . . . need not be customs . . . established by Torah scholars or even by Jews. Even if these customs were established by non-Jews, if the non-Jews are a majority of the inhabitants of the city, Jewish law incorporates the custom. It is as if the parties conditioned their agreement in accordance with the custom of the city.[50]

In addition, many authorities rule that such customs are halakhically valid even if they were established because the particular conduct in question was required by secular law, and there is no reason to assume that these *minhagim* (customs) would not be valid if international law gave rise to such practices.[51]

Nevertheless, authorities debate whether commercial custom can (by introducing nonnative concepts) substantively alter Jewish law or merely create alternative methods and mechanisms that resemble existing Halakhah. For example, there are

47 Jewish law prohibits a debtor from offering a "pound of flesh" as collateral for a loan, and, even if the borrower and the lender and the general community of merchants accept such a practice, Jewish law would nonetheless reject such practice as invalid. See R. Solomon Joseph Zevin (Israel, 1885–1978), "*Mishpat Shailok lefi ha-Halakhah* [Shylock in Jewish Law]," *Le-Or ha-Halakhah: Ba'ayot u-Beirurim* (2nd ed., Tel Aviv: Tsiyoni, 1957), 310–36.

48 BT M. *Bava Metsi'a* 7:1.

49 *Shulhan Arukh*, op. cit., 331:1. See also JT *Bava Metsi'a* 7:1(11b) (statement of R. Hoshaya: "*Ha-minhag mevattel et ha-Halakhah*" [Custom supersedes Halakhah]); *Responsa Maharik* 102 and R. Samuel b. Moses de Medina (Maharashdam, Greece, 1506–1589), *Responsa Maharashdam* 108.

50 *Iggerot Mosheh*, *Hoshen Mishpat* 1:72. See also *Arukh ha-Shulhan*, *Hoshen Mishpat* 73:20. And see, generally, Steven H. Resnicoff, "Bankruptcy: A Viable Jewish Law Option?" *Journal of Halacha and Contemporary Society* 24 (1992): 10–14, who discusses this issue at great length.

51 See, for example, *Iggerot Mosheh*, *Hoshen Mishpat* 1:72; R. Hayyim David Hazan (Israel, contemporary), *Responsa Nediv Lev* 12; R. Eliyahu Hazan (Israel, contemporary), *Nediv Lev*, no. 13; R. Isaac Aaron Ettinger (Lemberg, 1827–1891), *Mahariah ha-Levi* 2:111; R. Abraham Dov Ber Kahana-Shapiro, *Devar Avraham* 1:1; R. Israel Abraham Alter Landau (Hungary, 1886–1942), *Responsa Beit Yisrael* 172; R. Jacob Isaiah Bloi (Israel, b. 1929), *Pithei Hoshen*, *Dinei Halva'ah*, ch. 2, *halakhah* 29, note 82. For example, R. Joseph Iggeret, *Divrei Yosef*, no. 21, states:

> One cannot cast doubt upon the validity of this custom on the basis that it became established through a decree of the King that required people to so act. Since people always act this way, even though they do so only because of the King's decree, we still properly say that everyone who does business without specifying otherwise does business according to the custom.

various conventions as to how to "seal a deal." In some industries, it is said that a handshake is considered binding. These customs are referred to as *sittumta*. It is agreed that *sittumta* can effectuate a *kinyan* (i.e., the transfer of title to property). This is true even though, but for the custom, the particular practice would not otherwise constitute a valid form of transferring title according to Halakhah. Thus, *sittumta* can be used as a substitute for the normal procedures for achieving a *kinyan*. There is a classical controversy among the Rishonim, however, as to whether the mechanism of *sittumta* is capable of effecting actions or outcomes not normally possible according to Halakhah.

R. Asher b. Jehiel (Rosh, Germany and Spain, c. 1250–1327), R. Solomon Luria (Maharshal, Poland, 1510?–1574), and others contend that *sittumta* can accomplish much more than traditional halakhic forms of effecting a deal. For example, even though Halakhah has no native mechanism for transferring ownership of an item that does not now exist in the world (*davar she-lo ba la-olam*), this approach argues that, if the commercial practice of a particular society included a procedure for such transfers, Jewish law in that place would incorporate the practice as valid and enforceable.[52] Again, no basic halakhic form of *kinyan* permits someone to sell *something* that does not yet exist or to sell to *someone* who does not yet exist.[53] Nevertheless, R. Solomon b. Abraham Adret (Rashba, Spain, c. 1235–c. 1310), states:

> Great is the power of the community, which triumphs even without a *kinyan*. . . . Even something which is not yet in existence can be sold to someone who does not yet exist [if community practice so provides].[54]

If Rashba is correct and commercial custom can allow transactions to be accomplished that could not otherwise have been achieved under Jewish law, it is possible that world law would create obligations that, though profoundly not found

52 *Responsa Rosh* 13:20; R. Meir b. Baruch of Rothenberg (Maharam of Rothenburg, Germany, c. 1215–1293), cited in *Mordekhai* to *Shabbat* 472; *Maharshal* 36. See also R. Jacob Moses Lorbeerbaum of Lissa, *Netivot ha-Mishpat, Bei'urim al Shulhan Arukh, Hoshen Mishpat* 201:1, who appears to agree, as well as *Arukh ha-Shulhan, Hoshen Mishpat* 212:3.

53 Jewish law distinguishes between different categories of things "that do not yet exist." Perhaps the case about which there is greatest dispute concerns a person's ability to agree to sell property that exists but that he does not possess. The origin of this controversy is found in a difference of opinion between the Hakhamim (Sages) and R. Meir regarding the case of a man who attempts to take all the legal steps necessary to marry a woman at a time before it is legally permissible for them to be wed (BT *Kiddushin* 63a). "Suppose a man says to a woman, 'Be wedded to me after . . . your husband dies.' . . . [Then the woman's husband dies. The Hakhamim rule:] she is not wed. R. Meir rules: she is wed."

According to Jewish law, formation of a Jewish marriage requires a man to acquire "ownership" interests in his intended and the woman to agree to transfer herself to him. Consequently, the Talmud interprets the debate between the Hakhamim and R. Meir as founded on the basic issue as to whether a person has the power to effectuate a transaction involving property not yet in existence or not yet in his possession. The Talmud applies and extends this argument to the sale of a field that the seller has not yet acquired (BT *Bava Metsi'a* 16b), to "what my trap shall ensnare" (ibid.), to "what I shall inherit" (ibid.), and to "the fruit that will grow on a particular tree in the future" (ibid. 33b). In each of these cases, the Hakhamim rule that the agreement is not legally effective or binding.

54 *Responsa Rashba* 1:546.

in Halakhah, could nevertheless be introduced into Halakhah under the rubric of *minhag ha-soharim*.

Other halakhic authorities, however, maintain that Rashba is wrong in attributing expansive powers to nonnative mechanisms. Rosh and others posit that a customary convention functions only as a *substitute* method by which to transfer title and cannot be more effective under Jewish law than the forms of *kinyan* recognized by the Talmud.[55] According to this view, then, the capacity of Jewish law to assimilate world law precepts and private obligations would be somewhat more limited in that it would only be able to incorporate by convention those that could, as a matter of halakhic theory, be accomplished by halakhic mechanisms.[56]

Consider, for example, common commercial standards for the exchange of financial data through an international computer network. While there is no binding legal standard compelling the particular format for the sharing of such data across international borders, standards for such transmission have been developed by those companies involved in this business and have been accepted as industry-wide international standards.[57] One who enters such an international industry is obligated as a matter of Jewish law to determine the relevant standards and adhere to them, as that is the convention among those engaged in this commerce (or announce in a clear and direct way that the custom is not being adhered to). Indeed, courts in the United States have routinely accepted that such common commercial customs can sometimes even trump written legal standards—a result similar to that accepted by Halakhah.[58]

55 R. Jehiel b. Joseph of Paris (France, d. c. 1265) is cited in *Mordekhai* to *Shabbat* 473 and in *Tashbets (Katan)* 378. A similar approach can be found in *Responsa Radbaz* 1:278 and is accepted as correct by R. Aryeh Leib ha-Kohen Heller of Stry (Poland, 1745?–1813), *Ketsot ha-Hoshen* to *Shulhan Arukh, Hoshen Mishpat* 201:1.

56 For an excellent application of this dispute, see Michael J. Broyde and Steven H. Resnicoff, "The Corporate Paradigm and Jewish Law," *Wayne State Law Journal* 43 (1997): 1,685–818. (This law review article examines corporations from a Jewish law view, and the previous material is derived from that article.)

57 See, for example, John C. Yates, Electronic Commerce and Electronic Data Interchange, *Practising Law Institute* 471 PLI/Pat 233 (1997).

58 Consider, for instance, the case of *Dixon, Irmaos & Cia, Ltda. v. Chase National Bank*, 144 F.2d 759 (2nd Cir. 1944). In that case, an exporter had contracted to sell cotton to an international purchaser. Chase had issued two letters of credit on behalf of the purchaser. The terms of the credit required Chase to honor drafts accompanied by specified documents, including "a full set of bills of lading." The seller shipped the goods and received two original bills of lading for each shipment, but only one of the two sets of bills of lading was presented to Chase by the due date. In lieu of the other set, the exporter's New York representative, another New York bank, gave Chase an indemnity agreement against loss. Chase dishonored the drafts on the grounds that both full sets of bills of lading had not been presented. The plaintiff introduced evidence that New York banks that financed international sales with letters of credit customarily accepted a guaranty in place of a missing document when the letter of credit required a "full set of bills of lading." The court found that Chase was bound by the custom and had failed to follow it in this instance and was liable, even as formal contract law was consistent with Chase's practice. For more on this issue in American law, see Clayton P. Gillette, "Harmony and Stasis in Trade Usages for International Sales," *Va. J. Int'l L.* 707 (1999): 39. In this writer's opinion, the court here is relying on the correct understanding of the Jerusalem Talmud's statement (JT *Bava Metsi'a* 7:1[11b]) in the name of R. Hoshaya, that custom supersedes Halakhah, which, when properly understood, is limited to cases of financial law where the intent of the parties is the primary adjudicative tool in Jewish law (as well as American law and International law).

All agree, however, that private international law[59] can have the status of common commercial custom in any situation in which it is observed normatively, and, in some fields of commerce, such is the case already.

The Obligation to Obey the Law of the Land and World Law

Halakhah has another framework for understanding and relating to other legal systems, and, though it is usually invoked to assess Jewish law's relationship to national or local law, it should be relevant to a discussion of world law as well. The halakhic doctrine *dina de-malkhuta dina* provides that, in certain circumstances and for particular purposes, secular law is legally effective under Jewish law. A survey of the obligation to obey secular law generally is well beyond the scope of this article.[60] However, a brief review of the relevant theories is required to appreciate how the doctrine of the *dina de-malkhuta dina* would impact on the acceptance of world law in the Jewish tradition.

There are at least five principal perspectives explaining why *dina de-malkhuta dina* is a binding doctrine in Jewish law:

1. R. Samuel b. Meir (Rashbam, France, c. 1080–c. 1174) posits that the ruler of a country governs with the consent of the governed, and law is a form of social contract binding on the community because they all agree to a process that creates law, even if they do not agree with the content of the final law.[61]
2. R. Solomon b. Isaac (Rashi, France, 1040–1105) posits that the ability of society to make law is a fulfillment of the Noahide obligation to legislate, whose results are generally binding even on Jews, except in specific cases (such as divorce).[62]

59 Another use of the term "private international law" or "customary international law" is in the enforcement of public international law, but against private individuals who have violated public international law obligations, such as the prohibition against torture. Consider, for example, *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir., 1995) concerning a claim for damages against a particular person for torture committed during the Bosnian-Serbian conflict. From the perspective of Halakhah, these types of private international law claims would nearly always be valid, as the underlying conduct would almost always represent either a violation of Jewish law or Noahide law (as only the most severe of violations is permitted to be presented as a matter of international law).

60 R. Shemuel Shiloh's encyclopedic *Dina de-Malkhuta Dina*, supra, note 8, is an excellent resource for this.

61 Rashbam to *Bava Batra* 54b, s.v. "*ve-ha-amar Shemuel dina de-malkhuta dina*." A similar view is taken by Rambam, op. cit., *Gezelah va-Avedah* 5:18 and many others.

62 Rashi to *Gittin* 9b, s.v. "*kesherin*," "*huts*." See also R. Hayyim Hirschenson (Hoboken, NJ, 1857–1935), *Malki ba-Kodesh* 2:2.

3. R. Jacob b. Meir Tam (Rabbeinu Tam, France, 1100–1171) posits that the obligation to obey secular law is grounded in the ability of secular authority to transfer property through eminent domain (*hefker beit din*).[63] A related theory assumes that secular law has the same general power as Jewish kings[64] or Jewish courts.[65]
4. Maharshal posits that the ordered structure of society requires that law exist, and that it cannot be solely defined by religious faith. "If this is not the case, the nation will not stand and will be destroyed." Communities need law, and without it society will collapse into anarchy.[66]
5. R. Nissim b. Reuben Gerondi (Ran, Spain, 1310?–1375?) posits that the people (perhaps only the Jewish people) reside where they do solely by the grace of the king or government that owns that land. Just like one must obey the wishes of one's host when one visits in another person's home, so too one must obey the wishes of one's host nation when one resides in a country.[67]

Each of these theories gives rise to a particular stance concerning robust private world law. A social contract theory like Rashbam has no natural limits on the rule of law, and world law is binding on individuals in the same way as municipal law—it is not the geography that makes the law, but the acceptance. Similarly, law as a fulfillment of the Noahide obligation of *dinim* has no national boundaries, nor is the theory of secular law as *hefker beit din* of Rabbeinu Tam naturally limited to national, rather than international, law. The same can be said for the functional structuralist approach in Jewish law taken by Maharshal. If the foundation of law is order, then world law is just as binding as national law, which is just as binding as local law. Only those who limit law's binding authority to its coercive authority to expel might limit international law, although if world law becomes an accepted legal institution, it will ultimately acquire the coercive authority to be binding in the Jewish tradition in this theory as well.[68]

63 *Responsa Tosafot* 12; this responsum is sometimes cited in the name of R. Jonah b. Abraham Gerondi (Spain, c. 1200–1263).

64 R. Isaac Caro (uncle of R. Joseph Caro), cited in *Avkat Rokhel* 47 and discussed in R. Shemuel Shiloh, *Dina de-Malkhuta Dina*, pp. 77–79.

65 *Devar Avraham* 1:1.

66 *Yam shel Shelomoh*, *Bava Kamma* 86:14; see also *Yam shel Shlomo*, *Gittin* 81:22.

67 Ran to *Nedarim* 28a, s.v. "*be-mokhes ha-omed me-elav*." Similar to Ran is the view of Maharam of Rothenburg, *defus* Prague 1001. The explicit limitation on *dina de-malkhuta* not applying to a Jewish government is first noted by R. Eliezer b. Samuel of Metz (France, c. 1115–c. 1198), quoted by R. Isaac b. Moses (Germany and France, c. 1180–c. 1250), *Or Zarua*, *Bava Kamma* 447.

68 It is worth noting in writing that one is hard-pressed to find even a single modern halakhic authority who rules that the theory of the Ran is the normative one to be followed, particularly to draw the conclusion that *dina de-malkhuta dina* would not apply in the land or the state of Israel. See R. Ovadia Yosef, *Yehavveh Da'at* 5:64, who demonstrates this. While R. Hershel Schachter (New York, contemporary) notes that the *Hazon Ish* is purported to be of the opinion (unfound in his written work) that, based on the view of Ran, the Israeli government has no right to levy taxes on Jewish residents, R. Schachter goes on to write that this view would have no bearing on other government powers in Israel, such as the ability to mint currency, punish criminals, or set up a general legal system. See R. Hershel Schachter, "'Dina De'malchusa Dina': Secular Law As a Religious Obligation," *Journal of Halacha and Contemporary Society* 1, 1 (1981): 103–32, at note 26.

A more complex conversation among Jewish law authorities concerns the type of legislation that may be implemented through *dina de-malkhuta dina*, be it municipal or world law.

Three theories again predominate.

1. R. Caro rules that secular law is halakhically binding only to the extent that it directly affects the government's financial interests. Thus, secular laws imposing taxes or tolls would be valid under Jewish law,[69] but laws for the general health and safety of society would not.
2. Rema agrees that secular laws directly affecting the government's financial interests are binding, but adds that secular laws that are enacted for the benefit of the people of the community as a whole are also, as a general matter, effective under Jewish law.[70] In this model, all health and safety regulations would also be binding.
3. R. Shabbetai b. Meir ha-Kohen (Lithuania, 1621–1662) disagrees with Rema in one respect. He believes that, even if secular laws are enacted for the benefit of the community, they are not valid under Jewish law if they are specifically contrary to indigenous halakhic precepts.[71] Thus, general health and safety rules would be binding, but—for example—Jewish law has a rule that rooftop railings must be about a meter high,[72] so a secular law setting a lower height would not be accepted as halakhically valid.

There is substantial debate among halakhic authorities as to which approach to follow.[73] Nevertheless, it seems that most modern authorities agree that, at least outside of the State of Israel, Rema's view should be applied, and such is the view of all four of the deans of Halakhah in America in the previous generation: Rabbis Moses Feinstein,[74] Joseph Elijah Henkin (New York, 1880–1973),[75] Joseph B. Soloveitchik (Boston, 1903–1993),[76] and Joel Teitelbaum (New York, 1888–1979).[77] In this view, almost all applications of secular law are valid under

69 *Shulhan Arukh*, op. cit., 369:6, 11.

70 Ibid., 369:11.

71 R. Shabbetai b. Meir ha-Kohen, *Siftei Kohen* (*Shakh*) to *Shulhan Arukh, Hoshen Mishpat* 73:39. Thus, for example, according to *Shakh*, secular law can require that one return lost property in a case that Halakhah permits (but does not mandate that it be returned), but not permit one to keep a lost object that Halakhah requires be returned.

72 *Shulhan Arukh*, op. cit., 427:1.

73 See, for example, R. Yaakov Breish (Zurich, 1895–1976), *Helkat Ya'akov* 3:160 and R. Shemuel Shiloh, *Dina de-Malkhuta Dina*, at pp. 145–60, who list authorities adopting either the approach of *Shakh* or R. Joseph Caro.

74 *Iggerot Mosheh, Hoshen Mishpat* 2:62.

75 *Teshuvot Ivra* 2:176.

76 This is indicated in R. Hershel Shachter, *Nefesh ha-Rav* (Jerusalem: Reshit Yerushalayim, 1994), 267–69, and has been confirmed by many other sources as well.

77 *Responsa Divrei Yoel* 1:147.

Jewish law.[78] Should world law become a legal framework, there is no reason to assume that this same rule would not apply to it—broad doctrines of law would be binding as the law of the land. International law—law of a single sovereign authorized by many nations to create binding law—should be no less binding as a form of *dina de-malkhuta*. This would seem no different than the origins of the federal government in the United States, which derives its authority from a ratified treaty (constitution) of thirteen originally sovereign states. Such a federal authority would seem valid from the view of Halakhah.

Consider, for example, the validity of the rules derived from the North American Free Trade Agreement (NAFTA), ratified by Congress and then signed into law on December 8, 1993. NAFTA sets out rules of economic interaction governing commerce between the United States, Mexico, and Canada, and it directs individual conduct during such commerce (no different from, say, the Uniform Commercial Code).[79] Such a multicountry international agreement—including the provisions depriving American citizens of access to courts of the United States—is a classic example of a situation where Halakhah would classify international law as a valid law of the land, as the United States has decided that certain types of trade shall be governed by international law rather than indigenous American law. The law of the United States may, as a matter of Halakhah, allow or direct its citizens to obey international law.

Of course, just as with respect to commercial custom, there is a question as to precisely what *dina de-malkhuta dina* can accomplish. Some *posekim* clearly rule that, when this doctrine incorporates secular law into Halakhah, the secular law so incorporated can even accomplish things that would have been hitherto impossible under Jewish law.[80]

It is also important to note that the three principal approaches to *dina de-malkhuta dina* described above dealt with the halakhic validity of secular law as

78 See also R. Shemuel Shiloh, *Dina de-Malkhuta Dina*, at 157, who asserts that most halakhic authorities adopt the Rema's view and lists many of these authorities.

A contemporary of his, R. Menasheh Klein (New York, contemporary), in *Mishneh Halakhot* 6:277, questions whether *dina de-malkhuta dina* applies in the United States, and his view would be the same of world law. He states:

> [The applicability of the principle of] *dina de-malkhuta dina* in our times, when there is no king but rather what is called democracy, needs further clarification. As I already explained the position cited in the name of Rivash quoting Rashba, one does not accept *dina de-malkhuta dina* except where the law originates with the king.

Despite R. Klein's views, it is important to note that most authorities have held that *dina de-malkhuta dina* does not apply only to laws issued by a king, as noted by R. Ovadia Yosef in *Yehavveh Da'at* 5:64: "Even in a nation not ruled by a king, but rather by a government chosen by its citizens, the general principle of *dina de-malkhuta dina* applies. . . ." Moreover, a number of preeminent Jewish law authorities have specifically held that *dina de-malkhuta dina* applies within the United States and have not found any problems caused by the democratic form of government. See references to Rabbis Feinstein, Henkin, Soloveitchik, and Teitelbaum above.

79 19 U.S.C. §3311; upheld as constitutional in *Made in the USA Foundation v. U.S.*, 242 F.3d 1300 (11th Cir., 2001).

80 See *Ketsot ha-Hoshen* and *Netivot ha-Mishpat* to *Shulhan Arukh, Hoshen Mishpat* 201:1.

it applies directly to Jews. Jewish law, however, also takes a position as to the validity of secular law in transactions between non-Jews.

As discussed above in the first section, Jewish law provides that non-Jews are bound to observe the seven laws of Noah, referred to as the Noahide Code. In part, the Noahide Code requires non-Jews to establish a system of commercial laws. According to most halakhic authorities, such laws may differ from the rules governing transactions that are only between Jews.[81] Moreover, the majority view is that, in a country governed by non-Jews, the secular law consequences of transactions among non-Jews are valid and can generally be relied upon by Jews.[82] For example, assume that Ahmed and Christopher are not Jewish, and that Ahmed sells Christopher a widget in a transaction that would not be effective under Jewish law but is effective under secular law.[83] Daniel, a Jew, can rely on secular law to establish that Christopher owns the widget and, by purchasing it from him, Daniel becomes its owner under Jewish law. Consequently, it seems reasonable that international law, too, would be a fully effective mechanism between non-Jews and their society, and third-party Jewish participants need not question the efficacy of world law in such contexts.

Even assuming that Halakhah sanctions the application and accepts the results of secular law when applied to Jew-Gentile or Gentile-Gentile transactions, what of transactions between only Jews? Halakhah's response, of course, depends on the nature of the law in question. Broadly, two types of secular laws govern citizens' interactions with one another: civil and criminal. Civil law—like that governing torts, property, contracts, and commerce generally— levels the playing field by creating a consistent framework within which people can interact economically and, inevitably, resolve their disputes impartially. In this broad area, secular law essentially takes the place of contracts, providing default rules. Here, when Jews do business with each other, Halakhah supersedes secular law's default norms and its indigenous laws govern purely Jewish transactions.

But Jewish law often bows to secular law, as in the case of almost all criminal laws. For instance, there is an international convention against having sex with children; Jewish law has no opposition to such conduct after the age of

81 See, for example, *Iggerot Mosheh*, *Hoshen Mishpat* 2:62. See also Michael Broyde, *The Pursuit of Justice in Jewish Law*, 83–99, as well as the discussion of the view of Ramban above at notes 18 to 22.

82 Secular rules enacted pursuant to the Noahide Code *may* be enforceable by a Jewish litigant against another Jewish litigant, but only if the latter has no substantial connection to Jewish law and would not wish to be governed by Jewish law. Thus, R. Moses Sternbuch (Israel, contemporary), in *Teshuvot ve-Hanhagot*, vol. 1, no. 795 (rev. ed.), suggests the possibility that a litigant who does not generally observe Halakhah and who would not adhere to Jewish financial law when it would be to his detriment *may* not be entitled to insist on Jewish law's rules when they would inure to his benefit. In some areas of law, an apostate has the same status as a non-Jew. R. Sternbuch states that it is not clear whether this rule applies to commercial transactions in which it would operate to the apostate's detriment. For more on this, see Yehudah Amihai, "A Gentile who Summons a Jew to *Beit Din*," *Tehumin* 12 (1991): 259–65. Thus, even authorities who would not ordinarily apply *dina de-malkhuta dina* to enforce secular law against religiously observant Jews enforce secular law against nonobservant Jews.

83 For example, the sale might be void or voidable as violating the Jewish law prohibition against price gouging. See, for example, Aaron Levine, *Free Enterprise and Jewish Law* (New York: Ktav, 1980), 99–110.

maturity, defined as twelve or thirteen, for girls and boys respectively.[84] Nonetheless, Halakhah defers to secular law and forbids otherwise permitted behavior, banning Jews from engaging in sex even with Jewish adolescents.

Copyright Law as a Model

Since Johannes Gutenberg's printing of the Bible in the mid-fifteenth century, the question of authors' (and later, with the advent of recording technology, musicians') rights to their creations has plagued publishers and writers, judges and moralists. The question, on its face, is fairly simple: Can one really own, and thus deserve protection from theft of, a particular arrangement of words or formulation of an idea? The first iteration concerned publishers, rather than writers. If any Tom, Dick, or Harry could come along and reprint any work, the original publisher had no opportunity to recoup his significant investment, much less earn any profit, and so would not go to the trouble of typesetting and printing in the first place. There is a dual concern here both for the actual monetary losses that publishers did or would suffer, and for the promotion of new ideas and inducement of intellectual creativity.

States and nations each struggled with this issue for four hundred some odd years, until 1886, when the Berne Convention for the Protection of Literary and Artistic Works was convened in Berne, Switzerland. There, international copyright standards were set, and within two years Belgium, France, Germany, Italy, Luxembourg, Spain, Switzerland, Tunisia, and the United Kingdom had signed a treaty agreeing to abide by them. Currently, the Berne Convention and four subsequent international copyright treaties have 164 signatory nations, each of which agrees to enforce the provisions of international copyright law. It would hardly be an exaggeration to say that these copyright laws govern the entire world.

Halakhic authorities, too, have grappled with copyright issues. Two broad approaches exist to the problem of extending halakhic copyright protection, though Jewish law has no such concept per se. Both are premised on the assumption that such protections exist with Halakhah; they merely explain why and how. In fact, almost no halakhic authority questions that copyright infringement of some sort is prohibited; the question is to what extent and on what basis. In fact, R. Moshe Feinstein rules unequivocally that copying even a Torah tape is prohibited, simply referring to it as a form of theft.[85]

The first approach seeks to use preexisting concepts from other areas of Jewish law, sometimes stretching or modifying them, to provide copyright protections. Within this broad view, authorities put forward four specific rationales:

84 See Rambam, op. cit., *Ishut* 3:11–12 and 4:7.

85 *Iggerot Mosheh*, *Orah Hayyim* 4:40.

1. R. Moses Sofer (Hungary, 1762–1839) posits that infringing on a copyright would be a violation of the laws concerning unfair business practices, *hassagat gevul*.[86] Just as fishermen must not trap fish near another fisherman's net that he has labored to set up, publishers may not sell—and readers may not buy—a book that he has copied, benefiting from the efforts of the first publisher.
2. R. Ezekiel Landau (Czech Republic, 1713–1793) posits that copyright infringement would violate the Talmudic rule that, if one benefits from another while causing a loss, he must pay.[87,88]
3. Rema wrote the first approbation, announcing a ban on publishing or purchasing a copied work and threatening excommunication for whoever did so.[89] This became the most common form of copyright protection, with 3,662 approbations from 1499 to 1850.[90,91]
4. R. Zalman Nehemiah Goldberg (Israel, contemporary) posits that, when a producer sells her work, she withholds the right to copy it.[92] When a purchaser in fact copies the work, he commits theft, for the right to copy does not belong to him; he may not simply do whatever he wishes with this work.

The second approach incorporates wholesale secular law's model and provisions of copyright protections. In 1890, R. Isaac Judah Schmelkes (Poland, 1828–1906) wrote that whether Jewish law explicitly awards rights to a creator is irrelevant. Living in Przemysl, Galicia, the laws of his country—specifically the Austrian Copyright Act of 19 October 1846—clearly provided for copyright protections. Through the doctrine of *dina de-malkhuta dina*, then, Jewish law provides authors with the very same protections, forbidding its adherents from infringing upon those rights.[93,94]

Some modern-day authorities find the *dina de-malkhuta dina* approach problematic on theological and philosophical grounds. In their view, Jewish law is all-encompassing and is in no way deficient. Relegating an area of law—in this instance copyright law—completely to secular law's framework implies that Jewish law is in some way lacking; unable to deal in its own terms with the self-evidently moral and proper rights and concepts of copyright law, Halakhah flees the arena, relying on secular law to fill the gaps it cannot address on its own. This contradicts

86 *Shut Hatam Sofer*, *Hoshen Mishpat* 79.
87 R. Ezekiel Landau, *Noda bi-Yehudah*, *Hoshen Mishpat* 2:24.
88 BT *Bava Kamma* 20a.
89 *Responsa Rema* 10.
90 Encyclopedia Judaica, Vol. 7, 1,454.
91 See, generally, Nahum Rakover, *Zekhut ha-Yotserim ba-Mekorot ha-Yehudiyim* (Copyright in Jewish Law) Jerusalem, 1991 (Hebrew).
92 R. Zalman Nehemiah Goldberg, "Copying a Cassette without the Owner's Permission," *Tehumin* 6 (1985): 185–207 (Hebrew).
93 *Responsa Beit Yitshak*, *Yoreh De'ah*, Vol. 2, no. 75.
94 See also R. Ezra Batzri, *Tehumin* 6 (1985), 181–82.

the view of Jewish law as eternal and living, able to tackle all complex situations that life yields, and significantly diminishes its scope and stature.

Yet this is precisely the function of the interrelated doctrines of *dina de-malkhuta dina*, *dinim*, and *din melekh*. This approach's beauty and elegance lies not only in using one neat, simple rule to extend copyright protections, rather than bending or twisting existing halakhic categories to achieve the predetermined legal goal. These doctrines, in fact, protect Jewish law's integrity and provide it with the tools to continue evolving and interacting with surrounding legal systems as they change along with the times. Halakhah does not forbid one from engaging in all that one *should*—in a moral and even theological sense—avoid; nor does it require that one engage in all positive and beneficial—again, both morally and theologically—activities and actions. It recognizes that Gentiles may set up valid and proper systems of law that are distinct and different. Halakhah therefore contains a framework to interact with these legitimate systems and even to incorporate some of their positive, foreign conceptions.

Substantive Fairness as a Limitation to Obey the Law of the Land in the Area of International Law

One of the basic conditions upon which the obligation to observe secular law (as a function of *dina de-malkhuta dina*) is predicated is the fairness or equality of the secular law in question. As R. Shemuel Shiloh (Israel, contemporary) writes, "There is no dispute among the Sages with regard to the principle that the law of the government must apply equally on all members of the community."[95] There is no doubt that if international law (or portions of it) is ever incorporated into Halakhah through *dina de-malkhuta*, international law—just like national law—will be subject to the test of equality and fairness. Jews specifically, and the Jewish state generally, need not show fidelity to a legal system that codifies injustice.

The halakhic test for determining equality and fairness, however, has been subject to a great deal of analysis and discussion. Even though most Rishonim seem to indicate that full equality is a prerequisite for a valid secular law under *dina de-malkhuta*,[96] R. Joseph b. Solomon Colon (Maharik, Italy, c. 1420–1480)

95 R. Shemuel Shiloh, *Dina de-Malkhuta Dina*, 109.
96 The obligation of fairness in secular law was first noted by R. Joseph b. Meir Ha-Levi ibn Migash (Spain, 1077–1141) to *Bava Batra* 54b, and is seconded by Rambam, op. cit., *Gezelah ve-Avedah* 5:14 and *Or Zarua*, *Bava Kamma* 447. Rabbeinu Tam is also quoted as endorsing this principal (see Rosh, *Nedarim* 3:11). It is quite possible that Rosh himself does not fully accept this principle, as he raises a series of questions about Rabbeinu Tam's prooftext.

lays claim to a startling analysis: A secular law can be considered proper in the eyes of Halakhah even if it treats Jews differently as a group from members of other religions or other citizens, at least as a matter of taxation.[97] Indeed, Rema states that this is the proper understanding of the Halakhah. The *Shulhan Arukh* writes:

> When does taxation become like robbery? . . . When the taxation comes from the king with no limitations and precision, but rather the king takes what he wishes; however, a taxation enacted for a finite amount [is valid].[98]

And Rema adds:

> Even if [the government] directs that the Jews pay more than the non-Jews, nonetheless, this is called a finite amount.[99]

Other halakhic authorities—including the R. Caro himself—simply disagree with Rema and posit that in order for any law to be valid as a form of *dina de-malkhuta dina* it must apply equally to all in a given area, and it may not discriminate based on religion.[100]

Many halakhic authorities, however, are open to distinctions in secular law that seem rational, such as distinctions between citizens and noncitizens,[101] wealthy citizens and the impoverished,[102] regulations of one particular profession and not another,[103] or one geographical region and not another,[104] as well as other distinctions that seem consistent with the best interests of the society or community.

This author would like to suggest the possibility that Rema and Maharik might actually recognize this distinction and only permit distinctions based on religion in the area of *dina de-malkhuta dina* when they are consistent with fair government generally and not merely motivated by anti-Semitism. Consider, for example, a general secular law that prohibits surgical procedures outside a hospital and requires that such procedures be supervised by a physician. This writer does not doubt that such regulations are valid as a matter of *dina de-malkhuta dina* according to Rema, and yet also recognizes that an exception to such a regulation allowing circumcision of Jewish children by an authorized *mohel* (circumciser) would be a valid exception to the general application of *dina*

97 *Responsa Maharik* 195 (194 in other editions).
98 *Shulhan Arukh*, op. cit., 369:6.
99 Ibid.
100 See *Shulhan Arukh*, op. cit., 369:6–9 and *Responsa Radbaz* 3:968. For more on this and a full listing of these authorities, see R. Shemuel Shiloh, *Dina de-Malkhuta Dina*, 112.
101 R. Solomon b. Jehiel Luria (Poland, 1510?–1576), *Hokhmat Shelomoh, Hoshen Mishpat* 369:8.
102 R. Joseph Elijah Henkin, "On the Matter of *Dina de-Malkhuta Dina*," *Ha-Pardes* 31 (1957): 54, 3–5.
103 See the view of R. Jacob Israel, cited in *Beit Yosef, Hoshen Mishpat* 369.
104 R. Abraham Hayyim Rodriguez (Livorno, late seventeenth century), *Responsa Orah la-Tsaddik, Hoshen Mishpat* 1.

de-malkhuta dina.[105] Indeed, there are many other situations in which faiths are provided specific exemptions from general laws due to the unique religious needs of their faith, and Rema should be understood as permitting such faith-specific applications of secular law.[106] Thus, even in situations in which the beneficiary of such an exception is not an adherent of Jewish law, and legal discrimination against Jews seems to occur by denying them exemptions, Jewish law would still recognize the validity of such secular laws, such as one that, for instance, exempted Santeria sacrifice rituals from animal cruelty laws.

R. Joseph Elijah Henkin, one of the first *posekim* to ponder the application of *dina de-malkhuta dina* in a just democracy, noted that the proper formulation of the Halakhah is as follows:

> That which the *posekim* stated, which is that a law that does not treat all equally creates no obligation to obey it under *dina de-malkhuta dina*, their intent is when such a law distinguishes between people and groups because of evil motives, such as when a government decrees against the conduct of the Jewish people, Heaven forbid, or simply generally taxing individuals with no just cause, but with malice of the heart.[107]

This standard ought to be equally applicable in the incorporation of international law into everyday life through *dina de-malkhuta dina*.

A brief conclusion is needed to these four technical matters. Halakhah generally recognizes that international law as enacted by treaties agreed to by nations is a valid form of international law in the Jewish tradition, and it becomes binding on all citizens of those nations. Furthermore, Jewish law recognizes that, even when no formal treaty is enacted, international law could become valid through the doctrine of *dina de-malkhuta dina* being a valid source of law, so long as it is substantively fair. Finally, Halakhah notes that, even when there is no law, either national or international, the rubric of common commercial custom (*minhag ha-soharim*), which is fully binding under Jewish law, can form the foundation for global

105 Indeed, many states in the United States have exactly such an exception. Consider, for example, the following statute in Illinois (*Ill. Rev. Stat.* ch. 38, para. 12–32 [1992]):

> A person commits the offense of ritual mutilation, when he mutilates . . . another person as part of a ceremony, rite, initiation, observance, performance or practice, and the victim did not consent or under such circumstances that the defendant knew or should have known that the victim was unable to render effective consent.
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> The offense ritual mutilation does not include the practice of circumcision or a ceremony, rite, initiation, observance, or performance related thereto.

106 Consider, for example, the use of peyote in American Indian religious practice or animal slaughter in Santeria ritual, both of which have sought exemption from secular law. (See *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872 [1990] and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 [1993].) For other examples and an analysis of this issue in American law, see Eugene Volokh, "A Common-Law Model for Religious Exemptions," *UCLA Law Review* 46 (1999): 1,465.
107 R. Joseph Elijah Henkin, supra, note 102 (validating rent control laws).

commercial interactions. World law thus could be a possibility in Jewish law. However, it would have to be a fair and just legal system.

Conclusion

Even if an expansive world law in both public and private spheres could be incorporated into a Jewish law framework, intemperate faith in and an unbridled pursuit of international law solutions might still be a bad idea. Jewish law recognizes that, even when all of the procedural requirements for law have been met, there are situations and cases where governmental action does not rise to the level of law[108]—because such "laws" violate basic rules of substantive fairness. Authority alone does not in the Jewish tradition create law; law must rest on pillars of justice and fairness as well as basic right and wrong. Though the Rishonim tended to point to arbitrary taxation—a procedural violation of due process—as emblematic of unjust regimes,[109] in fact the pursuit of justice entails a much broader obligation: Before law can be truly valid, there must be *both* procedural and substantive fairness in the legal system. Absent that, the Jewish tradition coined a phrase "the theft of the government," which is definitively not the law,[110] and insisted that no person could bear an obligation to obey unjust regimes.

This author suspects that world law will never meet this dual standard, in that it requires the depoliticization of international law, where the wrongs of the mighty are judged by the same standards as the wrongs of the weak and the powerful are held to the same standards of conduct as the powerless—and where the community of nations arrives at these standards without trampling on the rights, freedoms, and beliefs of its minority members. And, of course, those standards must themselves be just in the deepest sense of that holy word.[111]

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108 See "*Dina de-Malkhuta Dina*," *Entsiklopedyah Talmudit* 7: 295–30.

109 See R. Jacob b. Asher (Spain, 1269–1343), *Tur*, *Hoshen Mishpat* 128; *Responsa Maharashdam*, *Hoshen Mishpat* 135, 389; and R. Elijah b. Hayyim (Maharanah, Greece, 1530?–1610?), *Responsa Mayim Amukim*, vol. 2, no. 95.

110 *Hamsanuta de-malketa*; see *Entsiklopedyah Talmudit*, supra, note 108, especially text accompanying note 24.

111 "*Tsedek, tsedek tirdof*" (Justice, justice shall you pursue), Deuteronomy 16:20.

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