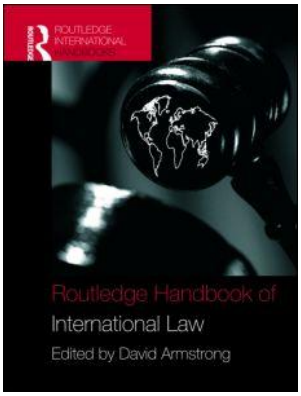

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International Law in the Ancient World

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Section II

Evolution of international law

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International law in the ancient world

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This briefly assesses the historiographic literature about the idea that ancient state systems predicated their relations on the rule of law. It examines ancient practices in relation to diplomatic privileges and immunities, treaty conclusion and observance, and the initiation and limitation of armed conflict. There was a coherent sense among ancient peoples from Near East and Mediterranean traditions that state relations should be conducted in accordance with established norms and values.

An historiographic introduction

This chapter examines the idea of international law in the ancient world. At the outset one must be aware that the entire project might be condemned with the charge of anachronism (Preiser 1984: 128–31). The study of a law of nations in antiquity suffers, in essence, from a double blight. First, there is the perception that *all* law in ancient times was primitive. Ancient law was formalistic, dominated by fictions, had a limited range of legal norms, and was based solely on religious sanction. In short, it lacked the essential characteristics of a modern, rational jurisprudence (Hoebel 1954: 258–86; Vinogradoff 1920: 1: 364). Although this critique has been largely disproved by modern scholarship that has either emphasized new, empirical research, or has adopted an anthropological attitude of moral relativism in legal relations, it remains a potent school of thought (Diamond 1971). If all of this were not enough, there is the second, and as yet largely unquestioned, belief that international law, even today, is a primitive legal order (Dinstein 1985).

The confluence of these two intellectual forces has meant that the study of ancient international law has had, of late, few advocates. Those doing serious scholarship on ancient legal systems have evinced little interest in exploring such an abstract area as legal restraints on interstate relations. The attitude of legal historians towards ancient international law has thus been one of indifference.

Alas, the same cannot be said of contemporary international law publicists writing on the subject of a law of nations in antiquity. Indeed, one can say that the opinion of a majority of modern international lawyers is that ancient states were incapable of observing a law governing their international relations. Consider the views of a few leading publicists. In Lassa Oppenheim's well-respected manual on international law, he noted that: "International law as a law between sovereign and equal states based on

the common consent of those states is a product of modern Christian civilization, and may be said to be about four hundred years old" (Oppenheim 1948: 68). Modern writers have insisted that ancient states did not possess a notion of sovereignty and that there was no sense of universal community, and without these two elements the idea of international law in antiquity was a nullity (Brierly 1958: 20; Shaw 1986: 14), Other writers have emphasized putative features of an ancient law of nations that one would instantly recognize as being somehow associated with any "primitive" legal system: the emphasis on religious (and not legal) sanctions; the inability to develop consistent, customary rules of state conduct; and the belief that there could never be a condition of peace between ancient states (Heffter 1881: 12; Maury 1859: 3: 401–402).

This modern critique of the intellectual soundness of referring to a law of nations in antiquity has served many purposes. One, of course, is to provide an acceptable story for the emergence of international law, not only as a cluster of legal doctrines, but also as a learned study. The inability of some modern scholars to perceive of an international law prior to its Grotian origins has been discussed elsewhere, and need not be repeated here. There is also a reproach here, which I readily credit, that antiquarian pursuits in tracing international law doctrines to some origin shrouded in the mists of time, is a silly and (ultimately) distracting exercise. The strong reaction that contemporary publicists have held to the idea of international law in antiquity may, in part, be explained as a reaction to those earlier writers who "inordinately extoll[ed] antiquity to the disadvantage of the modern age" (Phillipson 1911: 2: 166). Even worse, there were those who attempted to use ancient authorities in the pursuit of some instrumental historiography, particularly those who were advancing strong, Eurocentric characteristics for modern doctrines (Rostovtseff 1922: 32–3; Scupin 1984: 7: 132–3).

This contribution hopes to redress some of these historiographic and intellectual deficiencies by first considering the existence of authentic state systems in ancient times. Next, I will briefly examine three fundamental areas of states' relations that appeared to be influenced by consistent rules or norms of international behavior: (1) the sending and receiving of ambassadors; (2) the making and enforcement of treaties; and (3) the initiation and conduct of hostilities. From this narration, broad patterns of ancient state practice can be defined and analyzed, leading to the conclusion that there did exist in the ancient world a set of sources, processes and doctrines that constitute the beginnings of an international legal consciousness.

Ancient state systems

The scope of this chapter is limited to three general periods of antiquity. They are (1) the ancient Near East including the periods subsuming the Sumer city states, the great empires of Egypt, Babylon, Assyria and the Hittites (1400–1150 BCE), and a later, brief period focusing on the nations of Israel and their Syrian neighbors (966–700 BCE); (2) the Greek city states from 500–338 BCE; and (3) the wider Mediterranean during the period of Roman contact with Carthage, Macedon, Ptolemaic Egypt, and the Seleucid Empire (358–168 BCE).[1] My thesis is that the traditions of statecraft that were developed at an early time by the Sumer city states and their Akkadian conquerors, and reformulated by the Assyrians and Hittites, were transmitted to later cultures through the Egyptians and Israelites and Phoenicians, and thence to Greece, Carthage, and Rome.

It is for this reason that I do not survey the great international law traditions of India and China in this chapter. The literature available on the political cultures and international societies of ancient India (from the post-Vedic period until 150 BCE) is large and of generally high quality,[2] as is that on the Eastern Chou

and warring states periods in China (770–221 BCE).[3] (For considerations of the general theory of international relations in ancient India, see C. H. Alexandrowicz, 41 Brit. Y.B. Int'l L. 301 (1965); Ved P. Nanda in Janis and Evans (eds) (1994).) Nevertheless, there is simply no historical evidence to suggest that there was any substantial diplomatic contact between Indian and Chinese cultures, or between these great Asian international systems and those of the Near East and Mediterranean. This is surprising in view of the extensive economic and religious contacts between all of these culture centers in the ancient world. But without that essential element of diplomatic contact and continuity, I believe it prudent to exclude from the wider consideration of this article Indian and Chinese contributions to the development of international law.[4] I recognize that this exposes the study of ancient international law to the additional charge of Eurocentrism and western cultural particularism, but I see no alternative given the current posture of scholarship in this field, and the paucity of historical sources and material.

The three time periods and regions that are examined here all had one thing in common: An authentic state system was in place for these times and places. I take as my working definition of a state system Professor Hedley Bull's formulation in *The Anarchical Society*:

> A society of states (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations to one another, and share in the working of common institutions.
>
> (Bull 1977: 13)

Implicit in this definition is that political entities are organized and think of themselves as states, and that it is possible to discern "common interests and . . . values" in deciding whether those states deal with each other on a "conscious" basis. Both inquiries – the existence of states and the identification of conscious value systems – are essential in the context of antiquity.

Most contemporary scholarship has accepted both the fact of the existence of ancient states and the reality of international relations in antiquity (Ago 1982: 214; Paradisi 1951: 355–6). The city states of ancient Sumer and Mesopotamia, as well as the great Near Eastern empires that subsisted between 1400–1150 BCE (including Egypt, Babylon, and the Hittite, Mitanni and Assyrian empires) had at least an inchoate identity as an authentic state system (Ago 1982: 215; Preiser 1954: 269; Scupin 1984: 133). Even better documented are the interstate relations of the ancient Greek city states, particularly in the period from 500 to 330 BCE (Adcock and Mosley 1975: 128, 144–50; Ago 1982: 222; Low 2007: 33–76; Phillipson 1911: 1: 32–7; Scupin 1984: 134–5). Lastly, the Roman Republic's rise to empire from 358–168 BCE involved competition with many state polities, including Carthage, Ptolematic Egypt, Macedon, and the Seleucid Empire (Ago 1982: 229; Phillipson 1911: 1: 106–11; Preiser 1954: 131–32; Scupin 1984: 136–7; Walker 1899: 51).

There were, in essence, two traditions of ancient state practice (Bederman 2001b: 47, 277–9). The feudal empires of the Near East created their special diplomatic argot, one that was transmitted (by contacts through the Egyptians, Phoenicians, and Israelites) to the later political cultures of the Mediterranean basin. The second heritage was produced by the querulous relations of the Greek city states. Roman statecraft was a mixture of these two manners. How these two traditions came to define the ancient conception of a law of nations – through diplomacy, treaty making, and the initiation and conduct of hostilities – will be discussed in the remainder of this chapter. What needs to be reiterated here is that there were special times and places in antiquity where political entities coalesced as states and related with their like-constituted polities on the basis of independence,

sovereign equality, and a respect for rules in the conduct of international relations.

Reception and protection of diplomats and embassies in antiquity

Fundamental to the idea of a law of nations in ancient times was the proper respect and protection to be accorded to the official representatives of other sovereigns. Two ancient states might have been in a condition of distrust or competition, and yet diplomatic contacts were constantly promoted and reinforced between them as long as they were not actually at war. The principles of diplomatic intercourse were surely seen as rules to be followed save in the most grievous breach. The international law of diplomats and diplomatic protection was fundamental, because without it the simplest forms of negotiation between independent polities would have been impossible. The rules of diplomatic conduct were, therefore, motivated by the highest demands of necessity.

Each of the ancient cultures surveyed in this chapter held strong notions of hospitality and the proper courtesies and facilities to be extended to strangers from afar. In a world of imperfect and dangerous communications and means of transport, where even modest distances posed incredible obstacles and difficulties for travelers, hospitality was more than a merely desirable institution of personal favor. Rather, in each of the state systems considered here, hospitality was sanctioned and ritualized. It undoubtedly possessed a private aspect: one family or household extending hospitality to a traveler from abroad (Bederman 2001b: 88–95). Of concern here is how beliefs regarding private hospitality became institutionalized and ritualized into patterns of *state* practice.

There were enormous implications of the ancient institution of hospitality: In the treatment of aliens living abroad, in the peaceful settlement of certain kinds of dispute, and even in the conduct of hostilities between two warring nations. It is of note that the principle of private hospitality was quickly transformed into an essential feature of interstate relations. This transformation occurred quite early. Friendship and diplomacy were always inextricably linked. Strong personal relationships undoubtedly facilitated diplomatic contacts even between potentially belligerent nations. In the fourteenth century BCE, the Hittite king was vexed because one of his vassals, one Piyamaradu, was raiding his territories. The Hittite king complained to a neighbor, the king of Ahhiyawa, whose protection Piyamaradu had sought when militarily confronted by the Hittites. The Hittite king then asked the ruler of Ahhiyawa for Piyamaradu's extradition. The bearer of this message was a prominent individual well known to the king of Ahhiyawa. The historical record indicates that the well-born messenger had previously participated in diplomatic contacts between the houses of Hatti and Ahhiyawa. The selection of this envoy was apparently critical to the Ahhiyawa king's favorable consideration of the Hittite request: Piyamaradu was bound over to the Hatti. This, in spite of the fact that Piyamaradu was owed hospitality by his host. The selected envoy was privileged in his functions precisely because of the bond of friendship and hospitality that had been formed (Audinet 1914: 33; Hooker 1976: 124; Karavites 1987: 85). Likewise, Livy relates the incident where ambassadors were dispatched by King Perseus of Macedon to Rome in 171 BCE. This was apparently a delicate mission, and the only reason Perseus felt comfortable enough to send the embassy was that a bond of private hospitality existed between him and one of the current consuls in Rome, Marcius, a tie that had been formed between their fathers (Livy 12: 405 (passage xlii.38)).

These examples of "personal diplomacy" are hardly surprising. The concept of private hospitality and friendship, extended between individuals of different nationalities, surely acted as a critical facilitation of diplomacy. Even

more significant was the manner in which the hereditary aspect of private hospitality was transmuted into the concept of perpetual peace between sovereigns. As seen in the examples of Roman and Hittite practice, the initiation of diplomatic relations acted, in effect, as the formation of a bond of public friendship between two states. This fiction was probably intended as an antidote to the religious particularism of many ancient nation states. The very act of receiving a foreign nation's ambassadors was seen as an acceptance of an alien religion and its national gods. The concept of perpetual peace was seen as a very public form of ritualized hospitality between two nations (Paradisi 1951: 346).

The analogue between the forms and functions of private hospitality (on the one hand) and official diplomacy (on the other) was imperfect and certainly had its limits. International diplomacy could not have proceeded on the same basis, with the same assumptions of human nature, as the laws of private hospitality and comradeship. There was simply too much at stake. The fortunes of nations could be risked on a diplomatic interchange or negotiation. Envoys could be feckless. Or, worse still, they could take advantage of the rules of hospitality to deceive a host. So ancient peoples had an alternative to seeing the rules of diplomatic conduct as the extension of the dictates of private hospitality. This choice was reflected in their substantial concern in establishing the trustworthiness of diplomatic personnel. The Greeks were preoccupied with this. Many Greek cities established laws to punish envoys found guilty of distortions or fabrications in the course of their official acts (Mosley 1973: 94–5).

One technique for assuring the integrity of visiting envoys was to hold them personally liable for their transgressions or those of their masters. This seemingly conflicted with every civilized principle of diplomatic immunity, and yet it was not really viewed as a contradictory practice by ancient peoples. Diplomats were often held as privileged sorts of hostages, particularly in Greece (Amit 1970). Envoys who violated their own bona fides were subjected, under Roman law, to noxal surrender to an enemy (Rich 1976: 109). Other examples abound of personal coercion being applied against the official representatives of foreign states, all for the purpose of preventing deception or trickery in the process of international relations.

The ancient reconciliation of diplomatic immunity with sanctioned retribution is one of the paradoxes of ancient international relations. Suffice it to say here, however, that such duress rarely achieved much success. One example is enough. In the winter of 478 BCE, Athens began rebuilding the city's fortifications destroyed in the earlier Persian invasion. Athens' neighbors fretted about this development, and sought Spartan help to dissuade the Athenians from what might have been perceived as an aggressive move. The Athenians needed to buy some time, pending the completion of their works. This they accomplished with a diplomatic stratagem. Athens dispatched to Sparta one Themistocles, a leading citizen, but extraordinarily well regarded and well trusted by the Spartans. He assured the Lacedaemonians that no such aggression was intended and allayed their fears of a new round of Athenian imperial expansion. Reports of continued building on the walls found their way back to Sparta. Themistocles assured his Spartan hosts that the accounts should not be believed, and that, instead, a high-level Spartan delegation be sent to Athens to investigate in person. But Themistocles had secretly arranged that when that Spartan embassy arrived in Athens it would be detained to act as security for his own safety, once his own fraud was discovered, which it inevitably was. Thucydides reported that since the eminent Spartans were in the hands of the Athenians, the Lacedaemonian authorities had no choice but to accept Athens' fait accompli and release Themistocles (Thucydides 1: 149 (passage i.89–92)).

This story says much about the mutual expectations of diplomatic relations by ancient

states. Some level of trickery and dishonesty was acceptable, perhaps even required. What is noteworthy, however, is the extent to which the rules of diplomacy were so widely observed. Because the international law of diplomacy was inextricably linked with each of the authentic state systems considered in this contribution, a polity's acceptance of diplomatic niceties was often considered a sine qua non for its participation in the international system of state relations. There were a few, basic rules of diplomatic intercourse: (1) foreign envoys would be treated as guests, and that (2) although tolerable levels of personal coercion were permitted, the diplomats would otherwise be immune from sanctions in the host state. These basic rules were respected by nearly all of the states existing *within* the three time periods of international relations pondered here. The content of the rules was, moreover, remarkably consistent throughout the entirety of antiquity and throughout the ancient world (Bederman 2001b: 95–135). The universality of diplomatic law was a signal feature of its success.

A consistent theme of historic narratives from antiquity is the extent to which even peoples and states on the periphery of "civilization" still followed the dictates of diplomatic practice. So it was that Polybius could express surprise that the mercenary leaders of Libyan tribes observed all of the correct rituals (at least by Greco-Roman standards) in their relations with the Carthaginians in 238 BCE (Polybius 1: 229–31 (passage i.85)). In the same vein, the historical evidence is strong that Persia conformed its international conduct and behavior to Greek diplomatic standards, even as Persian kings attempted to conquer Greece in the fifth century BCE (Bauslaugh 1991: 38–43, 91; Mosley 1973: 164–5).

That leads me to consider the last general concept that motivated the development of the ancient practice and organization of diplomacy. This was the notion of *sovereign equality*. The power to dispatch and receive ambassadors, the right of legation, was typically seen as an incident of power and political independence. The Romans were particular sticklers on this point: They would not receive ambassadors from a less than free and autonomous political entity. This was codified in later Roman law, but even in the time of Roman transmarine expansion, as Polybius recorded, Roman authorities would not receive embassies from defeated peoples (Justinian Digest 4: 920 (passage 50.7); Polybius 4: 97 (passage ix.42)). In short, the privileges and immunities of diplomats came as part and parcel of the right of legation.

It made sense surely to regard those diplomatic practices as an essential part of a system of states. Envoys, as already noted, were seen as the personification of the sending state. Any offense to an ambassador was an offense against a coequal sovereign. It was also possible to see the entire system of diplomatic privileges and immunities as an outgrowth of the recognition that certain classes of entitled individuals were subject only to their own sovereign's authority, even when they traveled into the territorial realm of another ruler. Diplomatic privileges, as an outgrowth of extraterritorial immunities, were a very real way that political entities avoided conflict.

Taken together, the general principles that guided the ancient practice of diplomatic law had a profound impact on the manner in which envoys operated and the extent to which they were protected. Ritualized hospitality was balanced carefully with concerns over the probity of an envoy and that of his master. The universality of rules of diplomatic comportment was qualified by the principle that only legitimate states had the right to send and receive embassies. Despite these contradictions, the overall picture of the international law of diplomacy in antiquity was remarkably stable and predictable.

Treaty practices among ancient peoples

Enforcement was always a difficult issue of making faith in antiquity. For early Near

Eastern polities there were consistent concerns about crafting treaty terms that were truly reciprocal and recognized as equally binding on both sets of parties. For these cultures, the act of treaty making was viewed as a unilateral act: the sovereign of one nation pledged his troth on the assumption (although without the certainty) that the treaty partner was doing the same (Numelin 1950: 293; Théodoridès 1975: 105–107). The idea that treaty making was an inherently reciprocal exercise – indeed, that it had no meaning otherwise – appeared only later in the ancient Near Eastern tradition, with the covenant between Rameses II and Hattusili III being exemplary (Kastemont 1974: 47, 438–9; Langdon and Gardiner 1920: 188–98).

Once the notion of reciprocity was embraced by ancient cultures, they could then confront the problem of internal and external means of treaty enforcement. There was a dynamic tension between these two approaches. An "internal" way of enforcing an international agreement emphasized background rules of good faith, reasonable interpretation, and faithful observance over time. "External" means implicated personal surety and responsibility in the enforcement of treaty values. These included hostage taking and noxal surrenders.

Every ancient culture surveyed in this chapter vigorously debated the question of how to coerce treaty faith. This argument was typically conducted in the form of a disquisition of the morality (or at least the political wisdom) of accepting hostages as treaty guarantors. And, indeed, while commentators condemned the practice, it was followed with more or less regularity by every state system reviewed here, with the notable exception of the Greek city states. Even the Romans, despite their strong sense of bona fides in treaty observance, took hostages. The Greeks sought, instead, to put their reliance in a whole panoply of structural solutions to ensure treaty fidelity: anti-deceit clauses, rules of treaty interpretation, and refined doctrines of treaty termination (Adcock and Mosley 1975: 191–98, 221–25; Amit 1970; Ténékidès 1956; Wheeler 1984). The Greek approach to treaties was, in a very real sense, a legal one.

The Romans conceived treaties in a legal sense of obligation as well, but their vision was formalistic. The elaborate charade of noxal surrender following a repudiated *sponsio* was emblematic of (largely) empty Roman legal forms. It also says much about Roman (and, for that matter, ancient Near Eastern) ambivalence about observing international obligations for the simple reason that they reflect a rational exchange of promises and an expectation of subsequent certainty in political and diplomatic relations (Bickerman 1952).

There may well be a correlation between the character of the state system in which diplomacy (and treaty making) is being conducted and the preferred mode of treaty enforcement. "Dynamic" state systems (those with more than five major actors) may well have resorted to more "internal" means of enforcement. Greek multipolarism was exemplary of this. Alliances were extraordinarily fluid in these state systems, and so "external" (and usually more coercive) means of enforcement were likely not to have been employed with substantial success. The more "static" state systems that prevailed during much of the ancient Near East and the period of Roman expansion, having (typically) less than four or five great powers, were more brittle. Treaties seemed to matter for less, were drafted at a higher level of abstraction, and, yet, ironically, were more often enforced by coercive, "external" means, including hostage taking and personal pledges of surety.

Problematic enforcement of international agreements did not seem, however, to interfere with the process of developing legal sophistication. A signal aspect of every state system reviewed here is that, as time went on, treaties became more diverse in the subject matters of substantive provisions, more precise in the structuring of those clauses, and

(generally) more complex in the interrelation of these obligations. Treaties like the 1280 BCE instrument between Egypt and the Hittites, or the 215 BCE agreement between Hannibal and Macedon, are models both of complexity and precision (Bickerman 1952; Langdon and Gardiner 1920).

Both were treaties of alliance *and* friendship, capturing all the ambiguity and difficulty that those relationships entailed for the two treaty partners. Every legal culture considered in this article had to confront the issue of how to narrate and control diverse kinds of alliance statuses between two or more polities. Sovereign equality was always problematic, and although Greek alliance typology was certainly the most nuanced in antiquity, Roman conceptions of different kinds of affiliations were complex, and so too were Hittite and Assyrian treaty forms (Adcock and Mosley 1975: 191–93; Boak 1921; Larsen 1968; Martin 1940: 371–72; Matthaei 1907; McCarthy 1963; Mendenhall 1955; Paradisi 1951: 345–50). Alliance configurations culminated in extraordinarily complicated league patterns.

The most convincing evidence that ancient peoples conceived of international links as legal relations was that they committed their treaties to writing. The power of the written word was not to be underestimated in antiquity. The emphasis – one might say the obsession – of ancient states in properly keeping and revering treaty texts was symbolic of the power and authority of the written word to convey legal meanings for international relations (Adcock and Mosley 1975: 177–8; Karavites and Wren 1992: 188–9).

Ancient treaty making also had a strong universalist flavor. By this, I mean two distinct things. The first is that there was a single ancient tradition in treaty making, an inherent unity of conception in the way that treaties were made and observed. There were, of course, some variations in these forms, but what is surprising is the commonality. The basic Hittite treaty form, a secular contract formed out of solemnized oaths, was adopted (with some changes) by the Assyrians, Egyptians, and ancient Israelites. It was, in turn, transmitted into the Greek and Hellenistic worlds, and thence into the western Mediterranean region of Rome and her neighbors. The proof lies in those agreements made by nations at the temporal and spatial intersections of these different state systems – such as that between Rameses II and Hattusili, or that between Macedon and Carthage, or that between Rome and the Aetolians (Bickerman 1952; Langdon and Gardiner 1920; Matthaei 1907: 189; Paradisi 1951: 345–6). In each of these instances, pre-existing forms were (to be sure) altered. It may have been the dropping of elaborate preambular passages, or the inclusion of specific legal terms or provisions (such as *maiestas* clauses or qualifications regarding after-acquired allies). Regardless, there was always a synthesis of forms and motifs of legal expression in treaties, never an outright repudiation of old forms.

As developed in the ancient Near East, treaties narrated a story of relations between two or more states, and purported to tell also a story of their peaceful relations for all time to come. Although the elaborate preambular statements used by the Hittites were not replicated even in all ancient Near Eastern texts – and certainly not in Roman, Greek or Egyptian instruments – there was still a strong element of historic narration and structure to these later treaties. All political cultures reviewed here had to struggle with the fundamental dilemma of state relations: did the conclusion of treaties necessarily mean that relations with another polity could be based on the notion of perpetual peace?

There seems no doubt that ancient peoples regarded treaties as the chief means of regulating peaceful relations between states. The institutions of private hospitality and the public reception of emissaries could assist in this process, but, ultimately, it was up to states to pledge their faith to each other. This act of making faith could have many

forms. It could have been a simple recognition of friendship existing between nations. Or it could be a conclusion of some sort of political alliance. Greek and Roman statecraft understood a distinction between *philia* and *symmachia*, *amicitia* and *foeda*; they also knew that the alternative to peace was a state of war or enmity (Karavites 1982; Scupin 1984: 137–8).

Commencement and conduct of hostilities in ancient times

The ancient preoccupation with war focused on applying rationality to a fundamentally irrational endeavor. The goal was nothing less than managing conflict. To the extent that ancient societies developed religious, ritual, and rational strictures on declaring war and initiating hostilities, there must have been some manifest belief that war was an exception to the normal course of international relations, an aberration in the way that peoples dealt with each other.

The nearly universal conscience of peoples in antiquity was that it was never desirable to be branded the aggressor in a conflict (Adcock and Mosley 1975: 202–203). There was a moral advantage to be won in exercising restraint before entering a condition of belligerency, or at least in appearing to do so. It was this fact that led to the development of rules for neutrality, which depended for their vitality on a status being given to those polities that chose to abstain from conflict. And if the regime of neutrality was never widely, or absolutely, recognized, it was an epitome of a legal status used in ancient state relations (Bauslaugh 1991).

As for rules governing the conduct and prosecution of hostilities, one might wonder whether there was even a need to actually manage ancient warfare. Ancient conflict was usually a desultory affair, synchronized with the turn of the seasons, limited by great distances, imperfect communications, and difficult logistics. There were battles fought and towns besieged, for sure, but the structure of ancient warfare was such that a campaign could end very easily with a decisive engagement or a stormed city. Civilians were usually left alone, if for no other reason that if armies killed peasants and burned fields, soldiers would probably starve before the inhabitants of the district did. Total war was virtually unheard of. The Israelite doctrine of *mitzva* notwithstanding, and the dramatic, life-and-death struggles of the Peloponnesian and second Punic wars, the very process of war in antiquity succeeded in limiting its effects (Rosenne 1958: 139).

Ancient wars were fought for territory – and for glory. Most ancient states were socially organized on a footing that facilitated the marshaling of resources for armed conflict. These resources were finite. Blood and treasure came in limited supplies. The Israelites, the Greeks, and the Romans all came to understand that war depleted social and economic capital so quickly that the very integrity of the state was jeopardized. All ancient belligerents had an incentive, therefore, to make war quick and cheap. Warring nations feared defeat, but they trembled more in the face of *ataphos*, the death of the human spirit that the conditions of war produced. In antiquity, war was, at one and the same time, the great legitimizer of the state, and its greatest threat (Bederman 2001b: 208–27).

To respond to the challenges that war presented to the state, religion and ritual and reason were called on to sanction and give order to life in belligerency. These mixed and produced a distinctively legal vision of how ancient states initiated hostilities and how they conducted them. The mechanism by which religious values were transformed into rituals and thence into legal rules was achieved in two different ways, both hastened by war itself. The first was in the creation of distinctive social institutions, whether sacerdotal colleges like the Roman fetials or the Israelite high priests (Harris 1974: 269; Saulnier 1980; Watson 1993; Wiedemann 1987). Religious values,

often expressed in virulently nationalist forms, were maintained and applied by these institutions. Their primary goal was to preserve the legitimacy of the state against both internal and external challenge. These institutions kept the mysteries of the state religion and carried on a discourse with the national gods concerning the state's place in the world (Bederman 2001b: 59–79). The key elements in the legitimacy of these institutions were the rituals they managed on behalf of the state and its people. The second mechanism was simply the process of secularism. Religion and ritual, after time, could not succeed in sustaining state values or legitimacy. The ancient Israelite notion of *mitzva*, as a command for divine, obligatory war, gave way to a rational notion of "optional" war (Holloday and Goodman 1986). The spear-throwing ritual of the fetials, as the dramatic *bellum indicere*, was modified as time and international conditions changed (Harris 1974: 267–9; Rich 1976: 103–104; Wiedemann 1987: 481). It was replaced by the language and rhetoric of law and legal rules of obligation (Bederman 2001b: 79–85). *Halachic* (legal) thinking influenced and moderated the Israelite approach to war. The Greeks, strongly disposed to philosophy and rhetoric already, consistently referred to the norms of conduct in warfare as a common law of mankind. After all, the final, winning argument of the Thebans was that they had "suffered contrary to law" because of the Plataeans' previous violations of those customs (Thucydides 2: 117–19 (passage iii.66)). The Romans, from their earliest period of organized political history, claimed legal right as the basis for their moral and military superiority. Remember the words of the Roman *pater patratus*, head of the college of fetials, when he remonstrated against the enemy that had failed to do right? "Let the law of heaven hear," the enemy, he said, was "unjust, and does not act agreeably to law" (Livy 1: 115–17 (passage i.32.6–10)).

It was not just that ancient peoples uttered a sense of legal obligation in warfare. The Greek *to dikaion* and the Roman *ius ad bellum* and *ius in bello* had actual, substantive content. In part this can be seen in the many dualities that were part of the ancient law of war. Ancient states made a distinction between enemies and foes (Schwab 1987: 194–5). This was the central concept of restraint and proportionality in conflict. Without the idea that public wars had to be treated differently than private feuds, there could be no rule of law in wartime, since conflict presumably dissolved all bonds of hospitality.

Ancient states also saw a difference between just and unjust, lawful and unlawful wars. Sometimes this was a matter only of internal, scriptural significance (as in the Israelite contrast of *mitzva* and *reshut*), but it also could extend to broader notions of justification. Lastly, all ancient states saw the need for limitations and immunities to be impressed on the conduct of warfare. These were the most specific, and literal, of the norms governing armed conflict. And although there were only a handful of rules of conduct in warfare, these were generally observed and respected, to a degree that was startling for a time that was supposed to be barbaric and lawless (Bederman 2001b: 242–63).

Whether there was a law of war in antiquity is the ultimate test of whether there was a cohesive idea of a law of nations at all in ancient times. I have argued here that there indeed was a common core of ideas leading to the exercise of restraint by ancient states in armed conflict. As with all of the themes considered in this contribution, the sources of legal obligation in ancient state relations were multivalent, and this is nowhere more evident than in the ancient law of war.

Conclusion

The norms of international law thus had the same purpose throughout antiquity: to promote predictability and stability, to adequately channel state conduct in ways that were

conducive to maintaining power relations, and to nourish the internal legitimacy and sovereignty of polities. Despite my occasional use of the term "international law" in this chapter, the ancient law of nations was conceived only as an instrument of state relations. It had virtually no regard for other values such as human rights or dignity, the protection of common resources, or the advancement of some exogenous ideology or philosophy. The law of nations in antiquity was, first and foremost, an expression of the ancient mind's desire for *order*.

To achieve international society meant that a delicate balance had to be struck with the internal, political and religious order of individual states. This was the singular task of the law of nations in antiquity, one that it accomplished to a surprisingly effective degree. Ancient states were particularistic. Their internal political order depended on exclusion, on aggression, and on difference (Bederman 2001b: 59–61). The rules of state relations in ancient times managed to transform this particularism into cooperation. *Friendship* was achieved through the translation of hospitality practices into the institutions of diplomacy. Likewise, the ancient state was made *tolerant* by rules of conduct which permitted the movement of people, goods, and services across boundaries. *Trust* was made possible through the rituals and forms of making faith through treaties and alliances. Finally, *restraint* came to be exercised by ancient states even in wartime as a consequence of self-interest and concern for order.

We do not speak of these values today in modern international law. Perhaps we should. These are the essential ingredients of community, a notion and principle that is at the theoretical center of the modern law of nations. This contribution has, in large measure, been the story of the creation of a nascent community, one with a political structure and legal sensibility. Ancient state systems may have little to teach us about today's global world order, and they may not have much to instruct as to the substantive content of essential doctrines of international law, but the history narrated here has substantial bearing on the creation of legal communities which aspire to universality.

[Author note: This chapter is based on portions of the author's previous volume, *International Law in Antiquity* (Cambridge University Press. 2001b).]

Notes

1 "BCE" means "before the Christian era."
2 For general treatises, see, e.g. Chacko, "India's contribution to the field of international law concepts", 93 *Recueil des Cours de l'Académie de Droit International* [RCADI] 117 (1958–I); Hiralal Chatterjee, *International Law and Inter-State Relations in Ancient India* (1958); Nagendra Singh, "History of the law of nations – regional developments: south and south-east Asia", in 7 *Encyclopedia of Public International Law* 237 (Rudolph Bernhardt ed. 1984); Nagendra Singh, *India and International Law* (1969).
3 See, e.g. Britton, "Chinese interstate intercourse before 700 B.C.", 29 *American Journal of International Law* [AJIL] 616 (1935); Shih-Tsai Chen, "The equality of states in ancient China", 35 *AJIL* 641 (1941); Frederick Tse-Shyang Chen, "The Confucian view of world order", in *The Influence of Religion on the Development of International Law* 31 (Mark W. Janis ed. 1991); Iriye, "The principles of international law in view of Confucian doctrine", 120 *RCADI* 1 (1967–I); Shigeki Miyazaki, "History of the law of nations – regional developments: Far East", in 7 *Encyclopedia of Public International Law* 215 (Rudolph Bernhardt ed. 1984).
4 For much the same reasons, I also excluded considerations of African state systems and the international relations of the Byzantine Empire. For more on these, see T. O. Elias, "History of the law of nations – regional developments: Africa", in 7 *Encyclopedia of Public International law* 205 (Rudolph Bernhardt ed. 1984); Stephen Verosta, "International law in Europe and western Asia between 100 and 650 A.D.", 113 *RCADI* 484 (1964–III).