Chapter II

One versus Many.
Prophecies of World Rule and Manifest Rule over Cities (to c. 500 CE)

The Earliest Extant Written Records on the Law of War and Peace

The beginning of the transmission of written texts relating to the law of war and peace was hardly contingent during the latter part of the third millennium BCE in Ancient Sumerian Mesopotamia. At the time, an array of autonomous neighbouring city and territorial states coexisted in the area with intensive mutual ties. The inhabitants of these several states mutually recognised each other as outsiders, while maintaining relations among their communities. As a culture of writing pragmatic texts on clay tablets shaped daily affairs in this urban landscape, it was consistent that matters relating to the law of war and peace found their way into these written texts. That practice does not suggest that the law of war and peace was invented in Ancient Sumer, but it allows us to obtain knowledge of that law in retrospect.

Among the oldest extant texts recording the law of war and peace are treaties between states, specifically agreements between the cities of Ebla (in present Syria) and Abarsal from the twenty-fourth or twenty-third century BCE and between the state of Elam (in present Iran) and a ruler named Naram-Sīn of Akkade between 2291 and 2255 BCE. The text of the treaty between Ebla and Abarsal consists of four parts, a preamble regulating control over fortifications in areas under the rule of each signatory party,[1] a number of stipulations of reciprocal obligations,[2] a number of stipulations unilateral by Abarsal towards Ebla[3] as well as a concluding passage, which placed abidance by the treaty under divine surveillance.[4] The treaty specifically provided for mutually binding sanctions in the case that one party might inflict curses upon the other,[5] which is equivalent of the prohibition to act against the reciprocally stipulated friendship as a whole. Moreover, the agreement contained binding reciprocal as well as unilateral obligations relating to trade[6] and reciprocal hospitality[7] as well as finally Abarsal's duty to communicate information to Ebla.[8] Given the unilateral obligations appearing to benefit Ebla, the treaty seems to convey the impression that Ebla was positioned at a higher rank than Abarsal, although both partners mutually bound themselves on the basis of the recognition of their treaty-making and –enforcing capability. The agreement thus combined in itself elements signaling legal equality with factors establishing a hierarchy. It was written out indefinitely and enforced by an oath. Explicitly, the text identified breach of the treaty as breach of the oath.[9]

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*In this and the following chapters, the abbreviation *PL* stands for: Jacques-Paul Migne, ed., *Patrologiae cursus completus*. Series Latina.

[1] Treaty Abarsal – Ebla, 24th / 23th century BCE, edited by Riekele Borger, *Texte aus der Umwelt des Alten Testaments*, vol. 1, issue 2 (Gütersloh, 1983), pp. 4-9, part I.

[2] Ibid., II/Art. 1-16.

[3] Ibid., II/Art. 17-42.

[4] Ibid., III/Art. 1-4.

[5] Ibid., II/Art. 1-5.

[6] Ibid., II/Art. 6-19.

[7] Ibid., II/Art. 22-42.

[8] Ibid., II/Art. 20-21.

[9] For studies see: Amnon Altman, 'Tracing the Earliest Recorded History of International Law, part I', in: *Journal of the History of International Law* 6 (2004), pp. 153-172. Altman, *Tracing the Earliest Recorded Concepts of International Law* (Leiden, 2012). Dietz-Otto Edzard, 'Der Vertrag von Ebla mit A-ba-QA', in: Pelio Fronzaroli, ed., *Literature and Literary Language at Ebla* (Quaderni de semitistica, 18) (Florence, 1992), pp. 187-212. Burkhart Kienast, 'Der Vertrag Ebla-Assur in rechtshistorischer Sicht', in: Hartmut Waetzoldt and Harald Hauptmann, eds, *Wirtschaft und Gesellschaft von Ebla* (Heidelberger Studien zum Alten Orient, 2) (Heidelberg, 1988), pp. 231-243. Edmond Sollberger, 'The So-Called Treaty between Ebla and "Ashur"', in: *Studi Eblaiti*, vol. 3, issue 9 (1980), pp. 129-155. Gerd Steiner, 'Der Grenzvertrag zwischen Lagas und Umma', in: *Acta Sumerologica* 8 (1986), pp. 219-300.

By contrast, the slightly younger agreement between Elam and Naram-Sīn von Akkade was made out in the form of a unilateral promise (*promissio*) by the ruler of Elam. It established a military alliance and laid down Elam's obligations vis-à-vis Naram-Sīn, specifying Elam's readiness to defend Naram-Sīn against attacks by third parties together with Elam's assurance not to enter into alliances against Naram-Sīn. The latter duty found expression in the classical formula stating that Naram-Sīn's friend shall also be Elam's friend and that Naram-Sīn's enemy shall also be Elam's enemy.[10] The text of the agreement does not explicitly categorise Elam's obligations vis-à-vis Naram-Sīn as unilateral. Hence, it is possible to surmise that the extant text recorded only Elam's pledges to Naram-Sīn, while leaving unstated Naram-Sīn's to Elam. The agreement may therefore have consisted of two distinct texts, of which only one has survived. Consequently, the structure of the bilateral relations between Elam and Naram-Sīn remains unknown.

The triad of economy, politics and war has determined the contents of treaties among states not merely in Ancient Sumer but across the millennia essentially up until present international law. It has become the standard repertory laid down in treaties among states and other political communities. In lieu of repeatedly regulating certain details of economic, political and military relations, partners at some point of time arrive at the agreement to set out the principles informing their mutual ties and to lay down these principles in a formal treaty stipulating specified regulations once and for all. Commissioned envoys, usually specially empowered plenipotentiaries, conducted the negotiations required in preparation of the treaty. To that end, the envoys travelled to the government center of the partner state or to a neutral place. The envoys reported the results of their negotiations to the rulers, who had dispatched them, awaiting approval. The approval might have consisted in a formal ratification submitted to the treaty partner, even though ratification might not have been considered a prerequisite for the legal validity of the agreement. This so-called "composite" procedure of the conclusion of legally binding agreements[11] had the task of mutually obliging not merely the negotiators but also the rulers to recognise the agreement as legally binding. If the identification of the language, in which Elam's treaty with Naram-Sīn is recorded, as Old Elamic is correct, the extant text seems to be the version of the agreement that Elam sent to Naram-Sīn, while pledges given to Elam have so far not been found. The exchange of parallel unilateral treaty obligations established through "composite" procedure and laid down in written texts may therefore have already been practice in Ancient Elam.

Willingness to enter into legally binding agreements among states and other political communities requires the capacity to do so, in Ancient Sumer as at present. The capacity of concluding legally valid public instruments, then as now, does not result from unilateral declaration but from mutual recognition among the parties to the agreement. These parties must acknowledge their respective capacity of acting in the international arena, before treaty negotiations can take place. In turn, this acknowledgement presupposes the certainty among prospective partners that their capacity can be determined in accordance with the same legal norms and that these norms must be considered as existing before treaty negotiations can begin. Put differently, basic legal norms informing the public law of treaties among states must be understood as being honoured by prospective treaty partners before treaties can come into existence. These basic legal norms themselves do not have to be, and have in fact rarely been, laid down in writing. In Ancient Sumer, the best indication for the consciousness of the existence of some law of treaties among states was the practice of parties to place under oaths their willingness to honour given obligations. Oaths are conditional self-curses submitting the oath-giver to the mercy of omniscient divine agents in the case that commitments remain unfulfilled. This logic was already behind the treaty of c. 2470 BCE between En-akalle, military leader of Umma, and Eanatum, ruler of Lagaš. Through this treaty, En-akalle swore that the god Enlil should destroy him through war, should he break his agreement with Eanatum. En-akalle promised neither to invade Eanatum's territory again nor to change the

[10] Treaty Elam – Naram-Sīn of Akkade, 2291 / 2255 BCE, edited by Walther Hinz, 'Elams Vertrag mit Naramsin von Akkade', in: *Zeitschrift für Assyriologie und vorderasiatische Archäologie*, N. F., vol. 24 (1967), pp. 91-95, at p. 93 [also edited by Heidemarie Koch, in: Francis Breyer and Michael Lichtenstein, eds, *Texte aus der Umwelt des Alten Testaments*, N. F. vol. 2, issue 2 (Gütersloh, 2005), pp. 283-287].

[11] Walter Heinemeyer, 'Studien zur Diplomatik mittelalterlicher Verträge vornehmlich des 13. Jahrhunderts', in: *Archiv für Urkundenforschung* 14 (1936), pp. 321-413.

course of irrigation canals, which meant that En-akalle would not any more try to obstruct water supplies to Lagaš.[12]

That same trust in the validity of legal norms, even though they are not laid down in writing, is not only a necessary condition for the making of treaties among states but also for the conduct of war. If Elam and Naram-Sīn agreed on the principle that enemies of both treaty partners are common enemies, then this alliance obligation rested on the dual expectation, first that both treaty partners would apply the same criteria to determine enemy status and, second, that both treaty partners applied the same legal concept of war to military conflicts that might arise. Elam's alliance obligation towards Naram-Sīn thus rested on the commonly applied distinction between states and groups disturbing public order such as gangs of criminals. Acceptance of this distinction cannot have been decreed by one party only but must have sprung from consensus among the signatories. The alliance obligation, thus, must have been based on implicit agreement on the formal definition of war as a military conflict among states regulated in terms of law. The alliance obligation can only have come into existence under the condition that both partners mutually recognised not only their war-making capability but also that of their prospective common enemies. The latter condition must already then have been mandatory, because wars as legally regulated military conflicts can only be fought if all parties to the war reciprocally conceded their respective right to take up weapons (*ius ad bellum*). Without that reciprocal acknowledgment of the *ius ad bellum*, acts of the use of military force, even across longer periods of time, can take place, but no wars in any legal sense.

At least in part, these background conditions are recorded in Assyrian royal inscriptions of the eighteenth and the thirteenth century BCE. Some of these inscriptions made explicit some legal norms about the law of war. For one, the restitution of previously inflicted injustice, specifically the breach of an oath or a treaty, served as a just cause of a war.[13] Next to such general passages relating to the law of war and peace, some treaties showed some features continuing into later periods without having become necessary components of the law of war and peace. Among these features is the formal aspect that treaties may have made out in two separate texts with similar but not identical wording. These separate texts turned the treaty into a virtual agreement which was not manifest in a single instrument signed by both contracting parties. Instead, the treaty consisted in two declarations of will or promises, which were correlated by formally unilateral. Instead of setting up one single text, which both parties declare valid for themselves, two instruments come into existence with the proviso that each party delivers its own declaration or promise to the treaty partner. Each treaty partner can then preserve in its own archive the declaration of the will or promise of the other side. For this procedure, the technical term "concordat" (promotion of an agreement) came into existence much later, in the twelfth century CE, and the papal chancery has transmitted it as an empty phrase into the twenty-first century. The procedure of "concordating" a treaty shifted the validation of correlated declarations of will or promises from the act of authenticating a written text into the realm of ritual action focused on the exchange of each written unilateral declaration. The ritualisation of the procedure of treaty-making rested on deep confidence in the good will of the signatories, all of whom must have been willing to entrust their own declaration to the control of their partners. In doing so, they waived control over the texts of their own declarations. Put differently: each contracting party must have been able to expect that the other signatories would refrain from altering the declarations to their advantage. Swearing the oath was the means to prevent such alterations through appeals to divine agents as witnesses.

Oaths then must have appeared to induce signatory parties to fulfill their treaty obligations. For that purpose, divine agents were invoked as witnesses. Each treaty partner thereby obtained certainty that partners would not break or manipulate the agreements, unless they wanted to expose themselves to divine punishment. The practice of swearing oaths thus transferred the enforcement of treaty obligations from the realm of human action to control by divine agents. Even for the Ancient

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[12] Treaty Eanatum of Lagaš – En-akalle of Umma, c. 2470 BCE, edited by George Aaron Barton, *Royal Inscriptions of Sumer and Akkad* (Library of Ancient Semitic Inscriptions, 1) (New Haven, 1929), pp. 22-33 [also edited by Jerrold S. Cooper, *Presargonic Inscriptions* (Sumerian and Akkadian Royal Inscriptions, 1) (New Haven, 1986), pp. 33-39].

[13] Bustenay Oded, *War, Peace and Empire. Justification for War in Assyrian Royal Inscriptions* (Wiesbaden, 1992), pp. 36-38, 87-92, 102-113]

Sumerian agreements, the swearing of oaths as a treaty enforcement procedure confirmed the recognition among signatories of the prior existence of a law of treaties among states as part of the wider law of war and peace, in turn, connected with religious beliefs. These religious beliefs were taken to be common for signatories, general in kind and unchangeable. Consequently, the public law of treaties among states was also unchangeable. As this law related to matters of the conduct of war and the preservation of peace, it is arguable that the same perception was considered valid for the law of war and peace as well.

Ancient Sumerian as well as Ancient Assyrian law of war and peace, as it has been recorded from the third and second millennia BCE, was thus not merely some "law between powers", apparently activated only in given situations as a kind of residual aid. Instead, the law of war and peace must have been recognised as a framework of legal norms positioned above states as contracting partners and attached to religious beliefs of perceived generality. By the time the earliest Ancient Sumerian treaties came to be written down, this law of war and peace already covered a wide range of economic, political and military issues. We do not know how the previous process of the formation of the law of war and peace took place and how long it lasted. Given the fragmentary recording, the geographical range of the acceptance of the basic principles informing this law also remains unknown.

Yet, already Ancient Sumerian law of war and peace was apparently tied to the perception of the planet earth as a single permeable world island, encircled by a strip of water as the ocean. According to this perception, for which the earliest pictorial evidence exists only on a clay tablet from the seventh century BCE, held by the British Museum, humankind was constituted as the integrative group of the inhabitants of the world island, which featured only surmountable dividing lines, set according to the believed will of the creator deity, but no human-made borders. Consequently, manifest borders separating autonomous states and other political groups could only be transient in kind and of secondary significance. Within this perception of the planet earth, humankind as the inclusive group of inhabitants of the world island, all stood under the rule of the law of war and peace as part of the believed divinely ordered world

The Emergence of Claims for World Rule

In the course of the second millennium BCE, the Ancient Sumerian urban landscape came to its end, giving way to imperial structures drawn on ideologies of universal rule. These ideologies were cast into prophecies of the future political and administrative unity of humankind and are on record in programmatic titles of rulers. These imperial structures overarched the previous small-sized territories and political communities with distinct collective identities. In Ancient Mesopotamia, universal rule was practically defined in terms of effective control over lands and population groups extending to the point where the claim for universal rule by one power holder clashed with the same insurmountable claim of another. Thus, the Assyrian Great King Esarhaddon (681 – 669 BCE) could conclude a treaty with a ruler of a city under his suzerainty, using for himself the title of the lord of that city together with the title of the King of the World and the King of Assyria. A little later, the Maurya King Chandragupta (c. 340 – c. 297 BCE) in South Asia is recorded to have claimed to rule over the "waters of the four oceans". The phrase suggests that Chandragupta's rule was given out as extending onto waters encircling the land in the four cardinal directions, that is, the inhabitable world and its coastal waters, even though it was effectively limited to parts of South Asia.[14] Demanding acceptance of the claim for universal rule was, therefore, not incompatible with the factual recognition of territorial borders and did not stand against the acceptance of treaties in

[14] Treaty Esarhaddon, Great King of Assyria – Ramataya, Ruler of the City of Urakazabanu, 681 / 669 BCE, edited by James Bennett Pritchard, *Ancient Near Eastern Texts Relating to the Old Testament*, third edn (Princeton, 1992), pp. 534-541, at p. 534. Chandragupta, [Inscription; the text is imperfectly recorded, and it is unclear whether the formula was meant to be title or a descriptive phrase], in: John Faithfull Fleet, ed., *Inscriptions of the Early Gupta Kings and Their Successors* (Corpus inscriptionum Indicarum, 3) (Kolkata, 1888) [revised edn, edited by Devadatta Ramakrishna Bhandarkar, Bahadurchand Chhabra und Govind Swamirao Gai. New Delhi 1981, pp. 253-254].

accordance with the law of war and peace. On the one side, the law of war and peace continued, as in Ancient Sumerian times, to provide the legal basis for the conduct of relations among states under the mutual recognition of legal equality, if necessary, for a long period of transition to the future establishment of universal rule. But, on the other side, the law of war and peace was also applicable to rulers of unequal rank reciprocally conceding autonomy to each other, even if one ruler was in a position of dependence upon another. Further examples of such agreements come from the fifteenth and fourteenth centuries BCE, among them the treaty of c. 1400 BCE between Tuthalija, Great King of Hatti in Central Anatolia, and Šunaššura, ruler of Kizzuwatna in South Anatolia and dependent upon Hatti,[15] and the pact between Šuppiluliumas I, Great King of the Hittites (c. 1344 – 1322 BCE) and Šattiwazza, ruler of Mitanni.[16] A treaty based on the recognition of legal equality is extant between Ramses II of Egypt (1279 – 1212 BCE) and Hattušilis III, the Great King of the Hittites (c. 1267 – 1237 BCE) of 1270 BCE.[17]

The treaty between Šuppiluliumas and Šattiwazza has been preserved in the form of an edict in the name of the former. The treaty established Šuppiluliumas's superior rank, whose daughter was to marry Šattiwazza, and founded an indefinite alliance between the states under the respective control of both rulers. The text of the agreement was to be kept in the sanctuary of the Hittite sun goddess in Hatti. It invoked further divine agents to ensure its validity. Divine sanctions threatened Šattiwazza, should he refuse to preserve the treaty in the same way. The treaty between Ramses and Hattušilis is extant in two versions, derived from what may have been the common original written in Akkadian, the *lingua franca* of the Eastern Mediterranean area at the time. The Egyptian version with Hattušilis's pledges was incised in stone and kept in Ramses's temple at Karnack. The Hittite version with Ramses's promises has been found on a tablet in the Hittite archives at Boğazköj. The treaty ended the war that had been going on between Egypt and the Hittites since c. 1280 about the influence in the eastern Mediterranean area. The instrument recorded the peace agreement, imposed a border between the two areas of influence, stipulated mutual promises of non-aggression, established a defensive alliance, stated the conditions for the extradition of refugees and specified principles of hereditary succession. The treaty was placed under oaths and invoked divine agents as witnesses.[18]

The Egyptian-Hittite agreement of 1270 BCE contains in a nutshell the principles of the Ancient Near Eastern practice of treaty-making. It ended a longer period of warfare between its signatories about contested terrain. At the end of the war, both parties recognised their mutually exclusive claims for universal rule as ideologies and to maintain mutually beneficial relations on a pragmatic basis without considering these ideologies. The treaty thus resulted from a compromise dividing areas of influence on the basis of the reciprocal recognition of the legal equality of the contracting parties. The recognition then opened the path for the formation of an alliance. Both parties used the form of the concordat of two correlated but separate declarations of will, which they exchanged. Ramses even documented the Hittite pledges visible in perpetuity for all visitors of the temple at Karnack. The agreement was a war-ending treaty, validated through the ritual actions of swearing oaths and exchanging the declarations of will. The law of treaties between states as an element of the war and peace was, as in Ancient Sumer, tied to religious beliefs held to be common to the treaty partners. The basic legal norms informing the law of treaties among states were thus removed from the realm of human activity and derived from the will of divine agents. The belief in the obliging force of divine will continued even in times of war.

Religious beliefs were also the source of legal norms imposing protection upon diplomatic envoys, as recorded in the treaty between Tuthalija and Šunaššura. The religious sanction of the

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[15] Treaty Tuthalija, Great King of Hatti – Šunaššura, Ruler of Kizzuwatna, c. 1400 BCE, edited by Riekele Borger, *Texte aus der Umwelt des Alten Testaments*, vol. 1, issue 2 (Gütersloh, 1983), pp. 99-106.

[16] Treaty Šuppiluliuma I., Great King of Hatti – Šattiwazza, Ruler of Mitanni, 14th century BCE, edited by Riekele Borger, *Texte aus der Umwelt des Alten Testaments*, vol. 1, issue 2 (Gütersloh, 1983), pp. 114-121.

[17] Treaty Ramses II of Egypt – Hattušili III of Hatti, Kadesh, 1270 BCE, edited by James Bennett Pritchard, *Ancient Near Eastern Texts Relating to the Old Testament*, third edn (Princeton, 1992), pp. 199-203.

[18] Katrin Schmidt, *Friede durch Vertrag. Der Friedensvertrag von Kadesh von 1270 v. Chr., der Friede von Altalkidas von 386 v. Chr. und der Friedensvertrag zwischen Byzanz und Persien von 562 n. Chr.* (Europäische Hochschulschriften. Reihe 2, Bd 3437) (Frankfurt, 2002), pp. 35-54.

immunity of diplomatic envoys was to ensure that these emissaries could act, as dispatching rulers had commissioned them to do. They had to identify themselves as, so to speak, mouthpieces of dispatching rulers, whence they appear to have brought with them tablets authenticating their official status.[19] These instruments of authentication protected emissaries against the charge of being personally responsible for statements they might made in the course of a mission. The same evidence comes from a collection of 350 pieces of diplomatic correspondence of fourteenth-century Egyptian provenance.[20]

The practical handling of the law of war and peace as well as its theoretical foundation continued to shape relations among states for more than a millennium after the Egyptian-Hittite agreement of 1270 BCE. The prayers by Hittite Great King Muršili II (1321 – 1295 BCE), recorded from the late fourteenth century BCE, document the readiness of a ruler as well as his successors to take responsibility for what appeared to have been unethical acts. In his prayers, Muršili II testified to his belief that a severe plague, ravaging in areas under his control, had been imposed by divine agents after sinful acts of his father Šuppiluliumas I (c. 1386 – c. 1340 BCE). According to Muršili II, Šuppiluliumas I had taken up weapons without just cause and had broken treaties. Muršili pledged to repent and combined his pledge with his prayer to the divine agents to put an end to the epidemic.[21] In doing so, Muršili gave evidence to his firm conviction that humans should act in accordance with the divine determination to preserve peace and also testified to human willingness to act sinfully against divine will. Through the prophecy of Jesajas (chap. 2, verse 4), the Old Testament provided the lasting formula that, at some time in the future and by divine will, swords would turn into ploughshares and lances into sickles. The prophecy gave expression to the hope that future perpetual peace in accordance with divine will would terminate human warfare.

Subsequently, the prophecy of Daniel (chap. 2) integrated this hope for peace into the secular sequence of four world empires (called *regna* [kingdoms] in the Vulgate) spanning the believed period of human existence between the Flood and Judgment Day. According to Daniel's prophecy, the last of the world empires would usher in eternity. According to the prophecy, the partly co-existing Ancient Near Eastern universalist structures of imperial rule turned into a temporal sequence, equipping each of them with the claim for extension across the world island as laid down in the contemporary world picture. The prophecy thus abandoned the competition among these imperial structures and projected them as successive manifestations of the unity of humankind as inhabitants of the world island. The prophecy envisaged the future end of the law of war and peace and its replacement with, so to speak, the domestic municipal law of one single institution of universal rule.

Daniel's prophecy is likely to have been written only in the second century BCE. Therefore, it is not possible to assume that anywhere in the Ancient Near East claims for the universality of rule were credited with exclusive validity, rendering redundant the law of war and peace. On the contrary, it seems that, throughout the first millennium BCE, the law of war and peace remained regarded as a given even at times of conflict, regulating relations among states. There was neither a felt need for setting basic legal norms nor for constructing institutions to enforce them.

New Urban Landscapes

The foundations, on which the law of war and peace had rested since Ancient Sumerian times, continued beyond the political transformations that took place between the sixth and the fourth century BCE. First, the Mesopotamian empires and Egypt fell under Persian control in 539 and 525 BCE respectively, then the Persian empire came under Greek rule by 331 BCE. Yet expanding Greek rule over Western Asia and Egypt was concentrated on cities. It boosted the formation of new urban

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[19] Treaty Tuthalija (note 15), pp. 104, 105.

[20] Jeremy Martin Black, *A History of Diplomacy* (London, 2010), p. 19. Raymond Westbrook, 'International Law in the Amarna Age', in: Raymond Cohen and Raymond Westbrook, eds, Amarna Diplomacy. *The Beginnings of International Relations* (Baltimore and London, 2000), pp. 28-41.

[21] Albrecht Götze, 'Die Pestgebete des Muršiliš', in: *Kleinasiatische Forschungen* 1 (1930), pp. 161-251, at pp. 166-169.

landscapes divided into usually small territories under the rule of urban elites. These cities had been established as Greek speaking communities from the seventh century BCE, then on territories under the overlordship of Mesopotamian rulers.

Greek urban rule thus continued even after Greek and allied armies under King Alexander III (336 – 323 BCE) took control over Persia and Egypt and penetrated into Central and South Asia, while adopting the Ancient Near Eastern ideology of universal rule. Alexander's attempt to conquer the South Asia under the Maurya dynasty, thereby establishing what might have appeared to him as manifest rule over the world island, collapsed in view of the large and well-organised Maurya army. Consequently, though against Alexander's declared will, the Ancient Near Eastern model for the conceptualisation of ideologies of universal rule remained valid in the sense that ideological claims for universal rule could coexist not merely with the even treaty-based recognition of a pluralism of coexisting rulers but also with a multitude of autonomous cities. Alexander's successors, who divided his realm among themselves, enhanced the formation of new separate states and, at the same time, granted further privileges of self-government to cities.[22] Hence, a perplexing variety of economic, political and military relations among a multitude of power-holders commanding populations with distinct collective identities existed in the Eastern Mediterranean area and Western Asia well into the second century BCE. Relations among these entities were intensive and often conflictual and sparked the production not only of literary texts but also of variegated types of pragmatic writings. Their variety exceeded that known from the Ancient Near East. At the same time, Greek expansion into Western Asia and Egypt sparked processes of the reception of Ancient Near Eastern culture, including the law of war and peace. The reception also diversified the law of treaties among states created a larger number of detailed norms.

For example, the Greek city of Sybaris and the Serdaians entered into an agreement establishing their perpetual friendship before 510 BCE, invoked Zeus and Apollo together with the city of Poseidonia as witnesses and deposited the written document recording the agreement at the central Greek sanctuary in Olympia.[23] The ritualistic practices of concluding and preserving treaties thus remained within the existing conventions. A marble stele featuring the text of an agreement between Argos and Pallanthion of before 316 BCE confirmed this practice. The agreement obliged both parties to exchange official approvals of the friendship alliance that had previously been established. The agreement thus came about through the "composite" procedure of treaty-making and, upon its ratification, was to remain visible in stone for all times. The stele found beneath the Akropolis of Pallanthion featured the ratification by Argos, thereby putting on record that Pallanthion had honoured the agreement.[24]

Greek literary tradition not only allowed the further differentiation of types of treaty contents but also revealed the specification of terms of treaties. For treaties of alliance, usually with a military connotation, the word *symmachia* was current, while agreements stipulating agreements about trade and assistance in legal matters were referred to as *symbolai*. *Spondai* were agreements among states confirmed through ritual sacrifices. Swearing oaths remained in use as a ritual sanction against infringements of treaties, together with invocations of divine agents as witnesses. Hence, the law of treaties among states continued to be tied to religious beliefs. The formulary of agreements comprised, as already in Ancient Sumerian times, unilateral declarations of will and promises and the exchange among contracting parties of written documents often setting these declarations in stone or casting them in bronze. Charters uniting the wills of contracting parties in one document could be deposited in religious sanctuaries. This practice has allowed many of these agreements to remain extant in inscriptions.[25]

The modalities of the "composite" treaty-making procedure have been better recorded for

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[22] Alfred Heuß, *Stadt und Herrscher des Hellenismus in ihren staats- und völkerrechtlichen Beziehungen* (Klio, Beiheft N. F. 26) (Leipzig, 1937) [reprint (Darmstadt, 1964)].

[23] Treaty Serdaians – Sybaris, before 510 BCE, edited by Hermann Bengtson, *Staatsverträge des Altertums*, nr 120, vol. 2 (Munich, 1962), p. 15 [reprint (Munich, 1975)].

[24] Treaty Argos – Pallanthion, before 316 BCE, edited by Hatto H. Schmitt, *Die Staatsverträge des Altertums*, nr 419, vol. 3 (Munich, 1969), pp. 32-34.

[25] Treaty Anaitans – Metapians, c. 550 BCE, edited by Hermann Bengtson, *Staatsverträge des Altertums*, nr 120, vol. 2 (Munich, 1962), p. 1o [reprint (Munich, 1975)]. Treaty Serdaians (note 23). Treaty Argos (note 24).

Greek than for Ancient Near Eastern times. Thus, Greek tradition reveals several types of emissaries placed in charge of working out treaties. Already Homeric epics recorded the distinction between two types of diplomatic envoys, on the one side the herald (keryx), who was principally placed under divine protection as the transmitter of formal official messages and could thereby not be forced to take personal responsibility for the messages he had to convey. On the other side, Homeric tradition knew the specially appointed envoy (presbeutes), who was often accompanied by heralds and could be commissioned to conduct treaty negotiations. The *presbeutes* obtained protection only by special agreement between the sending and the receiving ruler.[26] However, an incident recorded in Herodotus's (c. 484 – 425 BCE) *Historiai* shows that diplomatic envoys must already have been placed under specific legal guarantees in Ancient Near Eastern times. Herodotus[27] reported on a clash between Persia and Sparta. According to the report, two emissaries, whom Darius I, Great King of Persia (521 – 485 BCE), had sent to Sparta, had been put to death there in 491 BCE. In redemption for the crime, Sparta had left two aristocrats as hostages to Darius. However, Darius's successor Xerxes (485 – 465 BCE) pardoned the hostages with the argument, as Herodotus put it, that Xerxes "did not want to act like the Spartans who, through the murder of the Persian envoy, had broken the law, which peoples regarded as inviolable." Herodotus's statement made explicit that the protection of the personal integrity of diplomatic envoys was part of the law of war and peace, that this law was unset and regarded as valid even if it could not be enforced through ruling institutions under all circumstances. Because Herodotus placed this statement into Xerxes's mouth, he must have assumed that the law protecting diplomatic envoys was current in the Ancient Near Eastern world empires.

Moreover, the intensive relations among Greek cities contributed to a variety of reports on warfare. Some of the reports reflected a wide concept of war comprising all forms of the use of force, while differentiating among the origins of belligerents. According to Plato (c. 427 – 347 BCE),[28] war between Greeks and non-Greeks as perceived barbarians (pólemos) was conceptually set apart from war among Greeks (stásis). *Stásis* served as a technical term for risings against existing established rule, but could in the wider sense also become applied to violence occurring among inhabitants of Greek cities, who were principally tied together through bonds of friendship. By contrast, *pólemos* stood for formal military conflicts among political communities, among which no ties of friendship existed. Plato believed that the distinction between the two terms could help restricting the intensity of violent action in a *stásis* to what appeared to be mandatory for the purpose of restoring order and legitimate government and the punishment of insurgents, citing the confiscation of property as a legitimate measure. Plato did not indicate that *pólemoi* as military conflicts among politically unrelated groups were not governed by norms at all. Rather, he conceded that wars against "enemies" could not stand under constraints regarding the choice of military means deployed in them. He derived the difference of norms relating to the use of force between *stásis* and *pólemos* from the difference among war aims applicable in either form of combat. He claimed that in the case of *stásis*, the goal was the restoration of order among friends. This goal, in his view, demanded limitations of the use of force, as only such limitations could help preserve the principally given friendship among the parties to the conflict. By contrast, the goal of *pólemos*, according to Plato, was not the restitution of order among friends, because, in his view there could not be friendship between Greeks and non-Greeks. In making this distinction, Plato provided one of the very rare records at the time of a narrow concept of war as *pólemos*, confined to the use of among communities belonging to different cultures and legal systems. Yet, he found little or no acceptance. Instead, wars were, as a rule, declared through heralds against all sorts of enemies and could be carried out to the annihilation of enemies who could fall victim to deportation, enslavement and massacre. Against Plato's plea, this was practice in military conflicts among Greeks as well as among Greeks and non-Greeks. A belligerent party, appearing to be militarily weaker than its opponent, could escape the fate of complete destruction through the conclusion of a treaty conceding its surrender (*deditio*) before the beginning of fighting. Thucydides (c. 460 – 399/396 BCE)[29]

[26] Frank Ezra Adcock and Derek John Mosley, *Diplomacy in Ancient Greece* (New York and London, 1975).
[27] Herodotus, *Historiai* [various edns], chap. VII/133-136.
[28] Platon, *Politeia* [verschiedene Ausg.], chap. V/16, 469e-471c.
[29] Thucydides, *Peri tou Peloponnesiakou Polemou* [On the Peloponnesian War, various edns], chap. V/16, 84-116.

inserted into his narration of the Peloponnesian War a probably fictitious dialogue between Athenians and their enemies on the island of Melos. According to the dialogue, the Athenians demanded that the Melians, seemingly being on the weaker side, should surrender before the launching of the Athenian attack on Melos. But the Melians refused to back in and were destroyed. However, a further possibility of evading annihilation existed even in the course of ongoing combat through formal capitulation by treaty.

The Fusion of Urban with World Rule in Rome

Greek city rule, presumably transferred to the Italian Peninsula by the Etruscans, became the model for government in Rome, defined as the political community of its citizens. The Latin word *civitas* came into use for such communities. With the Greek model of urban rule, core elements of Ancient Near Eastern traditions of the law of war and peace travelled to Rome, at least in the perception of Roman political theorists and historians. For one, historian Livy (Titus Livius, c. 59 BCE – c. 17 CE)[30] transmitted the doctrine that a "public herald" (publicus nuntius), dispatched abroad by authority of the Senate, the Roman city parliament, stood under divine protection from Jupiter (iuste pieque legatus), whom he had to invoke when leaving Roman territory. Livy thus gave expression to the idea that a Roman diplomatic envoy as a public messenger was inviolable, while, like the Greek *keryx*, he was on a formal mission, for example, in order to deliver a declaration of war. In Roman perspective, according to Livy, a declaration of war against an external enemy required the performance of a religious rite administered by a group of priests called fetials.[31] The fetials were also in charge of validating alliance treaties (foedera). Next to the *foedera*, Roman treaty-making practice featured agreements made by military commanders, so-called *sponsiones*, of which the fetials did not have to approve. In the early period, the city of Rome appears to have concluded *foedera* not only with neighbouring cities in the Italian Peninsula, but also with more distant cities such as Carthage. In any case, oaths served as the core instrument to confirm and enforce treaties. As in Ancient Near Eastern times, treaties by public law were made out not merely among partners mutually recognising themselves as legal equals, but also as instruments stipulating the submission of one partner to the other. Livy himself gave one example[32] in his report on the *deditio*, through which the political community of the Collatini surrendered themselves to Roman rule thereby terminating their autonomy. According to Livy, the Roman envoy asked the Collatini, whether the community (populus) had the competence of entering into binding legal obligations at its own discretion (in sua potestate). After the Collatini had confirmed that this was the case, the envoy further inquired whether the representatives of the Collatini were ready to place under Roman rule the *populus*, the city, the fields, the waterways, the demarcations of borders, the sanctuaries together with all divine and human things pertaining thereto. After having confirmed their willingness to do so, the *deditio*, Livy reports, was enacted. The story thus puts on record a formal procedure through which the Collatini as a political community used their autonomy for its renunciation by way of a treaty under the law of war and peace.

A recently excavated inscription reveals that Livy's report was appropriate in its general aspects. The inscription exists in the form of a bronze tablet fragment from the time, when Roman rule expanded over the Iberian Peninsula towards the end of the second century BCE. The fragment was unearthed in the south of the Peninsula. It records a *deditio* dated to the year 104 BCE. Through the legal act, the political community (populus) of the Seano, until then fully autonomous, surrendered itself with everything belonging to it to Roman provincial governor Caesius. The text allows the reconstruction of questions that must have been asked in a form similar to that contained in Livy's report on the *deditio* of the Collatini. According to the Bronze tablet, the Seano gave affirmative answers to these questions. The text of the *deditio* of the Seano, therefore, had the form of a declaration of will, thereby following the established formulary of treaties under the law of war

[30] Livy [Titus Livius], *Historiae* [various edns, chap. I/32, 6-7.
[31] Ibid.**,** chap. I/24, 4-9.
[32] Ibid., Chap. I/38, 1-2.

and peace.[33] It appears to have been common Roman practice to restore property rights to those political communities who had surrendered to the Senate and to place these rights under Roman guarantee. Through the implementation of the *deditio*, the surrendering political community, as the case of the Seano shows, lost its competence to conclude a *foedus* with Rome and was no longer in a position to legally resist authoritative edicts by the Senate. The surrendering political community abandoned its power (potestas) of self-government, but not its distinct collective identity. Consequently, the *deditio* was a treaty implementing the change of political and legal status under the law of war and peace to the disadvantage of the surrendering party. The agreement ended the autonomy which had continued to exist until the agreement came to be executed. But, contrary to assumptions in previous research,[34] the *deditio* did not necessarily imply the occupation of the surrendering political community by Roman authorities. Instead, Roman urban rule overarched a multitude of continuing distinct collective identities even after it had expanded beyond the Italian Peninsula.

Even after large parts of the area, over which Alexander and his successors had established a system of states in West Asia and the Eastern Mediterranean Sea, had fallen under Roman control in 168 BCE, Roman rule remained constituted as a combination of equal and unequal legal relations among states and other political communities with their own distinct collective identities, thereby continuing the Ancient Near Eastern model of universal rule. Roman rule remained principally control over the city of Rome, consociating with the city the growing number of states and other political communities as surrendered entities, as dependent communities, as equal partners or as external enemies. The oath, together with other rituals, remained the usual procedures of concluding and enforcing treaties as in the Ancient Near East.[35] These variegated legal relations did not emerge from a perceived legal vacuum, seemingly a lawless state of affairs in which Roman authorities should have ascribed to themselves the duty of first setting legal norms, before generating some form of order. That this was not the perception of Roman governing institutions, specifically the Senate, becomes clear from the legal norm, reported in historiography for the older period. This norm articulated the demand that a declaration of war should specify the violation of an existing treaty obligation on the side of the enemy to whom the declaration was addressed (res repetuntur).[36] The claim that this legal norm existed, must have been drawn on the perception that relations between Rome and its enemies were governed by the law and that wars had to be justified towards the enemies as responses against previous infringements upon the law. On principle, Roman historiography categorised war as a means to restore the previously given peace and, in doing so, again followed Ancient Near Eastern precedence. Consequently, the nineteenth-century scholarly opinion is untenable,[37] according to which the belief in some "natural enmity" should have informed relations between Rome and external governments and that friendship treaties had to be made in order to overcome this state of affairs.[38] By contrast, the embedding of Roman treaty-making practice into the Ancient Near Eastern tradition of the law of war and peace suggests the continuing perception of the law of war and peace as an unset and generally valid set of legal norms.

The Theory of the Law of War and Peace in Late Republican Rome

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[33] Dieter Nörr, *Aspekte des römischen Völkerrechts. Die Bronzetafel von Alcántara* (Abhandlungen der Bayerischen Akademie der Wissenschaften. Phil.-Hist. Kl., N. F. 101) (Munich, 1989).

[34] Alfred Heuß, *Die völkerrechtlichen Grundlagen der römischen Außenpolitik in republikanischer Zeit* (Klio, Beiheft N. F. 31) (Leipzig, 1933), pp. 60-77 [reprint (Aalen, 1963)].

[35] Alfred Heuß, 'Abschluß und Beurkundung des griechischen und römischen Staatsvertrages', in: *Klio* 27 (1934), pp. 14-53, 218-257 [separately reprinted (Libelli, 188) (Darmstadt, 1967); also reprinted in: Heuß, *Gesammelte Schriften*, vol. 1 (Stuttgart, 1995), pp. 340-419].

[36] Livy, *Historiae* (note 30), chap. I/32, 5-14.

[37] Thus already: Heuß, *Grundlagen* (note 34), p. 18.

[38] Theodor Mommsen, *Römisches Staatsrecht*, vol. 3, third edn (Leipzig, 1887), pp. 590-591 [reprint (Basle and Stuttgart, 1963); first published (Leipzig, 1871)]. Eugen Täubler, *Imperium Romanum*, part 1: Die Staatsverträge und Vertragsverhältnisse (Leipzig, 1913), pp. 318-372 [reprint (Aalen, 1964)].

During the first century BCE, Marcus Tullius Cicero and authors close to him gave explicit testimony to the belief that the law of war and peace was a given in the world. In his plea for Balbus,[39] Cicero jokingly praised Pompey for his knowledge, gathered through his many wars, of alliance treaties (foedera), further types of agreements (pactiones) as well as the legal basis for the relations between Rome and the several political communities, rulers and external states (condiciones populorum, regum exterarum nationum) in conjunction with the general law of war and peace (universum denique belli ius atque pacis). Cicero appears to have structured his list well, as it comprised the main categories of the treaties, namely *deditiones*, and agreements between legal equals, such as existed between Roma and the many political communities, states and rulers. Moreover, the list classed Rome's treaty partners as political communities under Roman rule (populi), rulers outside Roman rule but politically tied to Rome (reges) and, finally external states beyond Roman control (exterae nationes). Cicero subordinated these agreements, usually bilateral instruments, to the abstract category of the law he positioned as valid across and beyond the confines of Roman rule and termed it *ius belli ac pacis*, the law of war and peace. In using this phrase, Cicero avoided the then current *ius gentium*, the law of political communities. Cicero assigned to the law of war and peace the task of forming the legal basis for the generation of treaty obligations. In his view, the law of war and peace could fulfill this task because it derived from religious beliefs (ius quo bella indicerentur, quod per se iustissime inventum fetiale religione).[40] Like Livy, Cicero identified the fetials as the institution, which could convey not only legality but also justice to wars, whenever it was invited to participate in their preparation.[41] For Cicero, then, war was legal as a means to decide conflicts between autonomous political communities, mutually recognising each other as outsiders and thereby ranking as states (civitates). Cicero identified the *civitas*, a city or a state, as the *res publica*, the public matter per se. By consequence, war was a conflict between states, paralleling, in Cicero's view, domestic court trials (sunt duo genera de certandi, alterum per disaptationem, alterum per vim),[42] as Livy also believed.[43] The law of war and peace, thus, continued to be perceived as flowing from religious beliefs still in the first century BCE.

In short sentences, Cicero delivered the earliest theoretical statements on the law of war and peace since the beginning of its recording in Ancient Sumerian times. He defined war (bellum) comprehensively as a legal act comprising all forms of the use of force (genus de certandi ... per vim)[44] and positioned the law of war and peace, as he called it, as the legal source not only making possible the pragmatic conclusion of treaties but also the conduct of just wars. Next to the formal condition of the participation by the fetials, Cicero took up Livy's demand that war, in order to be just, should serve the restitution of previously inflicted injustice (rebus repetitis). Yet he specified the conditions under which wars could be just. In cases, where a Roman explicit request for the restitution of previously inflicted injustice remained unanswered, Cicero foresaw that the ensuing war would be just even without the involvement of the fetials. But, he believed, the fetials had to support just wars fought for goals other than the restitution of previously inflicted injustice.[45] In other words, Cicero held the view that the fetials had to convey justice upon wars the justification for which was not already eminent from the proclamation of war aims. The ultimate goal of accomplishing peace without injustice through wars, thus, appeared to require legitimation derived from religious beliefs. A just enemy (hostis iustus) of Rome, Cicero concluded, was a belligerent with whom Rome shared the law of war together with many further sets of legal norms.[46]

The military means deployed in the course of a war, were to remain unrestricted, in Cicero's perspective, only against enemies which had broken treaties or acted in breach of peace or,

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[39] Marcus Tullius Cicero, *Pro Balbo* [various edns], chap. VI/85.

[40] Marcus Tullius Cicero, *De re publica* [various edns], chap. II/17, 31.

[41] Helga Botermann, 'Ciceros Gedanken zum „gerechten Krieg" in de officiis I.34-40', in: *Archiv für Kulturgeschichte* 69 (1987), pp. 1-29, at p. 28. *Silvia Clavadetscher-Thürlemann, ΠΟΛΕΜΟΣ ΔΙΚΑΙΟΣ [Polemos dikaios] und Bellum Iustum*. LLD Thesis (University of Zurich, 1985), p. 177.

[42] Cicero, *De re publica* (note 40), chap. I/11, 34.

[43] Livy *Historiae* (note 30), chap. XXI/10, 9.

[44] Cicero, *De re publica* (note 40), chap. I/11, 34.

[45] Ibid., chap. I/11, 36.

[46] Ibid., chap. III/29, 108.

like pirates, were no legal belligerents at all.[47] Thus, Cicero, following the doctrine, though not the words of Plato, distinguished between two types of enemy parties, namely those contesting the legitimacy of existing institutions and practices of rule, and those among whom there was a struggle over life and death. Cicero claimed that only the latter type of war warranted the use of all available military means, while the former type obliged belligerents to respect restraints. Cicero, therefore, conceived the law of war and peace as a legal instrument for the purposes of hedging war and reduced the legal use of force to the minimum deemed necessary for the restitution of peace. To that end, he demanded that only regularly enlisted soldiers should be led into combat, while unarmed civilians as non-combatants should be left unharmed.[48]

Cicero defended his distinction between two types of enemies with reference to the history of the Latin word *hostis*. He expressed regret at the fact that this word, having denoted the foreigner in the Law of the Twelve Tables, had been turned into a generic term for the enemy (perduellis). Yet, he believed, the history of the word suggested that conflicts with parties identified as *hostes* were actually struggles against foreigners, not enemies. The original mild meaning of the word appeared to reduce the harshness of war.[49] In explaining his distinctions of the intensity of the use of force with the changes of the meaning of the word *hostis*, while using the word *bellum* for all kinds of war, Cicero committed himself to the wide concept of war, even though he selectively used Plato's theory of war.

As Cicero presented these arguments as pertaining to the law of war and peace, he left unused in these contexts the wider term *ius gentium*. This formula seems to go back to the early period of Roman history, when Roman rule did not extend far beyond the confines of the city. Already during this early period, *ius gentium* may have been used to denote all legal norms that were, in local perspective, considered to be valid not merely as part of Roman municipal law (ius civile), but also in other states and political communities. This perspective may have led to the establishment of the principle that legal norms enshrined in the *ius gentium* were valid for citizens as well as for foreigners in Rome. *Ius gentium*, therefore, was neither some "alien law" in the sense of a set of legal norms considered to be applicable in Rome for foreigners only. Nor, for that matter, was it conceived as a normative framework positioned above states and political communities for the purpose of regulating their mutual relations. Rather, it appears to have been equated with a law based on natural reason to which origin from divine will can have been ascribed, but which might as well have arisen from positive acts of legislation. In any case, *ius gentium* was that part of Roman municipal law, which was applicable to all free citizens of Rome and, simultaneously, to all free citizens in the world. Unfree persons, meaning slaves, were subject neither to the *ius gentium* nor to Roman municipal law, as they did not appear to have the moral status of human beings.

But the difficulty with this ascription of meaning to the formula of *ius gentium* is that it is must be reconstructed from much later sources pertaining to the first century BCE. The most important of these sources is again Cicero. He tied the *ius gentium* to views which he associated with ancestral convictions, thereby placing them in a long tradition of law.[50] The ancestors, Cicero claimed, had distinguished the *ius gentium* from municipal law (ius civile) in such a way as to say that *ius civile* was wider than *ius gentium*, while every norm pertaining to *ius gentium* was also part of *ius civile*.[51] Cicero thus constructed both fields of law as partly overlapping, with the *ius civile* being more comprehensive than the *ius gentium*, and assumed that norms of *ius civile* could not conflict with those enshrined in the *ius gentium*. Under these conditions, the *ius civile* should be "open" solely for Roman citizens.[52] Cicero's concept of *ius gentium* thus had little in common with the law of war and peace. Yet, he seems to have sensed the problem that, in consequence of the vast expansion of Roman rule beyond the confines of the city of Rome, an ever increasing number of persons owned Roman citizenship and ever more foreigners were residing in the city of Rome. As a

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[47] Ibid., chap. I/11, 35; III/29, 107.
[48] Ibid., chap. I/11, 36-37.
[49] Ibid., chap. I/1, 37.
[50] Max Kaser,' Mos maiorum und Gewohnheitsrecht', in: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Romanistische Abteilung 59 (1939), pp. 52-101.
[51] Cicero, *De re publica* (note 40), chap. III/17, 69-70.
[52] Max Kaser, *Ius gentium* (Forschungen zum Römischen Recht, 40) (Cologne, Weimar and Vienna, 1993), p. 15.

consequence, the two sets of legal norms were increasingly indistinguishable. The more intensively the *ius gentium* shaped relations between Rome and other states and political communities, the more likely became a situation in which the *ius gentium* might be of concern for the law of war and peace.

This may be the reason that the earliest extant record of the use of the phrase *ius gentium* for the law of war and peace comes from the circle of intellectuals around Cicero. The collection of texts assembled by Aulus Gellius in the second century CE contains this record as part of excerpts from a treatise, which Marcus Tullius Tiro (c 103 – 4 BCE), one of Cicero's released slaves and extraordinarily productive scholar, appears to have written about the theory of the just war.[53] In the extant fragment of this treatise, Tiro analysed an address that Cato Censorius (c. 234 – 149 BCE) haddelivered to the Senate in 167 BCE. In his address, Cato had justified the resistance by the inhabitants of Rhodes against the expansion of Roman rule. The Rhodians, Cato appears to have explained, had threatened Rome with, but actually had not declared war. Cato had concluded that merely planned but not implemented acts could not be unjust, neither according to natural law (ius naturale) nor to *ius gentium* nor to statutory prohibitions (iure legum). Therefore, Cato had opined, the war that the Romans had actually conducted against the Rhodians had been provoked by the Romans and was, by consequence, unjust.[54] Following this statement, which Tiro ascribed to Cato, *ius naturale* and *ius gentium* had a common origin in divine will and were not within reach of human will. Tiro, who was not a jurist, heavily criticised Cato's position, defending the view that the war of the Romans against the Rhodians had been just according to the *ius gentium*. But in pursuing his argument, he inserted the *ius gentium* into the context of a discussion of the law of war and peace. Whereas Cicero drew on the conventions of Roman urban rule for his use of the phrase *ius gentium*, Tiro tied the same formula to the process of the ongoing expansion of Roman urban rule.

Several words for political communities coexisted in the political diction of Cicero and his contemporaries. *Populus* was the word officially in use for the Romans. It is well recorded in the formula *Senatus Populusque Romanus* for ruling institutions and ruled in Rome. But *populus* could also find application for political communities outside Rome. Likewise, *gentes* could exist in Rome, even within the *Populus Romanus*, as well as elsewhere. Moreover, Cicero interutilised *nationes* with *gentes*, even combining both into the formula *nationes et gentes*. Yet Latin legal diction preferred *gentes*, applying the word to a wide range of types of groups, from small kin groups to large political communities.

The Theory of the Law of War and Peace in the Roman Imperium

At the end of the first century BCE, Roman urban rule could be clad into an ideology of universal rule, thereby following Ancient Near Eastern precedence. A word that had been long in use came to be reapplied with an additional meaning. This was the word *imperium*, whose original meaning had been 'command'. Its derivation *imperator* was the technical term for a high-ranking military commander. Soldiers had the habit of proclaiming some extraordinarily successful military commander *imperator* after a victory in battle. During the final phase of Roman republican rule, Octavian (63 BCE – 14 CE), nephew and adopted son of Gaius Julius Caesar (100 – 44 BCE) and leader of one of the factions in the then ongoing civil war, was elevated to the rank of *imperator* after the battle of Modena on 21 April 43 BCE. Since Caesar's deification in 42 BCE he named himself 'God's Son' (Divi Filius) and claimed the name Caesar for himself. He was then in the process of assembling various offices and powers, with the "tribunician power" (potestas tribunicia) granting him the most far-reaching influence. This power, derived from the annual office of the popular tribune, granted him immunity against criminal prosecution. As Octavian held "tribunician power" indefinitely without occupying the time-bound office of the tribune, his immunity was not tied to incumbency to an office. As *imperator* with "tribunician power" Octavian combined competences as no one else in the Roman *civitas*. Moreover, he was elected consul in 31 BCE,

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[53] Aulus Gellius, *Noctes Atticae*, chap. VI/3, 8-55, edited by Peter K. Marshall, vol. 1 (Oxford, 1968), pp. 222-230 [reprints (Oxford, 1990; 2002; 2005)].

[54] Ibid., chap. VI/3, 40, 45, vol. 1, pp. 227, 228.

thereby moving into the highest office of the state. Like the office of the tribune, the office of the consul had a one-year term. But Octavian allowed himself to be reelected again and again. After he won over his last remaining opponent Marcus Antonius (86/83 – 30 BCE), who had secured a position for himself in Egypt to 31 BCE, Octavian in fact ruled Rome by himself together with the set of manifold states and political communities tied to Rome in one way or another all over the Mediterranean Sea, in Egypt and Western Asia.

Roman rule thus continued as control of the city of Rome, even after Octavian had extended his own grip to areas far beyond the confines of the city. Therefore, it was hardly paradoxical that, on 13 January 27 BCE, Octavian staged a formal ceremony, in the course of which he officially returned to the Senate all his extraordinary competences, thus restituting to full vigour the republican institutions of government, specifically the Senate. For good reasons, Octavian avoided every step, which might be interpreted as his desire to establish monarchical rule. After all, his adopted father Caesar had been murdered under the pretense of having sought recognition as a king. However, the ceremony of 13 January 27 BCE did not signal that Octavian was willing to withdraw from government, as he used the same ceremony to receive approval for his installation as commander over Egypt and all areas that stood under Roman rule but had allegedly not yet been pacified. He remained consul anyway. *Imperium* served as the technical term for his commanding position that was initially limited to a period of ten years. Octavian also received the entitlement to use the title *imperator* as part of his name. Three days later, the Senate took the further step of proclaiming "Imperator" Octavian as "Augustus" in perpetuity, which stood for some kind of guardianship over the Roman *civitas*. The Senate also renamed the month *sextilis* into August, similar to the month *quintilis* which had previously been renamed July in honour of Caesar. The senate extended the term for Octavian's office of "Imperator" several times until Octavian's death in 14 CE. Imperator Octavian Caesar Augustus became incumbent to a position similar to Caesar's, while excluding all possible connotations of monarchical rule. The area under Octavian's control was henceforth called "Imperium". The word thus bore the dual meaning of command and of the area under Octavian's control as, in a way, supreme commander. Following the grant of Roman citizenship under Imperator Caracalla (211 – 217 CE) on 11 July 212, the Roman *civitas* became identical with the Roman Imperium. The words *imperium* and *civitas* could then be interutilised. The Roman Imperium, grown out of the combination of urban with universal rule, was bent on further expansion and, in this capacity, succeeded the Ancient Near Eastern empires, which it overwhelmed in extension already during Octavian's lifetime.[55]

The Imperium was still founded upon the original claim of the city of Rome that its relations with many other states and political communities were unequal in the sense that the Rome government could direct edicts at them. However, as in the Ancient Near East, this claim did not exclude the possibility that Rome could be tied with other states and political communities on the bass of the mutual recognition of legal equality. When in Roman perspective, relations with other states and political communities were unequal, the Roman government expected its edicts to be implemented. In cases, where this expectation did not materialise, war might be imminent. Should war occur under these circumstances, it was the response to *stásis* in Plato's sense. Again in Roman perspective, states and other political communities exempt from Roman government orders were located in Central and Northern Europe, Central, South and East Asia and in Africa south of the Sahara. In northern Europe, Roman rulers could not impose their will, even though already Octavian had made efforts to subject these areas. The wars resulting from such efforts stood under the law of war and peace. However, even though the subjection of areas in Central and Northern Europe to direct Roman rule failed, Roman rulers did seem to convey some form of guarantee for the security of Roman traders doing business in these areas.[56] Put differently, some aspects of Roman municipal law appear to have been applicable beyond the boundaries of effective Roman rule. Since the year 20 BCE, agreements on the basis of the recognition of legal equality came to be concluded with rulers over areas east of the Mediterranean Sea, mainly Parthians, with their centre of government in what

[55] Täubler, *Imperium* (note 37).

[56] Jürgen Kunow, *Der römische Import in der Germania libera bis zu den Markomannenkriegen* (Göttinger Schriften zur Vor- und Frühgeschichte, 21) (Neumünster, 1983).

is Iran today. When the Sāsānian dynasty succeeded to the Parthians in 227 CE, they continued the policy of maintaining relations with Rome on an equal footing. For the years 357 and 358 CE, the mutual address is on record in official letters exchanged between Roman and Sāsānian rulers.[57]

At the same time, Rome maintained relations with South and East Asia, focused on trade. The Alexandrine geographer Klaudios Ptolemaios (c. 90 – c. 170 CE)[58] listed locations of places even in East Asia, drawing on knowledge supplied to him through traders. But there are no indications that formal treaties existed at the time. Neither Roman traders nor rulers of those parts of Asia, including South Asia, where Roman merchants did business and from where official embassies reached the Roman Imperator, seem to have been in need of placing the conduct of trade under positive law.[59]

Acknowledging the law of war and peace as the basis for the relations with Parthians and the Sāsānian dynasty, was, in Roman perspective, compatible with the claim for universal rule. Likewise, the building of a wall (limes) separating areas under Roman rule from those that stood outside Roman control in Britain, Central Europe, Syria, Mesopotamia and Northern Africa, did not prevent the further articulation of that claim. Even though it was visible as an architectural manifestation of the limitation of factual Roman rule, it was not identifiable as some kind of an international border of the Roman Imperium and, in this respect, similar to the Great Chinese Wall.

Under Roman imperial rule, Cicero's formula of the *ius gentium* found continuous application, one of its variants eventually becoming part of legal diction. Roman jurists derived the *ius gentium* from what appeared to them as natural reason common to all humankind (naturalis ratio inter omnes homines). In all political communities under the rule of law and morality, jurist Gaius believed in the second century CE, law consisted in one part of a set of specific legal norms, valid only for the political community for which they had been legislated, and in the other part of norms common to all humankind. The law, he thought, which every political community had set for itself, was municipal law as law binding citizens in their *civitas* only. By contrast, he opined, *ius gentium* was the law valid for all humankind by virtue of its derivation from natural reason.[60] Gaius's concept was inserted into the legal code of the *Institutiones*,[61] part of Imperator Justinian's (527 – 565 CE) *Corpus iuris civilis* (529 x 534).[62] Gaius imposed a conceptual opposition between municipal law (ius civile) and *ius gentium*, while Cicero had assumed the partial identity of *ius civile* with *ius gentium*. Yet Gaius did not contest the view that *ius gentium*, like *ius civile*, could be valid within the *civitas*.

Next to the *ius gentium*, the law of war and peace, for obvious reasons, featured few references in the *Corpus iuris civilis* as a code mainly of municipal law. For one, jurist Proculus[63] took the view that any autonomous political community (liber populus) could not be subject to the governing power of another political community (alterius populi potestati), that, by

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[57] Ammianus Marcellinus Historiae [various edns], chap. 17/5, 3, 10.

[58] Klaudios Ptolemaios, *Cosmographia* (Strasbourg, 1513) [reprint, edited by Raleigh Ashlin Skelton (Amsterdam, 1966); new edn (Paris, 1828)].

[59] Otto Cuntz, *Die Geographie des Ptolemäus* (Berlin, 1923). Gerolamo Emilio Gerini, *Researches on Ptolemy's Geography of Eastern Asia* (Asiatic Society Monograph, 1) (London, 1909) [reprint (New Delhi, 1974)]. Karl-Heinz Meine, *Die Ulmer Geographia des Ptolemäus von 1482. Zur 500. Wiederkehr der ersten Atlasdrucklegung nördlich der Alpen* (Veröffentlichungen der Stadtbibliothek Ulm, 2) (Weißenhorn, 1982). Hans Mžik, *Des Klaudios Ptolemaios Einführung in die darstellende Erdkunde*. Erster Teil (Vienna, 1938). Carlos Sanz, *La Geografia de Ptolomeo* (Madrid, 1959). Paul Schnabel, *Die Entstehungsgeschichte des kartographischen Weltbildes des Claudius Ptolemäus* (Berlin, 1930). Henry N. Stevens, *Ptolemy's Geography. A Brief Account of All the Editions down to 1730*, second edn (London, 1908). On communications between Rome and South Asia under imperial rule see: *Res gestae divi Augusti ex monumentis Ancyrano et Apollonensi*, chap. XXXI, edited by Theodor Mommsen (Berlin, 1883), pp. 132-133. Strabon, *Geographika*, book XV, chap. 1, § 4, book XVII, chap 1, § 13.

[60] *Corpus iuris civilis*. Institutiones; Digesta; partly newly edited by Okko Behrends, Rolf Küntel, Berthold Kupisch and Hans Hermann Seidel (Heidelberg, 1995), Dig. 1.1.9, p. 94.

[61] Ibid., Inst. 1.2.1, p. 2.

[62] Mischa Meier, *Justinian. Herrschaft, Reich und Religion* (Munich, 2004).

[63] *Corpus iuris civilis*. Digesta, edited by Paul Krüger and Theodor Mommsen, fifteenth edn (Berlin, 1928), Dig. 49.15.7.1, p. 885.

with the consequence that the relations among political communities whose members recognised each other as outsiders, could only take place on the basis of the concession of legal equality. Hence, Roman jurists shared the view that there was a pluralism of autonomous political communities. However, they simultaneously postulated the existence of unequal relations among political communities. Hence, they agreed with the ideology of universal rule, while embedding the Roman Imperium into a network of relations with autonomous political communities. The latter type of relations appeared to be under the sole rule of the unset law of war and peace, with only those states and political communities ranking as enemies, against whom the Roman Imperium conducted wars.[64] This was the logic, according to which the *Corpus iuris civilis* deemed public emissaries as inviolable. In the context of the history of the law of war and peace, the *Corpus iuris civilis* stands out as a unique source, but not as witness to the uniqueness of the Roman Imperium.

In the course of the fourth century, the Christian religion rose to the most important religion in the Roman Imperium, with the Imperator first recognising and then practicing it. As an imperial religion, Christianity became exposed to the ideology of universal rule. The various Christian sects, successively dominating the Imperium, utilised the ideology of universal rule in two ways. On the one side, they conceived their own theological dogmata as valid for all Christian believers, wherever they would practice their faith. On the other side, they established Christianity as a tool for the preservation of the Roman Imperium as an institution of universal rule. The Old Testament, into which the prophecy of Daniel had meanwhile become inserted, provided the framework allowing Christian theologians to present world history as the sequence of world empires between the Flood and Judgment Day, including the Roman Imperium.

St Augustine was the most influential among theologians linking the continuity not only of the Roman Imperium, but of the world as a whole to the promotion of the Christian faith. Up until the fifth century, he was the most productive author theological works in all Christian churches. His texts were carefully copied and studied for more than thousand years and thence had a lasting impact on Christian theological doctrine. Augustine understood world history as a finite process with Judgment Day as its end and, in exegesis of Daniel's prophecy, positioned the Roman Imperium as the last world empire. With this projection, he responded to wide-ranging fears early in the fifth century, taking the sack of Rome under the Visigothic King Alaric (c. 370 – 410 CE) in August 410 as an indication of the approaching end of the world.[65] Against these fears, Augustine argued that the world would end by divine will, not through human action and that the strengthening and expansion of the Christian religion through trust in divine benevolence was the best condition for the preservation of the Roman Imperium and the world as a whole.[66] Augustine and his contemporaries ranked Daniel's prophecy as divine revelation and derived from its exegesis their certainty that the Roman Imperium was the last world empire before Judgment Day, but that it was not in acute danger. Theologians took the total number of four world empires, styled kingdoms (regna), as inalterable, while allowing different names to fill the list. Within the fifth-century theological perspective, the sequence of the Babylonian-Assyrian, Medio-Persian and Greek empires, left the last position available for the Roman Imperium.[67]

Moreover, Augustine consociated with this eschatology of the world empires the expectation for a future perpetual peace. In Augustine's projection, perpetual peace was to be established through the expansion of the Roman Imperium to the boundaries of the world island. Consequently, Augustine, within the tradition going back to Livy and Cicero, admitted only those wars as just, which were conducted under the goal of restituting previously inflicted injustice, thereby contributing to the strengthening of peace. Put differently, war in Augustinian theology was morally justifiable only if seeking to accomplish the ever increasing stability of peace, thereby

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[64] Ibid., Dig. 49.15.24, p. 887.

[65] Mischa Meier and Steffen Patzoldt, *August 410. Ein Kampf um Rom* (Stuttgart, 2010).

[66] Augustine of Hippo, 'Contra Faustum Manichæum libri XXXII', chap. 74, in: *PL* [Jacques-Paul Migne, ed., *Patrologiae cursus completus*. Series Latina], vol. 42, col. 207-518, at col. 447-448.

[67] Paulus Orosius, *Historiarum adversum paganos libri VII*, chap. I/19, II/1,4, II/2, edited by Carl Zangemeister (Corpus scriptorum ecclesiasticorum Latinorum, 5) (Vienna, 1882), pp. 71-72, 85 [Nachdrucke. New York 1966; Hildesheim 1967].

eventually removing itself from the world.[68] Peace in all respects, Augustine insisted, was the prime condition for the stability of the world.[69] Augustine used Cicero's comprehensive concept of war, covering all forms of the use of military force, thus admitting as military means only weapons and tactics that could not jeopardise the possibility of the quick restoration of peace among belligerents. Wars conducted by the Roman Imperator for the purposes of securing and expanding the Imperium as the "Respublica Romana" and the world empire were *ex definitione* just according to this doctrine.[70] In its presumed capacity as a world empire, the Roman Imperium was also *res publica*, that is a state as the public matter per se. Fifth-century theologians allowed rulers to bear the title king (rex) or Imperator.[71] This usage of the royal title, which had been anathema at the time of Octavian-Augustus, suggests that they did not hesitate any longer to apply the terminology of royalty to Roman institutions of government.[72] At the same time, fifth- and sixth-century Christian authors could also apply the word Imperium to non-Roman political communities, such as that of the Goths (Imperium Gothorum) at a time, when Goths had settled in Northern Europe outside the territory under Roman rule.[73]

Augustine knew six types of peace, that of the body, that of the soul, that existing between body and soul, that of the house, that of states and that of heaven. He categorised peace as the divinely-willed condition of human life, while war was to him as the deviation from peace caused by human sinfulness. The world appeared to him as divinely-ordered, whose creator had allowed only limited human influence. In Augustine's world view, humans had the freedom to act against the divinely-willed order, might act sinfully, break the peace and even resort to war. Yet, as humans were incapable of destroying the divinely created world, they could, according to Augustine, neither destroy peace completely. Therefore, every war would result in the restoration of peace.[74] In combination with the exegesis of Daniel's prophecy, Augustine shaped peace theology in two principal respects. First, the theology principally privileged wars conducted by imperial command as just wars. Second, it established the paradigmatic sequence of divinely-willed peace, its breach through war as an act of human sin and its restoration with the conclusion of a war classed as a just campaign against infringers of peace.[75] This Augustinian paradigm demanded the theoretical projection of every war, claimed to be just, as a means for the restoration of peace on a more stable basis than before the beginning of the war. It confirmed the position of peace as the normal condition of the world. His ideal served as the benchmark by which human actions, specifically those of heads of states and military leaders, were to be evaluated.

With this conclusion, Augustine reconciled the pacifism explicit in the New Testament, with the needs of preserving the Roman Imperium as the bearer of universal rule. In doing so, Augustine rejected the critical stance that earlier Christian theologians had taken against the conduct of war and military service. These early Christian moralists had maintained that non-Christian soldiers did not have to quit military service before receiving baptism as Christians, but that Christians were not allowed to be recruited into armed forces.[76] By contrast, Augustine ranked military service as necessary for Christians seeking to secure the continuing existence of the Roman Imperium. Under this condition, many military conflicts became legitimate as just wars

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[68] Augustine of Hippo, *De civitate Dei*, book XIX, chap. 7/13, edited by Bernard Dombart and Alphons Kalb, vol. 2 (Corpvs Christianorvm. Series Latina, 48) (Turnhout, 1955), pp. 671-672, 679. Augustine, 'Faustum' (note 66), chap. 74, col. 447-448.

[69] Augustine of Hippo, 'Quaestionum in Heptateuchum libri VII', chap. VI/10, in: *PL*, vol. 34, col. 547-824, at col. 781 [newly edited by Johannes Fraipoint and Donatien de Bruyne (Corpus Christianorum. Series Latina, 33) (Turnhout, 1958), pp. 318-319].

[70] Orosius, *Historiae* (note 67), chap. VII/43, p. 559.

[71] Ibid., chap. VII/27, 28, pp. 498-500; chap. VII/16, 33, pp. 473, 520.

[72] Werner Suerbaum, *Vom antiken zum frühmittelalterlichen Staatsbegriff. Über Verwendung und Bedeutung von res publica, regnum, imperium und status von Cicero bis Jordanes* (Orbis antiquus, 16/17) (Munster, 1961), pp. 229-235.

[73] Orosius, *Historiae* (note 67), chap. VII/43, p. 560.

[74] Augustine of Hippo, 'Epistola 189 ad Bonifacium', in: *PL*, vol. 33, col. 854-857, at col. 856.

[75] Augustine, *Civitas* (note 68), book XIX, chap. 3/ 11-4, pp. 663, 674-682.

[76] Tertullian, 'De corona militari', chap. 15, in: Tertullian, *Opera catholica. Adversus Marcionem* (Corpvs Christianorvm. Series Latina, Bd 2, Teil 2) (Turnhout, 1954), pp. 1056-1060, at pp. 1056-1060.

within Christian theological doctrine. The essential ingredients of Christian theological doctrines relating to the law of war and peace, specifically the formulation of the conditions under which military service was permissible for Christians and the orientation of war on the restoration of peace, go back to Augustine. The statement, seemingly contradicting his peace theology, but attributed to him, that victory in battle revealed divine grace and confirmed the justice of the war conducted under the victor,[77] was identified as a flawed ascription already in the sixteenth century. It is part of a late fifth-century text, which has nothing to do with Augustine.[78]

The Law of War and Peace in East Asia

Conveying the impression as if the history of the law of war and peace was confined to the Ancient Near East and the areas adjacent to Mediterranean Sea would be entirely wrong, for, beyond these parts of the world and, indeed distinct from them, the conditions for the emergence of norms of the law of war and peace were also given. China, for one, produced written testimony for the existence of a form of the law of war and peace from the fifth and fourth centuries BCE. This was part of the "Spring and Autumn Period" (Chūn-Qiū, 722 – 481 BCE) and the "Period of the Warring States" (Zhàn-Guó, 481 – 221 BCE) according to conventional Chinese historiography. During these roughly five hundred years, rule in China was dispersed across various power holders in changing administrative centres. The contemporaneousness of several centres of government sparked the emergence of inter-state relations at various levels maintained through diplomatic envoys.[79] Needless to say that complex armed forces also existed.

These periods witnessed the lifetime of several authors of influential texts, most notably Confucius, Lao-Tse (= Li-Eul Tzu, allegedly born 604 BCE) and Sun-Tzu (= Sun-Wu, c. 500 BCE). These authors worked in different fields of study and represented different approaches to the conduct of relations among states in their own time, Confucius and Lao-Tse as moralists, Sun-Tzu as a military theorist. Younger relatives and students reported on Confucius's projections about the unity of the world in the *Book of Rites* (*Lī kī*).[80] According to these reports, Confucius focused these projections on the past and formulated them as memories of bygone better times. In the past, Confucius is made to have claimed, a condition prevailed, at which everyone followed the so-called "Great Path" (dá-dào). Following this "path", humans appeared to have been led to cultivate their consciousness of belonging together. Accordingly, humans gave priority to the care of widows and orphans rather than promoting their own family interests, and recognised equal rights for everyone. The "Great Path" seemed to have prevented egoism, whence robbers had had no chance of even becoming active. All doors were constantly kept unlocked. Confucius concluded that this had been the period of the "Great Union" (dá-tòng). However, since then, the „Great Path" had been abandoned, egoism prevailed with everyone being engaged in selfish enrichment, towns becoming encircled with walls, hierarchical relations emerging between master and servant, father and son, elder and younger brother, husband and wife.[81] Mencius (Meng-tzu, 372 – 289 BCE) repeated Confucius's doctrine and arrived at the same conclusion[82] that, at the time of the "Great Union", advisers advocating policies of expansion had been named "robbers of the people". Acting against

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[77] [Pseudo-] Augustine of Hippo, 'Epistola 13: Gravi de pugna', in: *PL*, vol. 33, col. 1098.

[78] David A. Lenihan. 'The Influence of Augustine's Just War Theory. The Early Middle Ages', in: *Augustinian Studies* 27 (1996), pp. 55-93. Frederick Hooker Russell, *The Just War in the Middle Ages* (Cambridge Studies in Medieval Life and Thought, Third Series, vol. 8) (Cambridge, 1975), p. 26 [reprints (Cambridge, 1977; 1979); new edn (New York, 2005)].

[79] Chan Nay Chow, *La doctrine du droit international chez Confucius* (Paris, 1941). William Alexander Parsons Martin (= Wei-Liang Ding), 'Traces of International Law in Ancient China', in: *Verhandlungen des 5. Internationalen Orientalisten-Congresses*, vol. 2 (Berlin, 1881), pp. 71-78 [reprinted in: *The International Review* 14 (1883), pp. 63-77; also published as: 'Traces of International Law in China', in: *The Chinese Recorder* 14 (1883), pp. 380-393]. Tchoan-Pao Siu [= Xu], *Le droit des gens et la Chine antique* (Paris, 1926).

[80] *Lī kī* [Kong Zi, Confucius], edited by James Legge (The Sacred Books of the East, 27. 28) (Oxford, 1885) [reprint (Delhi, 1964)].

[81] Ibid., chap. VII/1, 2, pp. 497-498.

[82] Keishirō Iriye, 'The Principles of International Law in the Light of Confucian Doctrine', in: *Recueil des cours* 120 (1967), pp. 1-59, at p. 50.

such advice, rulers had been capable of pursuing the "right path".[83]

The vision of the "Great Union" through unlocked doors applied to relations among states as well. It envisaged a state of affairs in which the principle of the equality of separate yet intertwined states and political communities received mutual recognition among interacting parties. The vision ascribed to Confucius thus categorised peace as a real condition of human life that had been accomplished at some time in the past. The state of peace served as the benchmark, by which Confucius appeared to have wished to evaluate the politics of his own time. As rulers in Confucius's lifetime seemed to have failed to accomplish past standards, the current world appeared to be imperfect. With his projection, Confucius explicitly did not pursue the goal of establishing a framework of rule for the whole world, but described the "Great Union" as having been in existence among the communicating states he knew of. Put differently: Confucius was not an ideologue of universal rule, but demanded the recognition of the rule of law over relations among states and political communities. The word for "union" he wrote with a Chinese character, the root (radical) of which was the thread. Hence, his vision grounded in the model of the bundle tying together diverse entities. The bundle might be opened at any time to include new or release admitted entities.

This interpretation of Confucius's vision of the "Great Union" receives confirmation from entries in the official annalistic historiography on the period. These annals list numerous agreements among interacting rulers. Although none of these agreements is extant in the original, the annals specify that many of these treaties brought together two signatories, while several were even multilateral in scope. Occasionally, several agreements were recorded for one single year.[84] One entry provides information concerning negotiations about the making of a treaty. According to this information, the negotiators accomplished consent about the provisions, but one of the involved rulers scrapped the agreement which he refused to ratify.[85] The entry thus reveals that negotiations followed the "composite procedure" of treaty-making, with the implication that there was an international law of treaty among states. Despite harsh criticism from the point of view of philosophy, the pragmatics of treaty-making showed that relations among states were actually governed by the law of war and peace.

Moreover, the text Tao-te-ching (The Path and Virtue) ascribed to Lao-Tse put on

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[83] Mencius [Meng Zi], *[Mengtzu]. The Works of Mencius*., book VI, part II, chap. 9, nr 1, edited by James Legge (Oxford, 1861), pp. 440-441 [reprints (London, 1875); (Hong Kong, 1960; 1970); further edns, edited by D. C. Lau, 2 vols (Hong Kong, 1984)].

[84] *Ch'un Ch'iu [Chūn-Qiū, Chronicle of Spring and Autumn]*, edited by James Legge, *Chinese Classics*, vol. 5 (Hong Kong, 1872), book I, Year Yin 1, nr 2, p. 3, Year Yin 2, nr 4,7, p. 8, Year Yin 3, nr 6, p. 12, Year Yin 6, nr 2, p. 21, Year Yin 8, nr 6, 8, p. 25; book II, Year Hwan 1, nr 4, p. 35, Year Hwan 2, nr 8, p. 39, Year Hwan 11, nr 1, p. 56, Year Hwan 12, nr 2, 3, 7, p. 58, Year Hwan 14, nr 3, p. 62, Year Hwan 17, nr 1, 2, p. 68; book III, Year Chwang 9, nr 2, p. 83, Year Chwang 13, nr 4, p. 90, Year Chwang 16, nr 4, p. 94, Year Chwang 19, nr 3, p. 98, Year Chwang 22, nr 5, p. 102, Year Chwang 23, nr 10, p. 105, Year Chwang 27, nr 2, p. 111; book II, Year Min 1, nr 4, p. 124, Year Min 2, nr 6, p. 128; book V, Year He 2, nr 4, p. 136, Year He 3, nr 6, p. 137, Year He 4, nr 3, p. 140, Year He 5, nr 5 [multilateral], p. 144, Year He 7, nr 4, p. 148, Year He 8, nr 1, 2, p. 150, Year He 9, nr 4, p. 153, Year He 15, nr 3, p. 166, Year He 19, nr 2, 3, 7, p. 176, Year He 20, nr 5, p. 178, Year He 21, nr 2, 7, pp. 179, 180, Year He 25, nr 7, p. 195, Year He 26, nr 1, p. 198, Year He 27, nr 6, p. 201, Year He 28, nr 8, p. 207, Year He 29, nr 3, p. 213, Year He 32, nr 4, p. 220; book VI, Year Wan 2, nr 3, 4, p. 232, Year Wan 3, nr 6, p. 236, Year Wan 7, Nr 8, S. 247, Year Wan 9, nr 4, 5, p. 251, Year Wan 10, nr 5, p. 256, Year Wan 13, nr 8, p. 263, Year Wan 14, nr 8 [multilateral], p. 266, Year Wan 15, nr 2, 10, p. 270, Year Wan 16, nr 1, 3, p. 274, Year Wan 17, nr 3, p. 277; book VII, Year Seuen 7, nr 1, p. 300, Year Seuen 11, nr 2, p. 309, Year Seuen 12, nr 6, p. 316; book VIII, Year Ch'ing 1, nr 5, p. 336, Year Ch'ing 2, nr 4, 10, p. 343, 344, Year Ch'ing 3, nr 13 (two agreements), p. 352, Year Ch'ing 5, nr 7[multilateral], p. 356, Year Ch'ing 7, nr 5, p. 363, Year Ch'ing 9, nr 2 [multilateral], p. 370, Year Ch'ing 11, nr 2, p. 375, Year Ch'ing 15, nr 3, p. 387, Year Ch'ing 16, nr 14, p. 395, Year Ch'ing 17, nr 3, p. 403, Year Ch'ing 18, nr 14, p. 409; book IX, Year Seang 3, nr 3, 5 [multilateral], p. 419, Year Seang 7, nr 7, p. 431, Year Seang 9, nr 5, p. 438 [multilateral], Year Seang 11, nr 5, p. 451, Year Seang 15, nr 1, p. 469, Year Seang 16, nr 2, p. 472, Year Seang 19, nr 1, p. 482, Year Seang 20, nr 1, 2 [multilateral], p. 485, Year Seang 25, nr 5, p. 513, Year Seang 27, nr 5 [multilateral], p. 532, Year Seang 29, nr 7, p. 547; book X, Year Ch'aou 7, nr 3, p. 615, Year Ch'aou 11, nr 6, p. 633, Year Ch'aou 13, nr 5, p. 647, Year Ch'aou 26, nr 4 [multilateral], p. 715; book XI, Year Ting 3, nr 5, p. 748, Year Ting 4, nr 4 [multilateral], p. 752, Year Ting 7, nr 5, p. 764, Year Ting 8, nr 14, p. 768, Year Ting 11, nr 4, p. 779, Year Ting 12, nr 7, p. 781; book XII, Year Gae 2, nr 2, p. 798 [reprints (Hong Kong,1969; 1970; 1971; 1985)].

[85] Ibid., book VI, Year Wan 16, nr 1, p. 274.

record that not only Confucius but at least one further and close contemporary theorist took the view that government should be placed under the rule of law. Lao-Tse, as a philosopher of Daoism, severely censured rulers seeking to focus all governing powers on themselves alone, thereby regarding all other human beings as their subjects. In reality, Lao-Tse observed, such rulers were not at all full of moral integrity and, by consequence, not qualified for government. This, he argued, was not the case because the government of the state had to be placed under the rule of the three principles of care for others, humility and humanity.[86] Lao-Tse thus condemned dependence on hierarchical orders and posited the recognition of equality as the basis for peaceful relations in humankind. Even though Lao-Tse and Confucius, like Mencius a little later, linked their concept of the "path" with different contents, the need to return to nature for Lao-Tse, the willingness to preserve rites and to maintain order for Confucius and Mencius, they jointly insisted that a stable peace was not only desirable, but also accomplishable, and should consist in the respect for the rule of law above states and political communities.

The same conviction underlies the work of Sun-Tsu, perhaps the best known textbook of military strategy and tactics from Ancient China.[87] The text consists of a series of brief statements, most of which relate to the building of an armed force, the setting of pragmatic strategic goals and the choice of appropriate tactical means. Next to these matters, the work also featured statements about the principles of the theory of war. The latter comprised, among others, a scheme for levels of military planning, ranking the thwarting of enemy plans at the top, second the attack against enemies of an alliance partner, third the direct attack on the enemy and, at the end, the siege of fortified cities.[88] Sieges counted as the least desirable, because they inflicted damage on non-combatants. Sun-Tsu used this ranking scheme to defend his conclusion that the military leader best prepared for war, was capable of defeating enemies without fighting, taking cities without sieges and forcing governments of states into obedience without battles. In order to allow military commanders to accomplish these goals, Sun-Tsu proposed the following strategic rule of the thumb: If the number of troops controlled by a commander exceeded that of the enemy at the rate of 10 to 1, the commander should encircle the enemy; should the ratio be 5 to 1, the commander should order the attack; should it be 2 to 1, he should divide his forces into two parts; if there was an equilibrium, he should risk battle; if the commander controlled a force slightly weaker than that of the enemy, he should try to evade the enemy; and if the commander controlled a vastly inferior force, he should withdraw in good order.[89] For Sun-Tsu, the strategist, doing battle did not have priority but always was the choice of the lesser evil. It is hardly possible to give more explicit expression to the goal of orienting war to the maintenance and restoration of peace as the normal condition of human life, in conjunction with the demand to limit the military means deployed in war. The Ancient Chinese literary tradition reflected, in the language of ethics and military theory, propositions, according to which the law of war and peace was to serve, as a set of legal and moral norms overarching coexisting and even rivalling states, the purpose of maintaining and restoring peace.

Summary

In sum, the history of the law of war and peace, in the Ancient Near East and the Mediterranean area as well as in Ancient China from the middle of the third millennium BCE and the middle of the first millennium CE, manifests a great tradition. Not only norms relating to treaty-making and the conduct of war were derived from divine will, thereby being categorised as unset; also peace in general appeared to be the normal condition of human life; it could be breached through sinful action

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[86] Lao Tse [= Li Eul Tzu], *La voie et le vertu*, nr 67, edited by Stanislas Julien (Paris, 1842), pp. 250-251. For a comment see: Siu, *Droit* (note 79), p. 50.

[87] Michael I. Handel, *Sun Tzu and Clausewitz. "The Art of War" and "On War" Compared* (Professional Readings in Military Strategy, 2) (Carlisle Barracks, 1991).

[88] Ralph D. Sawyer, *The Art of the Warrior. Leadership and Strategy from the Chinese Military Classics* (Boston and London, 1996), pp. 105-106.

[89] Sun-Tsu, 'On the Art of War', edited by Thomas Raphael Phillips, *The 5 Great Military Classics of All Time* (Harrisburg, PA, 1940), pp. 13-63, at p. 27 [reprint (Harrisburg, 1985)].

but not destroyed. Within this great tradition, war was not unregulated combat but the use of weapons to decide conflicts among members of different states and political communities. The legal norms believed to regulate war determined the criteria for the recognition of war-making capability and the standards allowing decisions about the justice of wars.

Admittedly, many of these elements of the great tradition remained abstract and came on record only in writings by Greek and Roman authors towards the end of the period under review, such as the refutation of the war-making capability of pirates, the expectation of the inviolability of diplomatic envoys, together with the demands that relations among states and political communities should be placed under the rule of law, that valid treaties should be honoured and that the deployment of military means should be restricted. However, the late explicit recording of these elements of the great tradition outside China does not imply that they had not been in existence before. The expectation, to mention only this point, that diplomatic envoys should not be made responsible for the contents of the messages they are dispatched to convey and that, by consequence, they should be granted protection, is not specific to the degree that requires an identifiable cultural background, a manifest set of political institutions and a concrete legal order to become considered enforceable Moreover, some elements of the law of war and peace are extant not only in the Ancient Near, the Mediterranean area and Ancient China, but also elsewhere, namely in South Asia. In South Asia, the strategy of battle avoidance was well recorded early on, and the principle may have been stated that relations among states should be regarded as shaped not only by political calculations (artha), but also by abidance by the law (dharma). The latter record may have been laid down in writings from the late fourth century BCE, that is, the period when the Maurya dynasty had to face the invasion by troops under Alexander III.[90]

In conclusion, the law of war and peace appears to have consisted of its essential elements already at the time of its earliest recording. That does not mean that the law of war and peace did not change. Yet it suggests that efforts to trace its beginnings to specific cultural origins are useless. The comparison between the Ancient Near Eastern and the Ancient Chinese tradition supports the assumption that the law of war and peace has emerged from certain common conditions of human life, while it is that unlikely specific "legal communities" ever generated it. In so far, Cicero's insistence that the law of war and peace derived from the set of legal norms he identified as "natural law" has empirical evidence in its support. The specific feature characterising the law of war and peace during the period under review was the model employed to reconcile conflicting ideologies of universal rule with the demand for the maintenance of regulated relations among states and other political communities. The model helped combining ideologies of universal rule with the temporary or preliminary recognition of the pluralism of coexisting, at times rivaling, states and other political communities. Universal rule, programmatically proclaimed as the state of peace, served as the program for the future unity of humankind in diversity.

[90] *The Mahâbhârata of Krishna-Dwaipayana Vyasa*, edited by Prapāta Chandra Ray, vol. 12, part 1, section C II (Kolkata, 1890), pp. 327-328. *The Laws of Manu* [Mânava Dharma Shâstra], edited by Georg Bühler (Sacred Books of the East, 25). Oxford 1886, pp. 216-252 [reprints. Dehli 1964; 1967; 1988; 1996; 2006; Richmond, SY 1998; 2001]. Kautilya [Kautilīya], *Arthaçāstra*, edited by Rudrapatna Shamasastry (Mysore, 1909) [another edn (Mysore, 1929)].