1 A methodological introduction: this study and its limitations

This is a study of the intellectual origins of international law. This volume combines techniques of intellectual history and historiography in order to account for the earliest developments in the sources, processes and doctrines of the law of nations. This combination of methods is not only essential for considering the earliest formation of ideas of international law, but also for beginning an understanding of the manner in which those ideas have been received by modern publicists and the extent to which they have been recognized in the modern practice of States.

My book will thus critically examine what has become an article of faith in our discipline: that international law is a unique product of the modern, rational mind. I argue here that it is not. While this volume charts the intellectual impact of the idea of ancient international law, it purposefully ignores the appreciation of this subject by historians, political scientists and internationalists. My study, moreover, confines itself to the single inquiry of whether the ancient mind could and did conceive of a rule of law for international relations. I certainly do not attempt to argue or suggest here that modern principles or doctrines of international law can be traced to antiquity. Nor do I pronounce judgment on the exact manner in which the ancient tradition of international law was received in early-Modern Europe or after. These inquiries must be left for later research and discussion. I confront here, therefore, an ancient law of nations on its own terms. By doing so, I am making a start on a broader vision of the intellectual origins of our discipline.

Intellectual history is, after all, the story of ideas. International law, even when considered as an historical subject, is typically conceived as a collection of rules motivated by international relations. Rarely is it viewed as a cogent theory of State relations. One thrust of this book will test such a theory against the historical circumstances of the ancient world. In

order to do this, my study accepts the notion that international law is impossible without a system of multiple States, each conscious of its own sovereignty and the choice between relations being premised on order or on anarchy.[1]

Times and places

As a consequence of these conceptual limitations, this volume will be limited to three general periods of antiquity. They are (1) the ancient Near East including the periods subsuming the Sumerian city-States, the great empires of Egypt, Babylon, Assyria and the Hittites (1400–1150 BCE), and a later, brief period focusing on the nations of Israel and their Syrian neighbors (966–700 BCE); (2) the Greek city-States from 500–338 BCE; and (3) the wider Mediterranean during the period of Roman contact with Carthage, Macedon, Ptolemaic Egypt, and the Seleucid Empire (358–168 BCE). I am mindful, of course, that the temporal and geographical scope of this study is huge. But it is not insuperable. I have chosen with care the times and places in antiquity for review; in each one there is an undisputed, and authentic, system of States in place. The evidence for this proposition will be detailed in Chapter 2.

By the same token, I do acknowledge that there is some arbitrariness in the dates and localities selected for research in this book. As Professor Wolfgang Preiser wrote in his recent abstract of the history of international law in antiquity:

> We accept that writers of history of international law must . . . be allowed to apply the intellectual principle of order called categorization by period which is utilized by all historians, irrespective of specialization, when they perceive their task to be the comprehension respectively of an uninterrupted flow of events. It is regrettable that a living process should be thus divided into chronological and locational sections; yet, taking our limited powers of absorption into consideration, it cannot be avoided.[2]

This defense of historiographic method is especially pertinent in my study, attempting (as it does) to trace the patterns of State practice amongst different peoples and State organizations at very different times in antiquity.

[1] See Vilho Harle, *Ideas of Social Order in the Ancient World* 91–100, 165–68, 171–74 (1998); Georg Schwarzenberger, International Law in Early English Practice, BYIL 52, 52 (1948).
[2] Wolfgang Preiser, History of the Law of Nations: Basic Questions and Principles, in 7 *Encyclopedia of Public International Law* 126, 131 (Rudolph Bernhardt ed. 1984).

It is precisely because I believe that there is an essential unity in the nature of State behavior in ancient times that I am willing to adopt this comparative approach for this study. My selection of times and places for in-depth analysis has a very important aspect. The "uninterrupted flow of events" in ancient times in the Near East and Mediterranean meant that the traditions of statecraft that were developed at an early time by the Sumerian city-States and their Akkadian conquerors, and reformulated by the Assyrians and Hittites, were transmitted to later cultures through the Egyptians and Israelites and Phoenicians, and thence to Greece, Carthage, and Rome.

It is for this reason that I do not survey the great international law traditions of India and China in this book. The literature available on the political cultures and international societies of ancient India (from the post-Vedic period until 150 BCE)[3] and the Eastern Chou and Warring States Periods in China (770–221 BCE)[4] is large and of generally high quality.

[3] For general treatises, see, e.g., Chacko, India's Contribution to the Field of International Law Concepts, 93 RCADI 117 (1958–I); Chacko, International Law in India, 1 Indian JIL 184, 589 (1960–61); 2 *ibid.* at 48 (1962); Hiralal Chatterjee, *International Law and Inter-State Relations in Ancient India* (1958); Nawaz, The Law of Nations in Ancient India, 6 Indian BIA 172 (1957); Pavithran, International Law in Ancient India, 5 Eastern JIL 220, 307 (1974); 6 *ibid.* at 8, 102, 235, 284 (1975); Nagendra Singh, History of the Law of Nations – Regional Developments: South and South-East Asia, in 7 *Encyclopedia of Public International Law* 237 (Rudolph Bernhardt ed. 1984); Nagendra Singh, *India and International Law* (1969); S. V. Viswanatha, *International Law in Ancient India* (1925). For considerations of the general theory of international relations in ancient India, see C. H. Alexandrowicz, Kautilyan Principles and the Law of Nations, 41 BYIL 301 (1965); Derett, The Maintenance of Peace in the Hindu World: Practice and Theory, 7 Indian YBIA 361 (1958); Mahadevan, Kautilya on the Sanctity of Pacts, 5 Indian YBIA 342 (1956); Modelski, Kautilya: Foreign Policy and International System in the Ancient Hindu World, 58 *American Political Science Review* 549 (1964); Ved P. Nanda, International Law in Ancient Hindu India, in *The Influence of Religion on the Development of International Law* 51 (Mark W. Janis ed. 1991); Pavithran, Kautilya's *Arthasastra*, 7 Eastern JIL 193, 243 (1976); 8 *ibid.* at 16 (1977); Ruben, Inter-State Relations in Ancient India and Kautilya's *Arthasastra*, 4 Indian YBIA 137 (1955); Sastri, International Law and Relations in Ancient India, 1 Indian YBIA 97 (1952); Nagendra Singh, The Machinery and Method for Conduct of Inter-State Relations in Ancient India, in *International Law at a Time of Perplexity: Essays in Honor of Shabtai Rosenne* 845 (Yoram Dinstein ed. 1989). For reviews of specific doctrinal issues, see Armour, Customs of Warfare in Ancient India, 8 *Grotius Society Transactions* 71 (1922); Bedi, The Concept of Alliances in Ancient India, 17 Indian JIL 354 (1977); Palaniswami, Diplomacy of the Ancient Tamils, 10 Eastern JIL 17 (1978); Palaniswami, International Law (War) of the Ancient Tamils, 8 Eastern JIL 41 (1977); Pavithran, Diplomacy in Kautilya's *Arthasastra*, 8 Eastern JIL 163, 245 (1977); Poulose, State Succession in Ancient India, 10 Indian JIL 175 (1970); L. Rocher, The "Ambassador" in Ancient India, 7 Indian YBIA 344 (1958).

[4] See, e.g., Britton, Chinese Interstate Intercourse Before 700 BC, 29 AJIL 616 (1935); Shih-Tsai Chen, The Equality of States in Ancient China, 35 AJIL 641 (1941); Frederick Tse-Shyang Chen, The Confucian View of World Order, in *The Influence of Religion on the*

Nevertheless, there is simply no historical evidence to suggest that there was any substantial diplomatic contact between Indian and Chinese cultures, nor between these great Asian international systems and those of the Near East and Mediterranean. This is surprising in view of the extensive economic and religious contacts between all of these culture centers in the ancient world. Without that essential element of contact and continuity, I believe it prudent to exclude from the wider consideration of this volume Indian and Chinese contributions to the development of international law.[5]

I am mindful, of course, that this decision exposes me to the criticism directed against much modern international law scholarship: that it ignores or perverts non-European, non-Western traditions of international relations. I actually concur with this critique. But there is the obvious point that ancient cultures (whether from the Near East or Greco-Roman tradition) should not be enlisted for some modern historiographic conflict between East and West, developed versus developing worlds. I certainly make no claim here of historic continuity between the ancient and modern worlds, and absolutely eschew the notion that "modern," "Western" doctrines of international law derive any extra legitimacy by being traced back to ancient sources – assuming such could be proved (which I seriously doubt).

Comparison and relativism

Even so, that leaves a significant question about the propriety (and, indeed, even the intellectual legitimacy) of the kind of comparative study of ancient international law I wish to undertake here. I take as a starting-

Footnote 4 (*cont.*)
Development of International Law 31 (Mark W. Janis ed. 1991); Te-hsu Ch'eng, International Law in Early China (1122–249 BC), 11 *Chinese Social and Political Science Review* 38, 251 (1927); Iriye, The Principles of International Law in View of Confucian Doctrine, 120 RCADI 1 (1967–I); W. A. P. Martin, Traces of International Law in Ancient China, 14 *International Review* 63 (1883); Shigeki Miyazaki, History of the Law of Nations – Regional Developments: Far East, in 7 *Encyclopedia of Public International Law* 215 (Rudolph Bernhardt ed. 1984); Richard Louis Walker, *The Multi-State System of Ancient China* (1953).

[5] For much the same reasons, I also excluded considerations of African State systems and the international relations of the Byzantine empire. For more on these, see T. O. Elias, History of the Law of Nations – Regional Developments: Africa, in 7 *Encyclopedia of Public International law* 205 (Rudolph Bernhardt ed. 1984); T. O. Elias, *Africa and the Development of International Law* (1972); A. K. Mensah-Brown, Notes on International Law and Pre-Colonial Legal History of Modern Ghana, in *African Legal History* 107 (UNITAR 1975); Stephen Verosta, International Law in Europe and Western Asia Between 100 and 650 AD, 113 RCADI 484 (1964–III).

point for this caveat Professor Preiser's exegesis on comparative international legal history, which is worth quoting at length:

> General legal history is, for good reasons, concerned with all legal developments of the past, regardless of where or when they appeared, and also of whether or not they prevailed over the longer term. The history of international law has no reason for proceeding otherwise . . . The historian of international law, for his part, will see his task in gaining command over the international legal developments of the period in question and placing them in their correct context . . . The comparative law approach as such is nothing new for the history of international law . . . However, until now the comparison has been restricted almost entirely to different epochs in the history of European international law. Once research into the unexplored areas of international law has advanced sufficiently far to banish the danger of premature generalizations, this approach will be able to draw on an abundance of new and in part no doubt fascinating and exotic material. We may hope to see the appearance of new questions and answers . . . The ultimate aim of all conceivable comparative work in the area of the history of international law is not the comparison of individual phenomena, whatever their intrinsic importance, but the comparison of entire epochs. This means comparing above all those periods of time for which the claim can be made . . . for the existence of a legally ordered inter-State system which on its own merits persisted over a long period of time alongside the mere use of force. Put differently, what is here at issue is a comparative examination of independently developed, functional international legal orders which helped influence the legal character of their respective eras.[6]

Putting aside the attractions of "exotic material," and the extraordinary intellectual hazard of treating any subject as "different" or "other" than established norms (a common thrust of the Orientalism of the nineteenth century), Preiser offers an intelligible methodology for my project. The validity of any comparative exercise in studying ancient international law depends on the selection of historical evidence concerning authentic State systems and placing it in its "correct context," to use Professor Preiser's words, while taking care to avoid "premature generalizations." "Correct context" means, I would suppose, that statements made about notional rules of State conduct in international relations are weighed against the available historical record of State behavior in antiquity. It is not enough, of course, that States may have *said* that they observed a particular rule of international law. It is quite another matter to see whether they, in fact, did so. My survey will attempt, wherever possible, to ascertain the actual observance of these norms of State conduct.

[6] Preiser, *supra* note 2, at 128–29.

Likewise, taking care to avoid "premature generalizations" is in large part a matter of reminding oneself, as Professor Shabtai Rosenne has observed, that while "there is a marked similarity in the problems that have been faced [in different State systems], and in the solutions reached . . . they start from different underlying premisses and different general philosophies of law and the place of the law in the social system."[7] One cannot be misled by supposed similarities in "detailed rules of law"[8] developed in State systems separated by great time and distance.

This study scrupulously avoids any such conclusion that there was a single, cohesive body of international law rules recognized by all States in antiquity. Such an assertion would be folly, based (as it must be) on the same ruinous reasoning that compels some writers to suggest that modern doctrines of international law can trace their lineage directly back to ancient times. The point I am making here is, at once, more subtle and more consequential. This study will seek to understand not whether there was a common set of rules of State behavior in antiquity, but whether there was a common *idea* or *tradition* that international relations were to be based on the rule of law.

Sources, process, and doctrines

The organizing principle of this book will be to examine whether an ancient law of nations had the paradigmatic attributes of modern international law. I believe that it did not. Yet, that does not make the law of nations in antiquity any less relevant or worthy of study. We conceive of international law today as a network of sources, processes, and doctrines, forming a web of obligation, though without explicit sanction. The ancient mind, I will suggest here, could not distinguish the process elements of rules for State behavior from the sources of those obligations or their content.[9] For that reason alone, ancient international law was a primitive legal system, as that concept was understood and defined by Sir Henry Maine.[10]

[7] Shabtai Rosenne, The Influence of Judaism on the Development of International Law, 5 Netherlands ILR 119, 121 (1958). [8] *Ibid.*

[9] See H. L. A. Hart, *The Concept of Law* 89–96 (1961).

[10] See Sir Henry Maine, *Ancient Law* (1861) (1986 ed.); Sir Henry Maine, *International Law* 13 (1894). Other writers have developed the notion of international law as a primitive legal system: see Michael Barkun, *Law Without Sanctions: Order in Primitive Societies and the World Community* (1968); E. Adamson Hoebel, *The Law of Primitive Man* 331 (1954); Roger D. Masters, World Politics as a Primitive Political System, 16 *World Politics* 595 (1964); Yoram Dinstein, International Law as a Primitive Legal System, 19 *New York University Journal of International Law and Politics* 1 (1986).

The initial place to test that hypothesis is not, as some have supposed,[11] to examine the manifestations of international law doctrines in the ancient documents and materials. Instead, I take as my point of departure a comprehension of the sources of international legal obligation in antiquity. These will be very carefully considered in Chapter 3. What I hope to make clear is that other primitive aspects have been wrongly attributed to an ancient law of nations. For example, the sources of standards for State behavior were not, as has been supposed, exclusively religious. Reason and experience mattered in ancient international relations, just as today. To understand the sources of rules of State relations is the first step in comprehending whether those rules had content, whether they were perceived as being legitimate, and how they were given sanction.

Likewise, the doctrinal norms of international antiquity, though small in number, were broad in importance and capable of eliciting certainty and security of expectation. This will be shown for a range of restraints on State behavior, including (1) the conduct of embassies, immunities granted to envoys, and protections afforded to foreigners; (2) the sanctity given to treaties and alliances; and (3) the constraints of a nation declaring war and the limits on the actual conduct of hostilities.

These doctrines have been selected with the view of capturing the broadest spectrum of normative values in State relations. The reception, treatment, and functions of ambassadors (for example) implicated an essential inquiry: the capacity of the ancient State in placing its relations with its neighbors on a footing of friendship. A corollary of this problem was the ability of ancient States to develop statuses and relationships that would eliminate particularism. Likewise, the negotiation, ratification, enforcement, and termination of treaties was a vital aspect of ancient State relations. Some scholars (following an Austinian view of law)[12] have suggested that the only basis of a law of nations in antiquity was the positive act of one State making faith with another. Review of this assertion will be a consistent theme of this study.[13] But there is also the narrower

[11] This would be my single, methodological criticism of the pioneering works on this subject written in the late nineteenth and early twentieth centuries. As with any study of this sort, one must acknowledge that one is standing on the shoulders of giants. In my case, the leviathans are Coleman Phillipson's two-volume work, *The International Law and Custom of Ancient Greece and Rome*, published in 1911, the first two books of F. Laurent's earlier, multi-volume set, *Histoire de droit des gens* (1850–70), and Michael Rostovtseff, International Relations in the Ancient World in *The History and Nature of International Relations* (E. Walsh ed. 1922).

[12] See John Austin, *The Province of Jurisprudence Determined* 127, 141–42 (1832) (H. L. A. Hart ed. 1954).

[13] See Chapter 2, pp. 31–41 below; Chapter 3, pp. 51–59 below; and Chapter 5.

question of the manner in which the ancient mind was competent to interpret and enforce rules of State behavior contained in written agreements. Lastly, there is a recognition that armed conflict was a constant reality of international life in ancient times, as today. The conditions under which nations believed they had rights under international law, rights that had to be vindicated by the declaration of war against another nation, were significant choices made by ancient States. In the same fashion, the exercise of restraint in making war was surely one of the most important manifestations of the rule of law in ancient State relations.

Each of these doctrinal fields was the subject of at least some consideration by each of the civilizations studied in this volume.[14] As they are discussed in turn – diplomacy and friendship in Chapter 4, treaty-making in Chapter 5, and the initiation and conduct of war in Chapter 6 – it is important to remember that the emphasis of these chapters will not be merely to catalogue instances where ancient States apparently recognized these doctrinal features of an ancient law of nations. Instead, the object is to establish recurrent patterns of thinking and practice concerning these doctrines. This is what I intend in explicating a tradition of international law in antiquity.

Texts and sources

Intellectual history is largely a matter of close textual analysis. Such a study is, of course, only as good as the texts it relies upon. It is no surprise, therefore, that the greatest challenge for fashioning an intellectual history of international law in antiquity is the sparsity of the historical record. In researching this study I recognize that only fragments of that record, containing only limited memorializations of State practice, have found their way to the present. Some of those extant texts, one must

[14] The practice of international arbitration amongst the Greek city-States has been a popular subject of scholarly attention for many years. See, e.g., V. Bérard, *De arbitrio inter liberas Graecorum civitates* (1894); Victor Martin, *La Vie internationale dans la Grèce des cités* (1940) (reprinted 1979); A. Raeder, *L'Arbitrage international chez les Hellènes* (1912); J. H. Ralston, *International Arbitration from Athens to Locarno* (1929); Michel Revon, *L'Arbitrage international* 62–105 (1892); M. N. Tod, *International Arbitration Amongst the Greeks* (1913); W. L. Westermann, International Arbitration in Antiquity, 2 *Classical Journal* 197 (1906–07). Nevertheless, arbitration does not appear to have been practiced to any great degree in the ancient Near East or by the Romans and their rivals. See Louise E. Matthaei, The Place of Arbitration and Mediation in Ancient Systems of International Ethics, 2 *Classical Quarterly* 241 (1908). For that reason, arbitration – which could have been a putative element of third-party settlement of international disputes based on a rule of law – will not be considered in this book.

realize, have been degraded in transmission to the point that they are nearly useless for historical inquiry.

It is worth remembering, though, that today's record of customary international law, the uncodified practice of States, is also incomplete, and there continue today to be strong methodological problems in piecing together a complete picture of State practice. The problem today is not, of course, the historical distance of events, but, rather, the difficulty in determining which examples of modern practice are relevant, and which are not. The problem with antiquity is that the modern researcher is unaided by any contemporary treatment of the subject of rules governing State behavior in ancient times. We know, for example, that there were a few texts written in Greek and Latin (including those by Aristotle, Demetrius of Phaleron, and Varro) on subjects of statecraft that subsumed matters involved in the law of nations, such as rules for declaring war and the conduct of embassies.[15] None of these texts survived to the present day, and we have no reliable information from other classical writers as to the contents of these treatises. Our situation is aptly described by H. B. Leech in an essay he wrote in 1877:

> If, in the centuries to come, the special treatises upon modern Public Law were to disappear, and the student of European civilisation in the nineteenth century should be obliged to have recourse to purely historical works for light on this subject, he would find there but scanty information upon the principles and working of the present International Code. This is our position with regard to the Public Law of ancient times.[16]

While there is a paucity of systematic treatments of the subject of the law of nations in antiquity, our task has been made easier by notable advances in classical historiography. The first among these has been in more sophisticated treatments and understandings of the literary evidence that does survive from ancient times. Greater refinement in Biblical scholarship[17] and the handling of epic or archaic texts (whether from Sumer or from early Greece)[18] have allowed for more certainty in dating the historical events narrated in these writings, as has strong archeological evidence.

[15] See H. B. Leech, *An Essay on Ancient International Law* 22–23 (1877), for a consideration of these texts. See also Sir Frank Adcock and D. J. Mosley, *Diplomacy in Ancient Greece* 183–85 (1975).

[16] Leech, *supra* note 15, at 60.

[17] See Prosper Weil, Le Judaïsme et le développement du droit international, 151 RCADI 253, 266–72 (1976–III).

[18] See Michael Gagarin, *Early Greek Law* 20 (1986) ("[M]ost scholars now feel that the [epic poems of Homer] do reflect fairly accurately Greek society during the century or so preceding their final composition"); 1 Phillipson, *supra* note 11, at ix.

This study takes exceptional care with its treatment of classical literary evidence bearing on State practices and rules of State conduct in international affairs. I suppose the preeminent caution exercised in this book is the refusal to regard any single piece of literary evidence (standing alone) as being dispositive of any proposition concerning broader patterns of practice by ancient States. Aside from that vital methodological caveat, I have appreciated a number of standard approaches to literary texts, developed by historians and philologists after long years of study.

One of these is the recognition that not all classical historians, and the histories they relate, are to be treated equally.[19] In the Greek historical canon,[20] the history of Thucydides (460–400 BCE) remains preeminent in its fidelity to historical truth. The history of Herodotus (c. 480–430 BCE), though criticized for many lapses, has at least been praised for its literary presentation. The works of Xenophon (411–362 BCE) and the later Polybius (c. 198–144 BCE) are also highly regarded. On the other hand, the histories of such writers as Diodorus Siculus (Diodorus of Sicily) (fl. 60–30 BCE) are not so well respected, being largely a pastiche of other commentators. Among the Latin histories, that of Livy is regarded as among the best (despite charges that he was writing to pander to Augustan political values); the later writings of Tacitus are somewhat less esteemed.[21] Likewise, there are many works of statecraft, biography, and political philosophy written in Greek and Latin, all of divergent probative value.

The second tactic I adopt in this study is the careful cross-reading of literary texts. Not only do I attempt to ascertain the internal coherence and integrity of all literary sources used in this study,[22] I have tried to ensure the accuracy of historical evidence of State practice by relating the information found in these texts to the available archeological evidence, the most important of which are inscriptions of significant State decrees, treaties, proclamations, and other newsworthy events. The increased availability of this inscription evidence, particularly from earlier periods of

[19] See generally, Adcock and Mosley, *supra* note 15, at 123–27.

[20] See generally, John Bagnell Bury, *The Ancient Greek Historians* (1909); Charles Norris Cochrane, *Thucydides and the Science of History* (1929); A. W. Gomme, *The Greek Attitude to Poetry and History* (1954); J. E. Powell, *The History of Herodotus* (1939).

[21] See Alan Watson, *International Law in Archaic Rome: War and Religion* xii–xiii and n. 5 (1993).

[22] Wherever possible, all Latin and Greek sources are cited to the authoritative Loeb Classical Library Editions. I will also provide a pin-point page cite to the volume of the relevant work and also a standard indication of the passage from which the extract is drawn. I will follow the apparent convention of referring to the specific document or fragment by name, and then including the book number (in Roman numerics), followed by the section and line (or passage) numbers.