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Mechanisms of Conflict and Dispute Resolution in Ancient Near Eastern Treaties

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I. Introduction¹

The juridical classification and evaluation of the texts which here are unbiasedly and undiscerningly called “treaties”² and which are bequeathed from the Ancient Near East from the first three millennia BCE have caused some trouble in the past and the discussion has not come to a definite result yet. The difficulties derive on one hand from the fact that often particular juridical aspects of the texts and their content are combined with the more general question of the existence or non-existence of an Ancient Near Eastern International Law³. Similar to the question of the actual function and application of Ancient Near Eastern law collections this problem has been discussed widely and controversially⁴. We will come back to that topic later. Another reason for the problems that follow a legal perspective on the treaties, again similar to the law collections, is the fact that we miss a meta-level of contemporary theoretical reflection on treaties and their context which goes beyond the texts as such, as it is at least partially the fact with ancient Greece and Rome⁵. Finally, additional difficulties derive from details of the texts and their content and tradition.

Looking for a possibility to get around the foresaid difficulties of an all juridical access to the sources one could attend a terminological and phenomenological detour and sample an alternative categorization. For that purpose the term “mechanisms of conflict resolution” seems suitable, because it includes the juridical instruments of conflict resolution, but at the same time opens up a much wider spectrum of political and social actions, from sheer violence to all possible forms of negotiations including their breakdown up to procedural decisions of juridical nature or other. The effort of an alternative description of the treaties might provide a more adequate outline of the specific juridical aspects than the usual perspective of legal history does. A detailed analysis of individual texts cannot be offered in this place, as it will have to be done in the form of a textual commentary in the framework of a re-edition of several treaties in Akkadian language⁶. Instead this article will focus on the methodological and terminological background of a future commentary and aims to put it up for discussion. At the same time the examples from the quoted sources might be representative only to a limited extent and also some anachronisms might be unavoidable.

In the following we will shortly comment on the question of an Ancient Near Eastern International Law, then continue with the function of treaties as mechanisms of conflict resolution as such and finally take a look at peculiar contents of treaties which can be understood as mechanisms of conflict resolution.

¹ The article is based on a paper given at the conference “Under the Aegis of 1000 Gods... The Egyptian-Hittite Relations during the Late Bronze Age” in Prague, April 19, 2013. A German version based on a paper given at the conference “Staatsverträge des Alten Vorderasien. Überlieferung – Funktion – Rechtshistorische Perspektiven” in Frankfurt am Main, September 10-12, 2012 will be published in *Zeitschrift für Altorientalische und Biblische Rechtsgeschichte* (ZAR), vol. 19, 2013 (in print).

² For this use of the terminology and its problematic aspects cf. Michael Stolleis, *Staatsverträge in der neueren Staats- und Völkerrechtsgeschichte*, in: ZAR 19, 2013 (in print).

³ On the application of the term “International Law” in the context of the Ancient Near East see Hans Neumann, s.v. „Staatsvertrag, II. Alter Orient“, in: Hubert Cancik/Helmuth Schneider (ed.), *Der Neue Pauly* 11, Stuttgart/Weimar 2001 (879-880) 879.

⁴ For an overview see Amnon Altman, *Tracing the Earliest Recorded Concepts of International Law. The Ancient Near East (2500-330 BCE)*, Leiden/Boston 2012, xxi-xxvi.

⁵ For the law collections see Guido Pfeifer, *Vom Wissen und Schaffen des Rechts im Alten Orient*, *Rechtsgeschichte* (Rg) 19, 2011, 263-266.

⁶ This re-edition project is prepared by the author together with Hans Neumann und Susanne Paulus in the framework of the series “Staatsverträge des Altertums” which is published by the Commission for Ancient History and Epigraphy of the German Archaeological Institute (DAI).

II. Ancient Near Eastern International Law?

Especially early modern period historians are rather skeptic towards the existence of an International Law in antiquity, including the Ancient Near East. Essential part of the criticism is the reproval of an anachronistic conception, since the formation of states in a modern sense is more or less categorically denied for the ancient world⁷. In fact, there are no specific terms in the Ancient Near Eastern languages, which could be compared e.g. to the Roman conception of *ius gentium*⁸. The challenge resulting from this reproval could also refer to Benno Landsberger's idea of an "Eigenbegrifflichkeit der babylonischen Welt"⁹ which aims towards an even more fundamental dimension¹⁰. But this would require an examination of its own.

A rather pragmatist base could be found in a general conception of an ancient International Law, as offered by Eckart Otto referring to Wolfgang Preiser and Karl-Heinz Ziegler. He defines ancient International Law as "*rechtlich verbindliche Ordnung verschiedener unabhängiger, sich gegenseitig als im Prinzip gleichberechtigt anerkennender und durch einen rechtlich geregelten Austausch politischer, kultureller und wirtschaftlicher Art verbundener Staaten*"¹¹. Such a definition aims towards the analogy of phenomena from Ancient Near Eastern texts to institutions of modern international Law, without ignoring the peculiarities of ancient sources. As Amnon Altman has shown the Ancient Near Eastern tradition provides a vast number of material for accordant efforts of analogy, but also for an unbiased analysis¹². However, the critical point, especially for the legal historian, lies in the phrases "rechtlich verbindlich" (i.e. legally binding) and "rechtlich geregelt" (i.e. legally regulated). Besides the risk of a tautology ("Ancient International Law is International Law, because it is International Law") it is precisely the legal character of treaties which is challenged again and again. One main argument in this context is that treaties are immensely charged with religious contents, especially with the typical metaphysical sanctions such as contingent self-execration in the context of oaths¹³. David J. Bederman has indeed tried to modify this impression in favor of political rationalism and social sanctions as the fundament of an ancient International Law¹⁴. But that leaves the question of a specific legal character of the treaties and in the end the question of the existence of an Ancient Near Eastern International Law still unanswered. The mere assertion of a small, but significant legal basis of the diplomatic, political and economic relationships of the nations of the Ancient Near East, as postulated by Otto and Bederman, do not seem to provide a sufficient explanation.

⁷ See Eckart Otto, *Völkerrecht in der Hebräischen Bibel und seine altorientalischen Wurzeln*, ZAR 12, 2006 (29-51) 29 f. with further literature; Karl-Heinz Ziegler, *Völkerrecht in den antiken Welten*, in: Martin Lang/Heinz Barta/Robert Rollinger (ed.), *Staatsverträge, Völkerrecht und Diplomatie im alten Orient und in der griechisch-römischen Antike*, Wiesbaden 2010 (27-38) 29.

⁸ Essentially on this Max Kaser, *Ius Gentium*, Köln 1993.

⁹ Benno Landsberger, *Die Eigenbegrifflichkeit der babylonischen Welt*, *Islamica* 2, 1926, 355-372 (reprint with afterword Darmstadt 1965, 2. Aufl. 1974).

¹⁰ See Walther Sallaberger, Benno Landsbergers „Eigenbegrifflichkeit“ in wissenschaftsgeschichtlicher Perspektive, in: Claus Wilcke (ed.), *Das geistige Erfassen der Welt im Alten Orient. Sprache, Religion Kultur und Gesellschaft*, Wiesbaden 2007 (63-82) 64-66.

¹¹ Otto, *Völkerrecht in der Hebräischen Bibel*, ZAR 12, 2006 (29-51) 29.

¹² A compilation of his articles published in the *Journal of the History of International Law* from 2004 to 2010 now in Altman, *Tracing the Earliest Recorded Concepts of International Law*.

¹³ For the Hittite treaties still significant Viktor Korošec, *Hethitische Staatsverträge. Ein Beitrag zu ihrer juristischen Wertung*, Leipzig 1931, 92-100; on that also H. Neumann, *Zur rechtsgeschichtlichen und sozialpolitischen Bedeutung der hethitischen Staatsverträge aus dem 2. Jahrtausend v. Chr.*, in: Lang/Barta/Rollinger (ed.), *Staatsverträge* (141-155) 148. On the problem for antiquity in general Eckart Otto, *Völkerrecht in der Antike*, ZAR 9, 2003, 201-209.

¹⁴ David J. Bederman, *International Law in Antiquity*, Cambridge 2002, esp. 50; on that also Otto, *Völkerrecht in der Antike*, ZAR 9, 2003 (201-209) 208.

III. Treaties as mechanisms of conflict resolution

1. (Provisional) termination and prevention of future conflicts

Treaties – on a basis of parity or as vassal or subordination treaties – may be understood as mechanisms of conflict resolution (or with even more caution: of conflict accomplishment), when they follow and are meant to pacify an actual conflict between the parties, e.g. a war¹⁵. At the same time their conception of an – in most cases – unlimited validity implies the purpose to prevent future conflicts between the parties¹⁶.

2. Procedural context of treaties

The functions of conflict resolution and conflict prevention belong at the same time to a wider procedural context of actions, often in ritualized forms, which precede treaties. Among them count e.g. declarations of war for which we have examples from the early dynastic period, rules and modalities of conduct of war, but also rules and modalities of diplomatic negotiations¹⁷. Quite often treaties remark but a transitional phase in the procedural sequence of conflicts, because conflicts are only temporarily settled and are revived after the conditions of power politics have changed¹⁸.

The wide spectrum of possible actions contains particular mechanisms of conflict resolution of its own, among them such of juridical interest, as forms of arbitration as sketched by Sophie Lafont¹⁹. An example for such a mechanism shows the letter AMRT 26/2, 468²⁰: In the context of negotiations connected to a conflict between Hammurabi of Babylon and Zimri-lim of Mari (which was later determined by Hammurabi by military means) we find at least the consideration of submitting to an arbitral verdict to be returned by other kings as “peers” (“brothers”)²¹. Even if we cannot assume established institutions of legal or arbitral decision-making and the episode has probably to be located in a rather vague political setting there seems to be some terminological and structural evidence of a juridical connotation.

Treaties do therefore not stand for themselves, but are embedded in a procedural setting of political actions which are at least partially connected to legal forms of decision-making and conflict resolution.

3. Legal character of treaties

The procedural character of treaties as such does of course not answer the question of the legal character of these texts. The cardinal point is – as mentioned before – the legally bind-

¹⁵ This seems particularly apparent when treaties contain historical introductions which report the preliminary events leading up to the conflict and the treaty; cf. Neumann, *Bedeutung der hethitischen Staatsverträge*, in: Lang/Barta/Röllinger (ed.), *Staatsverträge (141-155)* 147; elaborately Amnon Altman, *The Role of the “Historical Prologue” in the Hittite Vassal Treaties: An Early Experiment in Securing Treaty Compliance*, *Journal of the History of International Law* 6, 2004, 43-64.

¹⁶ For such a fundamental functioning as conflict resolution mechanism also Otto, *Völkerrecht in der Antike*, ZAR 9, 2003 (201-209) 208.

¹⁷ Altman, *Tracing the Earliest Recorded Concepts of International Law*, 18 f.; for the Old Babylonian period *ibid.* 51-63.

¹⁸ To this context belongs also the modification of treaties as a consequence of altered circumstances; cf. Altman, *Tracing the Earliest Recorded Concepts of International Law*, 121-123.

¹⁹ Sophie Lafont, *L’arbitrage en Mésopotamie*, *Revue de l’arbitrage* 4, 2000, 557-590.

²⁰ AMRT 26/2, 468, rev. 6’-9’: *Remove Hit from the treaty tablet, and I shall commit myself! Then take the lead of the troops and get underway! After every single objective has been accomplished – afterwards, the kings, our brothers, must sit down. They must give us directions on the case (of the other cities) and I will heed the judgements they render*, transl. Wolfgang Heimpel, *Letters to the king of Mari*, Winona Lake 2003, 379.

²¹ Cf. also Altman, *Tracing the Earliest Recorded Concepts of International Law*, 79 f.

ing force of the documented agreements. The juridical validity of those agreements is bound to the sanctions with which they are reinforced and which grant provision for breach of contract.

One more time it has to be mentioned that there are virtually no secularized sanctions, whereas mechanisms of protection of a treaty which are affected by metaphysical references, such as oaths to the Gods, count among the standard repertoire of treaties. Amnon Altman has tried to explain the gap between the missing of secularized sanctions and the apparent importance of transcendent sanctions by a projection of earthly circumstances onto the divine sphere²²: Part of this projection is the idea that the outcome of war corresponds to decisions rendered by the gods – a conception which is of course not confined to the Ancient Near Eastern world, if one only thinks of the Homeric epic²³. The fact that the projection is arranged by the use of specific juridical language and forms, when e.g. the decision-making of the Gods is denominated as “judgment”, leaves an impression similar to the one we get when we look at daily legal life: Proper and just decision-making appears to be a universal principle, represented by the figure of the judge, and is to be found as well on the divine level of the cosmic order as in the context of the secularized authority of rulers who act as lawgiver and judge at the same time as on the level of an organized jurisdiction²⁴.

But relating to the treaties two critical remarks have to be made: On one hand the actual forms of the projected concepts cannot be taken from the texts of the treaties themselves, but derive from the contextualization with other texts, e.g. royal inscriptions or letters²⁵. On the other hand it is remarkable that with regard to the treaties an organized jurisdiction never has been established, different from general legal life which shows the same correlation between the human and the divine sphere²⁶. However this phenomenon can easily be explained by the missing of a superior authority which could have determined the conflict – a problem we face even today in a globalizing world²⁷.

The missing of an international judicial practice makes an answer to the question of a legally binding force of the treaties obviously difficult. A legally or differently binding force might therefore only be assumed as a general framework which is only indirectly documented. Evidence for that can be found, when treaties allude to earlier agreements or oaths which are held no longer valid because of breach of contract. One example for that offers CTH 41.I.1, a treaty between Hatti and Kizzuwatna from the last third of the 15th century BCE, in which a precedent agreement between Kizzuwatna and the Hurrians is declared as obsolete²⁸. This

²² See A. Altman, The Role of the “Historical Prologue”, *Journal of the History of International Law* 6, 2004 (43-64) 43.

²³ For the formation of perspectives by the controversy about the historical nucleus of the Homeric epic see Neumann, *Bedeutung der hethitischen Staatsverträge*, in: Lang/Barta/Röllinger (ed.), *Staatsverträge* (141-155) 141 f.

²⁴ Guido Pfeifer, *Judicial Authority in backlit Perspective: Judges in the Old Babylonian Period*, in: *forum historiae iuris*, August 2010, under <http://www.forhistiur.de/zitat/1103pfeifer.htm>, fig. 11.

²⁵ For the Old Akkadian and Neo-Sumerian Period see Altman, *Tracing the Earliest Recorded Concepts of International Law*, 30-32.

²⁶ For forms of arbitration see Lafont, *L'arbitrage en Mésopotamie*, *Revue de l'arbitrage* 4, 2000, 557-590.

²⁷ According to this, Altman's subtle irony points a bunch of times to the analogy between the pantheon of the Ancient Near East and the United Nations, cf. Altman, *The Role of the “Historical Prologue”*, *Journal of the History of International Law* 6, 2004, 43-64, 50 with fn. 28, and id., *Tracing the Earliest Recorded Concepts of International Law*, 100.

²⁸ CTH 41.I.1: obv. 1 [...] ²⁰ *The Hurrian did not give up my vassals to (me) the Sun-King, but he sent his troops and ²¹horses. ²²They plundered the land of Isuwa behind the back of the Sun-King. What they obtained as booty – cattle and sheep –, ²³they carried off [t]o the Hurrian-land. The Sun-King, took up position ²⁴[agai]nst the foe, for battle, at another place. ²⁵The Hurrians had transgressed the oath of the gods; transl. Kenneth A. Kitchen/Paul J. N. Lawrence, *Treaty, Law and Covenant, Part 1: The Texts*, Wiesbaden 2012, no. 51.*

refers at the same time to the question of the efficiency of treaties, but first we will turn to a short excursus on legislation by treaties.

4. Excursus: Legislation by treaties

Treaties do not only contain mechanisms of the settlement of conflicts between nations, such as disputes about territories and the like, but also normative orders which refer to daily legal life, such as sanctions for offenses etc. A simple example for that can be found in the sections 27 and 28 of the treaty between Ebla and Abarsal from the 24th/23rd century BCE²⁹. The linguistic structure of these legal rules is more or less identical with the structures of rules from the Old Mesopotamian law collections, even if those date a bit later. Apart from the already mentioned question of the actual function of the law collections (which cannot be discussed in this framework) it is apparent that treaties deserve attention in a context of normative or legislative genres as well.

5. Efficiency of treaties

According to the result of a missing international judicial practice the question of the efficiency of treaties actually cannot be answered in a positive way. However, the example of general legal rules as elements of treaties implies that the question itself might be problematic: In the context e.g. of sanctions for delicts evidence of enforcement of legal rules is also missing with regard to the law collections to a large extent. This is often explained by the recourse to legal custom³⁰.

And another fact has to be mentioned: Although we find technical instruments to ensure efficiency in private contracts and litigation documents from the earliest periods, such as waiving of actions³¹ or penalties, there is nothing comparable within the treaties. As a result there is not much more than the mere assumption of a factual efficiency. In general the already mentioned procedural setting of treaties in a multitude of different mechanisms of conflict resolution and especially the fact that a treaty could also be seen as a mere transitional phase³² seem to advise to put the criteria of efficiency and the quality of legally binding force in principle to the test – but that holds true for the past as well as for the present and the future.

IV. Mechanisms of conflict resolution as content of treaties

A similar picture can be drawn when turning to the contents of treaties which can be understood as mechanisms of conflict resolution, but cannot be located on the level of a settlement of primary conflicts which gave reason to the treaty, but refer to secondary ones which are connected to those.

²⁹ ARET XIII 43-76, rev. VII 8 - VIII 4: (§ 27) *(In) the (festival) of the month (of) Isi, if an Eblaite lays (violent) hands on (and) kills an Arbasalite, (then) he shall pay a penalty of 50 rams. (§ 28) If an Arbasalite lays (violent) hands on (and) kills [an Eblaite], (then) he shall pay a penalty of 50 rams;* transl. Kitchen/Lawrence, *Treaty, Law and Covenant*, Part 1, no. 2.

³⁰ For legal custom as a basis of normative texts see Guido Pfeifer, *Gewohnheitsrecht oder Rechtsgewohnheit(en) in altbabylonischer Zeit oder Was war die Grundlage des „Codex“ Hammurabi?*, ZAR 18, 2012, 127-132.

³¹ Cf. Guido Pfeifer, *Klageverzichtsklauseln in altbabylonischen Vertrags- und Prozessurkunden als Instrumentarien der Konfliktvermeidung bzw. Konfliktlösung*, in: Robert Rollinger/ Martin Lang/Heinz Barta (ed.), *Prozeßrecht und Eid: Recht und Rechtsfindung in antiken Kulturen*, Teil I (in print).

³² See above fn. 18.

Among them count regulations on prisoners of war or the interstate extradition of certain persons as shown in sections 1-3 of the already cited treaty between Ebla and Abarsal³³. The validity (or efficiency) of such regulations is indirectly proved by rules such as section 27 LH³⁴ which can be interpreted as a kind of an Old Babylonian *ius postliminii*.

V. Résumé

Treaties represent on one hand a singular phenomenon in the tradition of cuneiform laws which differs considerably from the other genres of legal literature, especially with regard to sanctions and their practice which are provided (or not provided) in these texts. On the other hand the consideration of treaties as one form in a multitude of mechanisms of conflict resolution and their embedment into a procedural setting show that the impression of a singular character has to be modified with a view to their functionality. The inherent element of “ordinary” legislation puts treaties in the neighborhood of law collections and the questions connected with these. The criteria for efficiency might have to be generally put into question.

Altogether the number of questions prevail the number of answers. But perhaps the juridical evaluation of treaties is not so much about avoiding a terminological, but a theoretical anachronism which implies false conclusions: Just because we do not find all criteria of validity and efficiency we expect from legal texts, it does not imply that validity and efficiency were not established by other means. What remains is the task and challenge of an adequate characterization.

³³ ARET XIII 43-76, obv. VI 6-VII 12: (§ 1) *Whoever: curses the Ruler, and curses the God(s), and curses the Land, he shall die!* (§ 2) *(Thus), if the man responsible (is) from A[barsal] Ebla shall hand him over; (and) if the man responsible (is) from A[barsal], A[barsal shall execute him].* (§ 3) *If [the man responsible (is) from Ebla], (then) A[barsal] shall hand him over; (and) if the man responsible (is) from Ebla, Ebla shall execute him;* transl. Kitchen/Lawrence, *Treaty, Law and Covenant*, Part 1, no. 2.

³⁴ KH X 13-29 (LH sec. 27): *If there is either a soldier or a fisherman who is taken captive while serving in a royal fortress, and they give his field and his orchard to another to succeed to his holdings, and he then performs his service obligation – if he (the soldier or fisherman) should return and get back to his city, they shall return to him his field and orchard and he himself shall perform his service obligation;* transl. Martha T. Roth, *Law Collections from Mesopotamia and Asia Minor*, 2nd ed. Atlanta 1997, 86.