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What Difference Does *Ius Inter Gentes* Make? Changing Diplomatic Rights and Duties and the Modern European States-System*

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Summary

The legal status of diplomats underwent a dramatic change between the sixteenth and eighteenth centuries as a consequence of a transformed European states-system. Its transformation is linked to *ius inter gentes*, a 'law between nations' whose emergence not only created a Europe of sovereign states but simultaneously affected the scope, definition and justification of rights and duties held by diplomatic representatives. It is generally acknowledged that diplomacy as an institution exists by virtue of rules that are embodied in the modern system of states and defined as 'international society' or the 'society of states'. What needs to be better understood is that diplomatic rights and duties are made possible by this framework of an international society, which has discernible historical and analytical boundaries, and that the relationship between such a framework and its diplomatic institutions is not contingent but logical.

Key Words
Diplomatic institutions, diplomatic theory, rights and duties of diplomats, international law, *ius inter gentes, ius gentium*, European states-system, international society.

Introduction

In thinking about diplomacy two commonplaces come to mind. One is that the diplomatic enterprise is largely *a*theoretical — it is a parlour in the palace of practice. Theorists are either not admitted to its secret chambers or themselves have scant interest in entering. Conflict studies — the balance

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of power, alliance formation and war — comprise the thrilling aspect of international affairs, while diplomacy lacks excitement. Diplomacy's purview is peace studies, and its investigation can be left without regret to its practitioners — career diplomats — or so the theorist reasons. The other commonplace is that diplomacy cannot, and perhaps should not, be explored theoretically because its subject matter is essentially historical. Indeed, the list of volumes on diplomatic theory appears meagre when compared with the abundant literature on diplomatic history.

But theory need not be opposed to history, or diplomacy to theory. Starting from this premise, this article aims to clarify the *principles* of modern diplomacy, and to do so in a historically conscious way. In particular, it argues that the legal status of diplomats underwent a dramatic change during the modern epoch — that is, between the sixteenth and eighteenth centuries — as a consequence of a transformed European states-system.[1] Its transformation parallels the emergence of an *ius inter gentes*, a 'law between nations', which created a compact of sovereign states and, simultaneously with this, affected the scope, definition and justification of rights and duties held by its diplomatic representatives. Such an exploration traverses familiar ground in regarding diplomacy as an institution that exists by virtue of rules that are embodied in the modern system of states, also termed 'international society' or the 'society of states'.[2] Its novelty lies in the proposition that diplomatic

[1] The term 'states-system' appears in the 1834 English translation of the Preface to the first German edition of A.H.L. Heeren's *Manual of the History of the Political System of Europe and its Colonies, from its Formation at the Close of the Fifteenth Century, to its Re-establishment upon the Fall of Napoleon* [*Handbuch der Geschichte des europäischen Staatensystems und seiner Colonien von seiner Bildung seit der Entdeckung beider Indien bis zu seiner Wiederherstellung nach dem Fall des Französischen Kaiserthrons*], translated from the fifth German edition, 2 vols (Oxford: Talboys, 1834 [1809]). For Heeren, a states-system is 'the union of several contiguous states, resembling each other in their manners, religion and degree of social improvement, and cemented together by a reciprocity of interests', in *Manual*, vol. I, pp. viii-ix. Martin Wight credits Heeren and Friedrich von Gentz with popularizing this term, which is crucial for theorizing the European framework of states. But Wight traces its origins to an earlier work — Pufendorf's 'De Systematibus Civitatus' appearing in *Dissertationes academicae selectiores* (1675) — where states-system is defined as 'several states that are so connected as to seem to constitute one body but whose members retain sovereignty'. See Martin Wight, *System of States*, edited by Hedley Bull (Leicester: Leicester University Press, 1977), p. 21. Wight's reference is to Friedrich von Gentz, *Fragments upon the Balance of Power in Europe* [*Fragmente aus der neuesten Geschichte des politischen Gleichgewichts in Europa*] (London: M. Peltier, 1806).

[2] The tradition of international society is associated with early modern writers such as Hugo Grotius, Emmerich de Vattel, Samuel von Pufendorf and Christian von Wolff, and recently with

rights and duties are made possible by this international society — as an *analytical* construct that acquires intelligibility at a particular juncture of European history — and that the connection between the construct and its diplomatic institutions is determining rather than accidental. The article has four sections: the first outlines diplomacy as an institution; the second explores the changing rights and duties of the embassy in the modern European state practice; the third briefly elucidates the concept of *ius inter*

primarily UK-based academics referred to as the 'English School'. See Hugo Grotius, *The Law of War and Peace* [*De jure belli et pacis*], translated by Francis W. Kelsey with an introduction by James Brown Scott, 3 vols of *The Classics of International Law* (New York: Oceana, 1964 [1646]); Hugonis Grotii, *De Jure Belli et Pacis Libri Tres*, accompanied by an abridged translation by William Whewell, with the notes of the author, Barberyac and others, 3 vols (London: John W. Parker, 1853); Samuel von Pufendorf, *Eight Books on the Laws of Nature and Nations* [*De jure naturae et gentium libri octo*], translated by C.H. and W.A. Oldfather, with an introduction by Walter Simons, *The Classics of International Law* (New York: Oceana, 1964 [1688]); Samuel von Pufendorf, *The Elements of Universal Jurisprudence* [*Elementorum jurisprudentiae universalis libri duo*], translated by William Abbott Oldfather, introduction translated by E.H. Zeydel, *The Classics of International Law* (New York: Oceana, 1964 [1660]); Samuel von Pufendorf, *The Whole Duty of Man, According to the Law of Nature*, translated by Andrew Tooke (Indianapolis IN: Liberty Fund, 2003 [1691]); Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* [*Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*], translated from the French, no translator specified (Northampton MA: Thomas M. Pomroy for S. E. Butler, 1805 [1758]); Christian von Wolff, *The Law of Nations Treated According to a Scientific Method* [*Jus gentium methodo scientifica pertractarium*], translated by Joseph H. Darke, introduction translated by Francis J. Hemett, *The Classics of International Law* (New York: Oceana, 1964 [1767]). The literature on the English school is too extensive to be listed. Authors whose ideas are engaged in this article include Hedley Bull, Adam Watson, Martin Wight, and especially Maurice Keens-Soper. See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 3rd edition (Basingstoke: Macmillan, 2002 [1977]); Hedley Bull, 'The Revolt against the West', in Hedley Bull and Adam Watson (eds), *The Expansion of International Society* (Oxford: Oxford University Press, 1984), pp. 217-228; Hedley Bull, 'The Emergence of a Universal International Society', in Bull and Watson (eds), *The Expansion of International Society*, pp. 117-126; Hedley Bull, 'Justice in International Relations: The 1983-84 Hagey Lectures', in Kai Alderson and Andrew Hurrell (eds), *Hedley Bull on International Society* (New York: St Martin's Press, 1999 [1983-4]), pp. 206-245; Maurice Keens-Soper, 'The Practice of a States-System', in Michael Donelan (ed.), *The Reason of States: A Study in International Political Theory* (London: George Allen and Unwin, 1978), pp. 25-44; Adam Watson, *Diplomacy: The Dialogue between States* (London: Eyre Methuen, 1982); Adam Watson, 'European International Society and Its Expansion', in Bull and Watson (eds), *The Expansion of International Society*, pp. 13-32; Adam Watson, *The Evolution of International Society: A Comparative Historical Analysis* (New York and London: Routledge, 1992); and Martin Wight, *Power Politics*, 2nd edition, edited by Hedley Bull and Carsten Holbraad (Harmondsworth: Penguin, 1986 [1978], originally published in 1946 by the Royal Institute of International Affairs).

gentes; while the concluding section addresses the historical dimension of the main argument, by elaborating Maurice Keens-Soper's view that diplomatic rules embody a single (diplomatic) foundation on which the entire system of rules — the European international society — can be said to rest.[3]

Diplomacy as an Institution

When Keens-Soper described the European states-system as a 'system of diplomacy', he touched upon the two broad themes of this article's investigation: one is the historicity of the states-system; the other is Wight's view of diplomacy as a 'master institution of international relations'[4] — a gravitational field that holds states together. If states are to be related to one another, they must participate in common diplomatic practices, rules or institutions: there is no other way. An institutionalist or humanist tradition,[5] exploring this insight, extends from Alberico Gentili through Hugo Grotius and Emmerich de Vattel to contemporary authors such as Martin Wight, Hedley Bull, Adam Watson and Keens-Soper.[6] It finds little favour with the proponents of scientific theory like Kenneth Waltz, who describe state conduct in terms of structure and process.[7] For Waltz, states are not related to one another — they resemble weights *positioned* inside an abstract international structure, or a 'distribution of capabilities' (resources). Each state calculates its advantage by taking, as it were, a hypothetical snapshot of the international situation. The resultant picture is structural (hence, Waltz's 'structural

3) Keens-Soper, 'The Practice of a States-System', pp. 34-36.

4) Significantly, Wight uses the word '*diplomatic system*' when writing that it is the master institution of international relations; see Wight, *Power Politics*, p. 113.

5) It is common to associate humanism with the classical (largely Roman) tradition of oratorical and historical studies, as Richard Tuck suggests in *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999). But humanism is defined in this article as institutionalism, having to do with the ability of intelligent human beings to create and abide by institutions or rules. Political moralism and political realism can be seen as separate strands in a common institutionalist tradition — with moralists proposing that rules are kept because this is the right thing to do, and realists claiming that rules are prudential devices, observed as long as they advance some sort of interest.

6) For a reference to these writers, consult note 1 above. Gentili's work with relevance for the current discussion is *Three Books on Embassies* [*De legationibus libri tres*], translated by Gordon J. Laing for *The Classics of International Law* (New York: Oceana 1964 [1594]).

7) Kenneth Waltz, *Theory of International Politics* (Reading MA: Addison-Wesley, 1979).

realism') because it depicts where the state is located on the map of aggregate resources, not how — through what policy, strategy or communicative procedure — it relates to other states. Waltz is explicit that his approach is not about international *relations* but about international *politics*. In his words:

> [I]n thinking about structure [we do not] ask about the *relations of states* — their feelings of friendship and hostility, *their diplomatic exchanges*, the alliances they form, and the extent of the contacts and exchanges among them. We ask what range of expectations arises merely from looking at the type of order that prevails among them and at the distribution of capabilities within that order.[8]

As these sentences indicate, even proponents of scientific analysis affirm (in a reverse or negative form) the key postulate of humanist international theory, namely that the expression 'international relations' is almost identical to 'diplomatic relations'.

The claim that 'diplomacy' is synonymous with 'relations' merits closer consideration. It implies that any form of relationship in the international realm — that is, any institution, rule or practice — is, fundamentally, diplomatic. Diplomacy is the genus, and other international institutions are its species. This is what Wight meant when he christened diplomacy the master institution. But if diplomacy serves as a prototype of institutional arrangements in the international sphere, the crucial question becomes: what is an institution, rule, or practice? Clearly, an institution is something permanent or standing as opposed to ad hoc.[9] And it involves constraints or limitations on conduct; it makes certain ways of acting mandatory. As Bull remarks, states subscribe to rules in the sense that they observe restraints, and that their activities in the international arena are determined by duty, not by interest alone.[10] Bull's linking of rules to duties is important and this article will return to it shortly. Here, another point that deserves attention is that institutions impose constraints on the *conduct* of intelligent actors, not the *behaviour* of casually determined entities. An institutional account, properly understood, is about agents who can think, plan and calculate (and thus occasionally miscalculate) a situation and decide to respond to it. Such agents are 'rational' in humanly significant terms — not in abstract terms — and it

8) Waltz, *Theory of International Politics*, p. 99; emphasis added.
9) H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961), p. 23.
10) Bull, *The Anarchical Society*, p. 102.

is not accidental that humanists from the age of Gentili to the current day see states as intelligent beings.

To say that states act like individuals is not to anthropomorphize international conduct, for there is a difference between claiming that states resemble people and that they *are* people.[11] When humanists ascribe personality to states, they flesh out the idea that states are agents or beings that can act and that can bear the rights and responsibilities attached to action. To say that the state acts is to hold that it pursues foreign policies.[12] Watson and Keens-Soper, with good reason, insist that foreign policy or action should be differentiated from diplomacy or procedures that constrain action.[13] For both Watson and Keens-Soper, diplomacy is not a tool, instrument or 'mechanism' that actors use in pursuing goals, but an institution or a constraining framework. Although foreign policy and diplomacy are sister ideas — the whole point of having rules is that they govern conduct and therefore policy — they are nonetheless distinct ideas. If one forgets the distinction, as Hans Morgenthau does,[14] the analysis of diplomacy slides into a study of foreign policy instruments.

Surely the idea that diplomacy is an institution presents an assumption, and not all theorists are willing to grant it. But when they do, they acknowledge that diplomatic language is about rights and obligations. It stipulates that each state must respect the rights of diplomats representing other states. The notion of rights demands a corresponding notion of duties and *vice versa*. Furthermore, rights resemble interests in being linked to a self who 'owns' them. The talk of rights and duties is embedded in an individualistic discourse that implies the existence of independent selves or agents. In the context of diplomacy, these agents are sovereign states.

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11) The argument that states *are* people was recently advanced by Alexander Wendt. See Alexander Wendt, *Social Theory of International Politics* (New York: Cambridge University Press, 1999), ch. 5, pp. 215-224.

12) This raises the question of whether Waltz, who denies the validity of foreign policy, is talking at all of a system of action, or rather mechanistic reaction. See Randall L. Schweller, 'Neorealism's Status-Quo Bias: What Security Dilemma?', *Security Studies*, vol. 5, no. 3, 1996, pp. 90-121.

13) Keens-Soper, 'The Practice of a States-System', p. 38; and Watson distinguishes diplomacy ('the process of dialogue and negotiation') from foreign policy ('the substance of a state's relations'), in Watson, *Diplomacy*, p. 11. Such a distinction is also proposed by Harold Nicholson in *Diplomacy*, 3rd edition (London: Oxford University Press, 1969 [1939]), p. 3.

14) For Hans J. Morgenthau diplomacy is 'the formation and execution of foreign policy'. See Morgenthau, quoted in Jose Calvet de Magalhães, *The Pure Concept of Diplomacy*, translated by Bernardo F. Periera (New York: Greenwood Press, 1988), p. 49.

Although the idiom of rights, duties and interests is individualistic, the idiom of rules is social. Rights, duties and interests belong to an 'I' but a rule is a 'we device' — it regulates the conduct of numerous participants. Analogously, as Wittgenstein writes, language takes place among multiple interlocutors instead of presenting the isolated experience or a solitary, solipsistic mind.[15] Language and rules call into existence an inter-subjective reality. This means that each individual state undertakes a *duty* to recognize the diplomatic *rights* of another because, jointly, they participate in a system of diplomatic *rules*. Examining the changing status of ambassadorial rights and duties in the following pages is not a self-seeking enterprise: it has high relevance for the question of diplomacy as a body of rules.

Legal Rights and Duties of Diplomats in the Modern Era

In the period of early modernity, the mode of diplomatic representation, its duration and the scope of diplomatic immunities underwent major change. This transformation was juridical: it signalled the emergence of a legalist international system, the European society of states, of which ambassadorial rights and duties were part and parcel. The change can be discerned in the teachings of three prominent thinkers: Gentili; Grotius; and Cornelius van Bynkershoek. Gentili, a sixteenth-century Italian humanist and protestant, lectured in Roman law at Oxford. Grotius, whose experience stretched from theology to diplomacy, struggled to distinguish international from other law in the decades before the Westphalian treaty of 1648. And Bynkershoek, writing 80 years after Grotius, in the middle of the eighteenth century, put some of the new international law to work as a judge on the Supreme Court of Holland, Zealand and West Friesland (the United Provinces of the Netherlands). It is safe to say that no society of states existed at the time of Gentili, but there was one by the time that Bynkershoek wrote, and the difference can be discerned in the way that each of the three authors defended diplomatic rights and duties.

Gentili is a pioneer in discussing the rights of embassy in a systematic fashion. Living in an age when the idea of autonomous, territorially based states was vaguely, if at all, present in the minds of Western publicists, he attaches

[15] Ludwig Wittgenstein, *Philosophical Investigations*, 3rd edition, translated by G.E.M. Anscombe (Oxford: Basil Blackwell, 1972 [1953]).

less importance to (what today we call) sovereignty. This leads him to pronounce that nominally independent *and* dependent political entities can send and receive ambassadors, or *legati* — a Roman name that he prefers.[16] For the same reason, Gentili does not draw an explicit link, as Bynkershoek later would, between principles of territoriality and political authority. In effect, Gentili views the resident embassy as unnecessary, even dangerous.[17] Diplomatic representation in its permanent or resident form, as Garrett Mattingly explains in his renowned study of modern or 'Renaissance' diplomacy, grew out of Italian city-state practices in the period between 1300 and 1450.[18] Before that, the so-called ceremonial or special embassies were dispatched between various kinds of political associations, be they the Roman Empire, the papacy, independent cities, duchies, municipalities or even universities.[19] Special ambassadors were sent on an ad hoc basis, to discharge a particular business, after which they returned home. They were usually prominent persons commanding considerable leverage.[20] Unlike special ambassadors, resident ambassadors were professionals or appointees, permanently stationed in the receiving state, whose job was to serve as representatives of the state, not as personal messengers dispatched by a particular ruler.

Because the notion of a society of nominally equal political entities is alien to his world-view, Gentili does not accept the idea that diplomatic relations *ought to* involve reciprocity or mutuality as a matter of duty. True, he speaks of the 'right of embassy', but 'right' does not denote a title to which there is a corresponding obligation. His discourse of choice appears to be political realism, where the word right stands for a licence to do as one pleases, that is, for unlimited entitlement or 'liberty'.[21] For Gentili, princes have a right of

16) *Legati* were the representatives of the Roman provinces, or dependent political associations, and by employing such language, Gentili reveals that he does not see diplomacy as a practice taking place between states. On the definition of *legati*, see *Three Books on Embassies*, book I, ch. 1 and book II, ch. 3, p. 62 [66], and on the diplomatic exchange between independent and sovereign political entities, book I, ch. 4. The page numbers refer to the English translation; in brackets, to the original text.

17) Gentili, *Three Books on Embassies*, book II, ch. 12, p. 95 [104].

18) Garrett Mattingly, *Renaissance Diplomacy* (Boston MA: Houghton Mifflin, 1955; reprinted by New York: Dover, 1988), p. 47.

19) Mattingly, *Renaissance Diplomacy*, ch. 3. See also M.S. Anderson, *The Rise of Modern Diplomacy, 1450-1919* (London and New York: Longman, 1993).

20) Anderson, *The Rise of Modern Diplomacy*, pp. 12 and 16.

21) The idea of liberty is Hobbes's 'right of nature'. See Thomas Hobbes, *Leviathan*, edited by Richard Tuck (Cambridge: Cambridge University Press (1991 [1651]), ch. 14.

embassy because each ruler is free to refuse to admit the *legati* of another, without pretext or justification.[22] Gentili's stern and bellicose outlook has led one scholar to conclude that he is a political realist.[23]

For Gentili, the idea of diplomatic rights and obligations receives its force from natural law, and more specifically from Roman law. Following the Roman canon, he suggests that diplomats enjoy immunities for offences that took place before assuming office but not over the course of its duration.[24] Ambassadors are not exempt from liability in civil cases, for if they were, they might misappropriate someone else's property and the local population would be unwilling to enter into contracts with them.[25] Gentili here refers to the famous stipulation of Roman civil law that no person, including the diplomat, can possess rights without corresponding duties. Gentili raises the thorniest problem of legal theory in connection to diplomacy, namely how to justify the *privileges* — literally, 'private laws' — of diplomats within a system of public law that is not supposed to accord preferential treatment to particular individuals. His answer is that ultimately such justification is impossible, leading him to articulate limited diplomatic immunities. Thus, in a case of criminal offence, the diplomat may be judged by the prince of the receiving, not the sending, political association. When in 1584 the English Queen Elizabeth I consulted Gentili for the case of the Spanish diplomat Mendoza who, together with the Duke of Norfolk, had plotted her assassination, Gentili's pronouncement was that Mendoza had to be acquitted not because the law of nations (*ius gentium*) granted such exemption but because the diplomat had not carried into effect his malicious deed.[26]

What authorizes the prince of the receiving country to judge foreign diplomats is not local municipal law. It is international law,[27] and for Gentili this means natural law.[28] *Ius naturale* is a perennial wisdom, an order of things that stands above the ruler. Princes act as interpreters of this immutable law;

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22) This is what Gentili calls the 'forbidden embassy', or the right of rulers to prohibit embassies being sent to their territory; see Gentili, *Three Books on Embassies*, book II, ch. 5.
23) Tuck, *The Rights of War and Peace*, ch. 1.
24) Gentili, *Three Books on Embassies*, book II, ch. 16.
25) Gentili, *Three Books on Embassies*, book II, ch. 16, p. 106 [116].
26) Gentili, *Three Books on Embassies*, book II, ch. 18, pp. 111-114 [121-125], and ch. 21.
27) Gentili argues that ambassadors can be tried only under international law, not municipal law; see Gentili, *Three Books on Embassies*, book II, ch. 13, p. 97 [105], and book II, ch. 17.
28) Gentili, *Three Books on Embassies*, book II, ch. 21. Percy E. Corbett suggests that Gentili does not seem to distinguish between *ius gentium* and natural law. Corbett's argument supports the view

they are not lawmakers or legislators, as they will be later for Jean Bodin.[29] Since Gentili derives a ruler's right to sanction foreign diplomats from natural law, which holds that equal offences merit equal treatment, the result narrows the scope of diplomatic privileges. Any special status, exemption or privilege presupposes separation between public and private personality of the rights-holder. And the trouble is that this distinction cannot easily be framed in the language of natural law because that language imagines the subject of law to be an indivisible natural person. Defending diplomatic privileges demands the vocabulary of positive law.

Grotius supplies the requisite argument, stating that the international realm is governed by positive law (also termed 'volitional' or 'instituted'). But it is simultaneously governed by natural law,[30] here implicitly extended to states as artificial persons, and with this observation Grotius acknowledges, while also transforming, the tradition of *ius naturale*. The contrast between Grotius and Gentili is therefore not to be underestimated. It reveals that by the early seventeenth century a society of states, based on concepts such as sovereign equality, had begun to manifest itself. Understanding that supreme political authority is increasingly connected to territorially demarcated political entities, Grotius views the resident embassy as an important institution, in contrast to Gentili, for whom it is incidental. On the same ground, Grotius holds that it is primarily rulers with sovereign powers who are entitled to send and receive ambassadors.[31]

And because Grotius links international law to a positive law instituted between sovereigns, he grants diplomats extensive immunities in both civil and criminal cases.[32] The justification is that ambassadors should be free from

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that this confusion appears to be common among authors who follow Roman civil law in writing on international legal relations. See Percy E. Corbett, *Law in Diplomacy* (Princeton NJ: Princeton University Press, 1959), pp. 19-20.

29) Jean Bodin, *Six Bookes of a Commonweale*, edited with an introduction by Kenneth Douglas McRae, translated by Richard Knolles in 1606 (Cambridge MA: Harvard University Press, 1962 [1576/1606]).

30) Grotius makes an ambitious attempt, eventually unsuccessful, to differentiate natural law from the instituted (positive) law of nations, and both from civil law; see Grotii, *De Jure Belli et Pacis Libri Tres*, vol. I, book I, Prolegomena, sec. XXX, XLI.

31) Grotius, *The Law of War and Peace*, vol. II, book II, ch. 18, sec. II, pp. 439-440.

32) Grotius writes that in a case of non-payment by an ambassador, the injured party should seek a friendly settlement or address the ambassador's sending sovereign. If a diplomat commits a crime, the case should be passed unnoticed if the violation was minor; more serious transgressions

violence,[33] or in Bynkershoek's insightful interpretation of Grotius, 'from coercion'.[34] Grotius defines the rights of embassy in a legalist manner to mean titles that imply obligations, not rights that grant licence for action, as was the case with political realism. This is reflected in his position that an embassy cannot be refused 'without cause',[35] a testimony to the growing importance of reciprocity as a legally sanctioned principle. Reciprocity as a rule should not be confused with reciprocity as interest, as when a political association extends a favour to another in the hope that the opponent will follow suit (or 'reciprocate'). The difference between rights and interests is revealed in instances of violation. When the interest of state A is violated, it has no ground to complain. But it does have such a ground if its *right* is infringed. This is the major consideration for why the right of one agent presupposes an obligation for other agents. If the duty fails to be honoured, the injured party is entitled to seek redress, through coercive methods if necessary. This reasoning animates Grotius's doctrine of war as enforcement of legal rights.

The repercussions of Grotius's legal theory for diplomacy are momentous. Diplomacy is understood as an autonomous realm. Its autonomy or independence means that it has its own rules, those of the ambassadorial office, and its own agents, diplomats, who while state representatives, are not mere messengers of sovereigns. As Berridge reflects, diplomats 'are not simply the limb of the sending state but persons with their own rights, the right of embassy.'[36]

Bynkershoek advances an argument for diplomatic immunity, which also defends diplomacy as an autonomous institution. In his writings, the presence of an international society, predicated on rules such as sovereignty and equality, is unmistakably felt. Whereas for Gentili non-sovereign political associations could send and receive diplomats, for Grotius and especially for Bynkershoek, an ambassador, in order to deserve the name, must represent a

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might lead to orders to leave the country, and diplomats can even be killed, but only in self-defence. See Grotius, *The Law of War and Peace*, vol. II, book II, ch. 18, sec. IV, paras 5-6, pp. 443-444.

33) Grotius, *The Law of War and Peace*, vol. II, book II, ch. 18, sec. III, para 1, p. 440.

34) Bynkershoek's rendering of Grotius's text (*The Law of War and Peace*, book II, ch. 18, sec. III) as 'coercion' rather than 'violence' seems more plausible since coercion implies law enforcement, a legalistic connotation that the term violence lacks. See the discussion of Bynkershoek below.

35) Grotius, *The Law of War and Peace*, vol. II, book II, ch. 18, sec. III, para 1, p. 440.

36) G.R. Berridge, 'Grotius', in G.R. Berridge, Maurice Keens-Soper and T.G. Otte (eds), *Diplomatic Theory from Machiavelli to Kissinger* (Basingstoke: Palgrave, 2001), pp. 50-70, at p. 60.

legally independent entity.[37] Bynkershoek understands international law as a positive law among states,[38] and on this basis grants diplomats full immunities. His justification is that they have to be exempt from the local jurisdiction of the receiving state. For an observer of contemporary state practice, the link between sovereignty, territorial jurisdiction and diplomatic privileges may appear trivial. But it was a challenge to articulate it at the time of Bynkershoek, when it was legally permissible for foreigners to be ambassadors, which meant that an embassy was not invalidated when the official representative to a country was its own subject (like the Greek *proxenoi*).[39] The occasion of Bynkershoek's treatise was the 1675 incident with Abracham de Wicquefort, the famous Dutch diplomat, who served as an ambassador of the Duke of Lüneburg at The Hague while in the paid service of his government. Wicquefort conveyed state secrets to the English and was imprisoned after the court of the United Provinces denied him diplomatic immunities. Bynkershoek endorsed the court's ruling, claiming that as a citizen and resident of the United Provinces of the Netherlands, or as someone who had lived in the country before assuming diplomatic duties there, Wicquefort was subject to Dutch laws.[40]

Bynkershoek does not assume but rather concludes that diplomatic immunity concerns the problem of jurisdiction as a central aspect of sovereignty. Grotius justified diplomatic privileges by holding that ambassadors are sacred persons who represent their political association,[41] and who therefore need to be free from coercion. But even a sacred person can be summoned to court

37) Cornelius van Bynkershoek, 'To the Reader', in *A Monograph on the Jurisdiction over Ambassadors in both Civil and Criminal Cases* [*De foro legatorvm tam in cavsa civili, qvam criminali liber sigvlaris*], translated by Gordon J. Laing, introduction by Jan de Louter, *The Classics of International Law* (New York: Oceana (1946 [1721/1744]), p. 8 [431]. As Laing clarifies in a translator's note, *The Minor Works of Bynkershoek*, as they appear in the 1744 edition, consist of seven volumes, the *Monograph* being number 6 in the collection. This is why the original 1744 text, which is in brackets, starts at page 425.

38) For Bynkershoek, international law consists primarily in 'usage' or positive law that has been confirmed by 'reason' or natural law; see Bynkershoek, 'To the Reader', p. 8 [431].

39) Bynkershoek, *A Monograph*, ch. 11, pp. 56-57 [485-487].

40) Bynkershoek, *A Monograph*, ch. 10, p. 52 [481-482]; and ch. 11, pp. 57-58 [486-88]. In his Introduction (p. xxii) to the *Monograph*, J. de Louter suggests that Bynkershoek's account is not without difficulties, as Bynkershoek endorses two mutually incompatible principles to support diplomatic immunities — the principle of domicile (which concerns the ambassador as a private person) and the principle of sovereign representation (which concerns the diplomat as a public person).

41) Grotius, *The Law of Peace and War*, book II, ch. 18, sec. I, pp. 438-439.

and tried, Bynkershoek objected, for such a summons does not count as a coercive act.[42] Despite appearances, the vigorous Grotian defence of diplomats' special rights is weak. As an alternative to it, Bynkershoek proposes his notion of *persona ficta*, and argues that a state has to regard foreign diplomats *as if* they were physically absent from its soil.[43] This does not mean that ambassadors are exempt from liability; it means that such liability can be sanctioned exclusively by the respective home courts, not by the courts of the receiving state. This linking of diplomatic immunities to the jurisdiction of the accrediting state is the canonical defence of these special rights, and it still underpins diplomatic conventions today.

But Bynkershoek is able to derive diplomatic immunities from the doctrine of exterritoriality because he accepts two premises. The first is that diplomatic representation takes place in an international system in which state territory is clearly demarcated, a condition that did not materialize until the eighteenth century.[44] The second is that this international system is legally autonomous — that its law is distinct from the civil laws binding citizens within each state, and that it binds states only as members of a society of states.

Ius Inter Gentes

It is important to be clear as to what sort of law underwrites the society of states and makes its diplomatic institutions possible. It is *ius inter gentes* or a 'law between nations'.[45] 'Between' is a key qualification because such a legal order is maintained solely at the level of states (the term 'nations' is

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42) Bynkershoek, *A Monograph*, ch. 4, p. 28 [454].

43) Bynkershoek, *A Monograph*, ch. 8, p. 43 [470-471]; and ch. 16, p. 80 [512].

44) Anderson observes that prior to the eighteenth century, 'when one ruler ceded territory to another it was usually defined in terms of jurisdictions and local and administrative divisions and not, as would now be the case, in those of lines laid down in precise geographical terms and illustrated by a map', p. 97 in *The Rise of Modern Diplomacy, 1450-1919*.

45) Here I follow Terry Nardin's argument developed in *Law, Morality and the Relations of States* (Princeton NJ: Princeton University Press, 1983), p. 59; and Terry Nardin, 'The Emergence of International Law', introductory remarks, in Chris Brown, Terry Nardin, and Nicholas Rengger (eds), *International Relations in Political Thought* (Cambridge: Cambridge University Press, 2002), pp. 318-321. On *ius inter gentes* as a law between nations, see Lassa Oppenheim, *International Law: A Treatise*, 2 vols, 6th edition, edited by Hersch Lauterpacht (London: Longmans, 1940), vol. I, p. 6; and note 49 below.

unfortunate). It does not descend downwards to cover relations between individuals, or between individuals and polities as *ius gentium*.

Among writers on international relations, few have been careful to distinguish *ius inter gentes* from ideas that it resembles — *ius gentium* (law of nations) or *ius naturale* (natural law). It is common to trace contemporary international law back to the Roman expression *ius gentium*. The Romans, however, used this term to designate the law designed for settling disputes between subjects of the Roman Empire and foreigners. It was what might be called private international law between individuals rather than international law proper, which is a public law between political associations.[46] It was also common to confuse *ius gentium* with *ius naturale*, a system of universal rational principles that reside in Nature or God, and which can be revealed through reason. Natural law comes in multiple and complicated guises, but its clearest statement, in the form of absolute negative prohibitions, can be found in the Decalogue.[47] It was not accidental that the Roman *ius gentium* was equated to *ius naturale*. Rome symbolized an *imperium mundi*, the largest civilized community of humankind, and it was easy to think that its contingent regulations expressed in *ius gentium* are the same as the eternal truths contained in the abstract precepts of *ius naturale*. During the Middle Ages, intellectual energies focused on canon or church law. The breakthrough in thinking about relations of political associations did not occur until the early Renaissance. In terms of legal theory, in the sixteenth century the concept of *ius gentium* acquired a novel meaning and came to mean legal practices and customs that nations have developed in common.[48]

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46) Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, 2 vols (London: Macmillan, 1911), vol. I, pp. 69-70 and 72.

47) On a conventional perspective, natural law is a set of immutable principles. But most natural law-thinkers investigate the question of whether this law can adapt to changing human practice. In *The Law of Nations Treated according to a Scientific Method*, Wolff develops a notion of a natural law that is open to change, 'a voluntary natural law', later embraced and modified by his student, Vattel. See Vattel, *The Law of Nations*, Preface, pp. x-xii. The possibility of historicity in natural law is also explored in the writings of Thomas Aquinas, *The Summa Theologica*, translated by Fathers of the English Dominican Province, reviewed by Daniel J. Sullivan, 2 vols, *Encyclopaedia Britannica* (Chicago IL: William Benton, 1952 [1265-1273]), vol. II, 1a2ae, 94.5, pp. 224-225; and Heinrich Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy* (Indianapolis IN: Liberty Fund, 1998).

48) Henry Maine suggests that *ius gentium* comprises the 'totality of common elements found in the customs and usages of the ancient Italian tribes, which constituted *all the nations* that the Romans had opportunities of coming in contact with and observing'. Henry Maine quoted in Phillipson,

It was not until the late seventeenth century that jurists and publicists were able to draw a critical tripartite distinction. They differentiated *ius naturale* from *ius gentium* or customs that nations *happened* to share — namely, rules concerning trade, piracy and contracts — but that each state had created individually, and also from *ius inter gentes* or rules that states have jointly acknowledged in an effort to come to terms with one another.[49] *Ius inter gentes* obligates the state directly, and thus its representatives: rulers and diplomats. It is not *ius naturale* that binds the consciousness of human beings. (Contrast the idea of princes bound as human beings by *ius naturale* with the notion of princes as public office-holders bound by *ius inter gentes*). And it is not *ius gentium* or legal procedures that coincide across various states, as a play of chance. It is a law that is instituted or 'posited' — namely, positive law that reflects choice and volition as opposed to natural necessity or accident.

Ius gentium, ius inter gentes and *ius naturale* present parallel, not mutually exclusive ideal types for reading international history.[50] The interpretation here prioritizes *ius inter gentes* because it assumes that states continue to be central, if not the sole, actors in the international sphere. A law taking place *between* states alone can constitute or define a society of states as a peculiar legal community; this sort of law immediately implies this sort of society,

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The International Law and Custom of Ancient Greece, pp. 70-71. The novelty about the early Renaissance meaning of *ius gentium*, in effect pertains to a realization that this law is public as opposed to a private law binding individuals. James Brown Scott attributes an understanding of *ius gentium* as public law to the sixteenth-century scholastic, Francisco de Vitoria. But this reading is not entirely consistent, since for Vitoria *ius gentium* is simultaneously a private law. See J.B. Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Oxford: Oxford University Press, 1934), p. 170.

49) The distinction between *ius inter gentes* and *ius gentium* is articulated by Richard Zouche, *An Exposition of Fecial Law and Procedure, or of Law between Nations, and Questions Concerning the Same* [*Iurius et iudicii fecalis, sive, iuris inter gentes, et quaestionum de eodem explicatio*], edited by Thomas Erskine Holland, translated by J.L. Brierly, *The Classics of International Law* (Washington DC: Carnegie Institution, 1911[1650]), sec. I, paras 1-2, pp. 1-2; and Samuel Rachel, 'Dissertation the Second: Of the Law of Nations' in *Dissertations on the Law of Nature and Nations* [*De jure naturae et gentium dissertationes*], edited by Ludwig von Bar, translated by John Pawley Bate (Washington DC: Carnegie Institution, 1916 [1676]), sec. I-IV, pp. 157-158.

50) Contemporary scholars continue to investigate and elaborate the idea of natural law. See, for example, Alan Donagan, *The Theory of Morality* (Chicago IL: University of Chicago Press, 1977), especially ch. 1; John Finis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980); Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996); and T.J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge: Cambridge University Press, 2000).

and one cannot have one without the other.[51] And because the international legal order brings together independent political associations, as opposed to human beings, it cannot be considered an automatic extension of the domestic legal order. The society of states is *sui generis*. And since it is unique in this strictly international manner, its diplomacy too can be an autonomous body of rules. That is, diplomacy is an international institution that cannot be extracted by analogy from the domestic model of law or politics.

This, so far, is the logical or conceptual part of the argument. Let's turn now to its historical part.

The Historical Construction of the European States-System as a Diplomatic System

That the society of states can be thought of as a system of diplomacy is at once an analytical and historical proposition. The society in question is not an abstract category: it is not any imaginable states-system but *the* European-states system. It is a chronologically-bound conceptual space — it begins to articulate itself in the framework of Latin Christendom,[52] in the thirteenth century, with the refusal of the French king Philip the Fair to submit to papal authority,[53] becomes palpable in the seventeenth century when thinkers such as Pufendorf and Slingsby Bethel generate a discourse of states as individuals that have rights and interests,[54] and reaches fruition in the eighteenth century with the emergence of *ius inter gentes*. The system is resurrected from

51) As J. Brierly writes, 'In any case the character of the law of nations is necessarily determined by the society within which it operates, and neither can be understood without the other', in J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th edition, reviewed by C.H.M. Waldock (Oxford: Oxford University Press, 1963), p. 41.

52) Wight, *Systems of States*, p. 119.

53) This is the famous conflict between Philip IV 'The Fair', King of France (1285-1314), and Pope Boniface VIII. As Michael Oakeshott comments, 'The occasion was that of the publication of Pope Boniface VIII's bull, *unam sanctam*, in which he claimed an authority over the affairs of the realms of Christendom which, if it had been admitted, would have turned the kings of Christendom into mere lieutenants of the pope'; see Michael Oakeshott, *Lectures in the History of Political Thought*, edited by Terry Nardin and Luke O'Sullivan (Exeter: Imprint Academic, 2006), p. 316. The rights of French kinship against Boniface VIII were defended by John of Paris in 1302; see John of Paris, *On Royal and Papal Power* [*De potestate regia et papali*], translated by Arthur P. Mochan (New York and London: Columbia University Press, 1974 [1302-3]).

54) Slingsby Bethel, *The Interest of Princes and States* (London: John Wickins, 1680); Samuel

the ashes of Christendom but it is something more than its secularized version. The fitting analogy is not evolutionist but transformational — the society of states is not a novel stage in the growth of the European organism, but an institutional framework that is *discontinuous* from previous political experience. A manifestation of such discontinuity, as Wight observes, is that the government of the Middle Ages was the church, while in modern times it is the state.[55] And although diplomatic conventions such as international congresses are slightly reminiscent of earlier church councils,[56] their multilateral, horizontally-based procedures present an unprecedented development and a benchmark of modern diplomacy.

The idea of a states-system hinges on two components: autonomous individuals (states) and a system of rules to which they subscribe. When its diplomatic rules are given analytical priority, the result is a conception of Europe as a system of diplomacy. Each of these components must be understood historically as well as analytically. Human problems may be eternal, but the language we use to convey them cannot be stretched indefinitely — different epochs have different vocabularies. Concepts like 'state', 'diplomacy' and 'society of states' acquire meaning in a historical context, and much theoretical effort is spent in identifying that context. What matters is not that resident embassies were a Western invention, or that they developed at a particular time and place — among Italian city-states in the fifteenth century — but that the idea of diplomacy as an *office*, or of the diplomat as a public official, presupposes a specifically European and modern political idiom. In invoking this idiom, I do not seek to recommend it ethically, or to suggest that it is intellectually superior to non-European or pre-modern modes of experience. The point is that a fully worked-out concept of modern diplomacy presupposes an understanding of this historical context.

Pufendorf, *An Introduction to the History of the Principal Kingdoms and States of Europe* [*Einleitung zur Geschichte der vornehmsten Staaten Europas*] (London: Thomas Newborough and Martha Gilliflower, 1700 [1682]). Here, of relevance, are the polemical and political ideas of Pufendorf, not his writings on international morality.

55) Wight quotes Figgis's dictum: 'The Real State of the Middle Ages in the modern sense — if the words are not a paradox — is the Church', in Wight, *Systems of States*, p. 28. The text is from J.N. Figgis, *Studies of Political Thought from Gerson to Grotius, 1414-1625*, 2nd edition (Cambridge: Cambridge University Press, 1956 [1907]), p. 15.

56) Wight traces multilateralism back to the Congress of Cateau-Cambrésis of 1559, in Wight, *Systems of States*, p. 145.

The 'state' that dispatches diplomats, plans and carries out foreign policies, and abides by international conventions, is not a mere object but a meaningful notion. It designates a *status*,[57] something permanent, standing, institutional. And if the state is an institution, it is distinct from the physical person of its immediate ruler. But this distinction should not be taken to mean the doctrine of the 'king's two bodies', originating in twelfth-century English law.[58] The image of a ruler's dual nature (temporal or physical as well as perennial or official) has its theological parallel in *persona mixta* — the mixed person combining spiritual with secular powers.[59] Either way, these are distinct but indivisible aspects of a single unity. This sets apart the early English-law principle that a single individual may be regarded as a corporation (uniting two natures) from the medieval German theory of corporations, where many agents have a joint corporate identity.[60] Modern, post-sixteenth-century political theory moves further to reflect a radical break, namely, that the two natures residing in one person have become themselves two different persons — private and public. The state is coterminous with the latter. Indeed, solely in its capacity of a public office can the state be fully detached from the private individual or individuals holding such office.

The repercussions for diplomacy are easy to see. Once the theory of the state is in place, the private and public personae of the diplomat can be differentiated, and the privileges of the public figure protected. Increasingly, with the crystallization of the state as an entity that speaks with its own voice, it becomes habitual to have representation *via* a single diplomatic mission, the resident embassy, where a single diplomat is accredited. (Before that, it was acceptable to dispatch two or more ambassadors or missions to the same

57) Quentin Skinner, 'The State', in Terrence Ball, Russell L. Hanson and James Farr (eds), *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989), pp. 90-131. For a discussion of *lo stato*, the Renaissance precursor of the modern state, which designates the personal power of a ruler as opposed to a permanent institution, see Watson, *The Evolution of International Society*, chs 14 and 15; and Watson, *Diplomacy*, pp. 98-100.

58) Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton NJ: Princeton University Press, 1957; 1981 printing), esp. pp. 12, 25, 30 and 78.

59) On *persona mixta*, see Kantorowicz, *The King's Two Bodies*, p. 43.

60) Otto Gierke offers an account of the German theory of corporations in Otto Gierke, *Political Theories of the Middle Age*, translated and with an introduction by Frederick William Maitland (Cambridge: Cambridge University Press, 1900).

political destination.) An indication that such an understanding had began to take root by early modernity is Philip de Commines' complaint that the Duke of Milan sent two diplomatic missions, instead of one, to the Venetian negotiations in turbulent 1495.[61]

But modern diplomacy is not the same as ancient diplomacy. This is so because the state that reproduces the modern diplomatic institutions is an idea with a historically specific meaning — it signifies a political association that is independent *de jure*. Contrast this with the Greek *polis*, which was *de facto* or functionally independent, as a sort of political autarky. Whereas ancient Greece denotes the Greek civilization or people, as opposed to the Greek association of *poleis*, Europe is a commonwealth of independent polities. The former rests on political instinct, espoused by citizens inside the city-state; the other, on institutions of politics *and* law that are shared between states. International law is an element found in the European framework only, and it enables the creation of a unique system of diplomatic rights and duties, which are cherished by all participants. A diplomacy that animates such a framework advances a state's interests — by supplying intelligence or aiding in the conclusion of alliances[62] — but also restrains the pursuit of interest through a common framework of diplomatic rules. By imposing limits on state conduct that are relatively stable, diplomacy is transformed into an office that persists beyond the transient, ever-changing flow of political events. As such, it is able genuinely to represent the state, which itself is an oasis of institutional stability. It is not an accident that the Greek city-states dispatched messengers or heralds[63] while modern states rely on *permanent* representatives, ambassadors, and permanent *loci* of diplomatic representation, resident embassies. While it is unwise to treat the resident embassy as a foundational category of the European states-system, as Bull

61) Philip de Commines was Charles VIII's ambassador to Venice. See Philip de Commines, *The Memoirs of Philip de Commines, Lord of Argenton, Containing the Histories of Charles the VIII, Kings of France, Charles the Bold, Duke of Burgundy, to which is Added the Scandalous Chronicle or Secret History of Louis XI by Jean de Troyes*, edited and with notes by Andrew R. Scoble, 2 vols (London: Henry Bohn, 1856), vol. II, p. 174.

62) Mattingly suggests that the first ambassador used for securing intelligence (as opposed to alliance), de Silva, was sent by Ferdinand of Aragon, Spain, to the French court of Charles VIII; see Mattingly, *Renaissance Diplomacy*, p. 123.

63) David Bederman, *International Law in Antiquity* (Cambridge: Cambridge University Press, 2001), pp. 96-99, 111 and 114.

and Watson remind us,[64] it is emblematic of the *status* — that is, the fully-fledged institutional character — of modern diplomacy.[65]

In effect, diplomatic activity evolved into a set of practices that are more or less permanent when compared to the shifting policies pursued by different rulers or by the same ruler at different times. Developments in its institutionalization, besides the emergence of resident embassies in fifteenth-century Italy, were the legal recognition of the extraterritoriality of ambassadors in the period of Louis XIV, the emergence of the diplomatic corps in the eighteenth century, and the agreement on the rules of diplomatic precedence reached at the Congress of Vienna.[66] Reciprocity was gradually established, not merely as an expedient but as a principle. Whereas all monarchs, including the (German) Emperor, sent envoys, the pope, until the sixteenth century, received but sent none. The Holy See for the first time sent one *nuntius* and *orator* to Emperor Maximilian's court after 1495, later followed by papal *nuntius* in Spain, France and Venice.[67] The Sultan did not dispatch any ambassadors until 1793 when Selim III began establishing embassies in Paris, Vienna, London and Berlin.[68]

The argument here that diplomacy is an institution builds upon Bodin's concept of sovereignty as juridical independence. Bodin's idea is pivotal, for it shows that states can acknowledge common rules as authoritative without thereby recognizing a common superior. Authority in international relations need not have an author, an all-powerful Leviathan; it can be enshrined in the form of rules that agents have imposed on themselves.[69] Since this constitutes *self*-imposition, the individual state is not denied agency. Its capacity to act and decide for itself is preserved by being incorporated in the fabric of a social order that it shares with other states. The state is not an atomistic indi-

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64) Bull, *The Anarchical Society*, p. 161; and Watson, *Diplomacy*, p. 11.

65) Christer Jönsson and Martin Hall use the word status in a related but distinct sense, as 'standing', to designate the representational character of diplomacy. See Christer Jönsson and Martin Hall, *Essence of Diplomacy: Studies in Diplomacy and International Relations* (Basingstoke: Palgrave Macmillan, 2005), pp. 113-116.

66) Bull, *The Anarchical Society*, p. 160.

67) Mattingly, *Renaissance Diplomacy*, p. 133.

68) Edward Vose Gulick, *Europe's Classical Balance of Power: A Case History of the Theory and Practice of One of the Great Concepts of European Statecraft* (New York: Norton, 1967), p. 15.

69) The idea that sovereignty is not coextensive with a particular individual, but is rather a principle or a rule, is hinted at by McRae, who writes in his 1962 Introduction to Bodin's *The Six Bookes of a Commonweale* that Bodin's notion of sovereignty is 'absolute and perpetual', p. A14.

vidual but a free — that is, freely choosing — member of international society. That freedom does not, however, imply freedom to ignore common rules, for constraint is the cardinal precondition of individual freedom. The puzzle of legal order at both domestic and international levels is to define the freedom of each member of society in a way that is compatible with a like freedom for all.

What matters, then, is not the state but the society of states. This is the corollary of Bodin's conclusion that internal sovereignty of the state, or its ultimate law-making capacity, results in external sovereignty, or legal equality among states.[70] And since diplomacy reproduces the principle of legal equality, which is central to the European states-system, it is not incoherent to think of it as a system of diplomacy. This equality is manifested in the reciprocity of diplomatic representation, in the principle that extends the same diplomatic immunities to the ambassador of even the smallest state, and in a uniform diplomatic protocol, in existence since the Conference of Aix-la-Chapelle, that grants equal ceremonial powers to all states.[71]

Diplomacy can reproduce state equality if it is seen as a language spoken among equals rather than as a set of bargaining tools that a state possesses according to its relative power.[72] This is not to say that instrumental considerations have no place in international life, only to emphasize that the story that has power and interest as its conceptual core differs in kind, and not

70) Bodin develops the argument that an absolute authority internally leads to nominal equality externally; see Bodin, *The Six Bookes of a Commonweale*, book I, chs 8, 10. In a similar fashion, Rob Walker claims that the domestic political order is related to the international order, and that a proper political theory demands considering both; see R.B.J Walker, *Inside/Outside: International Relations as Political Theory* (Cambridge: Cambridge University Press, 1993).

71) Harold Nicholson observes that at the Conference of Aix-la-Chapelle in 1818, the question of diplomatic precedence was resolved by adopting an alphabetical system (the French alphabet) for affixing signatures to international documents. Prior to this, this question was much contested and nearly led to a threat of war after an anecdotal exchange occurred between the Spanish and French ambassadors in September 1661. The order of precedence was devised around 1504 and stipulated that the official representatives of the German Emperor, the French King, and the Pope had primacy over the diplomats of other princes. See Harold Nicholson, *The Congress of Vienna: A Study in Allied Unity, 1812-1822* (London: Constable, 1946; 1948 reprint), pp. 218-220. For the rules of precedence established at the Vienna Congress, see also Wight, *Systems of States*, p. 136. A good source that elucidates the differences in diplomatic arrangements between the Congress of Westphalia and the Congress of Utrecht is Ernest Satow, *Guide to Diplomatic Practice*, 2nd edition, 2 vols (London: Longmans and Green, 1922 [1917]), vol. II, pp. 2-11 and 35-40.

72) Thomas C. Schelling offers a fascinating account of diplomacy in instrumental terms as 'diplomacy of violence'. See T. Schelling, *Arms and Influence* (New Haven CT: Yale University Press, 1966),

simply to a degree, from a story about rules. Rules do not deny the relevance of interests; they deny that interests can be pursued in the absence of restraint. And rules have significance because they constitute the relations of states as well as the *identity* of states. One way to make this argument is to point out that sovereignty is a status within a framework of rules, and that we cannot know the sovereign's interests until we know who or what the sovereign *is*.

Nevertheless, for all its dependence on the legalistic paradigm of the modern European society of states, diplomacy is not a mere by-product of international legal relations. On the contrary, it provides a language through which the workings of international law can be criticized, when states, especially the most powerful, fail to live up to the proclaimed standards of international legality, or when these standards are themselves seen as unjust. To give merely one example of this proposition, diplomatic forums offer an opportunity for less-developed countries to question whether the procedures of international society are genuinely impartial and public or whether they actually benefit the West.[73]

But the impartiality or the public character of diplomatic procedures can exist only because the European states-system itself is a *res publica*, or a public realm.[74] This system enables its members to coexist despite their disagreements over private matters, such as the irreconcilable differences in religious and moral codes among European powers during the Reformation. It enables states to transcend their differences, and establishes itself as a kingdom of

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pp. 1-34; and Robert Jervis, 'Bargaining and Bargaining Tactics', in J. Roland Pennock and John W. Chapman (eds), *Coercion* (Chicago: Aldine, 1972), pp. 272-288.

73) Bull, 'The Revolt against the West', pp. 222-223. Bull's proceduralist understanding of international society leads him to express concern over the substantive demands of developing nations for international redistributive policies. Despite the common perception, in the Hagey Lectures Bull does not substantially revise his understanding of justice as procedural; see Bull, 'Justice in International Relations', pp. 206-245.

74) Richard Tuck argues that the term 'respublica', with its political connotations, was rarely used by medieval jurists to describe Christendom. The typical expressions in medieval documents were 'Christianitas' or 'populus Christianus', not 'respublica Christiana' — a notion 'much more recent and much more tied to a clearly humanist view of the world'. See Tuck, *The Rights of War and Peace*, pp. 27-29. If Tuck's interpretation is correct, it lends support to the hypothesis of a significant discontinuity between Christendom and modern Europe, as a 'respublica' of independent states. That the idiom of Europe replaced that of Latin Christendom is an understanding endorsed by humanists from the times of Vattel up to the present. See Bull, *The Anarchical Society*, pp. 26 and 31-32; Keens-Soper, 'The Practice of a States-System', p. 27; Watson, 'European International Society and Its Expansion', pp. 13-16; and Wight, *Systems of States*, p. 151.

means, not a kingdom of ends. That the society of states embodies such impartial legal and diplomatic procedures has enabled its principles to be transported outside their original milieu to encompass the entire globe.[75] In retrospect, this global extension was possible because the European states-system, as a specific historical creature, paradoxically presupposes values that are universal. When it manifests itself as a system of diplomacy, the result is an impartial discourse that has no other purpose than to the keep conversation going between participants. This conversational potential implies that the future might bring about diplomatic societies quite different in form from the current society of states.[76] But it is important to remember that diplomacy as a language spoken by states (state officials) will inevitably differ from diplomacy whose principal agents are persons other than states.

Conclusion

In concluding this article, Keens-Soper's metaphor of the European states-system as 'singularity' is invoked.[77] The metaphor is felicitous because it indicates that such a system, or any institutional context, cannot be a mere spatial or geographical notion. It is a historical and, simultaneously, a conceptual notion. Concepts transform history because agents who act on the historical scene — their actions, plans, understandings, their very character — are themselves changing. The theorists qua institutionalists (humanists) who try to understand those actions, motives and ideas on their own terms stand miles apart from the theorists qua abstract observers (Waltz), who explain what is going on by ascribing motives and understandings that appear plausible from an observational standpoint but that are alien and arbitrary from the participants' standpoint. The message of humanism, for those willing to grant it a hearing, is that theory cannot be a purely analytical enterprise. Invariably, it is an attempt to understand historically situated identities. The implication is that even when the theorist seeks to articulate principles, rules and institutions — that is, general propositions — the object of study is something particular. From an institutionalist perspective, one studies *the*

75) Bull and Watson, 'Conclusion', in *The Expansion of International Society*, p. 433; and Bull, 'The Emergence of a Universal International Society', especially pp. 120-121 and 123-124.
76) Watson, *Diplomacy*, p. 214.
77) Keens-Soper, 'The Practice of a States-System', p. 26.

states-system, not any conceivable states-system, or the diplomatic system as opposed to diplomacy in general. This '*the*' conjures into being an identity and a historical actuality that renders such identity intelligible.

It is a historical fact that in the eighteenth century, international law or *ius inter gentes* came to define an international society that was comprised of nominally equal and territorially integrated political entities: states. This development transformed the framework of medieval diplomatic relations, which were hitherto associated with codes such as the canon of the Catholic Church, *ius naturale*, or *ius gentium*. With the appearance of an international society in Western European legal thought and practice, diplomacy was transformed into a characteristically modern institution. In the nominally equal and independent political associations that were members of the European states-system, as still another contingency, authority was linked to a territorial principle. This led to the proliferation of resident embassies and to the eventual establishment of diplomatic immunities that were predicated on the principle of exterritoriality, as the discussion above of Gentili, Grotius and Bynkershoek illustrates.

The argument presented here also supports the view that European international society can be pictured as a system of diplomatic relations between sovereign states. The idea is not that the states-system and diplomacy are one and the same thing but that diplomacy is one perspective, a theoretical platform from which the whole — that is, the states-system as such — can be understood. And if diplomacy, or the states-system for that matter, presents an ideal vantage point for comprehending actual political experience, neither diplomacy nor the states-system can be a mere epiphenomenon of state interest. Both must be understood as a corpus of rules. For unlike interests, rules are not abridgements of political action but standards through which such action can be judged, appraised, condemned and indeed understood.

Last but not least, the crucial upshot of the exposition is that diplomacy can be an autonomous discourse only if it is conceived in terms of rules. It is one thing to say that states agree to grant immunities to each other's ambassadors or to establish diplomatic representation on a reciprocal basis because of a shared sense of duty; it is quite another to say that they do so because of interest. Rules imply obligations, and by viewing diplomacy as a rule-governed activity, one removes it from the universe of interests. Adopting such premises means that diplomacy is not a passive channel for announcing the 'national interest'. It is also, and more fundamentally, an agency that can

redirect state interest. In this capacity, diplomacy cannot be a mirror image of some other, more fundamental domestic institution. It is an *international* institution par excellence because it can influence the individual state by reminding it that, as a part of international society, it is required to restrain its interests so that the part does not undermine the whole.

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