

## The Laws of War in Ancient Greece

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One of the earliest and the most famous statements of realism in international law comes from ancient Greece: the Melian dialogue in Thucydides' history of the Peloponnesian War. In 416 B.C.E., the Athenians invaded Melos, a small island in the Aegean that sought to remain neutral and avoid joining the Athenian empire. Thucydides presents an account of the negotiation between the Athenians and the Melian leaders.<sup>1</sup> The Athenians offer the Melians a choice: become a subject of Athens, or resist and be annihilated. The Melians argue, among other things, that justice is on their side. The Athenians dismiss arguments from justice as irrelevant and reply with a statement that many scholars believe represents Thucydides' own view: "We both alike know that in human reckoning the question of justice only enters where there is equal power to enforce it, and that the powerful exact what they can, and the weak grant what they must."<sup>2</sup>

Thucydides' presentation of inter-state relations has cast a long shadow on modern interpretations of the effectiveness of the ancient Greek laws of war. The reputation of the Greek laws of war also has not been helped by the massacres of noncombatants and other gross violations of modern humanitarian norms that regularly occurred in the classical period. There

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1. For references, see Simon Hornblower, *Commentary on Thucydides* (Oxford: Oxford University Press, 1996), 2:81–92.

2. Thucydides 5.89 (*The Peloponnesian Wars*, trans. Benjamin Jowett, rev. and abridged P. A. Brunt [London: New English Library, 1966]).

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was a relatively effective law of war in ancient Greece. But the Greek law of war did not encompass humanitarian ideals. Instead, it focused on protecting sacred objects and observances. The great irony here is that despite the central role played by religion and honor in the Greek laws of war, these laws were indifferent to considerations of mercy and the protection of noncombatants. Notwithstanding Thucydides' grim view of the efficacy of international law, I will argue that the evidence from ancient Greece actually supports the position that international law did serve as a meaningful check on state behavior.

This article first surveys what we know about the law of war in ancient Greece, addressing the sources of the Greek law of war, their enforcement mechanisms, and the content of the laws themselves. Along the way, I want to highlight three observations that help explain why the laws of war may have been more effective than generally thought. First, everyday domestic Greek law was very different from our own in that it included unwritten, customary law. For the Greeks, the notion of applying a customary international law based on state practice was familiar and completely uncontroversial. Second, the importance of honor and status in the ancient world meant that reputational sanctions for violating the laws of war could be effective even in the absence of formal enforcement mechanisms. Third, for the most part the Greek laws of war grew out of religious customs. The laws of war were therefore naturally part of the culture and values of constituent states and, as such, could more easily encourage compliance than laws whose legitimacy was based purely on a theory of consent or on the fairness of the procedure by which they were enacted.

After this survey, the article asks what insight the evidence from ancient Greece might give us in the ongoing debate over whether international law can ever truly restrain states. The traditional scholarly account of the Greek law of war would support the realist position. But I argue that the Greek example, which includes instances where Greek states observed international norms that were clearly contrary to their interests, suggests one time and place where international law served as a meaningful check on state behavior.

Before we begin, it may be useful to provide some background information about the political and cultural landscape of ancient Greece for the non-specialist reader. I focus in this article on the classical period, roughly the fifth and fourth centuries B.C.E., though I also discuss purported norms of war in the archaic period, which spanned the eighth through the sixth centuries B.C.E. In both these periods, Greece was comprised of autonomous city-states (*poleis*), which included oligarchies as well as democracies. Despite the important political and social differences between city-states, these states shared a common language, worshipped the same gods, relied

on the same Homeric epics as a guide to moral values, and shared cultural traditions at periodic panhellenic festivals. For these reasons, it is possible to speak of a common “Greek” set of cultural and religious values and norms.

### I. A Customary Law of War

Although there are a handful of examples in our sources of treaties purporting to regulate the conduct of warfare,<sup>3</sup> the Greek law of war was primarily an unwritten set of norms arising from Greek custom.

There is one formal agreement from the classical period that addresses the conduct of war. In theory it applied to much of Greece but was largely ignored in practice. The Amphictyonic Council was an association including the majority of Greek city-states that was formed to protect and oversee the oracle and sanctuary at Delphi. According to the fourth-century politician Aeschines, members swore an oath “not to lay waste to any city belonging to the Amphictyonic Council, nor keep it from using any spring, neither in war, nor in peace; but if anyone violate these oaths, to take the field against him and lay waste to his cities. . . .”<sup>4</sup> This oath was routinely broken and, so far as we know, never enforced according to its terms, though we do hear of a couple of attempts to fine violators.<sup>5</sup>

But for the most part the law of war in archaic and classical Greece was informal and customary, arising from shared norms and practices rather than explicit laws and treaties. Our sources generally refer to this body of law with such phrases as the “laws of the Greeks,” “the common laws of

3. The most famous written convention is the treaty reportedly conducted between the archaic city states of Chalcis and Eretria banning the use of missile weapons (Polybius 13.3.2–4; Strabo 10.1.12). Herodotus (1.82; 9.26) also mentions a couple of bilateral agreements to limit the scale of war by specifying the number of combatants per side or providing for a battle of champions. The historicity of these treaties has been questioned by scholars. See, for instance, Everett L. Wheeler, “Ephorus and the Prohibition of Missiles,” *Transactions of the American Philological Association* 117 (1987): 178–82; Josiah Ober, “Classical Greek Times,” in *The Laws of War: Constraints on Warfare in the Western World*, ed. Michael Howard, George J. Andreopoulos, and Mark R. Shulman (New Haven: Yale University Press, 1994), 12. In any case, if such agreements to exercise restraint in war did exist, they seem to have been exceedingly rare in the archaic period and nearly unheard of in the classical period. Thucydides (5.41) does refer to a treaty between Sparta and Argos in 420 B.C.E. in which the parties agreed that disputes would be decided in a single pitched battle, but suggests that this type of convention was old-fashioned.

4. Aeschines 2.115.

5. Herodotus 6.92; Diodorus 16.23.2–3, 29.2; Hans van Wees, *Greek Warfare: Myths and Realities* (London: Duckworth, 2004), 10 and 255 n.19.

the Greeks,” and “the laws common to all men.”<sup>6</sup> The limits on warfare appear to have been relaxed when fighting non-Greek barbarians.<sup>7</sup> But the distinction between “the laws of the Greeks” and “the laws of mankind” is not consistently applied, and it is not clear whether there was a shared understanding of precisely which laws applied only to Greeks and which were wider in scope.<sup>8</sup>

To say that the law of war was customary is not to imply that it occupied a lesser status in the eyes of the Greeks than written laws and treaties. Today customary international law, particularly in its traditional form that relies on states’ practice, is more controversial and contested than positive law in some quarters. The Greeks did not have this reaction to customary law. They used the same word—*nomos*—to refer to customs and written statutes. As a matter of ordinary domestic law, the classical Athenian courts did not require that a lawsuit be based on a written statute. We cannot identify the legal basis of some of our surviving court speeches,<sup>9</sup> and in at least one case we are fairly certain that the defendant’s actions were not prohibited by any existing statute.<sup>10</sup> Written law supplemented rather than superseded customary law. One scholar has pointed out that the first written laws tended to involve procedural and administrative matters rather than substantive norms and has argued convincingly that in early Greece the inscribing of decrees may have been intended to “confer divine protection and a monumental impressiveness on just those kinds of law which did not receive the time-honoured respect accorded the unwritten laws and customs.”<sup>11</sup> If anything, customary law may have enjoyed *more* respect than positive law in ancient Greece.

## II. Enforcement Mechanisms

How were the laws of war enforced? In the rare case of multi-state agreements, other parties to the agreement might attempt to punish violations,

6. Representative passages are collected in Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (1911; Buffalo: William S. Hein & Co., 2001), 1:58. Both *nomoi* and *nomima* are used to refer to “the laws.”

7. Plato *Republic* 471a; Euripides *Medea* 536–40.

8. Phillipson, *The International Law and Custom of Ancient Greece and Rome*, 1:59–60.

9. For example, the prosecutor in *Lysias* 30 never states the law under which he is bringing the case.

10. *Lycurgus* 1.9.

11. Rosalind Thomas, “Written in Stone? Liberty, Equality, Orality and the Codification of Law,” in *Greek Law in Its Political Setting: Justifications, Not Justice*, ed. L. Foxhall and A. D. E. Lewis (Oxford: Clarendon Press, 1996), 31.

for instance by imposing fines, as the Amphictyonic Council did. But for the most part direct sanctions by third parties were rare.

Fear of retaliation by the offended party and their allies surely offered some deterrence. Although the evidence is not entirely clear, it seems that it was acceptable for states to retaliate in kind. On the one hand, states sometimes argue that actions contrary to the laws of war are justified as a reprisal. The Boeotians, for example, flouted the requirement that the victor in battle hand over the enemy dead for proper burial in retaliation for the Athenians' violation of the sacred sanctuary of Delium in their territory.<sup>12</sup> The legality of reprisals is discussed at some length in Thucydides' depiction of the trial following the siege of Plataea. In 431 B.C.E. a group of Thebans attacked Plataea. In doing so, they contravened a peace treaty and violated the prohibition against attacking a state during a religious festival. The Plataeans defeated the invaders and took over one hundred prisoners, whom they later killed. A few years later, the Thebans and their Spartan allies attacked Plataea. After a long siege, the Plataeans surrendered on terms brought by a herald: "if they were willing, voluntarily, to turn their city over to the Spartans and accept them as judges, they would punish only the guilty, but no one contrary to justice."<sup>13</sup> At the trial before the Spartan judges, the Plataeans argue that their assassination of the Theban prisoners was justified as a reprisal: "The Thebans have committed many other crimes against us, and you yourselves know of their latest crime, the reason we are now put to this ordeal. You see, we took action against them when they attacked our city during a truce, and, besides that, during a holy month. We did so properly, in accordance with a universal law that makes self-defense against an aggressor a divinely-sanctioned act; and now, it would not be seemly if we suffer because of the Thebans."<sup>14</sup> Unfortunately we don't know whether such an argument would have been recognized as valid by the Greeks because the Spartan promise of a fair trial turned out to be a sham. The Spartan judges declared that they were interested in one question and one question only, "whether in the present war, they had in any respect benefited the Spartans and their allies."<sup>15</sup> By that standard, the Plataeans, long-time allies of the Athenians, were clearly guilty.

In contrast to the arguments put forward by the Plataeans, other sources suggest that reprisals were not permitted, at least in the case of norms based on religious customs. Polybius, writing in the second century B.C.E., states that destruction of sacred buildings and objects was not tolerated even in retaliation and offers examples of commanders, most prominently Alex-

12. Thucydides 4.98.

13. Thucydides 3.52.

14. Thucydides 3.56.

15. Thucydides 3.52.

under the Great, who took vengeance on states who committed sacrilege against them but carefully avoided destroying sacred objects themselves.<sup>16</sup> Two stories told by Herodotus, a historian of the fifth-century B.C.E., are more ambiguous. To atone for having killed Persian ambassadors, who were entitled to immunity under the laws of war, the Spartans dispatched two volunteers to offer themselves to Xerxes, the Persian king. But Xerxes refused to take the ambassadors' lives, saying that "he would not behave like the Spartans, who, by murdering the ambassadors of a foreign power, had broken the law of all men, and that he would not be guilty himself of the same crime they had committed."<sup>17</sup> Later in the war against the Persians a Spartan commander is horrified by his advisor's suggestion that he mutilate the body of a noble Persian in retaliation for the Persians' previous impaling of a Spartan king.<sup>18</sup> Although the actions of these two commanders suggest a norm against reprisals, the fact that others urged them to take revenge indicates that this norm was controversial at best. In other periods and civilizations the laws of war were at first based on the principle of reciprocity; the movement away from permitting reprisals toward a recognition of universal rights is a relatively recent phenomenon.<sup>19</sup> It seems likely that the passages in which leaders refuse to retaliate in kind reflect a particularly pious attitude toward sacred customs rather than an accepted international norm against reprisals.

Reputational damage may have been the most effective sanction against violating the laws of war. Honor and status were the currency of the Greek world. The Plataeans attempt to persuade their Spartan judges by arguing that Sparta's reputation would suffer if they ignore international law and kill the Plataeans:

You must consider also that at the moment among most of the Hellenes you are held up as an example of faith and honor. But if you come to an unfair decision in this trial, which cannot escape publicity, since you, the judges, are generally respected and we, the defendants, are not without reputation, beware lest public opinion condemns you.<sup>20</sup>

The ramifications of a damaged reputation extended beyond loss of honor: the typical Greek city-state's security and economic success depended on its relationships with other states via treaties, alliances, and informal friendship (*philia*) relationships. Flouting the laws of war and getting a reputation for

16. Polybius 5.9–10; 4.62, 67.

17. Herodotus 7.136.

18. Herodotus 9.79.

19. Theodor Meron, "The Humanization of Humanitarian Law," *American Journal of International Law* 94 (2000): 249.

20. Thucydides 3.56 (trans. Rex Warner, *History of the Peloponnesian War* [Baltimore: Penguin Press, 1954]).

being untrustworthy might jeopardize a state's ability to cooperate with other states. Behavior in battle affected not only the reputation of the city-state as a whole, but also the status of individual commanders and soldiers. In fact, battle was the primary way for ordinary citizens to distinguish themselves and bring honor to their families.<sup>21</sup> As such, the influence of the laws of war extended up and down the chain of command.

Finally, violations of norms arising from religious customs (which included most of the Greek laws of war) created the possibility of divine sanctions. Both Sparta and Athens were said to have suffered divine punishment for killing Persian envoys at the start of the first Persian war: Herodotus reports that the Spartans had unfavorable omens at their sacrifices until they offered up two volunteer human victims to the Persian king in reparation, though he expresses doubt about the story put forward by others that the sack of Athens ten years later by the Persians was assisted by the gods.<sup>22</sup> The Megarians were purportedly struck with an unusual form of divine punishment for killing an Athenian herald: it was said that the gods condemned the city to permanent poverty.<sup>23</sup>

It is difficult to say how seriously the Greeks took the threat of divine sanctions. It is clear that divine sanctions were not considered certain or predictable. There were no agreed-upon divine penalties for particular violations. Misfortunes of all sorts, sometimes occurring years or even generations after a violation,<sup>24</sup> were sometimes attributed to the gods' righteous indignation. As Herodotus's discussion of the sack of Athens illustrates, uncertainty and doubt surrounded stories of divine sanctions from the beginning. In the classical period intellectuals began to question traditional religious beliefs, and most scholars believe that fears of pollution and other religious superstitions declined over time.<sup>25</sup> Characters in two of Aristophanes' comedies suggest that the gods no longer punish wrongdoers such as those who make false oaths.<sup>26</sup> By the fourth century, the "superstitious man" was a figure of ridicule in Theophrastus's *Characters*. Although the

21. Most famously, Pausanias (1.14.5) tells us that Aeschylus's grave made no mention of his plays but described his service at the battle of Marathon. In a similar vein, Socrates' admirers often repeated the story of how he distinguished himself while serving as a hoplite by saving the life and armor of the wounded Alcibiades during battle (Plato *Symposium* 220d–e).

22. Herodotus 7.133–136.

23. Pausanias 1.36.3.

24. Solon Fr. 13.11–32 (West) provides a Greek version of the doctrine of "sins of the father visited on the children."

25. Robert Parker, *Miasma: Pollution and Purification in Early Greek Religion* (Oxford: Oxford University Press, 1983), 126–30; Robert Parker, *Athenian Religion: A History* (Oxford: Oxford University Press, 1996), 210–14.

26. Aristophanes *Birds* 1606–25; *Clouds* 398–402. For discussion, see Robert Garland, *Religion and the Greeks* (London: Bristol Classical Press, 1994), 22.

approach to oracles and divine portents was by no means uniform, political leaders could and did at times openly ignore them; Demosthenes, for example, was said to have scoffed at the Pythian oracle and to have cited as support Pericles' belief that religious signs were pretexts for cowardice.<sup>27</sup> On the other hand, religious rites remained a part of every aspect of state functions throughout the classical period, including the rituals leading up to and following battle, and divine signs did affect some important political and military decisions.<sup>28</sup> It seems that the possibility of divine sanctions was far from irrelevant and may have served as a deterrent in some situations. But the uncertainty and doubt surrounding these sanctions makes it unlikely that belief in divine enforcement generated widespread compliance with norms.

It bears noting here that the absence of formal enforcement mechanisms may have posed less of a challenge to compliance in ancient Greece than it does today. The importance of honor and status in the ancient world meant that reputational sanctions had serious bite. And, in at least some cases, fear of divine sanctions may have provided material incentives to comply with the law.

### III. Specific Norms

What were the Greek laws of war? The oldest, most widely recognized, and most effective norms were those related to religious observance. Ancient Greek religion differed from most modern religions in that it was not associated with a creed or fixed belief system. The gods demanded recognition through sacrifice and other ritual acts, but did not provide commandments or a moral code of conduct.<sup>29</sup> For this reason, the laws of war arising from religious customs involved protecting the property of the gods and ensuring that rites and sacrifices proceeded without interruption. I briefly summarize the Greek laws of war below. This survey illustrates that Greek religious beliefs did not give rise to ethical or humanitarian limitations on the conduct

27. Plutarch *Demosthenes* 20.1. As Parker (*Athenian Religion*, 214 n.60) points out, in other cases Demosthenes appears to have taken oracles seriously. Nevertheless, the story suggests that there was enough uncertainty about divine signs and sanctions to make it possible to counsel openly flouting them.

28. Most notably, Nicias doomed the Sicilian expedition by refusing to set sail from Syracuse after a lunar eclipse (Plutarch *Nicias* 23). But we are told that Nicias was an unusually superstitious man.

29. Two excellent short introductions to Greek religion are Louise Bruit Zaidman and Pauline Schmitt Pantel, *Religion in the Ancient Greek City*, trans. Paul Cartledge (Cambridge: Cambridge University Press 1989) and Garland, *Religion and the Greeks*.



of warfare. We will also see that secular moral values did not serve as a basis for humanitarian norms of war; the Greek code of honor offered no protection to surrendering soldiers or noncombatants.

*Protection of Sacred Places, People, and Events*

One norm was that temples, sanctuaries, and other religious buildings were not to be disturbed, even in wartime. The norm reaches back to the Homeric period and forward well into the Hellenistic period.<sup>30</sup> There are many examples of conquering forces being careful to avoid disturbing religious buildings and sites.<sup>31</sup> Adhering to this norm took uncommon restraint, since religious sanctuaries often held treasuries with riches and valuable objects dedicated to the god. Our most prominent example of a state disregarding this law actually illustrates how well-entrenched this norm was in the classical period.<sup>32</sup> During the Peloponnesian War the Athenians had fortified the sacred precinct of Delium while on campaign in Boeotian territory. The Boeotians complained that the Athenians “had transgressed against Hellenic law, [since] it was a rule established everywhere that an invader of another country should keep his hands off the temples that were in that country.”<sup>33</sup> The Athenians did not dispute the Boeotian statement of the law, but went to great lengths to excuse their behavior: they had fortified the precinct and used the sacred water for everyday needs out of necessity because there was no other escape from the Boeotian attackers, and they had been scrupulous not to harm the temple or sacred objects in any way.<sup>34</sup>

Immunity of priests and other religious functionaries was also a strong norm seen first in the period depicted in Homer and continuing through the Hellenistic period.<sup>35</sup> An invader who decided to enslave or kill the inhabitants of a sacked city was expected to spare the religious officials.<sup>36</sup>

Making war during a religious festival was also considered contrary to the laws of war. This prohibition appears to have applied not only to panhellenic festivals such as the Olympic games;<sup>37</sup> states were also banned

30. *Odyssey* 1.6–8; Polybius 5.11; 31.11; 32.27.

31. Pausanias 10.28.3; Xenophon *Agésilas* 10.1; Polybius 5.10; Phillipson, *The International Law and Custom of Ancient Greece and Rome*, 2:246–49.

32. Thucydides 4.97–98; David J. Bederman, *International Law in Antiquity* (Cambridge: Cambridge University Press, 2001), 246.

33. Thucydides 4.97.

34. Thucydides 4.98.

35. *Iliad* 1.442–45; Polybius 16.33; Phillipson, *The International Law and Custom of Ancient Greece and Rome*, 2.269–71.

36. Alexander, for example, spared the priests when enslaving the population of Thebes (Plutarch *Alexander* 11).

37. E.g., Thucydides 5.49.1.

from attacking a city that was observing a local festival<sup>38</sup> and from sending out troops during one's own festival.<sup>39</sup> To be sure, this norm was not always observed.<sup>40</sup> On occasion, the law was even manipulated to gain advantage, as when Argos changed the date of a festival in an unsuccessful attempt to forestall a Spartan attack.<sup>41</sup> But it is remarkable that this law was respected much of the time, even when, as we will see, observance was clearly contrary to the state's interests.<sup>42</sup>

### *Immunity for Heralds and Ambassadors*

International law granted immunity to heralds (professional messengers used to communicate with foreign states) and ambassadors (citizens who were appointed to represent their polis and negotiate with a foreign state). This norm enjoyed widespread acceptance by the Persians as well as Greeks.<sup>43</sup> The protection of diplomatic functionaries grew out of both religious and diplomatic concerns. There were obvious reciprocal advantages to granting immunity to messengers, since they made it possible to negotiate terms and otherwise cooperate with another state. But religious customs also helped form and ensure compliance with this norm. Heralds, "the messengers of the gods and of men,"<sup>44</sup> as Homer calls them, were thought to be under the protection of Zeus, and harming a herald could bring divine as well as human sanctions.<sup>45</sup>

### *Treatment of Enemy Dead*

Respectful treatment and return of the enemy dead was another well-entrenched norm with religious origins. Stripping a dead soldier to claim his armor was standard practice, but by the early classical period it was considered contrary to international law to mutilate or harm the body in any way.<sup>46</sup> Victors were required to hand over the dead to the enemy upon

38. E.g., Xenophon *Hellenica* 4.7.2–7.

39. E.g., Thucydides 7.73.2; Herodotus 6.106; 7.206.

40. E.g., Herodotus 1.150, 6.87; Xenophon *Hellenica* 5.2.29; for discussion of this norm, see M. D. Goodman and A. J. Holladay, "Religious Scruples in Ancient Warfare," *Classical Quarterly* 36.1 (1986): 158–60; Peter Krentz, "Fighting by the Rules: The Invention of the Hoplite Agon," *Hesperia* 71 (2002): 26–27.

41. Xenophon *Hellenica* 4.7.2.

42. Thucydides 7.73.2, 8.9.1; Herodotus 7.206.

43. Herodotus 7.136.

44. *Iliad* 1.334.

45. Pausanias 1.36.3; Herodotus 7.133–136.

46. Herodotus 9.78–79; 4.202–205. This norm did not exist in the Homeric period.

request.<sup>47</sup> This norm sprang from religious rather than humanitarian or dignitary concerns: to deny burial was to interfere with the funeral rites required by the gods. The religious character of this norm is underscored by references to it as one of the “laws of the gods” as well as the “laws of the Greeks.”<sup>48</sup> Our sources suggest that this rule was rarely breached.<sup>49</sup>

### *Treatment of Captives*

Because Greek religion was devoid of ethical content, religious beliefs and customs did not give rise to norms making war more humane. Might the Greek code of honor have placed limits on the conduct of warfare, just as the secular code of chivalry governed fighting between knights in the Middle Ages?<sup>50</sup> In Greece, the code of honor generally required simply “helping one’s friends and hurting one’s enemies;”<sup>51</sup> nothing, least of all compassion and mercy in battle, was owed to the soldiers or citizens of enemy states. Moreover, the pursuit of honor was a highly competitive endeavor: it was about victory, not how you played the game.<sup>52</sup> For this reason, the code of honor did not limit the tactics or weapons of warfare. There are occasional statements to the effect that fighting without deception and trickery requires more bravery and therefore confers more honor, but many more passages suggest that deception was an acceptable and well-used tactic.<sup>53</sup> Of course, Greek thought was not monolithic: these values were challenged by Greek philosophers and playwrights, and we will see that notions of mercy and leniency held some currency in Greek culture. But the glimmers of humanitarian thought never came close to overthrowing the traditional code of honor or finding a place among recognized international norms.

The absence of humanitarian impulses in Greek military values is most evident in the norms surrounding the treatment of captives. It was well

47. Thucydides 4.98; Euripides *Suppliant Women* 311, 526.

48. Euripides *Suppliant Women* 19, 311, 526.

49. The best known exception, the Boeotians’ refusal to give the Athenians their dead, is justified by the Boeotians as a reprisal for the Athenians’ fortification of the sacred precinct in Delium (Thucydides 4.97–101).

50. Robert C. Stacey, “The Age of Chivalry” in *The Laws of War*, ed. Howard et al., 27–39.

51. Plato *Republic* 332a; Lysias 9.20; Mary Whitlock-Blundell, *Helping Friends and Harming Enemies: A Study in Sophocles and Greek Ethics* (Cambridge: Cambridge University Press, 1989).

52. David Cohen, *Law, Violence, and Community in Classical Athens* (Cambridge: Cambridge University Press, 1995), 61–86.

53. Peter Krentz, “Deception in Archaic and Classical Greek Warfare,” in *War and Violence in Ancient Greece*, ed. Hans van Wees (London: Duckworth, 2000), 167–200.

established that a victorious state had complete discretion over how to treat the soldiers and civilians of its vanquished enemy. Xenophon states that “there is an eternal law among all mankind, that whenever a city is taken in warfare, both the people and their possessions belong to those who captured the city,”<sup>54</sup> and Aristotle notes that “the law is an agreement by which they say that the things conquered in war are the property of the conquerors.”<sup>55</sup>

There was no convention requiring fighters to show mercy to enemy combatants defeated in battle. This was true even if they attempted to surrender. The victor had the option of killing the enemy soldiers on the spot, enslaving them, or exchanging them for ransom. All three practices are well attested in our sources.<sup>56</sup> Massacres could be gruesome. The Spartans set fire to a forest where fleeing Argive fighters had taken refuge, killing thousands.<sup>57</sup> In another episode the Athenians stoned to death the surviving enemy soldiers.<sup>58</sup> The killing of captives on the battlefield was so well-accepted that our sources generally don’t bother to comment on why the victorious army chose this option. It seems likely that the choice was made based on self-interest: execution would prevent enemy soldiers in a long-running conflict from fighting again, while enslavement and ransom brought financial rewards.

One passage from Euripides’ *Heracleidae* suggests that, while it was permissible to kill an enemy soldier on the battlefield, prisoners of war taken from the battlefield could not be killed. In the play, Alcmene is about to kill Eurystheus, a prisoner of war, when a servant tells her that this would be against the law of Athens. Alcmene, a foreigner, asks, “What is this? In these men’s view it is not honorable to kill one’s enemies?” The response is: “Not an enemy they take alive in battle.”<sup>59</sup> Later in the play, Eurystheus states that since he was not killed when he was ready for it (i.e., on the battlefield), “the laws of the Greeks” forbid his execution.<sup>60</sup> There is no evidence for such a prohibition on killing prisoners of war in our non-literary sources. It seems likely that this passage is a piece of propaganda designed to illustrate Athens’s humane policy toward prison-

54. Xenophon *Cyropaedia* 7.5.73.

55. Aristotle *Politics*, bk. 1, chap. 6, lines 6–7, 1255a6–8; see also Polybius 5.11.

56. W. Kendrick Pritchett (*The Greek State at War. Part V* [Berkeley: University of California Press, 1991]) provides lists of massacres (218–19), enslavements (226–34), and ransom exchanges (247–71).

57. Herodotus 6.80.

58. Thucydides 1.106. Other examples: Xenophon *Hellenica* 4.4.12; Thucydides 4.96; Diodorus 12.10.1; Krentz, “Fighting by the Rules,” 31; Van Wees, *Greek Warfare*, 135.

59. Euripides *Heracleidae* 961–66.

60. Euripides *Heracleidae* 1009–11.

ers of war and thereby deflect criticism of Athens as an imperial bully.<sup>61</sup> Even though there appears to have been no recognized international norm protecting prisoners of war, this play suggests some support for the position that sparing prisoners of war was both ethically required and likely to enhance Athens's reputation abroad.

For a modern, the most striking lacuna in the Greek law of war is the absence of protection for noncombatants. We have no evidence for a norm against harming civilians. As a practical matter, civilians were generally able to avoid injury from raiding armies by withdrawing with their livestock to the fortified walls of the city, leaving the armies to fight it out in pitched battles outside the walls.<sup>62</sup> But civilians did not fare so well in the aftermath of sieges. The victorious army was permitted according to custom to kill the men and enslave the women and children, or to enslave the entire population. References to rape, enslavement, and other ill-treatment of women are common in literary sources,<sup>63</sup> but it was rare for women to be killed.<sup>64</sup> The norm that the conquered populace was at the disposal of the victor stretched back to the time of Homer; there was no question that the people of Troy faced extermination. A city confronted with a besieging army might try to avoid the worst by negotiating terms for surrender either before or during a siege. In the cases where the attacking army agreed to negotiate, the terms were often less than generous: it was common for the inhabitants to be forced to leave their city with little more than the clothes on their backs.<sup>65</sup>

Massacres following sieges elicit little comment in our historical sources, and we rarely know how or why a state decided whether or not to kill a town's civilians. But Thucydides provides an account of the debate in the Athenian Assembly over the fate of Mytilene, an "ally" or subject of the Athenian empire.<sup>66</sup> The Mytileneans surrendered after a long siege, and the Athenian people were assembled to vote on whether to kill the entire male population or only those who had actively participated in the revolt. If we can trust Thucydides' account, the speakers on both sides ignored questions of compassion and mercy and focused on which course of action would better serve Athens' interests by discouraging other states from

61. Pierre Ducrey, *Le Traitement des prisonniers de guerre dans la Grèce antique, des origines à la conquête romaine* (Paris: E. de Boccard, 1968), 290.

62. E.g., Xenophon *Hellenica* 4.6.4; Thucydides 2.14.1; Krentz, "Fighting by the Rules," 27.

63. The rape of women rarely merits mention in our historical sources. For discussion, see David Schaps, "Women of Greece in Wartime," *Classical Philology* 77 (1982): 193–213.

64. But the Athenians did kill all the women and children of Mycalessus (Thucydides 7.29).

65. Thucydides 2.70; Xenophon *Hellenica* 2.3.6.

66. Thucydides 3.36–48.

resisting.<sup>67</sup> But Thucydides suggests that ordinary Athenians did have some moral qualms about exercising their right to kill enemy civilians: after initially voting to put all the Mytileneans to death, pangs of guilt led the Athenians to recant in a second vote, resulting in a mad chase as a trireme carrying revised orders raced to prevent the first embassy from carrying out its gruesome orders. As with the treatment of prisoners of war, it seems that while the laws of war did not include humanitarian limitations on the treatment of civilians, public opinion might encourage states to exercise some restraint.

Before we leave the discussion of the content of the laws of war, I should emphasize what is perhaps obvious, namely that the religious basis of these laws helped to foster compliance. Within the ongoing debate surrounding compliance with international law, one explanation as to why states obey international law is that some states internalize the norm. International law scholars have studied various mechanisms by which this process of internalization might occur.<sup>68</sup> In Greece, because the laws of war were organic and already part of the culture and value set of each of the Greek states, no such internalization process was needed. The Greek laws of war exerted a much more natural pull than many modern international laws.

#### IV. Did the Laws of War Constrain Greek States?

Thus far I have been emphasizing the differences between the ancient and modern approaches to the laws of war. But the Greek case may offer some evidence in the contemporary debate over whether international law can ever truly constrain states.

In the past few years, the perennial debate over whether states ever comply with international laws contrary to their interests has again risen to the fore among legal academics. Much international law scholarship has traditionally assumed that states follow international law, at least in part, for noninstrumental reasons.<sup>69</sup> In other words, the law exerts an independent pull on

67. Cleon, who argues for extermination of the entire male population, does make an argument from justice, but he argues, absurdly, that the Mytileneans had done a great wrong to Athens by revolting.

68. E.g., Harold Hongju Koh, "Why Do Nations Obey International Law?" *Yale Law Journal* 106 (1997): 2603; Laurence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Efficient Supranational Adjudication," *Yale Law Journal* 107 (1997): 337–66; Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990), 183–94; cf. Ryan Goodman and Derek Jinks, "How to Influence States: Socialization and International Human Rights Law," *Duke Law Journal* 54 (2004): 621.

69. For discussion, see Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005), 14–17.

states to comply quite apart from any advantages—material, reputational, etc.—that compliance might bring. According to this approach, international law can function as an important check on state behavior. This view has recently been challenged by Goldsmith and Posner, who argue that when states follow international law, they do so only because they believe that compliance furthers their short- or long-term interests.<sup>70</sup>

It may be helpful to provide a short overview of my argument before delving into the details. At first glance, classical Greece seems to be the perfect case study to illustrate the realist/instrumentalist approach to international law. The traditional account of the Greek law of war is quite different from the synchronic summary that I have provided. It holds that hoplite warfare of the archaic period followed an elaborate set of conventions, but that these norms were disregarded during the Persian and Peloponnesian Wars when adherence to the norms no longer served state interests. The implication of this account is that international rules inevitably adapt to accommodate state interests and have no ability to constrain state behavior when these interests are at stake. However, recent research suggests that the brutality of combat increased during the Peloponnesian War, not because Greek states began to disregard international law, but because military tactics changed, resulting in greater civilian casualties. Put differently, limited technology and military tactics, not more stringent laws of war, produced the lower loss of life associated with archaic warfare. And once one appreciates that the increasing violence was unrelated to adherence or non-adherence to any of the Greek laws of war, it is possible to identify convincing evidence of a relatively stable adherence to other norms related to war, and, in some cases, compliance when doing so was clearly contrary to the state's interests.

Until recently, most classicists would have provided a much longer list of the Greek laws of war than I have, at least with respect to the archaic period. The traditional view, best known from the work of Victor Davis Hanson, was that warfare in the archaic period was “a deliberate, contrived contest.”<sup>71</sup> Some additional constraints that are said to have applied in this period, helpfully collected in an article by Josiah Ober, include: (1)

70. Goldsmith and Posner, *The Limits of International Law*, 3. Goldsmith and Posner's work has sparked debate in the legal academy: “Symposium on *The Limits of International Law*,” *Georgia Journal of International and Comparative Law* 34 (2006): 253–484; Oona A. Hathaway and Ariel N. Lavinbuk, “Rationalism and Revisionism in International Law,” *Harvard Law Review* 119 (2006): 1404.

71. Victor Davis Hanson, “The Ideology of Hoplite Battle, Ancient and Modern,” in *Hoplites: The Classical Greek Battle Experience*, ed. Victor Davis Hanson (New York: Routledge, 1991), 3–14. For similar views, see Ober, “Classical Greek Times,” and W. R. Connor, “Early Greek Land Warfare as Symbolic Expression,” *Past and Present* 119 (1988): 3–29.

“battles should be fought during the (summer) campaigning season,” (2) “use of nonhoplite arms should be limited,” (3) “pursuit of defeated and retreating opponents should be limited,” (4) “punishment of surrendered soldiers should be restrained,” and (5) “noncombatants should not be the primary targets of attack.”<sup>72</sup> These norms, so the argument goes, arose not for humanitarian reasons, but to further the interests of the hoplites, the class of farmers rich enough to buy hoplite armor that ruled most archaic Greek states.<sup>73</sup> The norm limiting the use of nonhoplite weapons such as arrows ensured that the hoplite class took the lead role, and thus the greatest share of honor, in the fight. The norms limiting warfare to the summer season made it possible for a non-professional force of farmers to fight and still get home in time to tend their crops. The rules prohibiting the killing of fleeing and surrendered soldiers and noncombatants kept casualties and the other costs of war low, making it possible for amateur citizen armies to engage in this ritualized form of combat year after year.

The traditional account also holds that these norms broke down in the fifth century. Scholars have proposed a number of factors that contributed to this alleged abandonment of the laws of war. First among them is that while archaic warfare generally involved small conflicts over border territory, the very survival of states was at stake in the Persian and Peloponnesian Wars. In the face of such “total warfare,” states quickly jettisoned the laws of war and sought every advantage, from brutal treatment of prisoners of war to civilian massacres—or at least so the theory goes.<sup>74</sup> Moreover, battles in these wars often involved unevenly matched forces that were less likely to adhere to the protocols of war.<sup>75</sup> Scholars who argue that the norms lost their force also posit that the conditions that created and supported adherence to the archaic laws of war did not apply to the two main protagonists in the Peloponnesian War, Sparta and Athens.<sup>76</sup> Sparta’s citizens were not hands-on farmers but professional soldiers who could afford to engage in full-bore warfare year-round (while state-owned serfs, the helots, worked each soldier’s land) rather than being limited to seasonal small-scale battles. In the case of Athens, the hoplites lost their political and social clout in the

72. Ober, “Classical Greek Times,” 13; see also Ducrey, *Le Traitement des prisonniers de guerre dans la Grèce antique*, 334–36; Victor Davis Hanson, *The Western Way of War* (New York: Alfred A. Knopf, 1989), 14–18, 36, 223.

73. Ober, “Classical Greek Times,” 15–17; Connor, “Early Greek Land Warfare,” 20; cf. Victor Davis Hanson, *A War Like No Other: How the Athenians and Spartans Fought the Peloponnesian War* (New York: Random House, 2005), 299–300.

74. Hanson, *A War Like No Other*, 146; Hanson, *The Western Way of War*, 37; Connor, “Early Greek Land Warfare,” 27; Ober, “Classical Greek Times,” 18–19.

75. Hanson, *A War Like No Other*, 90.

76. Hanson, *The Western Way of War*, 37–39; Ober, “Classical Greek Times,” 18–19.



wake of the formation of a radical democracy and an imperial navy manned by ordinary citizens. As a result, Ober argues, “Athens’ social structure was no longer fundamentally dependent on a continued adherence to the hoplite ideology—nor to the rules of war that sustained that ideology . . . by the mid-fifth century the Athenians could afford to break the rules of war.”<sup>77</sup>

The implication of these traditional accounts is that the laws of war never acted as a meaningful check on state behavior. In the archaic period, adherence to the rules served the interests of the dominant class by helping to secure its social and military position in the state. Thus, compliance meant little because the dictates of the laws and state interest overlapped in the archaic period. But the laws were quickly and easily disregarded when they no longer served state interests in the fifth century. As one proponent of this view states, the readiness of states to ignore the norms of war in the fifth century “demonstrates clearly the essentially voluntary nature of the rules of intra-Greek conflict and point to the possibility of a voluntary defection from those rules.”<sup>78</sup>

Recent research, particularly the work of Peter Krentz<sup>79</sup> and Hans van Wees,<sup>80</sup> has cast doubt on the traditional account of the archaic laws of war. These scholars have demonstrated that the “rules” of hoplite battle that supposedly limited the brutality of war were not rules at all, but mere artifacts of the military tactics of the period. Unlike the statements in our sources explicitly identifying the norms of war as “laws” that I listed above, no ancient source suggests that it was contrary to the “laws of the Greeks” to attack outside of the traditional campaigning season; it seems that limiting attacks to the summer was a matter of convenience rather than obligation.<sup>81</sup> The claim that nonhoplite weapons were outlawed comes in part from a statement of Polybius:

The ancients . . . supposed that no success was distinguished or secure unless they defeated their adversary by bravery in open battle. For this reason they actually agreed among themselves not to use hidden or long-range missiles against each other, and they considered that only hand-to-hand, close-range combat counted as a true trial. Hence they gave each other notice in advance of wars and battles—where they proposed to make their stand and where they would march out in battle formation.<sup>82</sup>

But van Wees has shown that archaic battles *did* typically include archers

77. Ober, “Classical Greek Times,” 20–21.

78. *Ibid.*, 18.

79. Krentz, “Fighting by the Rules.”

80. Van Wees, *Greek Warfare*, 115–50.

81. Krentz, “Fighting by the Rules,” 27.

82. Polybius 13.3.1–8.

and javelin-throwers.<sup>83</sup> Polybius's statement reflects a false nostalgia about the civility of the ancients,<sup>84</sup> fueled in part by the singular (and likely invented) agreement between Chalcis and Eretria banning the use of long-range missiles.

The supposed "rules" designed to keep casualties low reflected the military tactics of the time, not international law. There was no norm prohibiting hoplites from pursuing fleeing enemy soldiers on the battlefield.<sup>85</sup> Hoplite armor was designed for tight formations; breaking ranks to chase the enemy could expose the victorious army to lethal counterattacks. When circumstances permitted a safe pursuit, victorious armies did chase down and kill their opponents with impunity.<sup>86</sup> Similarly, there is no evidence for a norm protecting noncombatants. Civilians were generally able to avoid invading armies by retreating to the fortified walls of the city.<sup>87</sup> Prior to the Peloponnesian war, the short campaigning season and the limited nature of most conflicts meant that cities were often spared from sieges. But when cities were successfully sacked, their inhabitants faced the same fate as civilians in the classical period: they might be enslaved or killed at the discretion of the victor.<sup>88</sup> In contrast to the clear sense of legal obligation and possibility of sanction attaching to the various religiously oriented laws of war discussed in the previous section, there is no evidence that the "laws of the Greeks" protected noncombatants or limited the brutality of warfare.

It seems, then, that states did not abandon the laws of war in the fifth century; international law never included norms that significantly reduced the destructiveness of war. Yet when reading Thucydides it is hard to escape the conclusion that the Peloponnesian War was much more vicious and violent than previous conflicts. Why was this the case? The traditional account correctly observes that the Peloponnesian War brought a move to year-round, "total" warfare. This change meant that towns were more often subject to siege; in fact, Thucydides' three famous set pieces illustrating the brutality of the war involved the treatment of noncombatants following

83. Hans van Wees, "The Development of the Hoplite Phalanx: Iconography and Reality in the 7th Century," in *War and Violence in Ancient Greece*, ed. Hans van Wees (London: Duckworth, 2000), 146–56; Krentz, "Fighting by the Rules," 29–30.

84. Van Wees, *Greek Warfare*, 116.

85. *Ibid.*, 135; Krentz, "Fighting by the Rules," 30–31.

86. Krentz, "Fighting by the Rules," 30–31 (collecting examples); Van Wees, *Greek Warfare*, 135.

87. E.g., Thucydides 2.14; Krentz, "Fighting by the Rules," 27.

88. Enslavement: Herodotus 3.59, 6.66, 6.23, 7.156; Diodorus 11.21, 11.25, 11.62, 11.65, 11.88, 12.9; Thucydides 1.98; Diodorus 11.62, 11.65, 11.88; Thucydides 1.113; Athenaeus 13.10. Massacres: Thucydides 1.30, 1.50, 1.100.3; Plutarch *Pericles* 23. For a detailed catalogue, see Pritchett, *The Greek State at War*; 5.218–19, 226–34, 247–71.

sieges: Plataea, Mytilene, and Melos. It is here that I part ways with the traditional account: while Hanson and others see the increase in massacres, enslavements, and razing of towns as a deviation from the humanitarian laws of war of the archaic period, I see these actions as perfectly legal and as the natural result of the more frequent use of siege tactics. We do not have enough data to determine whether victors were less likely to agree to terms with a defeated town and more likely to exercise their discretion to kill or enslave the civilian inhabitants in this period; this may well have been the case, given the ferocity of the conflict and conviction on both sides that their very survival hinged on victory. But in any case, such harsh treatment of civilians did not violate international law, which provided that “that which is conquered in war is the property of the conquerors.”<sup>89</sup> Just as in every period, one can find examples of states violating the laws of war, but there was no large-scale breakdown of international law in the fifth century.

In fact, in all periods the Greek laws of war were observed with remarkable frequency given the absence of formal sanctioning mechanisms. It is difficult to pinpoint a state’s reasons for complying with international law in a particular case; in most instances both instrumental and noninstrumental motivations surely played a role. But in a handful of cases, it seems that Greek states followed the rules of war even when doing so was contrary to their interests.

Spartan kings served not only as military commanders but also as religious officials and, as such, were arguably entitled to immunity under the laws of war. We are told that opposing forces avoided harming the Spartan kings in battle for just this reason.<sup>90</sup> That states would forgo the opportunity to cripple the enemy’s forces by killing or injuring the opposing general is a testament to the power of the laws of war. Ancient military commanders did not direct battle from the safety of the rear but entered the fray with the rest of the soldiers. That the rule giving Spartan kings immunity might be observed by ordinary soldiers in the midst of battle illustrates that the rules exerted an influence throughout the chain of command.

The clearest examples of states following international law for noninstrumental reasons involve the rule prohibiting fighting during religious festivals. Greek states sometimes forfeited tactical advantages to comply with this rule. After a victorious battle Syracuse had the Athenians on the run, but delayed pursuing them until they celebrated a festival.<sup>91</sup> In 411 B.C.E. Chios decided to revolt from the Athenian empire and secretly

89. Aristotle *Politics* 1255a6–8.

90. Plutarch *Agis* 21.

91. Thucydides 7.73.3.

made an alliance with Sparta and her allies, including Corinth, promising to donate several ships to the Peloponnesian League's cause. Chios asked its new allies to send reinforcements immediately in case the Athenians got wind of their secret agreement. The Corinthians delayed sending out its fleet to Chios because of a festival, causing them to lose the element of surprise when the Athenians learned of the Chian plot to revolt.<sup>92</sup> Most striking are the cases in which a state failed to defend itself or its allies from attack because of the prohibition on fighting during festivals. The most celebrated example is the late arrival of the Spartans at the battle of Marathon. When the Persians had reached as far as Marathon, the Athenians sent word to Sparta to send men to repel the threat. The Spartans were celebrating a festival at the time and on these grounds refused to send a force immediately.<sup>93</sup> There is no reason to think that the Spartans were delaying for any reason other than to comply with the law; they did eventually send a large force that raced to Marathon, but arrived too late to assist in the battle. The Peloponnesian War provides other examples: in several cases members of the Peloponnesian league did not send assistance to allies under attack, inhibited by the norm that forbade fighting during a sacred festival.<sup>94</sup>

One might object at this point that the decision to comply with the norm protecting religious festivals *does* reflect a calculation of self-interest prompted by the fear of divine sanctions. But even if we assume that divine sanctions played a role in a state's calculus, one would expect that the need to protect the state from immediate attack would outweigh the possibility of a divine sanction of unknown severity, perhaps not visited on the city until many generations later. We have seen that even for those who believed in divine sanctions, they were uncertain, unpredictable, and of varying severity. Moreover, it is not the case that the threat of divine punishment was perceived to be so strong as to overwhelm all other interests. In some cases states did ignore or manipulate this norm, not simply when their own survival was immediately at stake, but also when they wanted to gain advantage in launching an offensive attack.<sup>95</sup> The Athenians, for

92. Thucydides 8.9.

93. Herodotus 6.106, 120. A similar case occurred in 479: When the Persians threatened Athens, Athens applied to Sparta for help, but the Spartans refused to send a force because of a religious festival. The speculation that the Spartans were using the norm against fighting during the festival as an excuse seems unlikely, since the Spartans sent a very large force with great speed as soon as the festival ended (Herodotus 9.7–10). For discussion of instances where a state refused to send forces to help an ally under attack because of a local religious festival, see Goodman and Holladay, "Religious Scruples," 159.

94. E.g., Thucydides 5.54, 75–76.

95. E.g., Thucydides 3.3, 3.56; Xenophon *Hellenica* 5.2.29.

instance, sought to take Mytilene while they were celebrating a festival, thereby exploiting the element of surprise.<sup>96</sup> The Plataeans complained that the Thebans seized their city during a religious festival, a grossly illegal act.<sup>97</sup> It seems safe to say that when Greek states complied with the norm, even when doing so would place the physical security of the state or its allies at risk, their decision was not made for instrumental reasons, but because it was prohibited by the laws of war.

To be sure, the Greek case offers only a handful of examples where we can say with confidence that a state followed the laws of war even though doing so ran contrary to that state's interests. This is not surprising; it is only in the extreme case that it is clear that a state's actions cannot be explained purely by its perceived self-interest. But even a few episodes suggest that, at least in ancient Greece, the laws of war could serve as a meaningful check on state behavior.

But what did this really mean in practice? The Greek laws of war failed to restrain powerful states like Athens from doing their worst to weak states like Melos. And so in this sense Thucydides was right. On the other hand, the Greeks had unwritten laws that did effectively limit states in the conduct of war. And while these laws did not prevent the increase in violence associated with the Peloponnesian War, it is also true that the laws never purported to regulate violence in the first place. The absence of a categorical humanitarian ethos in the Greek mind tends to make us believe that the Greeks had no law of war, or that the law broke down in the fifth century. I see something different: a limited but relatively stable set of norms, uniformly recognized and broadly obeyed. That the Greek adherence to international law addressed concerns that seem irrational and idiosyncratic should not obscure the fact that, at the beginning of the Western tradition, there was a law higher than the law of any state, unwritten but understood, unenforced but seldom defied.

96. Thucydides 3.3.

97. Thucydides 3.56.

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