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## **A Contribution to the Deliberations on the Relationships Between International Law and Roman Law<sup>1</sup>**

In *Wileński Przegląd Prawniczy*, Professor F. Bossowski published a summary of his lecture, entitled *The principles of Roman law as a source of auxiliary law in international law*. Even though I would much like to, I cannot—relying on the summary alone—dispute the proposition which in no uncertain terms encapsulates the relationship between both domains of law in the title of the lecture by this esteemed author. Still, it may perhaps be worthwhile to examine the issue in at least one detail, taken as an example. Such an attempt at verification, even conducted with respect to but one aspect—*un coup de sonde*, no more—may sometimes prove interesting, not only for an amateur. This is precisely what this modest contribution sets out to do.

The direct incentive behind the aforesaid lecture was a book published several years ago, namely H. Lauterpacht's *Private Law Sources and Analogies of International Law*.<sup>2</sup> Significantly enough, assertions of propinquity between Roman and international law, which at times go as far as considering the former the source of the latter, are encountered most often in Anglo-Saxon scholarship. The famous judge Lord Stowell, Sir R. Phillimore—also

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1 Translated from: B. Winiarski, *Przyczynek do rozważań nad stosunkiem prawa międzynarodowego do prawa rzymskiego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1934, no. 14, vol. 1, pp. 11–24 by Szymon Nowak and proofread by Stephen Dersley. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

2 H. Lauterpacht, *Private Law Sources and Analogies of International Law*, London 1927.

an outstanding judge—as well as Sumner Maine, Westlake, Holland—to name only a few—associate international and Roman law in the closest of terms. Why is this the case? Why is it that in the countries of the European continent, which after all had not infrequently been exposed to much greater influence of Roman law than England, jurists do not go anywhere near as far as that? Perhaps because according to the well-known Anglo-Saxon formula (which in any case must not be construed all too... straightforwardly), international law is a part of the domestic law; because there that domestic law is chiefly common law that develops largely through case law of the courts, which for their part enjoy an authority unknown elsewhere; because the notions of equity and the reason of the thing play a great role in that case law; because when resolving the questions of international law, Anglo-Saxon judges readily look for inspiration and guidance in the solutions adopted in Roman law, which is always considered there a *ratio scripta*, the most perfect expression of that *recta ratio*, which is *iuris gentium magistra*. This is coupled with the idea of natural law, to which Anglo-Saxon jurists have generally always been faithful. Let us then choose international riparian law as our testing ground.

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Towards the end of the eighteenth century, the United States have demanded that the lower Mississippi and its outlets, which at the time belonged to Spain, be open to their navigation and, next to treaties and natural law, they invoked Roman law to justify their claim. In the instructions to the envoy in Madrid, Secretary of State T. Jefferson emphasized this argument. “The Roman law, which, like other municipal laws, placed the navigation of their rivers on the footing of nature, as to their own citizens, by declaring them public (*flumina publica sunt pax est, populi Romani*. Inst. 2. T. 1. §. 2.) declared also that the right to the use of the shores was incident to that of the water. Ib. §. 1. 3. 4. 5.”<sup>3</sup>

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<sup>3</sup> J.B. Moore, *A Digest of International Law*, Washington 1906, I, p. 624. Cf. also H. Wheaton, *Histoire des progrès du droit des gens etc.*, 3rd edition, Leipzig 1853, vol. II, p. 195.

In the nineteenth, and even in the twentieth century, one would often cite Roman law to substantiate the thesis that the law of nations requires that international navigation be able to access not only those rivers which in their navigable course are divided or intersected by two or more states, but also national rivers; Roman law would thus partly overlap with the law of nations; perhaps there would be a need to treat it as auxiliary law; not infrequently, it is argued to be one of the sources of international law. Let us examine this argumentation in greater detail.

Edouard Engelhard, a jurist and a diplomat, as well as a long-standing French delegate to international riverine committees, sought legal foundation for navigation in foreign territory in natural law, whose sublime expression was Roman law. Quoting a well-known paragraph from the *Institutes: Et quidem naturali iure communia sunt omnia haec: aer, aqua profluens et mare et per hoc litora maris... Flumina autem omnia et portus publica sunt* (I. II, 1, 1 and 2), the author observes that “Roman legislation compared watercourses to air and sea, in other words to things that are common to all and can never be monopolized. It firmly rejected any thought of appropriation which, by conveying the disposition of waterways either to the state or to private persons, would have divested the community as a whole of the benefits to which it held undeniable rights. Any watercourse freely and continuously flowing with in permanent banks, *naturalem cursus sui rigorem tenens*, belonged to public property, and every domestic sailor was able to have use of it under protection of the state which reserved itself the supervision, maintenance and fiscal administration. These very simple principles relied on the fundamental tenets of natural law; they were dictated by that *aequum ius* which is proclaimed by the public conscience and whose principles are invariable and universal.

“Exclusive possession,” Engelhardt continues, “is understandable when state territory or private property is concerned. Land, regardless of its area and configuration, can indeed be permanently occupied; it is demarcated, divided, boundaries are imposed; it is inevitably doomed to bear the tyranny of ownership; its nature of stable land does not permit

it to evade the yoke of government, union, an entity to which it belongs. Things are otherwise with the second element which circumscribes it with a seemingly immeasurable girdle and penetrates it with permanent current. Without doubt, water can be imprisoned in a very small estate. But the sea which surrounds lands, and the rivers that feed into the sea cannot belong to anyone, for no one can fetter them, because captivity cannot be reconciled with their ceaseless mobility. In any case, no one has any interest in appropriating a thing which is inexhaustible and continually renews itself, a thing anyone may have use of without diminishing the benefit of others.”<sup>4</sup>

This long quote has been deliberately cited, since it delivers a characteristic argumentation which has invariably been reiterated until the present day, as those evil laws that Goethe compared to a hereditary disease which recurs in each generation:

Es erben sich Gesetz' und Rechte  
 Wie eine ew'ge Krankheit fort.  
 Sie schleppen vom Geschlecht sich zum Geschlechte,  
 Und rücken sacht von Ort zu Ort....

Carathéodory had already asked whether water does not belong to everyone, like air, fire, and light?<sup>5</sup> Vernesco follows in his footsteps<sup>6</sup>, and Demorgny in particular, who unreservedly accepts Engelhardt's argumentation. “Natural law,” says the latter, “is opposed to the fact that any state—by appropriating a thing which is common to all—should dictate to others such laws that they have not voluntarily acknowledged themselves. This is particularly true for water, which is one of the most vital natural factors and which, as a whole, as seas and rivers, has all the capacity to serve eternal and universal use by humankind. Natural law does not know

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4 E. Engelhardt, *Du régime conventionnel des fleuves internationaux*, Paris 1819, p. I ff.

5 *Du droit international concernant les grands cours d'eau*, Leipzig, 1861, p. 26.

6 *Des fleuves en droit international*, Paris 1888.

riparian, privileged peoples; rivers are a common asset of all, and cannot be object to servitude or co-ownership.”<sup>7</sup> After the lapse of many years, in a report submitted to the Institute of International Law<sup>8</sup>, J. Vallotton d’Erlach substantiates the demand for freedom of international navigation chiefly by invoking Roman law, according to which rivers are *res publicae*, and *iure gentium* in addition, as opposed to merely *iure civitatis*. According to this author—who is by no means alone in his opinion—Roman law is one of the sources of international law.

It is clear that the sentence quoted by Engelhardt from the *Institutes*, almost identical with the provision in the *Digest* (D. I, 8.2,1) and the *Basilica* (XLVII, 3, 2), does not bear in any way on the matter discussed here. *Aqua profluens* means water as a substance which is indeed suited to be universally used: the water coming down with the rain, the water of sea or river waves. From that common thing anyone can appropriate a portion for direct use, fill a vessel, a cistern, a ditch or a pond, but at that point the water becomes their property. Water found on private land belongs to that land. “Each proprietor,” to quote only the French civil code, “has the right to make use of the rainwater falling on their land, and dispose of it.” (Art. 641 (1)). “Whoever has a spring on their land, may always use its water at will within the bounds and for the needs of their estate.” (Art. 642 (1))

Taken in its entirety, as a natural element, water is *res communis omnium*, but water on land, a spring, a stream, or a river, do not necessarily belong to that category. Ossig, who wrote a very interesting and arguably the best book on Roman water law, surmises that Marcian’s paragraph concerning *aqua profluens* was distorted in *Corpus Iuris* through omission of a phrase, and that one can only conjecture how that determining phrase was formulated. It is possible that it was “vom Himmel, aus den Wolken herabfliessende Regenwasser.”<sup>9</sup> Ossig

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7 *La question du Danube*, Paris 1911, p. 171.

8 *Annuaire de l’Institut*, 1929, vol. I.

9 S. Ossig, *Römisches Wasserrecht*, Leipzig 1898, p. 73.

does not state whether he used the Gloss, but it is there that he may have found the characteristic supplement. The aforesaid sentence from the *Institutes* is provided in the Gloss with the following addition: *vo profluens: id est de coelo cadens*. Only then does no contradiction arise with other sections of *Corpus Iuris*, which explicitly presume the possibility of ownership of not only springs, streams, irrigation or drainage ditches; even larger rivulets could be private, given that Roman law recognizes the servitude of *aquaeductus* as well as *navigandi* on private waters (D. VIII, 3, 23, 1). *Nihil enim differt a caeteris locis privatis flumen privatum* (D. XLIII, 12, 1, 4).<sup>10</sup> Engelhardt himself admits that water on private land (also flowing water) constitutes *portio agri*; it is therefore also subject to the “tyranny of ownership.”

The fact that, like sea water, *aqua de coelo cadens* is a common thing, does not permit one to derive any argument to support freedom of navigation on foreign territory. These are altogether different things which function on different planes. Air represents a similar instance: sources mention *aer* among common things, such as *aqua profluens*, but the air space above land belonged to the proprietor of the land. The view that ownership of land extends *usque ad coelum* may be considered erroneous or exaggerated; still, the holder of a property, as the owner, had the disposal of overground space, as much as was practicable. After all, air is not the same as air space.

In the paragraph we have cited, Engelhardt argues further that any permanent watercourse belonged to public property. Let us then leave aside the main argument, since *res publicae* constitute a completely different category from *res communes*: nobody could appropriate even the tiniest part of the public thing intended for public use. As for rivers,

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<sup>10</sup> The most important outcome of Ossig’s studies is that the author does not assume *fons* to mean a spring, but a stream, a rivulet. This hypothesis, supported in numerous Roman writers, makes it possible to interpret many provisions in *Corpus Iuris* without contradictions, but it may be noted that St. Isidore of Seville, who was not that remote from its compilers, clearly explicates *fons* as *caput aquae nascentis quasi fuidens aquas*. The same author clarifies: *proprie autem flumen ipsa aqua, fluvius cursus aquae*. *Etymologiarum Libri XX, lib. XIII, cap. 21* (Migne, vol. 82).

Roman law distinguished permanent ones (*perennia*) and those which flowed only periodically (*torrentia*); the former were able to flow permanently only in general, which did not rule out interruptions in certain periods, e.g. during draught (Gloss ad D. XLIII, 12, 1, 3 explains: *perenne i.e. perpetuum et si non omni tempore fluat*), and only those could be public, even when unnavigable. Views are strongly divided here. A well-known passage in the *Digest* reads: *publicum flumen esse Cassius definit quod perenne sit* (D. XLIII, 12, 1, 3), but the *Institutes* state that *autem omnia et portus publica sunt* (I. II, 1, 2) whereas the *Digest* that *flumina pene omnia et portus publica sunt* (D. I, 8, 4, 1); indeed the Gloss clarifies the word *pene* (nearly all) in a manner which excludes *torrentia*: *propter ea que ad tempus fluunt*. However, we know that it was possible for rivers to be private, and very serious scholars assume that they were intended solely for public use, which appears to be corroborated in the sources. For instance, Paul claims that (*flumina publica quae fluunt ripaeque eorum publicae sunt* (D. XLII, 12, 3, pr.), in which he compares the legal status of the river to the banks held by littoral owners; nevertheless, the Gloss adds that river shores are public only *quoad usum, sed flumina etiam quoad proprietatem*.

Elsewhere, one reads that *riparum usus publicus est iuris gentium sicut ipsius fluminis* (I. II, 1, 4). An island which formed on a river was not public property but became, as any no man's land, the property of the first one to take it if the adjoining land was demarcated (*agri limitati*); otherwise (*si arcifinales*), it fell to the nearest owner or was divided; the same happened to a waterless river bed. However, other authors—Ossig among them—assume that essentially *all major rivers were public property*, most often simply belonging to the state.

Quite, but how should one comprehend the term *res publicae*? The *Digest* states that: *quae publicae sunt, nullius in bonis esse creduntur: ipsius enim universitatis esse creduntur*; while the Gloss rectifies that only the property of Rome, and therefore no corporation, town or province, can be called public; hence, it concurs with Ulpian, who

in *De verborum significatione* (D. L. 16,15) says that *bona civitatis*. The Gloss adds: *civitatis alterius quam Romae abusive publica dicta sunt. Sola enim ea publica sunt quae Populi Romani sunt*. Still elsewhere the sources distinguish *quaedam publica*, or *quaedam universitatis*.

It appears that originally and for a long time afterwards the term “public” was used to denote only those things which were the property of or were intended to be used by the people of Rome in accordance with civil law. The provinces and the towns of the Empire were treated as corporations and could not own *res publicae*; it was only later, as *ius gentium* merged with *ius civile*, that the existence of public things under *ius gentium* was presumed throughout the Empire. Still, this has nothing to do with the issue at hand, while Vallotton d’Erlach seems to ascribe to it a significance it could never have had. Regarding the seashore, the Gloss supplies *et quidam naturali iure* (D. I, 8, 2, 1) with the following explanation: *litora: communia sunt quoad usum et dominium: ut hic. sed quoad protectionem sunt populi Romani*. Even later the following remark was added: *sed iurisdictio est Caesaris*. Thus, medieval jurists are perfectly conversant with the distinctions between *usus*, *dominium*, *protectio*, *iurisdictio*, which Hrabar also underlines with considerable appreciation in his book on Roman law in the history of international legal doctrines.<sup>11</sup> It may be suspected that the state element carried greater significance where the matter did not concern *res communis omnium* but *res publica*. Indeed, Engelhardt himself admits that any domestic sailor was entitled to use waterways in ancient Rome. For us, this would be much more interesting and, if this is so, it would be superfluous to draw on the legal principles relating to things common and public.

Regrettably, little is known about foreign navigation within the limits of the Roman Empire; even Kazanskiy, who discussed the history of riparian law most extensively, failed to find anything crucial.<sup>12</sup> We know that disputes concerning navigation on frontier rivers (the Rhine, the

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11 Dorpat, 1901.

12 P. Kazanskiy, *Rzeki traktatowe*, Kazan 1895.

Danube) were frequent; that emperors would sometimes forbid barbarians to undertake navigation, and sometimes were compelled to allow it. But even this, however interesting, is not that significant precisely because barbarians were involved, and the difference of civilizational development was too great to compare relationships between the Empire and barbarian peoples to relationships which emerged between modern states and remain governed by the law of nations. And if the aforementioned reporter of the Institute of International Law finds that principles of Roman law are in line with the provisions of the most recent treaties, we are faced with yet another misunderstanding.

Roman riparian law was eminently a private law; Romans' legal principles concerning waters and rivers in particular became a shared heritage of probably all European legislations, falling within the purview of civil and administrative law in any case. Thus, for example, the substance of the interdicts by means of which a praetor ensured that river navigability and freedom of navigation were maintained is a matter for administrative law today. We shall not enumerate them here. However, if internal riparian law has endured until the present sustained by the legacy of the Roman genius, can the same be claimed of international law?

Incidentally, one should at this point reject the thesis that Roman law is one of the sources of international law. That technical term denotes a factor which renders a social norm legally binding. We know of two such sources of international law in the formal sense: custom and contract; thus Roman law has nothing to do with it. Still, one not infrequently understands sources to be factors which historically shaped the substance of the legal norm, and only in this sense can one sometimes speak of the influence of Roman law on international law<sup>13</sup>; but was there actually any influence in the domain we are interested in?

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<sup>13</sup> Thus it is conceived by e.g. J.B. Moore, *A Digest of International Law*, Washington 1906, I, p. 2., as he argues that Roman civil law (civil in the present-day sense) was the principal source of the international private jurisprudence.

The flourishing of the study of Roman law in the twelfth, thirteenth and fourteenth centuries, which should be credited to the endeavours of glossators and post-glossators, had a very limited impact on the development of international law, chiefly due to the fact that the law studied by the jurists was private law; the two titles in the *Digest* which do display a tenuous link with that law, namely those regarding captivity, *postliminium* and embassies, have led now and again to a confusion of terms (e.g. the long-lasting and persistent attempts to introduce the institution of *postliminium* into international law). When elucidating Roman law, glossators must have noticed the political changes which had occurred in Europe since Justinian and felt a need to adjust Justinian's law to contemporary circumstances. They had long evaded the issue, relying on the fiction of the unity of the Empire and recognizing only one emperor (*imperator, dominus mundi*); other monarchs were treated as Roman clients, their states as Roman provinces, and therefore *universitates*<sup>14</sup>; they sought to apply the norms of Roman law to international relations, seeing the former as a universal law of the community of Christian nations. Hence, if glossators occasionally extend the notion of *res publica* to "all nations", one should always bear the fiction of state unity in mind. For instance, this is how the Gloss clarifies the word *public* (Inst. II, 1, pr) *quasi populica, scilicet omnium populorum ut... § flumina*: meaning solely that various peoples subject to the political power of the emperor are concerned, not unlike in that section of the Code which caused so much ink to be spent in the Middle Ages: *Cunctos populos quos clementiae nostrae regit temperamentum*: those were always the peoples living within one state, i.e. the Empire.

In the age of the glossators, the weakening of the Empire's unity went much further; the independence of states which did not want to recognize imperial authority anymore were no longer treated as usurpation. On the contrary, the sovereignty of those *exterae nationes* was

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14 A trace of such a conception may be seen in the English term 'municipal law' (referring to internal as opposed to international law).

acknowledged, and the only concession to the principle of the political unity of the Christian world was that a distinction was drawn between the state of fact, which actually existed in the fifteenth century, and the legal state, which essentially should have existed but had already expired.<sup>15</sup>

Post-glossators accord the control of the seas to states; not only territorial waters, whose boundaries are in any case traced very widely, but also open seas. As regards rivers, they left evidence that only peoples ruled over by one and that specific sovereign power were entitled to use them. In his remarks on the *Institutes* (I, 1, 5) Bartolus explains that things at the disposal of all are commonly shared, but makes an exception for rivers. *Communia sunt maioris communitatis quam publica* (one needs to remember that *maior communitas* encompasses a community broader than the subjects of one state)—*unde pluribus se offerunt, ut aer, mare, aqua de coelo profluens, litora maris, unde appropriant sibi hoc nomen commune. Sed flumina*—significantly enough—*non tot offerunt se*.<sup>16</sup>

Each sovereign state, *superiorem non recognoscens*, had its law, under which navigable and floatable rivers were available to be used by its people, in line with the principles of Roman law; each state adhered to the same principles, but they did so on their own account and for their own purposes.

A certain repertory of legal notions, principles and even provisions was transferred via glossators and post-glossators from Roman

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15 Claiming that “Imperator est de iure totius orbis dominus”, Bartolus nevertheless adds: “licet de facto ei non oboediatur” (in remarks in *Extrav. Ad reprimendum* of Henry VII). Ecclesiastical law is largely favourable towards monarchs aspiring to independence, and yet already in the sixteenth century a work such as *Summa Sylvestrina* mentions—next to the lawfully sovereign pope and emperor (in *temporalibus*)—those who are independent only *de facto*: *cuiusmodi etiam est is qui superiorem non recognoscit de facto, ut rex Franciae, Hispaniae et huiusmodi*. (p. 89, c. 2, 90, c 1). Quoted in Beaufort, *La guerre etc.*, The Hague 1933, p. 106. *Summa* was published in 1514, but in 1532 Fr. Vitoria in his now renowned *Relectiones morales* recognizes the independence of the kings of Spain and France without reservations: *licet glossator ex capite suo addat quod hoc non est de iure, sed de facto*. (De Indis, II).

16 Hrabar, where this passage was found, established that it had originated from the writings of Faure’s (Johannes Faber), who had nonetheless used *omnibus patent* instead of *pluribus se offerunt*.

law into the emerging international law. Thus, the rules of Roman law concerning land ownership, means of acquisition, riverine frontier, *alluvio*, *avulsio*, *alveus derelictus*, *insula in flumine nata*, were suitably applied to state territory, although they fairly often distorted the picture of actual relationships, inaccurately reflected international realities; many of those principles were adopted in practice; much the same applies to international agreements, in which the rules governing Roman covenants were employed. Sometimes, the outcomes were excellent; now and then, however, that transfer of the notions and principles of Roman law into international jurisprudence proved dismal, as in the case of the so-called international easements or the aforementioned *postliminium*. Still, with respect to international river navigation, there is naught to be found. Exploring the writings of such an eminent jurist as Bartolus, we have found quite an extensive treatise, entitled *De fluminibus* in his *Consilia, tractatus et quaestiones*.<sup>17</sup> Faithful to the premises of Roman law as an internal law, the work cannot offer even the meanest clue relating to international river navigation in Roman or medieval law. The feudal period, during which elements of public and private law, of authority and ownership were heavily intermingled, left its mark on the history of riparian law with multiple and diverse privileges and monopolies acquired by feudal lords, towns (e.g. staple right and related rights) and corporations, some of which were very ancient indeed, such as *collegia nautarum*, whose beginnings go back to Roman times. Relying on the principles of Roman law, rulers strove to regulate the freedom of navigation against feudal lords, towns and corporations; however, having breached those privileges, the rulers constrain river navigation on their own account. Anything associated with that mode of navigation is subject to so-called *iura regalia* and governed by numerous statutes and ordinances; in addition, there are the many navigation levies, particularly onerous

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<sup>17</sup> *De Fluminibus* is dedicated to issues within private law; it touches upon public law only in the section discussing boundaries of jurisdiction following changes of the river bed.

in the period of absolutist fiscalism, as well as customs barriers and formalities at the borders which covered Central Europe at that time so densely. This is an interesting and little studied chapter in the history of riparian law, but again it offers nothing of interest from the standpoint of international law. On the other hand, the claim that international river navigation did not exist at all in the pre-revolutionary period should be approached as an exaggeration; it did exist where it was economically profitable, always pursuant to international agreements. As an example one could mention two which pertained to navigation on the Oder river: the treaty of Trzebieszów of 29 January 1619, concluded between Poland and the Electorate of Brandenburg, or the treaty of Warsaw of 18 November 1705, between Poland and Sweden.

One more observation is due by way of conclusion. We know already that if according to the *Digest* navigation on public rivers was free *iure gentium*, it had nothing to do with our law of nations. However, the previously cited *Etymologiae* by St. Isidore of Seville had preserved a trace of a slightly different understanding of *ius gentium* than the one we became accustomed to on the basis of *Corpus Iuris*, an understanding which—as some would have it—is more akin to our international law. One reads in St. Isidore that *ius gentium est sedium ocupatio, aedificatio, munitio, bella, captivitates, Servitutes, postliminia, feodera, paces, induciae, legatorum, non violandorum religio, connubia inter alienigenas prohibita; et inde ius gentium quod eo iure omnes fere gentes utuntur*. This designation, rather than a statement of the substance of *ius gentium*, was later incorporated in Gratian's Decree and, undoubtedly, could have later contributed to the name being employed to denote international law. Dirksen cogently argues that St. Isidore took that passage from Ulpian's *Institutes*, from which only minor fragments have survived until our times.<sup>18</sup>

However, this does not warrant the conclusion that in ancient Roman law *ius gentium* meant something similar to international law today, for

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18 H.E. Dirksens *Hinterlassene Schriften*, Leipzig 1871, vol. 1, p. 185 ff.

one thing because the very excerpt mentions matters belonging to internal law side by side with those belonging to international law, and secondly because Justinian's codification adopted Hermogenian's definition, in which *ius gentium* is first and foremost private law, and thus a non-formalistic, flexible law observed in all parts of the Empire, unlike the formalistic civil law, which was applicable solely to Roman citizens (quiritians); in the relationships between the peregrini, as well as between them and Roman citizens, that law not only existed alongside civil law but also prompted its development towards emancipation from anachronistic forms, concepts, and institutions, ultimately absorbing it altogether. Certain norms in *ius gentium* are also encountered today in public law and even—to a minimal extent—in international law, although those in the latter domain are approached from the perspective of internal law; yet it was Roman law nevertheless. It was not a law which was earlier and superior to the state, as some describe it, but simply the entirety of rules, principles, and institutions whose existence (or presence of similar ones) was observed by Romans among peoples other than the *Populus Romanus*, and which may have been considered expressions of norms common to all people, for they derived from the nature of things and reasons of equity. In fact, the term “natural law” carried multiple meanings in Roman law and later – glossators and post-glossators enumerate five, if not more. Now, in one of those meanings *ius naturale* is no more and no less than *ius gentium*; the Gloss states this on many occasions and provides examples from private law.<sup>19</sup>

The great legal historian H. Sumner Maine, professor of Roman and comparative law who ultimately became professor of international law at the Whewell Chair (Cambridge), refers twice to the Roman provenance of international law.

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19 E.g. ad I. I, 2, pr. v<sup>o</sup> *quod natura: et nota quia quatuor modis ius naturale ponitur: quandoque pro iure gentium...* I. I, 2, 1, v<sup>o</sup> *ius civile; iuris naturalis id est iuris gentium*. I. II, 1, 1, v<sup>o</sup> *naturali iure: id est de iure gentium* etc. Cf. Gaius's *quod vera naturalis ratio inter omnes homines constituit* etc.

Setting aside the Conventional or Treaty Law of Nations, it is surprising how large a part of the system is made up of pure Roman law. Wherever there is a doctrine of the jurisconsults affirmed by them to be in harmony with the Jus Gentium, the Publicists have found a reason for borrowing it, however plainly it may bear the marks of a distinctively Roman origin.<sup>20</sup>

A great part, then, of International Law is Roman Law, spread over Europe by a process exceedingly like that which, a few centuries earlier, had caused other portions of Roman Law to filter into the interstices of every European legal system.<sup>21</sup>

The view formulated in this manner is without doubt considerably exaggerated, at least where international public law is concerned; still, we have seen above that indeed, chiefly thanks to the work of glossators, post-glossators and, may it be added, through theologians and canonists, numerous solutions, norms, principles of Roman law penetrated into the nascent international law. Some remained, as a permanent acquisition, other did not hold or had to be discarded. Whence that material influence? In his *Commentaries Upon International Law*, R. Phillimore subscribes thoroughly—even enthusiastically—to the words of Leibniz: *Dixi saepius post scripta Geometrarum nihil exstare quod vi ac subtilitate cum Romanorum scriptis comparari possit: tantum nervi inest, tantum profunditatis.*<sup>22</sup> Perhaps nowhere else are the words of the Dutchman Bynkershoek comprehended as in the Anglo-Saxon countries, namely that *qui id* (i.e. Roman law) *audit, vocem fere omnium gentium videatur audire*<sup>23</sup> or, concerning a principle of Roman law: *ipsa iuris gentium, non sola Ulpiani vox est.*<sup>24</sup> Undoubtedly, Roman law owes its material impact on international law to the genius of Roman jurists who, combin-

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20 H. S-M., *Ancient Law. Its Connection to the History of Early Society and Its Relation to Modern Ideas*, Beacon Press, Boston, 1863, p. 93; H. S-M., *International Law. The Whewell Lectures*, London 1890, p. 20.

21 H. S-M., *International Law...*, p. 20.

22 3rd edition, London 1879, vol. I, p. 34.

23 *De foro legat*, c. XI.

24 *Questiones iuris publici c. VIII in f.*

ing an unshakeable sense of equity with tremendous common sense in a truly admirable manner, created things which endure eternally. But it is that inner value of solutions, norms, and principles which has caused and still causes them to serve as a model, even in the domain of international law to some extent, while not being the source of this law nor its auxiliary law, for the term of auxiliary law has a strictly defined meaning. However, the very nature of things to which Roman jurists paid such great attention makes it impossible to apply the measure of internal, inherently private law that Roman law is to the relationships between states, which differ so vastly from domestic relationships. Instead, one can speak of general legal principles, of the few principles shared by any law of a given civilizational family to which Article 38 of the Statute of the International Court of Justice in The Hague refers: here, Roman law can never be omitted.

It would be nothing short of harmful if—invoking Roman law—one strove to fill the so-called gaps in international law, for instance by using analogy, which in view of the nature of that law can only have limited significance. At this point, however, we enter into issues relating to the state, international law, international human rights and the attempts to exploit the undeniable revival of natural law for that end. One cannot but recall the words of Cicero: *Neque erit alia lex Romae alia Athenis. Or: Cum animus... seseque non unius circumdati moenibus loci, sed civem totius mundi quasi unius urbis agnoverit...*<sup>25</sup>— would that not be again within the extent of the Roman state? That, however, lies beyond the scope of this brief paper.

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<sup>25</sup> *De republica* III, 22. *De legibus* I. 23.

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## SUMMARY

### **A Contribution to the Deliberations on the Relationships Between International Law and Roman Law**

The paper is an English translation of *Przyczynek do rozważań nad stosunkiem prawa międzynarodowego do prawa rzymskiego* by Bohdan Winiarski, published originally in Polish in “Ruch Prawniczy, Ekonomiczny i Socjologiczny” in 1934. The text is published as a part of a jubilee edition of the “Adam Mickiewicz University Law Review. 100th Anniversary of the Department of Public International Law” devoted to the achievements of the representatives of the Poznań studies on international law.

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