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## **JUS GENTIUM AND THE PRIMARY PRINCIPLES OF INTERNATIONAL LAW**

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# Jus Gentium And The Primary Principles Of International Law

Svitlana ZADOROZHNA<sup>1</sup>.

## Abstract

*Jus gentium is a system of rules of law that takes its origins even from the inter-ethnic Roman law, that contains the basic principles of regulation of both internal and international law. Thanks to the jus gentium the customary general principles of law and the general principles of international law have been transferred from the ancient law to the middle ages when they were established as well as. Most of the general principles of law of peoples have become today the imperative principles of international law, and the general principles, that were developed by the Roman jurists, foremost, it is the principles of equality, justice, and humanism, that were reciprocated by the law of European states, eventually transformed into the general principles of national law, and through them - the basic principles of international law.*

*Jus gentium made a significant impact on the formation of the basic principles of international law on the European continent, and later on - universal international law. In the structure of Roman law, three main elements were distinguished: jus civile, jus naturale, jus gentium. The main source of international law is usually jus gentium, but today international law also accumulates the general principles of law (jus naturale) and universally recognized principles of domestic law (jus civile), which is confirmed by the norm of art. 38 of the Charter of the United Nations. In jus gentium, we find the origins of the principle of sovereignty, establishes the principle of bona fide compliance, the principle of mutual courtesy (comitas gentium), develops the principle of succession, there are first principles of territorial space, the principle of res judicata - the principle of binding for the parties to the court decision. Most procedural and technical principles have their source jus gentium.*

## Keywords:

*Jus gentium; principles of international law; general international law; history of international law.*

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## 1. Introduction

Jus gentium contained the principles inherent to the private law but could apply equally to regulate relations between individuals, and between different unions, social entities, which now we call sovereign states (the principle of justice, the estopulum, the principle of human rights). In addition, jus gentium became the primary source for the general principles of international law, those which application has a purely international-legal relationship (the principle of sovereign equality of states).

## 2. Theoretical Background

The study of various aspects of general principles of international law, its history and the nature has been paid much attention to domestic and foreign as international scholars and theoreticians alike. However, the influence and role of jus gentium for the principles of international law was almost neglected. In particular, the question of role of Rome law was the subject of the study of Ukrainian scientist L. Grabar [1], [3], this problem was the subject of the study of G. Berman [2], F. Raimondo [6], [7] B. Cheng [7] H. Lauterpacht [8] and soviet theorist-internationalist M. Volf [4].

## 3. Argument of the paper

Jus gentium is a system of rules of law that takes its origins even from the inter-ethnic Roman law, that contains the basic principles of regulation of both internal and international law. Thanks to the jus gentium the customary general principles of law and the general principles of international law have been transferred from the ancient law to the middle ages when they were established as well as. Most of the general principles of law of peoples have become today the imperative principles of international law, and the general principles, that were developed by the Roman jurists, foremost, it is the principles of equality, justice, and humanism, that were reciprocated by the law of European states, eventually transformed into the general principles of national law, and through them - the basic principles of international law.

### Arguments to support the thesis

The Primary Law of the Romans, according to V. Grabar, was intergenus, or in other words, international. Only the genus or tribe acts as a subject of law, whereas an individual is a subject that is not yet recognized. The collective responsibility for violating international norms in ancient times may serve as a confirmation of this fact. Roman law permeates the field of international

relations as a natural law constant with the requirement of the wisdom of human nature.

In Roman law, particularly, *Corpus Juris Civilis*, during the reign of Emperor Justinian, we still do not find a holistic system of international law, but certain rules concerning the right to war (49 books of the mentioned Digest) and certain norms of the embassy law (50 Digest book) were already established by the Law of nations.

The reason for denying the existence of international law in Roman law, is the reluctance to recognize the existence of equal state-like subjects of international relations by emperors who had deliberately not included in the texts of codifications of norms of international legal origin, such as those who lost their intended purpose (practical value), because subjugated subjects became part of a single empire in which all relations could be governed by internal law. The absence of international relations is also indicated by the adherents of the private legal nature *jus gentium*, however, given the above fact, this justification can be considered as artificially created. We can not oppose the historical facts of the existence of international relations in the ancient world, and not only in the European continent, where they were already regulated by well-known, sometimes even universally recognized principles (in particular, the principle of *pacta sunt servanda*), besides the Roman law recognized the existence of two types of treaties: public and private, where the former were intergovernmental agreements, which also drew up their regulation in the Law of nations. In addition, the absence of existing norms of customary and contractual norms for the Law of Rome in the period of the empire can not testify to the absence of international law in general and the Law of nations in particular.

Some institutes of Roman law had a direct impact on the formation of international law, in particular, the question of the institution of property, which was taken as the basis of the norms, and the doctrine of the treaties was postponed for regulation on agreements between States.

Proof that *jus gentium* is the cradle of international law is an excerpt from the work of St. Isidore of Bishop of Seville (510-636rr life) on "Beginning", which has a leading role in the history of international law. It is about transferring the main institutions that comprise the sense of *jus gentium*, which in their essence are institutions of intergovernmental law used by all peoples, namely: city consolidation, war, slavery, unions, peace treaties, armistice, inviolability of ambassadors and a number of others. According to V. Grabar, "the Law of nations in this sense is identified with the interstate law" V. Grabar [1: 98].

According to G.J. Berman, "the current system of world law includes not only international public law, that is, the right created by the national

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states in the process of relations, including the law governing the activities of the United Nations and its subsidiary intergovernmental organizations, but also a huge system of the rules of contractual and customary law governing the relations between natural and legal persons involved in voluntary activities outside national borders. Global law (in the author's opinion) is a new name for what we once called the Law of nations, the universal right of mankind, covering the common features of different legal systems, different peoples of the world"[2: 13].

Many of the general principles, if not the majority, came from Roman law. Jus gentium - or the Law of nations, is a legal complex about whose origin and character are debated for centuries. And although its study goes beyond the scope of our topic, we should pay attention to one very interesting scientific research for us. It is about the origin of the term jus gentium, which has been studied by many scholars, including internationalists, in particular V. Grabar, in his work «The Origin of the Roman term jus gentium», referring to numerous studies on this issue (Preller, Mokko-Rosa, J. Charles, etc.), makes its own, not isolated, conclusion about the fact that "international law emerges in the intercultural relations of a preclassical society called jus gentium or just jus, and later with the formation of the Roman state community, it splits itself in jus gentium (jus fetiale) and jus quiritorium (in subsequent periods jus civile), that is explained how community of basic principles and basic rules"[3: 38].

The term gentes - family, hence the intergenus law that existed with respect to the genus of Lacium, whose association turned into Rome. V. Grabar convinces that the original international law was an international law. Outside of the genus on behalf of the genus, the primary source of the original jus gentium was the contract (an intermarriage contract). Interesting here is the terminological sequence of the Latin terms foedus - the contract - one of the root terms fides - loyalty, and bona fides - is known in modern international law as the type of solution of international disputes in the so-called "Soft law" - good services, which at the present stage of the development of international law have an important or even special significance, also originates in ancient society.

In the opinion of V. Grabar, even the "law (lex) in its original meaning was an agreement: inter populos lex convenit"[3: 39]. Roman law had a significant influence on the formation of the basic principles of international law on the European continent, and later on a universal international law. It owes him the rich legal inheritance left for us in the form of the basic norms that prevail in the Middle Ages in particular thanks to the works of the interpreters of the Roman law. At the first stage of the development of Roman law, it did not know the division of relations into

public and private, and therefore their regulation was carried out as if imperceptibly on the basis of private standards, in particular, to the treaties of interstate value were applied the rules of binding law, disputes about the territory and their boundaries were solved on the basic property law, and even family and inheritance relations had their application to feudal political relations. At the stage of separation within the framework of *jus civile* public and private law, the former has already experienced a significant influence of Roman civil law.

In the teachings of glossators, we find the structure of Roman law, in which the last distinguished three main elements that are important for the study and the basic principles of international law, which take their origins in Roman law. In particular, Roman law is considered in its narrow and broad sense. In the first sense, it is identified with the Roman positive law, while in its broad sense, it includes, in addition to the Roman civil law itself, the natural law and *jus gentium* (Law of nations). If we analyze each structural element separately, we find interesting conclusions for our study. The Roman law covered the widest range of rules governing both private and public relations of the Roman state. Later, they (public) norms were allocated in a separate part under the name of the public law. Natural law (*jus naturale*) attracted the attention of canonists, who also considered it in several ways: 1) as a natural instinct, inherent in both humans and animals (in particular, Ulpian); 2) as a right inherent only to people and is a universal right of all mankind; 3) as a divine right, having its source for the Bible (in Gratian); 4) the most just, perfect law (formulated by the philosophers of the XVII-XVIII centuries). In all its manifestations, *jus naturale* cannot be canceled, except that it has been partially changed.

The Law of nations, or *jus gentium*, included a dual set of rules: first of all, the basic principles (later categorical imperatives of practical reason), in particular, "love for God, flooding of parents and motherland, reflection of violence and insults", and secondly, they are the rules of positive law that were widespread, stood above the state authority, which established the Roman civil law, these are the rules of interstate law. That is, *jus gentium* had two natural norms - natural (the nature of man) and socially -necessary (needs of cohabitation), or otherwise natural and positive rights of peoples. Later (in the XVI-XVII centuries) the first part of it will still be attributed to you *naturale*. Like *jus civile*, *jus gentium* regulated relations both privately and publicly, but unlike Roman civil law, the right of peoples had its own force in all countries.

Consequently, all three of the proposed glossary elements of Roman law serve as sources for both private and public relations, including intergovernmental ones. Despite the fact that already in the XVII century,

*jus gentium* was identified with positive international law, it united institutions operating on the basis of the basic principles that arise out of state power, the state as a new subject of law, appearing in the late Middle Ages, as if receiving them already established, and so they have to respect and protect them as intact. In the opinion of the outstanding scientist V. Grabar, in this statement "it is a germ of the future doctrine of the "basic", "inalienable" or "natural" human rights, and in the future - of the state"[3: 39].

Consequently, within the framework of Roman law, branches of internal law are formed: both private and public, separated from Roman private law and the system of interstate (international) law, both draw the basic principles in natural law.

The main source of international law is usually *jus gentium* or the Law of nations, but it can be stated that the basic principles of modern international law take their origins in all three sources, in particular, in *jus civile* finds common principles of internal law, which today are applied in international justice by analogy with detecting gaps; in *jus naturale* there are common, basic principles of law that are recognized in particular by Art. 38 UN IC Charter; in *jus gentium* we find the basic principles of international law, including the modern branch principles of international law. Consequently, the modern system of principles of international law is based on the teachings of glossators, and also reaches the pre-classical period of history.

We have already proved above that the first basic principles of international law are emerging in the pre-classical period, as evidenced by various written and non-written evidence that took place in different regions of the world and are widely recognized, but by presenting the basic and forming on their basis nevertheless however, the Roman law of nations (*jus gentium*) came out.

We are responsible for the post glossator jurisprudence due to the emergence and for the first time the application of the principle of sovereignty as a special concept, the features inherent in a particular type of union (corporation) - the state, and were identified with the notion of statehood, the principle of supremacy. In the process of electing independence to individual states within the framework of the Roman Empire in the XIV century, the first doctrines of the principle of sovereignty of the state were drawn up. The first person among the Legist who began to talk about sovereign was Olrado, followed by Bartol, and later this concept was widely developed in the XVI century by French politicians, in particular, J. Boden. In the teachings of Bartolus, we find the doctrine of the modern

principle of sovereign equality of states, which is based on the thesis: there is no power over equal.

Interesting on this principle is the concept of V. Grabar, about the real equality of states. His equality is equal to the sovereignty of the states regardless of their power, that is, the equal right to rule in the territory of their state, and in the international arena, to determine the degree of participation in solving international issues plays material criteria. According to the author, it would be fair to determine such a degree depending on the number of full-fledged population of the country. In particular, a principle (the principle of diminishing proportionality, according to which the ratio between representation in the European Parliament of more populous and the less-populated Member States should be less than the ratio between the numbers of their population) is today used in determining the quota of representation of the Member States in the EU Parliament.

After the collapse of the Roman Empire, Roman law ceased to be obligatory for the peoples of Western Europe, however, the norms developed in the theory of statutes did not perish, but continued to act as rules of customary law. This fact of the continued validity of the *jus gentium* rules was based on the principle of mutual politeness of states, which today (and in particular English lawyers), so, the English scholar of the late XIX-early XX centuries, Franz Kahn interpreted the international politeness (in English-comity) as "mutual comity"[4: 38]) explains the legal force, including international private law, which, as international law, takes its origins in *jus gentium*. American lawyer of the XIX century, Joseph Stores, who believed that there was no more basis than conflict, for conflict (private international law) law does not exist. In accordance with the understanding of "international courtesy" currently adopted in private international law, these are "acts of good neighborliness, friendliness, hospitality, accountability, abolition of formalities, the granting of privileges, privileges and services to foreign states and their citizens, not by virtue of the requirements of internationally-legal norms, but according to the will of the state"[5: 23]. In the modern world, the institution of "international politeness", albeit episodically, is used, for example, in the practice of relations between states with each other in some issues of legal assistance in terms of international courtesy in the absence of an international agreement on the provision of legal aid.

Postglossator Baldo due to the succession of contractual obligations, the latter believed that since international treaties oblige the state as a whole, then the change of supreme power in the state cannot be the reason for non-fulfillment or suspension of international obligations.

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In the Middle Ages, the first norms-principles of territorial space appear. Initially, the airspace was recognized as the property of the landowner, later this right began to be limited to the benefit of the state. Today, this principle has found its recognition in principle of the territorial integrity of states, enshrined in the vast majority of constitutions of modern countries of the world.

The Roman principle of bona fide is part of the norm of art. 31 of the Vienna Convention on the Law of Treaties, in art. 60 of the Statute IC of the UN establishes the Roman principle *res judicata* - the principles of binding on the parties to the court decision. Such transformations can be called a lot, which proves that the general principles of law have their origin in Roman law, and today most of them have become an integral part of customary or contractual international law.

Principles governing the operation and interaction of norms: *lex posterior derogat legi priori*, *lex specialis derogat legi generali*, and *lex posterior generalis non derogat legi priori specialis*, also have their source of Roman law, are universally recognized in all legal systems and apply to sources international law (treaties, customs, general principles) provided that there is no threat of violation of the rules of *jus cogens*.

We find the confirmation of the Roman origin in the comments to the decisions of international courts. Thus, in the case of Russia against Turkey, the plaintiff's claim was based on the Constantinople Treaty of 1879[6: 14], the court, in the absence of contractual and customary norms of international law, has transformed to the international legal level of the rules of Roman private law governing the relations arising from monetary obligations between private individuals as a norm of international law. In particular, not accepting the defendant's arguments about the privileged position in accordance with the principle of sovereign rights in monetary obligations, the court applied the principle of liability for monetary obligations in the form of payment of interest on overdue payment. In arguing the decision, the court indicated that this principle was recognized in the private law of the states of the European continent, which takes its origins in early Roman law. In this case, the court, filling in the gap in international law and in order to eliminate the problem of non *liquet*, has applied the norm of private law, which derives its origins in Roman law, and gave precedence to the general principles of law without recognizing the special rights of the defendant on the principle of sovereignty.

In another case of *Affare du Queen* in 1872"[7: 327-328], arbitration also expressly points to the principle of "universal jurisdiction" as recognized in the legislation of all countries, the principle of "burden of proof lies with the plaintiff" (also of Roman origin).

In an arbitration award between the United States and the United Kingdom on the Alaskan borders, the court has explicitly stated that "the basis of the entire international system is Roman law, as it has been developed and included in the codes of the continental states"[8: 237].

When analyzing the rules of Roman law of different times, we draw attention to the fact that we are obliged not only to the general principles, the most powerful of which are the principles of procedural law (*audiatur et altera pars* (let it be heard and the other party), *nemo iudex in propria causa* (no one can be judge in his own case), *ei incumbit probatio, qui dicit, non qui negat* (the burden of proof lies with the one who affirms, but does not object), *in dubio pro reo* (in case of doubt in favor of the accused), *manifestum non est probatione* (obviously does not need proof)), but also the norms of legal technique (*lex posterior derogat priori* (the next law of bail takes the previous one), *lex specialis derogat generalis* (special provisions have an advantage over general ones), etc.) and well-known aphorisms, such as *scipe leges non hoc est verba earum tenere, sed vim ac potestatem* (to know the laws does not mean to hold on to their words, but to understand their strength and significance); *legalitas regnorum fundamentum* (legality - the basis of the state); *salus populi - suprema lex* (the good of the people is the supreme law), *justitia est fundamentum regni* (justice is the foundation of the state), etc.

## Conclusion

*Jus gentium* - is a system of rules of law, which reaches the origins of interstate Roman law, which contain the basic principles of regulation and domestic and international law. Most of the general principles *jus gentium* have become today the general principles of international law. The analysis of the history *jus gentium* allows us to conclude that this law was inter-ethnic, that is, international, which was used by all peoples, in particular its norms regulated the relations of war, peace, armistice, unions, diplomatic relations.

*Jus gentium* made a significant impact on the formation of the basic principles of international law on the European continent, and later on - universal international law. In the structure of Roman law, three main elements were distinguished: *jus civile*, *jus naturale*, *jus gentium*. The main source of international law is usually *jus gentium*, but today international law also accumulates the general principles of law (*jus naturale*) and universally recognized principles of domestic law (*jus civile*), which is confirmed by the norm of art. 38 of the Charter of the United Nations. In *jus gentium*, we

find the origins of the principle of sovereignty, establishes the principle of bona fide compliance, the principle of mutual courtesy (*comitas gentium*), develops the principle of succession, there are first principles of territorial space, the principle of *res judicata* - the principle of binding for the parties to the court decision. Most procedural and technical principles have their source *jus gentium*.

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