

ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY: SYMPOSIUM ON INTERNATIONAL THOUGHT  
AND THE MAKING OF THE CANON

## The rediscovery of the Roman *jus gentium* and the post 1945 international order

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### Abstract

The main query of this contribution concerns the circumstances and conditions under which the concept of *jus gentium* as it existed in Roman law is included in or excluded from the historical canon of international law. Paradoxically, according to the major twentieth-century handbooks on the history of international law the term ‘law of nations’ derives from the Latin *jus gentium*. However, historians of international law tend to indicate the *jus gentium* does not amount to any ‘international law’ in the modern sense. The contribution argues that the idea of the Roman *jus gentium* as equivalent to our modern international law was rediscovered in the 1930s and 1940s, first by a group of leading Roman law scholars who were ousted from Germany by the Nazi regime, and second by a larger group of thinkers and academics they came into contact with in their new academic surroundings. The reason for this rediscovery is a change in the definition of ‘international law’ especially beyond legal positivism, to encompass two qualities the Nazis despised: individualism and universalism. The purpose of the contribution is to show an instance of a change in canon due to the political circumstances, one with consequences for the formation of actual institutions in international law.

**Keywords:** history of international law; *jus gentium*; refugee scholarship; Roman law; theory of international law

### 1. Introduction

Is there room in the historical canon of international law for classical Antiquity? The question is difficult to answer, because it not only depends on the existence of the notion in Antiquity itself, but also on what constitutes the definition of ‘international law’ according to who poses it. The definition of ‘international law’ in general seems contingent on political and societal circumstances and considerations, thus its history appears to change depending on the time period in which the notion is defined. This article aims to examine a singular instance of such a change in definition, namely the period between the 1930s and 1950s in Western Europe and the United States in which there was an emergence of refugee scholarship among legal scholars who were forcibly displaced by the Nazi regime in Germany. The argument is centred around a peculiar notion in classical Antiquity, namely the *jus gentium* as it occurred in Roman law. This notion will be defined more in depth below. This article claims that due to these political circumstances the Roman notion of *jus gentium* came to be included in the historical canon where before it had not been. The reason for this is certain specific characteristics that the Roman notion of *jus gentium* had, or were ascribed to this notion, by the refugee scholars in question.

To demonstrate this wide-ranging and far from singular process of reinvention, first the Roman notion of the *jus gentium* will be traced in various prominent handbooks and scholarly works on the history of international law from the nineteenth and twentieth centuries. Next, the presence in these handbooks will be contrasted with the perspective on the notion of Roman law scholarship itself in the same period. It seems that this perspective led to a particular form of taking up the Roman notion of *jus gentium* among legal scholars forcibly displaced to the United States. The scholars in question studied and developed private international law, taking up the private law dimension of the Roman *jus gentium* to their benefit. I will indicate this perspective as the ‘individualist’ perspective. Subsequently, other aspects of the Roman concept came to be emphasized, such as its foundation in the Roman idea of natural law. The Roman jurists had already connected the notions of *jus gentium* and *jus naturale* through their supposed shared respective practical and theoretical universal validity, hence this perspective will be designated as the ‘universalist’ perspective. After the end of the Second World War the impact of the rediscovery of the Roman notion of the *jus gentium* is felt most clearly when both perspectives came together in the search for new types of international law, aiming to realize its universal and individualist ambitions. Lastly, via a treatment in various post-war handbooks, the Roman notion of *jus gentium* was folded back into the traditional narrative, nowadays usually obscured as a ‘pre-history’ or ‘precursor’ of modern international law.

It is difficult to provide a singular definition of the Roman concept of *jus gentium*, as there is a multitude of definitions already in Roman Antiquity itself.<sup>1</sup> To be clear, whereas the term literally means ‘law of peoples’, the notion of *jus gentium* differs structurally from our modern idea of ‘international law’, although our modern concept is ultimately derived from it.<sup>2</sup> Two complexes of definitions need, however, to be distinguished: first the Roman philosophical one as primarily related by Cicero meaning a law valid for all peoples of which the *jus civile* or law for Roman citizens is a part, and which is a reflection of natural law in the Stoic sense.<sup>3</sup> The meaning of this philosophical understanding of the *jus gentium* had changed in the works of the jurists of the imperial period about two hundred years later, Gaius above all, who completely separate the *jus gentium* and *jus civile*, perceiving the former as the common law valid in the Roman Empire beyond Roman citizenship.<sup>4</sup> The second complex of definitions is even more directly pertinent to our problem, namely the difference in meaning between the *jus gentium* as a ‘public international law’, including the law of war and treaties, and the *jus gentium* as a more-or-less ‘private international law’ (taking into account the differences in periodization for instance between Cicero and Gaius) governing the private relations between Roman citizens and non-citizens either inside or outside the Roman territory in a number of specific legal contexts.<sup>5</sup> Although the definition is somewhat fluid, what does interconnect the various meanings is an idea of the *jus gentium* as a shared or common law, with the complex process of the reception of Roman legal texts from the Middle Ages onwards and their constant rediscovery and reinvention explaining how it could be at the root of our modern thinking about international law.

<sup>1</sup>M. Kaser, *Ius Gentium* (1993), at 3: ‘Von dem, was die Römer unter “*ius gentium*” verstanden haben, geben sie selbst uns keine Definition. Die moderne Literatur hat mehrere Deutungen versucht, von denen jedoch keine geeignet ist, sämtliche Anwendungen zu decken.’

<sup>2</sup>*Ibid.*, at 4; R. Lesaffer, ‘Roman Law and the Intellectual History of International law’, in A. Orford and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (2016), at 38; K. Tuori, ‘The Reception of Ancient Legal Thought in Early Modern international law’, in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (2012), at 1012.

<sup>3</sup>Cicero, *On Duties*, at 69–70; Kaser, *ibid.*, at 14–17. The wording ‘common law’ is in the sources themselves, remaining unclear whether this means ‘notions that are present in all laws’, or a single legal order that is upheld by each *gens*.

<sup>4</sup>Gaius, *Institutes*, at 1; Kaser, *ibid.*, at 20–2. The definition of Gaius seems to have a philosophical connotation as well, particularly by founding the *jus gentium* in *naturalis ratio* (natural reason), see on this much more elaborately H. Wagner, *Studien zur Allgemeinen Rechtslehre des Gaius* (1978).

<sup>5</sup>Kaser, *ibid.*, at 11–12, further: 23–39 and 40–54. The late classical jurist Hermogenian groups both ‘public’ and ‘private’ law institutions under the *jus gentium* in *Digest* 1,1,5. The regulation between citizens only is undisputed, the regulation between non-citizens only is difficult to ascertain.

## 2. The Roman *jus gentium* beyond the canon of international law

Up until the early twentieth century, the history of international law starts with the Dutch scholar Hugo Grotius (1583–1645) with whom we can ascertain a move from ‘not international law’ to ‘international law’. For example, in Lassa Oppenheim’s fundamental handbook, the absence of international law in Antiquity is made very explicit, the paragraph in question in the part on *Peace* being titled ‘No law of nations in Antiquity’.<sup>6</sup> Although the Romans then did have legal rules for its foreign relations, especially war and treaties, the main issue concerning the existence of an early form of international law in this period seems to be the superstructure of the Empire on the one hand and the lack of ‘civilised states’ outside the Roman territory on the other.<sup>7</sup> In Arthur Nussbaum’s *Concise History* we encounter more elaborate discussions of the problem of international law in Antiquity in this context, distinguishing between the ancient orient, Greece and Rome, and mentioning the earliest instance of a treaty in 3100 BCE between the city-states of Lagash and Umma.<sup>8</sup> On Roman legal thought Nussbaum is relatively expansive, starting with the function of priests (*fetiales*) in the Republic with respect to the laws of war, and continuing with the concept of surrender (*deditio*), the treaty system, envoys, the term *jus gentium*, forms of legal protection for non-citizens, notions of natural law, and slavery.<sup>9</sup> There does not, however, seem to be a clear relation between the practice of international law, and the concepts of *jus gentium* and *jus naturale*. According to Nussbaum especially the *jus naturale* all too often formed an ‘invented tradition’ on which new legal notions could be based.<sup>10</sup> Sometime later, in his *Epochs of International Law* Wilhelm Grewe even upholds a fairly positive image of the existence of some forms of international law in Antiquity. However, the relevant section only counts four pages and is not enough to warrant a designation of any period in Antiquity as a separate epoch.<sup>11</sup> Also in more recent handbooks, a history of international law commences in the fifteenth or sixteenth century, either leaving Antiquity unmentioned completely<sup>12</sup> or discussing primarily Roman legal notions as a basis for its later development.<sup>13</sup> In general, in writing the history of international law Antiquity is given fairly short shrift and usually taken as a ‘pre-history’ on the basis of which later more accomplished versions of international law would be formed.<sup>14</sup>

<sup>6</sup>L. Oppenheim, *International Law: A Treatise, Peace*, vol. I (1905), at 44–5, para. 37. In later editions of Lauterpacht the paragraph is called ‘Law of nations in Antiquity’, e.g., 37b in L. Oppenheim *International Law: A Treatise, Peace*, vol. I, ed. H. Lauterpacht (1955), at 72. The Roman conception of *jus gentium* is mentioned at 76: ‘So many foreigners came into the process of time to Rome that a whole system of law sprang up regarding these foreigners and their relations with Roman citizens, the so-called *jus gentium*.’

<sup>7</sup>Oppenheim, *ibid.*, at 44–52: ‘They did not know of any independent civilised states outside the borders of their empire. There was, therefore, neither room nor need for an International law as long as this empire existed.’

<sup>8</sup>A. Nussbaum, *A Concise History of the Law of Nations* (1954), at 1.

<sup>9</sup>*Ibid.*, at 10–16. Two years before: ‘The Significance of Roman Law in the History of International Law’, (1952) 100(5) *Pennsylvania Law Review* 678, mainly based on Italian authors like Arangio-Ruiz and Paradisi.

<sup>10</sup>Nussbaum, *ibid.*, at 16.

<sup>11</sup>W. Grewe, *Epochen der Völkerrechtsgeschichte* (1984), at 27–30, primarily based on the work of Wolfgang Preisler. In the 1943 article ‘Die Epochen der Modernen Völkerrechtsgeschichte I’, (1943) 103(1) *Zeitschrift für die Gesamte Staatswissenschaft* 41, Grewe commences with the Spanish epoch (1494–1648) which, however, includes Grotius, not mentioning Antiquity at all. On Grewe’s periodization see I. De La Rasilla, ‘The Problem of Periodization in the History of International Law’, (2019) 37(1) *Law and History Review* 275, at 279–80.

<sup>12</sup>For example, A. Orakhelashvili (ed.), *The Research Handbook on the Theory and History of International Law* (2011). This is often noted, see, e.g., G. Stadtmüller, *Geschichte des Völkerrechts. Teil I: Bis zum Wiener Kongreß (1815)* (1951), at 9; and now E. Buis, ‘The Politics of Anti-Politics: Historiographies of International Law and the Paradox of Antiquity’, in R. Schäfer and A. Peters (eds.), *Politics and the Histories of International Law: The Quest for Knowledge and Justice* (2021), at 430, who emphasizes Ancient Greece as a model.

<sup>13</sup>Apart from Lesaffer, *supra* note 2, at 58 and Tuori, *supra* note 2, at 1012, see S. Besson and J. D’Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (2017), commencing with the scholastic tradition. See also Nussbaum, *supra* note 8, at 12: ‘The main significance of Roman law for the development of international law is indirect, however.’

<sup>14</sup>This by-and-large excludes textbooks on legal history, which do tend to treat the Roman notion of *jus gentium*, though not necessarily as a form of ‘international law’. For a recent example, T. Herzog, *A Short History of European Law: The Last Two and a Half Millennia* (2019), at 152–4.

To understand the idea of the *jus gentium* from a standpoint of Roman law scholarship beyond the handbook-narrative of the history of international law, a brief introduction has to be provided, mainly with respect to German-speaking studies on the matter. In Germany in the late nineteenth and early twentieth centuries the legal positivist concept of public international law was mitigated by concurrent more naturalist and philosophical considerations. The question that remains pertinent even for the twenty-first century is the measure in which basic notions of 'modern' international law, treaties, immunities, rules for warfare et cetera, relate to ancient more abstract and philosophical concepts such as *dikaion koinon/jus gentium* and *dikaion fysikon/jus naturale*, if at all. The scholar who has given the most complete treatment is Moritz Voigt (1826–1905), professor of Roman law at Leipzig.<sup>15</sup> Just to indicate how difficult and intricate the problem is, the subject took him four volumes, comprising several thousand pages. Voigt's work remains by-and-large unknown outside of a specialist readership. In his second volume on the relation between the *jus gentium* and the *jus civile* Voigt recognizes a twofold conception of the law of nations among the Romans: first by virtue of its content, as a 'law of war and peace', and second based on its subject, the 'nation' (*gens*) rather than the people or the tribe. Moreover, in the Roman conception the *jus gentium* encompassed all nations, not just those with specific political or ethnic traits, and even more astounding, it concerned all free men equally.<sup>16</sup> As such, Voigt discusses the content and (primarily private law) scope of the *jus gentium* from the conceptual to everyday legal practice in the remainder of the volume in three periods: the first until Cicero, the second between Cicero and the third century CE, and the third until the reign of the Eastern Roman Emperor Justinian in the sixth century CE.<sup>17</sup> The main difference between the first and the second periods is the measure in which the Romans exerted control over the Mediterranean from the first century BCE onwards, allowing for a *jus gentium* that was both universal in concept and practical in scope.<sup>18</sup>

Building on Voigt's work, in 1891 the Roman law scholar Ludwig Mitteis (1859–1921) took up the discussion on the relation between what he termed 'Reichsrecht', the central law of the Roman Empire, and 'Volksrecht', local and municipal laws.<sup>19</sup> Not only did he advance a strong distinction between the development of this relation in the Western and Eastern provinces of the Empire, according to Mitteis the local laws in the Eastern provinces even managed to some degree to influence the Reichsrecht.<sup>20</sup> Greek law is presented as a unified law with a general development and a universal tendency.<sup>21</sup> Under Greek law treaties offering legal assistance guaranteed a measure of mutual legal protection specifically in the context of trade in dedicated peregrine courts (*Fremdengerichte*). In a similar manner as would happen later as a result of the legal practice of the Roman peregrine *praetor* shaping a *jus gentium*, these peregrine courts delivered their own version of an 'international law', one that even surpassed the 'selfish economic' one of the Romans.<sup>22</sup> With the work of Mitteis, a renewed interest emerged in ancient law beyond that of Rome, especially in the context of what was termed 'ancient legal history' (*Antike Rechtsgeschichte*).

In a 1927 programmatic document, an Austrian scholar of Mitteis called Leopold Wenger (1874–1953) argued that the emphasis in legal history was to be shifted from Roman law alone

<sup>15</sup>M. Voigt, *Die Lehre vom jus Naturale, Aequum et Bonum und Jus Gentium der Römer*, vol. I-IV (1856–1875).

<sup>16</sup>*Ibid.* vol. II (1858), at 27–8.

<sup>17</sup>The dichotomy between the concept and its practical employment is stated by Voigt in the first volume as well: *ibid.* vol. I (1856), at 399–400.

<sup>18</sup>Voigt, *supra* note 16, at 681–9.

<sup>19</sup>L. Mitteis, *Reichsrecht und Volksrecht in den Östlichen Provinzen des Römischen Kaiserreichs* (1891), at 6–8.

<sup>20</sup>*Ibid.*, at 8–10.

<sup>21</sup>*Ibid.*, at 72: 'Das griechische Recht ist demnach in seinem Grundlagen wie in seiner weiteren Ausbildung durch gross und einheitliche Züge charakterisiert: es ist nicht eine Summe einzelner Stadtrechte, welche uns entgegentritt, sondern das Recht einer grossen, weltbeherrschenden Nation.'

<sup>22</sup>*Ibid.*, at 74–5.

to a wider perspective, including for example the legal orders of Greece and Egypt.<sup>23</sup> The shift away from Roman law concerned the *jus gentium* in particular, since Wenger saw this as a law expressing Roman hegemony first and foremost.<sup>24</sup> Through this method, a cultural history of Antiquity as a whole can be written, with the study of ancient law as a sub-discipline of classical studies, however one that remains focused on law and the state.<sup>25</sup> Although their conclusions differed fundamentally,<sup>26</sup> there is an interesting interplay in both Mitteis and Wenger in what constitutes as ‘national’ and ‘international’ law in Antiquity, going much beyond the Roman conception of *jus gentium* as it was prevalent in the handbooks of international law of the time alone. After Voigt, Mitteis and Wenger the discussion among scholars of ancient law has remained centred on three complexes of problems: the meaning and development of the notion of *dikaion koinon/jus gentium*, the existence of a ‘conflict of laws’ primarily between Roman and other ancient legal orders, and the scope of legal remedies afforded to non-citizens in any legal order in Antiquity.<sup>27</sup> These three complexes of problems seem interrelated, although the exact relation remains unclear and disputed to this day.

In the same year as Wenger’s programmatic work, two publications on international law and its historical precursors saw the light of day. These adopted a completely separate perspective from Wenger’s and ultimately came to profoundly shape the subsequent trajectory in the field. Following Voigt, the French Romanist Felix Senn emphasized the importance of the link between the *jus gentium* and the *jus naturale* in ancient Rome and even its centrality in Roman legal thinking, the *jus gentium* being the natural law proper to mankind as opposed to the natural law that man and animal have in common. In this, the *jus gentium* indicated an application of natural law in legal practice.<sup>28</sup> Senn’s work coincided with a small revival of natural law thinking in international law particularly among scholars such as Alfred Verdross and James Brown Scott, the latter championing the role of the Spanish late Scholastics who similarly wrote extensively on the link between *jus naturale* and *jus gentium*.<sup>29</sup> Certainly, the First World War and its aftermath contributed to a renewed attention for possible moral foundations of international law, and vice-versa whether international law could function as a conduit by means of which moral principles or natural law could be realized.

Although the perspective is completely different, a similar premise underlies Hersch Lauterpacht’s 1927 dissertation at the London School of Economics on *Private Law Analogies and the Sources of International Law*. Focused on contemporary black-letter-international law but framed by a historical-legal theoretical framework, Lauterpacht demonstrates the manner in which private law arguments and notions are used in an international context. Specifically, Lauterpacht equates domestic private law and Roman law, or at least legal concepts derived from

<sup>23</sup>L. Wenger, *Der Heutige Stand der Römischen Rechtswissenschaft: Erreichtes und Erstrebtes* (1927), at 6–7 and throughout.

<sup>24</sup>*Ibid.*, at 5: ‘Wir werden darum auch im römischen *ius gentium* kein antikes Recht, sondern römisches Recht sehen . . . .’

<sup>25</sup>*Ibid.*, at 5: ‘Antike Rechtsgeschichte als Sammelname soll nichts anderes besagen, als eine vom Standpunkt des Juristen aus gesehene, Staat und Recht in den Mittelpunkt stellende Kulturgeschichte des Altertums; antike Rechtsgeschichte ist also eine Teildisziplin der Geschichte des Altertums, aber eben nur eine solche, die sich des Zusammenhangs mit allen anderen Teildisziplinen stets bewußt bleiben muß . . . .’

<sup>26</sup>Mitteis was not sympathetic to the idea of an *Antike Rechtsgeschichte*, since it detracted from the study of the system of Roman private law: R. Zimmermann, ‘In der Schule von Ludwig Mitteis: Ernst Rabels Rechtshistorische Ursprünge’, (2001) 65(1) *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* 1, at 27–8.

<sup>27</sup>See also, for example, E. Weiss, *Ius Gentium*, RE X, 1221–1224 (1919); the literature in D. Nörr, *Aspekte des Römischen Völkerrechts: Die Bronzetafel von Alcántara* (1989), at 12, note 9; Kaser, *supra* note 1.

<sup>28</sup>F. Senn, *De la Justice et du Droit: Explication de la Définition Traditionnelle de la Justice* (1927), at 78–9: ‘Le jurisconsulte appellera donc le plus souvent ce *ius naturale* le *ius gentium*. Et il indiquera, de ce droit naturel, commun à tous les hommes, les principales applications.’

<sup>29</sup>G. Gordon, ‘Natural Law in International Legal Theory. Linear and Dialectical Presentations’, in Orford and Hoffmann, *supra* note 2, at 290–1; P. Amorosa, *Rewriting the History of the Law of Nations: How James Brown Scott made Francisco de Vitoria the Founder of International Law* (2019).



the Civil law tradition, such as prescription in land occupation.<sup>30</sup> The notion of *jus gentium* as a universal private law based on comparative jurisprudence is excluded from the historical-theoretical framework.<sup>31</sup> Nevertheless, Lauterpacht queries the role of Roman law and the legal concepts inherent in it in the historical development of international law. It has to be taken into account that the dividing line between international and private law in Roman law is vague at best considering the *jus gentium* encompassed what we would now designate as both public and private (international) legal notions. The importance of Roman law for international law in the nineteenth century is stressed primarily based on a variety of English and American scholars,<sup>32</sup> whereas the Germans tended more towards positivism, rejecting recourse to analogies with private law.<sup>33</sup>

### 3. Roman law and 1930s and 1940s refugee scholarship

The works of Mitteis, Wenger, Senn, and Lauterpacht set the scene for a peculiar development in legal history. Mitteis had passed away in 1921. Wenger, Senn and Lauterpacht were all personally affected by the advent of fascism and the Second World War in different ways. Under Nazism the study of Roman law was precarious because of Article 19 of the NSDAP programme, preferring a German common law over Roman law as the latter ‘served a materialistic world order’. Moreover, many prominent Roman law scholars were perceived by the Nazis as having undesirable political views or a Jewish or otherwise non-Aryan family background, and were fairly rapidly sidelined. Usually this resulted in their forced displacement, for example to the UK and the US. Neither country has a Roman or Civil law tradition that is even remotely comparable to the German-speaking one. Thus, scholars that were traditionally trained in Roman law needed to adapt their scholarship simply to find employment in the new academic context.<sup>34</sup> This happened in various different ways, all pertinent to a rediscovery of the Roman concept of the *jus gentium* in the 1930s and 1940s.

The first manner in which Roman law was adopted to fit a new academic context in the 1930s is due to predominantly shared interests of particularly the erstwhile scholars of Ludwig Mitteis and a section of Anglophone legal scholars in Roman law as a basis for comparative law, the conflict of laws, and private international law.<sup>35</sup> As such, with its focus on the relation between various ancient legal systems some of the scholars of Mitteis ended up in fertile ground, enjoying relatively successful careers even after their forced displacement to the US. Primary among them is the Austrian-American legal scholar Ernst Rabel (1874–1955) who was forced to leave the University of Berlin soon after the Nazi take-over, as well as his pupil Max Rheinstein (1899–1977), but of course the group was much larger.<sup>36</sup> In his comparative method, Rabel appears to develop a universal system of (private) law by means of the creation and application of conflict rules. As such, even in his 1930s works on modern (US) law his Romanist background shines through often.<sup>37</sup> According to Stagl particularly in the law of sale Rabel takes inspiration from

<sup>30</sup>Compare R. Lesaffer, ‘Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription’, (2005) 16 *European Journal of International Law* 25–58; R. Lesaffer, ‘Roman Law and the Early Historiography of International Law: Ward, Wheaton, Hosack and Walker’, in T. Marauhn and H. Steiger (eds.), *Universality and Continuity in International Law* (2011), at 152–3.

<sup>31</sup>H. Lauterpacht, *Private Law Analogies and the Sources of International Law* (1927), at 5.

<sup>32</sup>*Ibid.*, at 23–31.

<sup>33</sup>*Ibid.*, at 19–23.

<sup>34</sup>K. Tuori, *Empire of Law. Nazi Germany, Exile Scholars and the Battle for the Future of Europe* (2020), at 76–86.

<sup>35</sup>Roman law and comparative law: R. Pound, *Readings in Roman Law* (1906). Pound would refer to the Roman *jus gentium* in a variety of publications, for example, ‘Revival of Natural Law’, (1942) 17(4) *Notre Dame Lawyer Quarterly* 287, at 292, 313.

<sup>36</sup>Zimmermann, *supra* note 26, mentions the Roman law expert Eberhard Bruck, the epigraphist Rafal Taubenschlag, and the comparative lawyer and legal historian Hans Julius Wolff.

<sup>37</sup>In ‘A Draft of an International Law of Sale’, (1938) 5(4) *Chicago Law Review* 543, at 558 he remarks: ‘In an American guide to sales contracts and order forms, I find the bewildering statement that “printed agreements are sometimes made with the full knowledge that they will not be used in courts . . . .” What an experience after years of research in preclassical Roman *jus civile!*’

the Roman *jus gentium* as a historical example, not so much its content (although it could be said the Roman law of sale was a part of the *jus gentium par excellence*), but more the manner in which it came into being. Briefly put, first similarities between various legal systems result in more-or-less universal rules on an international level; second, these rules are implemented in the domestic legal systems again, ensuring a proper enforcement not because of a ‘world-state’ but simply because it is the result of ‘juristic insight’.<sup>38</sup>

In and of itself, the concept of *jus gentium* is not that pertinent or interesting for dogmatic research into Roman law: the structural aspects of the legal notions are much more relevant than for example the reason why they came into being. Also influenced by the rise of *antike Rechtsgeschichte*, the study of the *jus gentium* in Germany thus primarily became a matter for ancient historians, not lawyers.<sup>39</sup> Overseas, however, the question was asked whether by placing the concept within its historical context the Roman idea of *jus gentium* could be employed to solve contemporary legal problems in private law<sup>40</sup> and in international law, the latter for example by re-examining moral grounds for entering into a just war.<sup>41</sup> The main exponent of a legal realist perspective on the Roman concept of *jus gentium* may well be the legal theorist at Berkeley Max Radin (1880–1950), who composed an encyclopedia article on the topic, and lectured at the Romanist Riccobono seminar during his presidency at the Catholic University at Washington, DC.<sup>42</sup> As such, Radin fits well within the post-war development of presenting Roman law in general or the Roman conception of *jus gentium* as a precursor to particular institutional developments, above all the formulation of human rights, the creation of international organizations such as the UN, and the erection and construction of the Nuremberg Trials.<sup>43</sup>

Conceptually, it is interesting to note that the Roman jurists did not use the term *jus gentium* before the time of the Emperor Hadrian in the second century CE, when the Classical period of Roman law and deep-rooted contacts on trade and other matters of what we would now term international law had long since been established.<sup>44</sup> Thus, from Roman legal scholarship there emerged a gap between the concept of *jus gentium* and the practice of trade and communication between peoples. Moreover, it is the Roman republic that tended to be viewed as the more inclusive society. The empire on the other hand was generally seen as despotic and absolutist, an idea

<sup>38</sup>J. Stagl, ‘Eine Flucht nach Rom. Der Geistige Weg Ernst Rabels’, (2011) 79 *Tijdschrift voor Rechtsgeschiedenis* 533, at 542–5. The piece on the International Law of Sale ends with the phrase (at 565): ‘Within each country the international sales law would rival the domestic law by intrinsic strength, as did in Rome the *ius gentium* with the *ius civile*. Looked at in this way, it is well worth to help the international law of sales come into existence.’ Max Rheinstein would refer on several occasions to the Roman conception of *jus gentium*, such as in ‘Comparative law and Conflict of Laws in Germany’, (1935) 2(2) *Chicago Law Review* 232, at 240. His Festschrift would eventually be called *Jus gentium privatum*.

<sup>39</sup>E.g., A. Heuss, *Die Völkerrechtlichen Grundlagen der Römischen Außenpolitik* (1933). Noteworthy is A. Wegner, *Geschichte des Völkerrechts* (1936), who has a separate chapter but mainly treats Roman conceptions of state.

<sup>40</sup>The refugee legal theorist Gerhart Husserl (1893–1973) actually published on both: ‘The Foreign Fact Element in the Conflict of Laws’, (1940) 26(3) *Virginia Law Review* 243, at 261–7; ‘Global War and the Law of Nations’, (1944) 30(4) *Virginia Law Review* 543, at 557–78; ‘The Conception of War as a Legal Remedy’, (1945) 12(2) *Chicago Law Review* 115, e.g., at 134.

<sup>41</sup>J. von Elbe, ‘The Evolution of the Concept of the Just War in International Law’, (1939) 33(4) *American Journal of International Law* 665, at 666; A. Nussbaum, ‘Just War – a Legal Concept’, (1943–1944) 42 *Michigan Law Review* 453.

<sup>42</sup>‘Jus Gentium’, in E. R. A. Seligman and A. Johnson (eds.), *Encyclopedia of the Social Sciences*, vol. 8 (1932), at 504; ‘Chronicle’, (1942) 2 *The Jurist* 322, at 332 (‘The *jus gentium*: a new point of view’, 11 May 1942) ‘Contrasted the notions of *jus naturale* and *jus gentium* showing the important position the foreigner occupies in the historical development of the *jus gentium*, comparing in this regard the Greek city states with the city of Rome.’ Compare also: ‘A Glimpse of Roman Law’, (1949) 45(2) *The Classical Journal* 71, at 73–4.

<sup>43</sup>E.g., ‘Justice at Nuremberg’, (1946) 24(3) *Foreign Affairs* 369, at 372: ‘If these inhuman incidents were disregarded, and we were simply dealing with acts of murder and robbery, and if the number of victims no such portentous total as it demonstrably did, the acts by the custom of those civilized nations we know best, by what the Romans called the *jus gentium*, be capital crimes subject to the death penalty.’

<sup>44</sup>E. Weiss, *Grundzüge der Römischen Rechtsgeschichte* (1936), at 61; F. Schulz, *History of Roman Legal Science*, (1946), at 73, 137. Schulz has an extremely minimal view on the usage of the term, calling the employment in a Roman private law-context ‘scholastic’.

that compared poorly to the cosmopolitan character of the notion of *jus gentium* among the jurists emerging only in the second century CE.<sup>45</sup> Apart from the discussion on private international law, the second manner in which the *jus gentium* played a part in 1930s and 1940s legal scholarship is the conceptual relation between ‘international law’ and ‘natural law’. In the light of their intellectual backgrounds, steeped in legal positivism and all too aware of Nazi legal theory, refugee scholars took up the question of natural law.<sup>46</sup> Rather than a full-scale repudiation of natural law, the political scientist Ernst Fraenkel (1898–1975) argues that the Nazis upheld a ‘communal natural law’ over a ‘societal natural law’, detailing the differences in a separate chapter of his *Dual State*. As such, whereas communal natural law is limited to the community to which it owes its existence, thus making the only international law that which is written, societal natural law is valid for the whole world. ‘*Jus gentium* as natural law is in contrast with *jus civile* as positive law’.<sup>47</sup> Of course, the universalist tendencies of the Roman concept of *jus gentium* particularly in its close relation to the *jus naturale* were widely noted before, during and after the war.

A peculiarity of the *jus gentium* is not only its purported universalism, but also the fact that it could be invoked by individuals – Romans and non-Romans – before a specialized magistrate. Cicero has presented the *jus gentium* as a realization of natural law – a law that contrary to natural law in the Roman conception actually was enforced just like the *jus civile*.<sup>48</sup> It is this individualism that was seen as inherent in Roman law in first instance by the Nazis, as well as a quality they abhorred specifically in the eighteenth century conception of natural law.<sup>49</sup> Therefore, it is no surprise that among refugee scholars the individualist tendencies in Roman law were emphasized.<sup>50</sup> Primary among them is Lauterpacht, building on his 1927 work in the course of the 1930s in developing individualist conceptions of human rights.<sup>51</sup> In 1943, he would provide his concept with the Roman *jus naturale* and *jus gentium* on the same footing, presenting *jus gentium* as the positive law component of natural law,<sup>52</sup> although in his view any fundamental relation between international law and human rights only really commences in the theory of Grotius. This development seems to be peculiar to international lawyers, as the historical narrative of the burgeoning discipline of international relations tends to start with Thucydides, with scholars such as Hans Morgenthau critiquing the usage of Roman law in an international law context.<sup>53</sup>

Generally, the Roman concept of *jus gentium* demonstrated it was possible to have a more or less universal set of rules, relatively independent from a centralized legislator, coupled with

<sup>45</sup>Sometimes excluding Hadrian as a ‘good emperor’; Tuori, *supra* note 34, at 94–105

<sup>46</sup>At times legal positivism and *jus gentium* are linked, however not in the specifically Roman conception, e.g., H. Kelsen, ‘The Legal Process and International Order’, in E. Jäckh and G. Schwarzenberger (eds.), *The New Commonwealth Research Bureau Publications* (1934), at 7: ‘The international organism whose reform is to be sought through the elimination of war and similar acts of coercion is what is called international law, the *jus gentium*.’

<sup>47</sup>E. Fraenkel, *The Dual State* (translated by J. Meierhenrich) (2017), at 137. See also F. Wittreck, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion* (2008); J. Meierhenrich, *Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (2018); D. Morris, *Legal Sabotage: Ernst Fraenkel in Hitler’s Germany* (2020).

<sup>48</sup>Cicero, *supra* note 3.

<sup>49</sup>Fraenkel, *supra* note 47, at 135.

<sup>50</sup>E.g., F. Schulz, *Prinzipien des Römischen Rechts* (1934), at 99–111.

<sup>51</sup>See, for example, his course for the The Hague Academy of International Law: ‘Règles Générales du Droit de la Paix’, (1937) 62(4) *Recueil des Cours* 95, at 228–40 (Les droits fondamentaux de l’individu).

<sup>52</sup>‘The Law of Nations, the Law of Nature and the Rights of Man’, (1943) 29(1) *Transactions of the Grotius Society*, at 16: ‘But *jus gentium* and *jus naturale* came sufficiently close together to act as a reminder that the notion of the law of nature was not pure speculation.’

<sup>53</sup>Singling out Lauterpacht and Pound: H. Morgenthau, ‘Positivism, Functionalism and International Law’, (1940) 34 *American Journal of International Law* 260, at 270. In modern histories of international relations, the Roman *jus gentium* is sometimes mentioned as a precursor, e.g., H. L. Malchow, *History and International Relations: From the Ancient World to the 21<sup>st</sup> century* (2020), at 36–45, 121–5. For Morgenthau and John Herz as pupils of Kelsen, see P. M. R. Stirk, ‘International Law, Émigrés, and the Foundation of International Relations’, in F. Rösch (ed.), *Émigré Scholars and the Genesis of International Relations* (2014), at 61–80.



concrete and accessible procedures leading to effective forms of legal protection beyond and even against a hegemonic ‘state’. Moreover, the concept inherently combined two qualities of a legal system the Nazis explicitly had decried, ‘individualism’ and ‘universality’. In this sense, the rediscovery of the Roman concept of *jus gentium* pre-empts the revival of natural law after 1945. The renewed emphasis on the universalist tendencies is by no means unique to discussions of historical ideas of international law, *jus gentium* or other forms of law beyond the state, however, a connection to effective guaranteed concrete (private law) legal remedies and protections that the Roman notion offered was a novel addition. The Roman concept of *jus gentium* thus provided a fertile ground for early constructions of an international legal order that was expected to deal with the aftermath of the conflict, however unclear the scale of the atrocities still remained at this point in time.

#### 4. Constructing a post-1945 international legal order

After 1945, there was at least a brief moment in which the individualizing and universalizing tendencies in the theory of international law in the broad sense – including political theory and international relations – may have contributed to the formation of practical institutions such as the Nuremberg tribunal and the Council of Europe.<sup>54</sup> It is debatable how long this moment lasted, and how deep-rooted its influence was. Regardless, it was precisely because of the individualist/universalist convergence identified by the refugee scholars who drove the rediscovery of the *jus gentium* that the latter came to acquire so much traction in the making of the post-1945 international legal order. The ideas of the practical creation of the law of a ‘world-state’ and the *jus gentium* as the realization of an individually and universally styled natural law mainly in the realm of international law overlapped in several influential post-war theories. Interesting in this regard in particular are the early histories of human rights that included references to Roman law in general and the *jus gentium* specifically.

The first major work to address the Roman concept of *jus gentium* after the War is Gabrio Lombardi’s diptych on the concept and several legal notions termed as belonging to it by the Romans, both squarely within an Italian dogmatic tradition.<sup>55</sup> However, erstwhile refugee scholars, but also several of those that had remained, reappraised the connection between *jus gentium* and *jus naturale* as crucial in the development of Roman legal thought and even ancient society.<sup>56</sup> Beyond the academic, the primary influence of the Roman concept of *jus gentium* on the creation of post-war international institutions was exerted via a group of conservative Catholic scholars, who answered the call for the creation of a law beyond the state by reappraising Medieval thinking about natural law.<sup>57</sup> The groundwork for this development was already laid out in the 1940s, with explicit references to the Roman link between *jus gentium* and *jus naturale*. Following Lauterpacht already in 1943, the connection between natural law and the specific Roman conception of *jus*

<sup>54</sup>E.g., concerning Lauterpacht’s influence on the drafting of the ECHR: M. Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (2017), at 236–9. An indirect relation is drawn between the Nuremberg Trials and the *jus gentium* via the idea of *bellum justum*, see, e.g., H. Kelsen, ‘Collective and Individual Responsibility in International Law with Particular regard to the Punishment of War Criminals’, (1943) 31 *California Law Review* 530, at 531.

<sup>55</sup>*Ricerche in Tema di “Ius Gentium”* (1946); *Sul Concetto di “Ius Gentium”* (1947); despite later criticism in works on other topics, according to Kaser, *supra* note 1, at 2–3, it is the last work on the specific topic before his, one marred by interpolatory criticism. For a broader perspective see S. Riccobono, ‘La Universalità del Diritto Romano’, (1954) *L’Europa e il Diritto Romano: Studi in Memoria di Paolo Koschaker* 2, at 11: ‘La universalità del diritto romano deriva dunque da quelle stesse fonti del *ius gentium*.’

<sup>56</sup>E. Levy, ‘Natural Law in the Roman Period’, (1949) *Natural Law Institute Proceedings* II 43, at 59, 68; A. D’Entrèves, *Natural Law: An Introduction to Legal Philosophy* (1951), at 19–32; L. Wenger, *Quellen des Römischen Rechts* (1953), at 6–7.

<sup>57</sup>E.g., W. Kaiser, *Christian Democracy and the Origins of the European Union* (2007). On the personalism of De Visscher and Maritain see S. Moyn, ‘Personalism, Community, and the Origins of Human Rights in the Twentieth Century’, in S.-L. Hoffmann (ed.), *Human Rights in the Twentieth Century* (2011), at 85–93.

*gentium* in a human rights context is made in 1945 by the French Catholic philosopher Jacques Maritain (1882–1973), who would later prove to be influential in the creation of the Universal Declaration of Human Rights.<sup>58</sup> A year later the Belgian professor of international law and judge at the International Court of Justice Charles De Visscher (1884–1973)<sup>59</sup> emphasizes that the *jus gentium* progressively extended the law over foreigners, evolving from a law valid outside the confines of the municipality to becoming a law that was seen as common to all mankind, one founded in natural reason at that.<sup>60</sup> In later works, De Visscher, however, argued against creating individual claims under international law, opting instead for emphasizing the moral obligations of the states.<sup>61</sup>

Apart from the Catholic personalists, the figure of Lauterpacht looms large over the post-war institutional debates surrounding the (historical) foundations of a new international legal order.<sup>62</sup> The historical narrative set out in 1943 is applied to the formulation of an International Bill of the Rights of Man in 1945, this time with an additional chapter on natural rights in British constitutional law.<sup>63</sup> In the proposal, Lauterpacht does not so much problematize the universal character of the bill, but rather its enforcement. Interestingly, the enforcement envisioned is primarily one on the national level, i.e., via the judicial organs of the state.<sup>64</sup> Beyond aiding in the development of the notion of human rights, among refugee scholars from German-speaking countries, the universalist characteristics of the Roman concept of *jus gentium* were at times employed in the service of teaching, as a notion providing easy access to the inner workings of the Civil law systems.<sup>65</sup> Noteworthy is the presence of the term in the works of the political philosopher Hannah Arendt (1906–1975), especially when viewed from the perspective of her famous conception of a ‘right to have rights’, as the Roman notion of *jus gentium* seems to combine individual subjecthood to a law transcending the nation-state.<sup>66</sup> Birmingham here refers to passages from Arendt’s 1966 *Introduction into Politics* and the 1968 work *On Revolution*, in which the Roman concept of *jus gentium* is not only seen as the basis for the Roman ‘political’ idea of law in general,<sup>67</sup> but is also contrasted with the more limiting Greek view on ‘laws’ or *nomoi*. In defining the spaces between

<sup>58</sup>J. Maritain, *Les Droits de l’Homme et la Loi Naturelle* (1945), at 72, ‘Intermédiaire entre la loi naturelle et la loi positive’, presented as synonymous with English Common law.

<sup>59</sup>For a biography see F. Rigaux, ‘An Exemplary Lawyer’s Life (1884–1973)’, (2000) 11(4) *European Journal of International Law* 877; V. Genin, *Incarner le Droit International: Du Mythe Juridique au Déclassement International de la Belgique (1914–1940)* (2018).

<sup>60</sup>‘Human Rights in Roman Law Countries’, (1946) 243 *Annals of the American Academy of Political and Social Science*, at 54; C. De Visscher, ‘The fundamental rights of man as the basis for a restoration of international law’, *Report of the Commission of Human Rights of the UN Economic and Social Council second session*, UN Doc. E/CN.4/40 (1947), at 3.

<sup>61</sup>E.g., C. de Visscher, *Theory and Reality in Public International Law* (translated by P. E. Corbett) (2015), at 125.

<sup>62</sup>Compare Lesaffer, *supra* note 30, at 153.

<sup>63</sup>H. Lauterpacht, *An International Bill of the Rights of Man* (2013), at 54–65.

<sup>64</sup>*Ibid.*, at 184–190.

<sup>65</sup>The usefulness of teaching Roman law in the US in particular was signaled early on by E. Bruck, *Römisches Recht und Rechtsprobleme der Gegenwart: Richterpersönlichkeit und Lebendiges Recht* (1930), at 14–21, and continued by, for instance, A. Ehrenzweig, ‘A Common Language of World Jurisprudence: Teaching Roman Law in Twenty Hours’, (1945) 12 *Chicago Law Review* 285, mentioning *jus gentium* at 293. The Austrian private law-expert Albert Ehrenzweig (1906–1974) was forcibly displaced from Vienna to the US, ending up at Berkeley in 1948.

<sup>66</sup>M. Canovan, *Hannah Arendt: A Reinterpretation of her Political Thought* (1992), at 220–1; P. Birmingham, ‘Hannah Arendt’s Philosophy of Law Approach to International Criminal Law’, (2014) 4 *International Criminal Law Review* 695, at 699. But decrying the link to natural law, precisely because it is beyond the realm of politics.

<sup>67</sup>H. Arendt, ‘Introduction into Politics’, in J. Kohn (ed.), *The Promise of Politics* (2005), at 178–9: *Lex* (statute) meaning ‘lasting tie’, and at 186: the *societas Romana* indicating ‘an infinitely expandable system of alliances initiated by Rome’. For Arendt on international law see S. Benhabib, ‘International Law and Human Plurality in the Shadow of Totalitarianism: Hannah Arendt and Raphael Lemkin’, in M. Goldoni and C. McCorkindale (eds.), *Hannah Arendt and the Law* (2012), at 191–214.

people, the Roman idea of law according to Arendt marked nothing less than the beginning of the Western world itself.<sup>68</sup>

As a consequence of its rediscovery among refugee scholars, there certainly was an increased attention for the Roman *jus gentium* as a precursor for modern international law in a number of 1940s handbooks. The first edition of Nussbaum's *Concise History* dates from 1947. Moreover, in Germany two general works on the history of international law were published post-war, *Geschichte des Völkerrechts* by the classical philologist Georg Stadtmüller (1909–1985) and *Völkerrecht* composed by Ernst Reibstein (1901–1966), the first volumes of both works containing discussions of the *jus gentium* in Antiquity.<sup>69</sup> Stadtmüller in his discussion explicitly links his perspective on the history (and reconstruction) of international law to the experiences during the War, the Nuremberg Trials, and the revival of natural law-thinking inspired by Radbruch.<sup>70</sup> As such, he strongly emphasizes the link between the *jus gentium* as a law common to all peoples and the *jus naturale* as its moral foundation in the Roman empire, moreover relating it to the *pax Romana* securing the peaceful coexistence of all peoples in its territory.<sup>71</sup> However, where Stadtmüller provides an in depth-discussion of traditional forms of public international law, he decries the existence of both private international law and international criminal law in Roman Antiquity.<sup>72</sup> Reibstein's work has a fundamentally different focus: the history of a (European) law of nations as an idea stemming from the development of the notion of *jus gentium* between the late-Classical imperial Roman jurists and the Early Church Fathers in first instance.<sup>73</sup>

The works of Stadtmüller and Reibstein form the introduction to a larger debate still going on that includes Nussbaum and Grewe, but also a more 'maximalist' perspective particularly of the historians of international law Wolfgang Preiser (1903–1997) and Karl-Heinz Ziegler, in which the Roman concept of *jus gentium* plays a crucial role.<sup>74</sup> Reviewing Reibstein's *Völkerrecht*, Wolfgang Preiser remarks that when the history of the law of nations is viewed from the perspective of the history of ideas, and when it is primarily the concept as it existed in the course of the Roman empire that is taken as containing its essential meaning, it is possible to view the Roman concept of *jus gentium* not just as a precursor, but as a starting point for a continuous later development of a European international law:<sup>75</sup>

Wieder befinde ich mich in grundsätzlicher Übereinstimmung mit dem Verf. wenn er, weit hinter die üblichen Ansätze zurückgreifend, die spätrömische Kaiserzeit als Ausgangspunkt nimmt und die ihr zugrunde liegenden rechtlichen und staatlichen Anschauungen der vorchristlichen Antike als "Vorgeschichte des europäischen Völkerrechts" in fortlaufender Bezugnahme in seine Darstellung mit einschließt . . . Natur- und Menschheitsrecht, Rechtfertigung des Krieges unter bestimmten Voraussetzungen, die ethischen Lehren des frühen Christentums und, durch dies vermittelt, des Alten Testaments- das alles Gehört zu den Grundlagen der europäischen Kultur allgemein, seiner rechtlichen Kultur im

<sup>68</sup>Arendt, *ibid.*, at 189: 'The Roman politicization of the space between peoples marks the beginning of the Western world- indeed it created the Western world *as world* [emphasis Arendt]. This 'space in between' was thus threatened by totalitarianism in particular.

<sup>69</sup>Stadtmüller, *supra* note 12, at 30–6; G. Reibstein, *Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis I: Vom Ausgang der Antike bis zur Aufklärung* (1958).

<sup>70</sup>Stadtmüller, *ibid.*, at 10.

<sup>71</sup>*Ibid.*, at 36. Cf. W. Preiser, 'Review of Stadtmüller', *ibid.*, in *Macht und Norm in der Völkerrechtsgeschichte: Kleine Schriften zur Entwicklung der Internationalen Rechtsordnung und ihrer Grundlegung* (1978), at 88–90.

<sup>72</sup>Stadtmüller, *ibid.*, at 36.

<sup>73</sup>E.g., Reibstein, *supra* note 69, at 45–59.

<sup>74</sup>Compare Lesaffer, *supra* note 30, at 150. Lesaffer derives the terms 'minimalists' and 'maximalists' from the Dutch Romanist Laurens Winkel.

<sup>75</sup>W. Preiser, 'Review of Reibstein', *supra* note 69, in Preiser, *supra* note 71, at 96.

besonderen- nicht nur die Vorgeschichte, sondern ein integrierender Bestandteil der Geschichte des “europäischen” Völkerrechts.

Provided it is indeed specifically a ‘European’ law of nations as a singular idea stemming from the Roman *jus gentium* we are discussing, it is Preiser himself above all who to some degree at least reintroduced it to the larger handbook-narrative of international law, for example by Wilhelm Grewe who based his section in the 1984 *Epochs on Antiquity* primarily on Preiser’s scholarship. The idea in the review of Reibstein was elaborated on in several later publications, stressing the continuity of the idea of a European law of nations founded in Antiquity.<sup>76</sup> In Preiser, however, as is the case in Grewe, the individualist private law connotation of the Roman *jus gentium* is noticeably absent, treating it exclusively in the sense of a public international law.<sup>77</sup> Given its explicit ‘European’ character, one could say it has also lost its essential universal character. Therefore, to a large extent, the journey of the idea of a *jus gentium* ends up in the 1970s where it had started at the outset of the twentieth century, despite the consequences of the development of the idea in between.

## 5. Conclusion

The question of whether the Roman notion of *jus gentium* counts in any way as a precursor to modern international law – is ‘canonical’ in its history – needs to be distinguished from whether the Roman world knew any form of international law itself. Both questions are definitionally contingent, in the sense that the answer depends on which definition of *jus gentium* or international law is upheld and employed. When reasoning from a very positivist public international law outlook coupled with the *jus gentium* solely indicating the practical presence of a (Roman) legal rule in multiple legal orders, there really is ‘no international law in Antiquity’ in the guise of a *jus gentium* or otherwise. However, ideas of what constitutes a *jus gentium* in Antiquity alone (let alone in later time-periods) and what defines the law of nations or even international law are fluid, depending on the temporal and societal context in which they are formulated. Nevertheless, in the course of the 1930s and 1940s elements of the Roman notion of *jus gentium* seem to have been rediscovered, likely due to the legal upbringing and scholarly context of various refugee scholars in combination with the aversion of the Nazis to Roman law in general. In first instance, this element was the idea of the *jus gentium* as a common law among various ancient legal orders particularly in private law relations. The names of Ernst Rabel and his comparative law colleagues in the United States are most closely connected to this reinvention of the Roman notion of *jus gentium*.

The second strand of scholarship in which the Roman notion is rediscovered in the 1930s and 1940s stresses the connection between the *jus gentium* and the *jus naturale* made in both the ancient philosophical and legal texts. The idea is that the *jus gentium* realized a universal natural law with a strong moral content, in explicit contradiction with the communal natural law of the Nazis subordinate to principles of the common good. This article argues that these strands came together in a brief period after the Second World War to provide an intellectual basis for several crucial international law institutions, evidenced by explicit relations drawn between fundamental aspects of the Roman *jus gentium* and these institutions, namely human rights and the Nuremberg Trials. Briefly put, the *jus gentium* seems to have been singled out because it provided *effective individual claims derived from a universal moral higher order beyond citizenship and (state)territory against the hegemonic legal order*. As such, the workings of the *jus gentium* as far as it was possible to ascertain them were seen as it were as a laboratory in which a variety of newly minted post-war legal notions could be tested.

<sup>76</sup>W. Preiser, ‘Über die Ursprünge des Modernen Völkerrechts’, in Preiser, *supra* note 71, at 11.

<sup>77</sup>W. Preiser, ‘Die Epochen der Antiken Völkerrechtsgeschichte’, in Preiser, *ibid.*, at 122–6.

Via the works of Nussbaum, Stadtmüller, and Reibstein in the course of time the Roman notion of *jus gentium* was reincorporated into the ‘canon of international law’, being taken up by Preisler and consequently Grewe’s *Epochs*. However, in this ‘canonical’ context the *jus gentium* lost much of the meaning it has carried from the 1930s until the 1950s. The idea of effective individual (private law) claims in particular are lacking from the public law and state-based conception of Preisler and Grewe, as it really had been abandoned in the context of human rights claims under international law before. On the other hand, based on Rabel and his colleagues this idea was actually transferred to a modern comparative and private international law context. Nevertheless, with Nussbaum, it may be said that the Roman notion of *jus gentium* especially as connected to the *jus naturale* served as an invented tradition for a number of previously non-existent legal notions. Primary among them may be the concepts of human rights and crimes against humanity as developed by Lauterpacht. The interesting question to close this article thus becomes: if these previously inexistent legal notions nowadays form an important (and growing) part of international law, should the Roman *jus gentium* in the wider sense not be reincorporated in the canon of international law? Does and should the invention of new legal notions lead to changes in the canon of the legal context in which they are reinvented?