

# AN UMBILICAL CORD TO BE PRESERVED: THE RELATIONSHIP BETWEEN ROMAN LAW AND PUBLIC INTERNATIONAL LAW

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## 1. Introduction

It is fair to warn the reader that there is a strong personal element in this essay. Somewhat to my surprise, as I went on with the tentative project of writing “something on Roman law and public international law” I became involved in a subject that, as I found with the wisdom of hindsight, had played a greater role in my academic life than I had realised. Rereading Laurens Winkel’s article in *Fundamina*, a complimentary copy of which I had received from the author on its publication, there was a shock of recognition that I certainly had not felt on my first acquaintance with the text.<sup>1</sup> I recollected that in 1997, I had not been much impressed by Laurens’ *cri de coeur* about the doubtful future of the study of Roman law. It is true, it concluded with a more optimistic final sentence, but that seemed to me a case of whistling in the dark. Laurens had a gloomy view of the future of his discipline, far too gloomy in my opinion. At that time as well as in subsequent years, I did not share Laurens’ concerns about the “un-historic tendency” of Dworkin and Anglo-Saxon legal theory in general. Nor did I wonder whether “the study of Roman law following the same course as the study of Babylonian law would [become] only the work of a small specialised group of scholars”. I was more confident, setting store by hopeful signs such as the movement towards an integration of private law in the European context, which invoked the tradition of the *ius commune*. Roman law in that context was recognised as being indeed, in Laurens’ words, “one of the roots of Western civilization”. The series of studies published with the cooperation of well-known civilians heralded, in my opinion, a return to the Roman law tradition.<sup>2</sup> I also read with much appreciation in Zimmermann’s introduction to his great book that “the

1 Winkel “The role of general principles in Roman law” 1996 *Fundamina* 103 ff., 119.

2 Hartkamp *Towards a European Civil Code* (first ed. 1994).

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‘European’ *ius commune* and the ‘English’ common law were (and are) not really so radically distinct as is often suggested”.<sup>3</sup>

Trying then and now to understand Laurens Winkel’s pessimism, I noticed in particular the weakening position of Roman law in the Dutch academic curriculum; in the nineteen-nineties it was indeed a far cry from the time I had my first real encounter with law studies in 1963. To avoid a misunderstanding, I have to explain the indirect fashion in which I made my first acquaintance with Roman law. At Groningen I continued to study history after obtaining my Bachelor’s degree at Utrecht University. As a student, I never heard a law lecture. Of course, this proved regrettable, and a rather curious preparation for a career of some forty years as a teacher at the Utrecht Law Faculty. At least, in my new environment, starting as a freshman at my fraternity, I acquired a certain interest in Roman law through conversations with my comrades, many of them law freshmen. They were fascinated by their remarkable professor, H.J. Scheltema. He was a poet of some renown, a practical joker and a public figure in Groningen, as well as an outstanding scholar. His lectures, remarkable performances in themselves, offered a general introduction to law, notably Dutch private law, on the basis of a schematic presentation of Roman law, rather than a course of Roman law as such.<sup>4</sup> This was in accordance with the traditional preparatory function of Roman law at Dutch universities. It implied a strict division between research and teaching. As Feenstra remarks, the systematic pandectist view of Roman law that Scheltema gave his students is a nineteenth-century construction, conflicting with current research and itself an object of historical research, rather than an introduction to the history of Roman law.<sup>5</sup> Scheltema’s epoch-making research in Byzantine law did not feature at all in his general course and was unknown to his undergraduate students. His successors at Groningen, following his example, persisted in the pragmatic use of Roman law as a general introduction.

As regards the strong position of Roman law in the curriculum, things were not much different at Utrecht University when I started my career in 1967. I found in place a legal history department of considerable dimensions. Indeed, at that time it had slightly more staff than the departments of public international law and EU law together. As the assistant to Ms. J.K. Oudendijk, then professor of the history of international law,<sup>6</sup> I found myself included in the department of public international law, in an anomalous position according to the legal historians, but one I came to appreciate as I witnessed the decline of Roman law in the Utrecht curriculum, and a consequent drastic reduction of the staff allotted to the teaching of legal history. This certainly did not reflect the scientific output of the legal historians.<sup>7</sup> It was, rather, the outcome of a general shift in the organisation of teaching that was taking place at all Dutch law faculties. Far stricter time slots were

3 Zimmermann *The Law of Obligations Roman Foundations of the Civilian Tradition* (1996) xi.

4 Feenstra “Herdenking van Herman Jan Scheltema” 1984 *Jaarboek KNAW* 192-199.

5 Feenstra (n. 4) 197.

6 A chair established in honour of the major historical studies of J.H.W. Verzijl, Professor of Public International Law at Utrecht University (1919-1958).

7 Spruit was the editor of the Dutch translation of the *Corpus juris* (completed 2012), an enormous enterprise that met with a national and international response. Van den Bergh published a seminal study, *Die holländische elegante Schule* (2002).

introduced, notably at the expense of the introductory course in Roman law. In Utrecht and elsewhere in the Netherlands, Roman law is no longer an obligatory subject, even for civil-law students.<sup>8</sup> This is not just a Dutch story. In France and Germany, the picture seems not much different. I can no longer cherish my optimism about a new European role for the *ius commune*.<sup>9</sup> Once the consciousness of a common tradition has been lost, it seems that the necessary convergence between European legal systems will be hard to achieve. As a teacher of modern public international law as well as of its history, I regretted students' general ignorance of the basic notions of Roman law. With some ten years' delay, as I recently realised, I had come to understand and to a great extent to share Laurens' mood of 1996, though as an internationalist my perspective may be less gloomy than his. In this essay then, I propose to sketch the past relationship between Roman law and public international law and to offer my view of the future of that relationship.

## 2. The history of the relationship between Roman law and public international law: Grotius and Lauterpacht

At the outset, a brief exposition of the author's position in the current argument on the origins of public international law will be useful. It is a subject on which controversies still abound. Much depends here on the definition of "public international law". If we reserve the use of this term to a normative system between sovereign states, not based on common religious or cultural bonds, the definition excludes Islamic, Indian and Chinese "international systems" as well as the medieval *Respublica Christiana*. Neither the *ius gentium* of antiquity nor the customary norms elaborated in the Carolingian Empire for communication with outside powers can qualify as normative systems between equal partners.<sup>10</sup> In our opinion, it is therefore the *Ius publicum europaeum* (*Le droit publique de l'Europe*) of the seventeenth century that first fulfils the criteria of a recognisable and acknowledged legal system. The term is notably in evidence at the Peace of Utrecht (1713). More or less in agreement with Kintzinger, we would prefer a "gestation period" from the 1400s onwards.<sup>11</sup> Public international law was certainly not an Athena springing from Zeus' head but the fruit of a long gestation period. The definition outlined here is frankly Eurocentric in denying to non-European regional systems a significant role in the genesis of public international law.<sup>12</sup>

8 Interestingly, at Groningen Roman law maintained a stronger position.

9 Wieacker *Privatrechtsgeschichte der Neuzeit* (1967).

10 Kintzinger "From the late Middle Ages to the Peace of Westphalia" in Fassbender & Peters (eds.) *The Oxford Handbook of the History of International Law* (2012) 607 ff. Cf. Steiger *Die Ordnung der Welt* (2010) 19; Baldus *Regelhafte Vertragsauslegung nach Parteirollen im klassischen römischen Recht und in der modernen Völkerrechtswissenschaft. Zur Rezeptionsfähigkeit römischen Rechtsdenkens* (1998) 739, 749.

11 Kintzinger (n. 10) 620; Roelofsen "De periode 1450-1712" in Eyffinger (ed.) *Compendium Volkenrechtsgeschiedenis* (1991) 43 f.

12 A critical view in Lorca "Eurocentrism in the history of international law" in *The Oxford Handbook of the History of International Law* (n. 10) 1034 f.

Roughly from the fifteenth century onwards we can observe various regimes of an “international” character in operation between European political entities. One such was the *Law of Arms*. The contents of this “law of armed conflict” owed less to Roman practice and notions like *postliminium*<sup>13</sup> than to the code of chivalry of European knighthood and Church doctrine. But since “the Church lived according to Roman law” and disputes under the “law of arms” were adjudicated by courts such as the Parliament of Paris, Roman law, that is essentially Roman private law, came to exercise a considerable influence.<sup>14</sup> This is also true in the case of the *lex maritima* administered by admiralty courts. Customary law, national ordinances and treaties constituted the main ingredients of substantive law, but the interpretation of these rules was in the hands of civilians, lawyers trained in Roman law. They set store by Roman precedents such as the principles of contraband in Paulus’ *Sententiae*.<sup>15</sup> It is not a coincidence that civilians, not common lawyers, advised the English Crown on international affairs and administered prize law in the English Court of Admiralty, as their counterparts did in France and the Netherlands.<sup>16</sup>

It is not by accident either that to illustrate the evolution of the relationship between Roman law and nascent international law I choose a maritime case from the early seventeenth century. In 1606, some Pomeranian merchants were despoiled by a Dutch privateer, turned pirate. As an international case, this started in 1609 with the complaint to the States-General by the Duke of Pomerania, protesting against the treatment of his subjects, neutrals in the Spanish-Dutch War.<sup>17</sup> The Stettin merchants, or rather the law faculties of some German universities, in *consilia* on their behalf, based their argument on the *lex Aquilia*.<sup>18</sup> According to their construction of the case, the captain of the vessel, having received a commission from the States-General, was their “agent”. Since he had committed robbery, he was obviously not a reliable person. Consequently, there was *culpa in eligendo*, fault by a negligent choice, not by *dolus*, by a wrongful action; since it was not in dispute between the parties that Dutch privateers were instructed to respect neutral property at sea. Against this, the Advocate-Fiscal of the Amsterdam Admiralty representing the States-General in the trial before the Supreme Council of Holland and Zeeland at the Hague pointed out, as a subsidiary argument, that the *lex Aquilia* was not applicable since the captain in question enjoyed a good reputation before he turned

13 D. 49,15.

14 Roelofsen “International arbitration and courts” in *The Oxford Handbook of the History of International Law* (n. 10) 153 f.

15 D. 39,4,11. Spruit & Bongenaar *Gaius en Paulus* (1984) 170.

16 Wijffels *Qui millies allegatur* (1985). Roelofsen “La relation entre le droit romain et le droit coutumier dans quelques procès de prise devant la Cour de Hollande et le Grand Conseil de Malines” in *Idem Studies in the History of International Law* (1990) 27 ff. On prize law in general, see Verzijl *International Law in Historical Perspective The Law of Maritime Prize* vol. 11 (1992) and Hill “Prize law” in Hattendorf (ed.) *The Oxford Encyclopedia of Maritime History* (2007) 3, 384 f.

17 Roelofsen “State responsibility and jurisdiction: Grotius and an early 17th century case” in Gill & Heere (eds.) *Reflections on Principles and Practice of International Law* (2000) 109 f. The late Professor Feenstra pointed out, after the publication of this essay, that Grotius had been the author of Storm’s plea: see R. Feenstra “Die Quasi-Delikte bei Hugo Grotius” in Feenstra *Histoire du droit savant(13<sup>e</sup>-18<sup>e</sup> siècle)* (2005) 175 f.

18 D. 9,2,27,11; Zimmermann (n. 3) 16 f., 1121 f.

pirate.<sup>19</sup> The main Dutch argument, however, was the statement that the invocation of the *lex Aquilia*, a law in force between Roman citizens, was not admissible. As the Advocate-Fiscal or rather Grotius, the author of the plea, presented the case: between the parties, the States-General and the Stettin merchants, there was “no legal community of domestic or civilian law, but only a *communio iuris gentium* consisting in natural reason and equity”.

According to Grotius, State responsibility did not arise from the action of private persons, even if they were official agents of the State. States would only be liable if they had ordered their agents’ action or if they took up the defence of individuals who were at fault and refused to subject their actions to justice.<sup>20</sup> As Grotius argued, the condition imposed on Dutch privateers, namely the constitution of pledges for their behaviour, was stricter than prescribed by customary international requirements, notably as established by French practice. International Law was applicable, not “municipal law, and that not a universal rule, but one introduced as against sailors and some other persons for particular reasons”.<sup>21</sup> Reading this attentively we may – indeed we should in my opinion – conclude that Grotius does not refuse a binding character to general norms of Roman law.<sup>22</sup> However, the strict liability of certain categories of persons, notably sailors, introduced by the *lex Aquilia* merely reflected specific conditions existing in Roman society. This criterion should not be applied to the relationship between governments and privateers commissioned by them. A general maxim that States are responsible for the actions of duly commissioned privateers can therefore not be established by the *lex Aquilia*. We have gone into the case in some detail, since it highlights the complexities of the relations between international law and Roman law. Grotius “found”, or rather construed a rule on State responsibility out of alleged precedents, both from Dutch history and contemporary practice, and – not surprisingly – this was accepted in a Dutch court.<sup>23</sup> The general concept of responsibility that Grotius found in Roman law, he adapted to cover State responsibility under natural law.

The episode illustrates Grotius’ systematic approach. He carefully outlines in the chapter “on damage caused by injury and the obligation arising therefrom” a subject that we would describe as the Responsibility of States for Internationally Wrongful Acts. The

19 The Supreme Council had been offered by the States-General as an “impartial” court and accepted by the Duke of Pomerania on behalf of his subjects. Dutch regulations attributed jurisdiction in prize cases to the Admiralty Court, in this case the Amsterdam Admiralty. This had been inculcated by the Pomeranians.

20 This is clearly a reference to *déni de justice*, the base of reprisals. In the affair discussed here, the threat of reprisals against Dutch merchants within the ports of Pomerania was suggested by Duke Philip of Pomerania in his correspondence with the States-General.

21 See Kelsey’s translation of *De jure belli ac pacis* (1925) 2 437.

22 This would be *not* because Roman law in itself was binding, but because many Roman legal norms codified universally accepted principles. De Kanter, Van Hettinga, Tromp, Feenstra & Persenaire (eds.) *De iure belli ac pacis* (1625, ed. 1993) Prolegomena (53) 26. A good example is the reference to D. 12,1,32 in Grotius II, 10,2,2: Zimmermann (n. 3) 874, 880.

23 It was indeed Grotius who construed the Dutch case. The late Professor Feenstra proved, after the publication of my essay (n. 17), that the Advocate-Fiscal Storm merely reproduced Grotius’ argument. See Grotius’ account of the affair II, 17,20,2: De Kanter et al. (n. 22) 432, 433.

comparison with the Draft Articles (*DARSIWA*) of 2001 is instructive. The commentary on *DARSIWA*: “one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law” reads like a transposition of Grotius’ “the liability of one for the acts of his servants without fault of his own does not belong to the law of nations, according to which this question has to be settled, but to municipal law”.<sup>24</sup> We are not suggesting that *De Iure belli ac pacis* is just a seventeenth-century international-law manual. Haggemacher’s massive study has made a persuasive case against that, placing the book firmly within the context of the scholastic just war theory.<sup>25</sup> In our opinion, this makes the comparison all the more interesting. *DARSIWA* is the product of the International Law Commission’s systematic programme of “progressive codification” of international law. It is the result of what we may call a quasi-legislative process in which the International Law Commission and the General Assembly are due to cooperate. That a United Nations organ reproduces a basic rule enunciated in 1625 proves the rule’s fundamental and indispensable character. Apparently, general legal principles rooted in Roman law still survive in international law. In part, this is no doubt due to the creative use of Roman law by Grotius and other seventeenth-century lawyers, in contrast to the somewhat mechanistic invocation of the *lex Aquilia* by the German universities that we noticed in the Pomeranian case, which is similar to the indiscriminate use of Roman tags in earlier practice.<sup>26</sup> This is not a matter of mere antiquarianism.<sup>27</sup> Understanding the historic base of contemporary doctrine provides a useful, indeed necessary, introduction to contemporary problems.

The “Pomeranian affair” for instance not only serves to illustrate the concept of state responsibility, it also takes us to a part of maritime law that currently is enjoying a new surge of interest: piracy and the use of force at sea by proxy. Privateering as a means of engaging auxiliary forces may have nominally disappeared in 1856, but its relics remain. It is often overlooked that the granting of commissions to private ship-owners did not vanish at a stroke through the Paris Declaration of 1856. Among the States refusing to become parties to the declaration, the United States expressly protested the abolition of privateering. The American government denounced it as a means of strengthening the traditional maritime powers, notably Great Britain, as against powers such as the United States with a large merchant fleet but a relatively weak navy. However, in 1861, after the Confederate States seceded from the Union, the United States government announced its accession to the Paris Declaration. Great Britain and France refused to accept this as operative during the American civil war. Both belligerents, the United States as well as the Confederate States, consequently retained the right to grant privateering commissions, a legal situation that resulted in the career of the *Alabama*. Indeed, the United States never became a party to the Paris Declaration, and Spain acceded to it only

24 UN International Law Commission Report of its 53d session (2001) Official Records 56th Session Supplement No. 10 (A/56/10) Ch. IV 38; Kelsey (n. 21) 437.

25 Haggemacher *Grotius et la doctrine de la guerre juste* (1983); Idem “Hugo Grotius” in *The Oxford Handbook of the History of International Law* (n. 10) 1100.

26 Wijffels (n. 16) passim.

27 Zimmermann (n. 3) x; Winkel (n. 1) 119.

as late as 1908.<sup>28</sup> Contemporary piracy, as well as the measures taken to repress it, has given a new topicality to the subject of private and semi-private use of force at sea. An entangled affair like the *Enrica Lexie* may serve to warn us against the bland assumption that UNCLOS 1982 has solved the problems of Grotius' age.<sup>29</sup> Surprisingly, there have even been suggestions in the United States that privateering be resurrected as a means of combating Somali piracy.<sup>30</sup>

One author who would certainly not have been surprised at this conclusion is Lauterpacht. To quote:

It was Grotius who introduced the conception of fault into this branch of international law. 'That any one' he says, 'without a fault of his own, is bound by the acts of his agents, is not a part of the law of nations.' 'A civil community, like any other community, is not bound by the act of an individual member thereof, without some act of its own, or some omission. This 'fault of his own' lies in *patientia* and *receptus*, namely in the sharing in the crime by 'allowing' or 'receiving'. The principle thus introduced by Grotius into international law was based on the Roman law doctrine of liability as dependent on *culpa*. It is, subject to modifications and exceptions, the foundation of the doctrine of liability in modern systems of private law. There are in international law few examples of both theory and practice following so closely in the footsteps of the founder of international law as in the case of this private law principle of culpability. The opposing theories do not arise before the end of the last century.

The great historical service rendered to international law by the introduction of this principle can only be fairly estimated by considering the state of affairs to which the *culpa* theory was originally opposed. It was directed against the Germanic doctrine of reprisals based on collective responsibility for wrongs done to a State or its subjects by a foreign State or its subjects. There was an element of perpetual strife and anarchy in this reversal of the Roman principle of '*si quid universitati debetur singulis non debetur; nec quod debet universitas singuli debent*', an element so rooted in the habits and usages of Grotius' time that the great lawyer himself was not free from a partial justification of some aspects of this practice. However, it is obvious that by the adoption of the principle of *culpa* he dealt a deathblow to the doctrine of collective responsibility. It is not possible to expatiate here upon the merits of the doctrine introduced by him, but it may be stated with confidence that it became a part not only of the science of international law but also of the practice of governments. It is believed that it corresponds with the conception of States as moral entities accountable for their acts and omissions in proportion to the *mens rea* of their agents, the real addressees of international duties – a conception which must form the foundation of any legal theory of responsibility.<sup>31</sup>

28 The Dutch Criminal Code, reflecting the nineteenth-century situation, still mentions privateering commissions in art. 381.2: piracy is defined among other things as transgressing the conditions set in a privateering commission or carrying commissions of belligerent states in conflict with each other.

29 Sankar "Jurisdictional and immunity issues in the story of *Enrica Lexie*: A case of shoot and scoot turns around" Blog of the European Journal of International law [www.ejil.talk.org/author](http://www.ejil.talk.org/author) (accessed 12 Feb 2014).

30 Hutchins "Structuring a sustainable letters of Marque Regime: How commissioning privateers can defeat the Somali pirates" 2011 *California Law Review* 819 f.

31 Lauterpacht *Private Law Sources and Analogies of International Law* (1927) 135 f.

Hersch Lauterpacht, a naturalist and an admirer of Grotius, placed himself resolutely in what he called the Grotian tradition.<sup>32</sup> As we have seen, he considered Grotius to have established the conception of fault in the theory of State responsibility. Also, he considered Grotius to be the founder of international law. On neither count can we share his conclusions; at the least, we would have to revise them considerably. If Grotius indeed found occasion to elaborate a theory of State responsibility in the affair of 1609, it was as we have seen not Roman law, but state practice that in the first place helped him to exculpate the States-General.<sup>33</sup> In addition, after about a century of fundamental critical research into the sources of Grotius' ideological and intellectual background, we cannot simply credit Grotius with the creation of the discipline of public international law. In other words, Lauterpacht could anticipate neither a detailed inquiry into the case of the Pomeranian merchants, nor Haggenmacher's painstaking research into the scholastic roots of *De iure belli ac pacis*. What are we then to make of Lauterpacht's conclusion, his impassioned rejection, quoted above, of a theory of State responsibility merely based on State practice, "divorcing legal responsibility from the moral one"? Here we may turn to the recent comment by Iain Scobie in the Oxford Handbook.<sup>34</sup>

Scobie describes Lauterpacht's vision of international society as "founded on the rule of law or, as Koskeniemi puts it, that 'international lawyers, in particular international judges, should rule the world'".<sup>35</sup> The implied criticism here is of course that Lauterpacht overrated the importance of law in international relations and therefore arrived at a rather naïve view of international society. However, in his conclusion Scobie states, "Lauterpacht has an enduring legacy, due to the academic legacy of his writings and their vision of world order, methodological and intellectual perspectives they embody".<sup>36</sup> Indeed, my reference to Lauterpacht confirms Scobie's conclusion. Lauterpacht was the logical choice as the key witness in favour of the close connexion between Roman law and public international law. Lauterpacht's own conclusions leave no doubt as to his argument. A final quote is due:

There exists a customary rule of international law to the effect that 'general principles of law', 'justice', and 'equity' should, in addition to and apart from custom and treaties, be treated as binding upon international tribunals. These sources, which are shown by the practice of international tribunals to connote legal rules proper and not precepts *ex aequo et bono*, are for the most part, identical with generally recognised rules of private law.<sup>37</sup>

This is still true today, even if the original derivation of such general principles has often been overlaid with case law.<sup>38</sup> However, if Lauterpacht protested as early as 1927

32 Scobie "Hersch Lauterpacht (1897-1960)" in *The Oxford Handbook of the History of International Law* (n. 10) 1179 f.

33 Above (n. 21).

34 Above (n. 32).

35 Above (n. 32) 1180.

36 Above (n. 32) 1182.

37 Above (n. 31) 298 f.

38 A well-known example being the Chorzow (1928) principle "that reparation must, as far as possible, wipe out all the consequences of an illegal act", quoted by the International Court of Justice in the *Arrest Warrant Case* (Democratic Republic of the Congo v Belgium) (2000) par. 76.



against the “uncritical iconoclasm in relation to private law manifested by modern positivists”, we must suppose that he would have been even more seriously worried in 2014. Presumably, he would have sympathised with Laurens Winkel’s pessimistic prognosis of 1997, the point of departure of this essay. He would no doubt still have considered the link between private law, notably Roman law, and public international law, to be essential to the principle of the rule of law.

### 3. The present: conclusion

Interest in the history of public international law has increased greatly since 1990. The impact of the school of critical legal studies has been considerable. Koskenniemi, Kennedy, Carty and Anghie, to mention a few names, have exercised considerable influence. Their fundamental criticism of the European tradition as well as the surge of studies by non-European scholars has led to an increased interest in the interaction between European powers and non-European entities. The 2012 *Oxford Handbook* reflects these shifts of focus. Closer to the academic concerns of both Laurens Winkel and myself is the resurgence of studies on Grotius. As long-time president of the directorial board of the Foundation Grotiana, Laurens has been actively involved in the development of Grotian studies in the Netherlands as well as – to a considerable degree – globally.

At the same time, as we have already remarked, in the Netherlands during the last twenty years that part of the legal syllabus devoted to legal history has been much reduced, particularly in respect of Roman law. Inevitably, this is reflected in the composition of faculty staff. The career prospects of Romanists have been much reduced and the future of the study of Roman law in the Netherlands, as elsewhere in Europe, is clearly at risk. Laurens’ nightmare of Justinian and Hammurabi becoming equally irrelevant to the next generation of lawyers sometimes looks like a realistic forecast. This would be a serious loss, particularly in the global perspective. Roman law is a common element, not only in European national legal traditions but also in many non-European jurisdictions. Among European countries there might be an alternative, particularly among the members of the EU. EU-law and the common jurisprudence of Luxembourg and Strasbourg might yet serve as a basis for a future common civil code, and would at least provide a firm link between the national jurisdictions. The rule of law is firmly anchored in the common EU institutions and the conditions these impose on national legislations. Comparative law would largely take over the role of legal history.<sup>39</sup> In our opinion, in public international law the loss of the common Roman-law tradition would be far more serious.

The results of Baldus’ massive comparative study of the functioning of the Roman judge and the International Court of Justice would at first glance seem to contradict this assertion.<sup>40</sup> Baldus concludes after a painstaking analysis that “a reception of Roman ideas will regularly prove to be difficult ... and even without any great interest.” In the last resort, however, Baldus agrees with Scheltema:<sup>41</sup>

39 Such a comparative-historical approach is for instance to be found in the recent Rotterdam thesis of Tervoort *Het bestuursverbod bij de commanditaire vennootschap* (2013).

40 Baldus (n. 10).

41 Feenstra (n. 4).

International law should, however, cultivate traditional means of legal reasoning in order to be able to have recourse to them in times of different conditions of reception. The value of Roman law lies in our times in this primarily methodological and didactical perspective ...

One characteristic of Roman private law indicates that it will, in any instance, always serve well especially in international law: its technical concentration on the subjective point of view and its prudent way to consider current 'objective' social rules.<sup>42</sup>

This indeed is grist to my mill. The technical and secular character of Roman law (and therefore of classic public international law) facilitates its reception across religious frontiers.<sup>43</sup> In two decades of teaching mixed classes, often including students with a non-European background, I learned the wisdom of stressing the technical, indeed 'legalistic' approach to the history of public international law. International law in the seventeenth century as well as at present was *not* merely a convenient way of imposing the rule of the strong on the weak. It always included a normative element. This is often best taught by starting from Roman law adages. *Ut res potius valeat quam pereat* is a more useful starting point in discussing the status of Gibraltar as laid down in the Peace of Utrecht in 1713 than referring to the 1969 Vienna Convention on the Law of Treaties. Many students had at least some grasp of Roman law, on which a teacher could base the historical and legal exposition of the problems involved in, for instance, title to territory in colonial situations. It is evident that the complete disappearance of a basic acquaintance with Roman law will be a handicap in teaching public international law. An alternative common ground is not available.<sup>44</sup> Consequently, it might become advisable to include an introduction to Roman law in Master's courses in public international law. Let us hope this will not become necessary.

In conclusion, the relationship between Roman law and public international law is not only of academic interest; it is valuable both in teaching and in practice. Here I find myself in agreement with Laurens Winkel in whose Rotterdam classes on the history of international law the Roman-law element is well represented. Roman law and its European tradition indeed appear to me still an indispensable element in public international law as it stands today. International law, according to a classical pun, lacks a legislator, police and a judge. The institutional framework and the imposing corpus of legislative treaties established after 1945 rest on consent. States are still joined in what Hedley Bull called an "anarchical society". In this society deep rifts are evident, some of them between "the West and the rest." Neglecting or abandoning the rule of law, as the cornerstone of the existent international order would not be a viable solution. In Baldus' words, within the present international legal order, Roman law offers an element of flexibility. It would be unwise to abandon a living tradition that still has much to offer. We should therefore preserve the umbilical cord between Roman law and public international law.

42 Baldus (n. 10) 762.

43 Cockayne "Islam and international humanitarian law: From a clash to a conversation between civilizations" 2002 *Revue internationale de la Croix Rouge* 597.

44 Starting from the corpus of human rights is not advisable in a general course on public international law.

**Abstract**

In the Netherlands and elsewhere the position of Roman law as an integral part of legal studies is now under a serious threat. This is not a matter for civilians only. International lawyers have good reason to be concerned. Public international law is not only in its origins the product of the European Roman law tradition; its development too owes much to imported Roman law principles and institutions. These have not been rendered obsolete by the massive United Nations codifications and the enormous development of international law in the last fifty years. There is no international legislature and therefore no “global constitution”. However, a common legal system overarching the material rules is indispensable. Traditionally, this function was fulfilled by Roman law. Because this threatens to disappear from general legal education, it makes sense to strengthen the historical introduction, notably its Roman law component, in the curriculum of future international lawyers. Somewhat to my surprise, this pragmatic conclusion leads me to agree with the conclusion of Professor Baldus’ comparative study and to vindicate Laurens Winkel’s practice as a teacher of the history of international law.