The *ius pacis* in Ancient Rome

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I. INTRODUCTION (1)

A. The Problem. According to some scholars (2), the Romans had no Public International Law, because: (a) there was no community of nations or *comitas gentium*; (b) the

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2) Cfr. TOMULESCU, *RIDA* 24, pp. 423f.

Romans had no significant body of Public International Law; and (c) they did not recognize the principles of equality and reciprocity with other nations; they simply imposed their rules on other nations (3).

According to other scholars (4), we must distinguish two periods in the history of Rome. The first period ranged from the origins of Rome to 338 BC (or, if you will, to the unification of Italy by Rome, ca. 270 BC). During this period the Romans had a Public International Law, because they did recognize the principle of equality and reciprocity with other nations (hence, there was a *comitas gentium*) (5), as the existence of *foedera*

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3) The principles of equality and reciprocity entail the mutual recognition of sovereignty, i.e., of independence (historical identity) and of government (formal identity). It is claimed that independent States, like human persons, have innate rights, that is, natural rights which flow from the very being of the State. Cfr. H. GROTIUS, 1583-1645 (*De Iure Pacis et Belli*; a work which apparently played an important role in drawing the Peace of Westphalia in 1648) who has been hailed as the father of "Modern International Law" and one of the major exponents of the "Natural Law School". Now, one of the natural rights is security against interference in internal matters. However, some jusnaturalists claim that exceptionally a State may interfere in the affairs of another State, namely: (a) on the plea of balance of power, i.e., to prevent a State from acquiring new territories or dangerous weapons (thus, justifying preemptive strikes); (b) on the plea of humanity, i.e., to remedy the terrible conditions of a State or some minorities; (c) on the plea of preventing revolutions; (d) on the plea of forcing commerce; etc.

4) Cfr. TOMULESCU, *ibidem.*

5) The doctrine of the *comitas gentium* is based on the general principle that when a citizen of a State has acquired certain rights (e.g., property rights, contractual rights, etc.), he is regarded as invested with these rights in any other country he visits or takes domicile, and the court of the host country will assist him to enforce these rights. However, there is an exception to this general principle, namely, when there is a conflict between a foreign law and the national law, the national court may hesitate to recognize the foreign law on grounds of State Policy (generally, on matters dealing with the public

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aequa, i.e., Equal Treaties (which took the form of a juridical act and consequently created bilateral obligations of a legal nature) (6) demonstrates (7).

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health or public morals; e.g., burial in the house, marriage celebrations, etc.). A propos of the recognition of Aliens' rights note Cicero's appeal to transcendent natural rights (*De Officiis* 3, 6, 28): "but those who say that the rights of the citizens should be upheld but those of the foreigners be denied, would destroy the common bond of mankind" (*qui autem civium rationem dicunt habendam, externorum negant, ii dirimunt communem humani generis societatem*).

6) According to Cicero (*Pro Balbo* 6, 15), there is, among all peoples, a universal law of War and Peace. And, according to Livy (34, 57, 7-9), there were three kinds of Treaties (*foedera*): the *foedus iniquum* (Unequal Treaties), which existed between the conqueror and the conquered when the conquerer unilaterally imposed his commands to the conquered; the *foedus aequum*, which existed between two militarily equally matched belligerents when they concluded a Treaty of Peace on an equal footing; and the *foedus sociale*, which existed between two nations when they made a Treaty of alliance (of mutual assistance). Since the stronger generally tends to lead the weaker, the scholars have referred to the last type of Treaty as *foedus minus aequum*. Generally, the *foedus aequum* included: (a) the guarantee that the citizens of one community were protected in the other community in respect to both their person and their property; (b) the guarantee that all disputes between citizens of the two communities were to be resolved by a special tribunal of judges; and (c) the grant of *hospitium publicum* and of *amicitia*, which entailed the *ius commercii ex iure gentium*, the exchange of envoys, etc. Cfr. Dion. Hal. 6, 95; *NNDI*, "Foedus"; PHILLIPSON, vol. I, pp. 113f.

7) In the first period, the administration of the *ius belli et pacis* in Rome was entrusted to the priestly college of *fetiales* (hence, the *ius belli et pacis* was also known as *ius fetiale*). According to Cicero (*De Officiis* 1, 36), the fetial procedure for a declaration of a just war was as follows: (a) *Petitio rerum*, in which the plaintiff State requested satisfaction from the defendant State for a wrong suffered; (b) *Belli denuntiatio*, i.e., formal notice of war or ultimatum, if the defendant State ignored the request to comply with the complaint within a specified time; (c) *Belli indictio*, i.e., formal declaration of war and beginning of hostilities, if the defendant State persisted in its refusal of compensation. See also Livy 1, 32; 3, 25; 4, 30 and 58; 7,6 and 31; 30, 26; Pomponius, D. 49, 15, 5, 2.

The second period ranged from about 338 BC to about 400 AD, after which the Western Roman Empire was moribund, and the traditional date for its demise is 476 AD (8). During this period the Romans "generally" rejected the principles of equality and reciprocity with other nations and more often than not succeeded to impose their will on them (9), as the existence of the *foedera iniqua*, i.e., Unequal Treaties, demonstrates.

B. The Purpose. The purpose of this paper is to review the sources and attempt to provide a profile of the Law of Peace (*ius pacis*) of ancient Rome and thus indirectly shed some light on its Foreign and Domestic Policies.

In regard to Foreign Policy the scholars still argue whether during the Republican period, at least, it was motivated by a spirit of hegemony, of imperialism (*ut imperaret*) or of self-defence (*ut esset*) (10). For the imperial period, however, there seems to be a

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8) The last stronghold, however, of the Eastern Roman Empire, i.e., Constantinople, fell in 1453.

9) There still appeared an occasional *foedus aequum* after around about 270 BC. But such an equality was "symbolic" rather than "real". The reality was that the contracting parties with Rome were submitting (whether rancorously or obsequiously) to the Roman terms or, if you will, to the Roman Might. Such references to the contracting parties as *civitates foederatae*, *liberae* or *isologia*, etc. in the treaties were acts of Roman condescendence to an inferior power. One can argue about the time when the Roman Foreign Policy shifted from the *aequa foedera* to the *iniqua foedera*. It certainly was not an overnight decision, but rather a long process of evolution of attitude. Cfr. Polybius 24, 10, 9; 30, 31, 16; Cicero, *De Officiis* 2, 8 (27f); E.S. GRUEN, *The Hellenistic World and the Coming of Rome*, Berkeley 1984; J.L. FERRARY, "Traités et Domination Romaine dans le Monde Hellénique", in L. CANFORA, *op.cit.*, pp. 217ff.

10) Cicero, *De Officiis* 1, xii (38). See also Livy's *caput rerum Romam esse* (1, 45, 3). Commenting on it, R.M. OGILVIE (*A Commentary on*

consensus that, by and large, the Foreign Policy was one of Containment of the Barbarians (11). I submit that Rome's Foreign Policy was essentially determined by practical considerations of Realpolitik as the cases arose from time to time.

In regard to Domestic Policy I submit that it was one of gradual, albeit slow, cultural and political integration of the various nations brought under Rome's *imperium* (12). Note,

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Livy: Books 1-5, Oxford University Press, 1970, p.183) wrote: «a phrase redolent of Augustan ethos (cfr. Livy 5, 54, 7); thus in Ovid, *Met.* 15, 736 *iamque caput rerum Romam intraverat urbem* and later in Tacitus, *Hist.* 2, 32; Man. 4, 689. The boldness and presumption of the phrase are compared by FRAENKEL (Horace 452) with the sweeping simplicity of Horace's *custode rerum Caesare* (Odes 4, 15, 17). The first traces of awareness of Rome's destiny are no earlier than the third century. Until that time Rome was struggling for her standing in Italy but her successes against Pyrrhus lifted the veil on a wider scene. Cfr. Lycophron 1226-33 (if genuine) and Ennius' translation of Pyrrhus' dedication at Tarentum (199-200). The most that Romans of Servius' day would have aspired was to supplant Aricia as the 'capital' of Latium».

For one of the latest rounds of debate on whether the Roman Empire was the result of self-defence or imperialistic wars see W.V. HARRIS, ed., *The Imperialism of Mid-Republican Rome*, Rome: Papers and Monographs of the American Academy in Rome, 29, 1984. This issue really pertains to the Law of War (*ius belli*) and I have dealt with it in another project. In this paper, therefore, I will concentrate on the Diplomatic and Domestic Policies regarding Foreigners and Subjects, i.e., on the law of Peace (*ius pacis*).

11) The most notable exceptions to the Policy of Containment would be the Roman futile attempts to move the frontier from the Rhine river to the Elbe river and to incorporate the Mesopotamian region. For an exponent of Foreign Expansion, however, see Tacitus, who strongly advocated the Northern Expansion against those who favored the Near Eastern Expansion. If I may paraphrase Tacitus, the Foreign Policy dilemma of the expansionist faction was: *aut Germania aut Mesopotamia.* See also N. LEWIS & M. REINHOLD, *Source Book II : The Empire*, pp. 42ff.

12) Livy 1, 2, 4 for the legendary fusion of the Trojans and the Latins; Livy 1, 13-14 for the fusion of the Sabines with the Romans; Livy 2, 16, 4

however, that the cultural fusion had already begun in the Eastern Mediterranean as a result of the Empire of Alexander the Great; but now it spread in the Western Mediterranean and Europe as a result of Rome's military unification.

Originally, the Roman People formed a loose federation of clans (*gentes*). These *gentes* were essentially independent groups in matters both within the clan (*gens*) and between the clans (*inter gentes*). Relations with people outside the federation, however, were generally carried out by the federal assembly of the clans (*gentes*); exceptionally, however, a *gens* might carry out a raid or a reprisal against an outside *gens* or community without the approval of the federal assembly (13).

Relations with *gentes* within the federation, in this early stage of the Roman community, were generally left to the private initiative of the *gentes*, so that private justice sometimes could degenerate into a real war, unless the defendant *gens* expelled the individual wrongdoer or extradited him to the injured *gens* (noxal surrender), or both *gentes* agreed to abide by the decision

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for the political assimilation of the *gens Claudia*; Livy 1, 28 for the fusion of the Alba Longans with Romans. Above all, see the Emperor Claudius' grants of citizenship in *FIRA* I, nos 43, 70 and 71; Tacitus, *Ann.* 11, 23-25; A.N. SHERWIN-WHITE, *RC*, p. 168; and Caracalla's Act in *FIRA* I, n. 88.

13) For Livy's (2, 48ff) famous account of the Fabian military expedition against Veii see OGILVIE, p. 362: "The Fabian expeditionary force was regarded by the Roman legal opinion not a *militia legitima* but as a *coniuratio*... Livy unconsciously makes the expedition a *militia legitima* to enhance the tragedy of it".

of a tribunal of other clan-chiefs of the federation, who gave their judgement in accordance with the customary practices of the *gentes* (*ius gentium*, i.e., Law of the Clans) (14).

The *ius gentium*, therefore, originally referred to the customary uses and practices among the neighboring Roman *gentes*. Later, however, it included the customs among the neighboring Latin *gentes* or communities. Then it extended to all communities of Italy. Finally, it referred to the customary law common among all people (*ius gentium*, i.e., Law of the Nations). *Ius gentium*, furthermore, after the birth of the *civitas romana* (Roman State), designated the law applied by the Roman magistrates to non-Roman citizens as opposed to the *ius civile* which, as a rule, was applied to Roman citizens only.

Thus, the term *ius gentium* referred not only to "private" international customary law (which governed the private relationships between foreigners and Roman citizens as well as those between foreigners) (15), but also to the "public" international custumary law, i.e., to the customary law that

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14) The evolution of the Roman Community from a loose federation of clans into a highly centralized State was really an evolution from a "self-help" period (or private justice) to a "voluntary arbitration" period, when the parties to a dispute, under social pressure, resorted to an arbitrator (or arbitrators) and finally to a "compulsory arbitration", when the community was strong enough to impose its arbitration to the parties through its public authority or officials, i.e., the court (or State justice). When did this evolution take place? It is hard to say, especially, because these periods of evolution were overlapping. The State justice, however, was certainly in place by the time when the code of the Twelve Tables was published. Cfr. P. STEIN, *Legal Institutions*, London: Butterworths, 1984.

15) I.e., as opposed to the *ius civile* which was applicable, as a general rule, to citizens only.

governed the relationships among the communities as such. The "public" international customary law in Rome was, in the archaic period, administered by the priestly order of the *fetiales*; consequently, this *ius gentium* was also referred to as *ius fetiale* (16). The "private" international customary law, however, was administered by the *praetor peregrinus*, who had the power to issue edicts concerning his administration of justice among foreigners in Rome, so that this *ius gentium* also referred to the edictal law of the *praetor peregrinus*. Naturally, in the development of the edictal law of the *praetor peregrinus* the traditional customary law among the nations (17), the Roman *mores* and eventually the stoic ethics were bound to play a significant role, so much so that this *ius gentium* was romanized or, if you will, nationalized (18).

In other words, by the time of Cicero, the term *ius gentium* included: **(1)** The "Public" International Law (19), which the Romans referred to also as *ius fetiale* or as *ius belli et pacis* (20).

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16) Cfr. Cicero, *De Officiis* 3, 108: *totum ius fetiale et alia iura communia* (the whole fetial law and many other laws common among the nations).

17) These rules must have been few and vague, so that the *praetor peregrinus* was forced by the expansion of the Roman conquests and by the ever-increasing number of disputes between people of different nationalities in Rome to expand and clarify them through edicts.

18) Cfr. J. MICHEL, "Sur les Origines du Ius Gentium", *RIDA* 3 (1956), pp. 313ff.

19) I.e., The Law of Nations, which consisted of both international customary uses and practices, governing the Nations, and Treaties (if any).

20) Branches of the Public International Law were, for instance, the *ius legatorum* (Law of the Envoys) and the *ius bellicum* (law of War).

(2) The "Private" International Law, which was mostly the product of the edicts of the peregrine praetors. In USA this branch of the International Law is also referred to as Conflict of Laws. The USA system of Conflict of Laws governs not only the relations within the States of the Federation but also with the States outside of the Federation. I submit that there is an analogy between the American Federation and the Roman Imperial Federation (21), so that the Roman *ius gentium* (qua Private International Law) would be analogous to the American system of Conflict of Laws, that is to say, it applied to both the city-states of the Empire and people outside of the Empire (22). (3) The *ius naturale*, in so far as the *ius gentium* incorporated elements of the stoic doctrine of natural law, i.e., stoic elements

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21) Note, however, that the Roman Imperial Federation was based (at least, until Caracalla's Act of AD 212) on a graded political system; that is to say: (a) some communities were simply subject (*civitates peregrinae*); (b) others were granted the *latinitas* (*civitas*) *minor*, i.e., only exmagistrates received full Roman citizenship (*optimum ius*); the rest got partial Roman citizenship, namely: the *ius commercii*, the *ius conubii* (if specifically granted), the *ius suffragii* (if specifically granted) and the *ius migrationis* (also if specifically granted); (c) others were granted the *latinitas* (*civitas*) *maior*, i.e., not only the ex-magistrates but also the members of the municipal council (*curia*) received Roman citizenship; (d) others were granted *ius optimum*, i.e., all the citizens of the community received full Roman citizenship; (e) finally some municipalities received not only *ius optimum* but also *ius italicum*, i.e., their land was considered as if it were Italian land and thus exempt from direct Roman taxation. Cfr. J. REYNOLDS, "Cities", in D. BRAUND, ed., *op.cit.*, p. 23; A. BERGER, "Latini", *Encyclopedic Dictionary of Roman Law*, 1953.

22) Cfr. P. FREZZA, "Le Forme Federative e la Struttura dei Rapporti Internazionali nell'Antico Diritto Romano", *SDHI*, 1938 (pp. 368f), 1939 (pp. 161f) and 1967 (p. 337).

of ethics (23). Note, however, that the *ius gentium* contained also elements from the customary law of the nations such as, for instance, slavery, which the *ius naturale* of the Stoics apparently condemned (24).

Due to these various meanings, the phrase *ius gentium*, prima facie, might cause some confusion. Naturally, the context, in which it is found, will determine its specific meaning.

II. ENVOYS

A. The Principle of Hospitality *ex iure gentium.* The Roman words for ambassadors were *nuntii* and *legati rei publicae causa* (25). Technically, the *nuntii* were official messengers simply conveying the terms of the sovereign (e.g.

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23) Cfr. Cicero, *De Officiis* 3, 23; Gaius 1, 1; 3, 154; J. 1, 2, 1; 1, 2, 11. See also H.F. JOLOWICZ & B. NICHOLAS, *Historical Introduction to the Study of Roman Law*, 3rd ed., Cambridge University Press, 1972, pp. 102-107.

24) According to Aristotle (*Nic. Ethics*, for instance, 1145b2-7), the Natural Law is rooted in the collective conscience of the Common People; that is to say, the common opinions on moral questions, though somewhat fuzzy, unclear and inconsistent, yet constitue the data, from which the wise men, by collating them and eliminating the inaccuracies and the inconsistencies, draw the first principles which, at first sight are not obvious, but become self-evident once one has reached them. Cfr. D. ROSS, *Aristotle* (London: Methuen & Co, 5th ed., 1949), p. 189. Thus, on the basis that slavery was common to all peoples, Aristotle (*Politics* 1, 2, 13) drew the conclusion that some men were slaves by nature. But apparently the Stoics rejected this conclusion. Cfr. J. 1, 2, 2.

25) Naturally, the purpose of the Foreign Envoys was: (a) In time of Peace, to conclude Treaties of Friendly Relations, of Commerce, of Alliance, etc.; (b) In time of War, to conclude Treaties of Peace, of Assistance, of Exchanging Prisoners; etc.

Roman Senate and People); they had no diplomatic power to negotiate. The *legati* were official agents of the sovereign with diplomatic power to negotiate. They probably carried with them the State Symbols or Credentials (*tesserae*, *mandata*) (26).

In the archaic period the Roman *legati* were chosen from the State priests called *fetiales* (27). After the unification of Italy by Rome (ca 270 BC), they were generally chosen from the Senate (28). The *fetiales*, however, continued to be consulted on the legality and procedure of certain international acts (29). Naturally, the field generals had power to negotiate with the enemy the terms of truce, of surrender or of peace, subject, however, to the ratification by the Roman Senate and People (30). The generals also had the power to issue safeconducts to foreign envoys to

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26) Note that in the *Public Law* the term *legati* referred to several classes of people, namely: military commanders, provincial administrators, *ad hoc* political envoys, ambassadors or municipal lobbyists. Cfr. Polybius 18, 44; Livy 33, 24; 37, 55-6; 42, 46; D. 50, 7; C. 10, 65. Note also that the *legati* in the Titles of the *Corpus Iuris Civilis* of Justinian are generally from the City-States of the Roman Empire (namely municipal or provincial *legati*) to the Roman Senate or Emperor. Cfr. D. 50, 7 (*De legationibus*); C. 10, 65.

27) For the functions of the *fetiales* see Dion. Hal. 2, 72ff ; Livy 1, 24, 4; Varro, *De Vita Populi Romani* 2, 13; 3, 8; *De Lingua Latina* 5, 15 (83-86); Nonius, *De Compendiosa Doctrina* 529. Cfr. C. SAULNIER, "Le rôle des prêtres fétiaux et l'application du 'ius fetiale' à Rome", *Revue historique de droit français et étranger*, 58 (1980), pp. 17ff ; A. WATSON, *International Law in Archaic Rome: War and Religion*, Baltimore: The Johns Hopkins University Press, 1993, pp. 1-9.

28) Cfr. WATSON, *op.cit.*, pp. 57-8.

29) Cfr. WATSON, *op.cit.*, pp. 38-43 on the cautelary functions of the *fetiales*. See also Livy 29, 20; 33, 24.

30) Livy 42, 36.

enter the Roman territory and negotiate directly with the Roman Senate (31).

Apparently, according to the Laws of Nations (*ex iure gentium*) only independent States (i.e., communities with a political structure) had the right to send embassies (32). Therefore, bands of marauders, of pirates, or robbers were considered by the *ius gentium* to be outside the *comitas gentium*; hence, they had no right of embassy (33). Naturally, *ex iure gentium*, as a general rule, States had the duty to receive embassies (34). Exceptionally, however, *ex iusta causa* they could refuse to receive a foreign embassy (35). Refusal to receive a legation, however, would terminate existing treaties (36). It might even lead to war, if the Envoys had come to demand reparation (37).

There were no permanent embassies in the ancient world; there were only *ad hoc legationes*, i.e., *ad hoc* missions of

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31) Polybius 18, 10; Livy 8, 2; 37, 49.

32) Polybius 9, 42; Cicero, *Rep.* 1, 25, 39; 1, 32, 49; 3, 31, 43; 6, 13, 13. Cfr. D. 50, 7, *passim*.

33) Cicero, *De Officiis* 3, 103; Ulpian, D. 49, 15, 24; Pomponius, D. 50, 16, 118; OGILVIE on the Fabian expeditionary force against Veii (Livy 2, 48ff).

34) Livy 21, 10.

35) Sallust, *Jug.* 28; Livy 30, 23; 42, 26 and 36.

36) Polybius 32, 1; Livy 45, 20.

37) Livy 4, 58; 10, 12.

ambassadors (38). During the sojourn in the foreign country the ambassadors stayed either in Public Quarters or with a prominent family of the host country (*hospitium publicum* (39) and *hospitium privatum*).

In ancient Rome foreign envoys were to report to the quaestors who provided them with the necessities, i.e., room, board and services (*munera, lautia*) (40). Ambassadors of friendly States stayed inside the city of Rome; whereas those of enemy States stayed outside the city in a villa near the Campus Martius (41). Foreign envoys who failed to report to the quaestors could be treated as spies (*speculatores*) and told to leave the Roman territory (42).

As already mentioned, exceptionally, the foreign envoys were guests of prominent Roman Families. Note that in ancient times, since there were no permanent embassies, it became

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38) Arcadius, D. 50, 4, 18, 12; C. 10, 65(63). As already mentioned, next to the *legati* of "Foreign States" there were *legati* of "Internal City-States" of the Roman Empire (namely, of *municipia*, of *civitates*) to the Governor, to the Senate and to the Emperor. These are really analogous to the modern "lobbyists". Cfr. D. 50, 7; C. 10, 65. It can be argued that permanent Embassies came into existence after the Peace of Westphalia in 1648, which recognized the independence and the community of the European States (*comitas gentium*). But apparently it was the Congress of Vienna in 1815 which laid down the fundamental structure of modern diplomacy. In recent times the relative success of UN has dramatically influenced the diplomatic relations among the Nations.

39) Cfr. Livy 5, 28; 5, 50; Tacitus, *Ann.* 11, 25.

40) Polybius 32, 19; Livy 28, 39; 29, 16; 42, 19 and 26; 45, 22 and 44; Suet., *Claudius* 21.

41) Livy 30, 21; 33, 24; 45, 22.

42) Livy 30, 23; 37, 1; 42, 26; 43, 36.

customary for families of different communities to establish a relation of friendship and, consequently, of mutual assistance and protection in each other's community. So, if a member of family A travelled into the territory of the community of family B, family B hosted and protected the traveller while the latter was in B's country. Essentially, the duties of the host were included in the term *hospitium* and they were: (1) gratuitous lodging (*liberae aedes*); (2) gratuitous food; (3) gratuitous services (horses, clothing, arms...); (4) protection (physical and legal) (43).

Once in Rome, the envoys were brought before the Senate to state their mission. And the procedure (44) at a Senate meeting (45) was generally as follows:

1. ***Relatio.*** The presiding magistrate opened the session with a report of the motion on which the Senators were to deliberate and offer their advice and consent. The motion could have been initiated by any body in writing and presented to the presiding magistrate, who, if he accepted it, introduced it to the Senate for discussion. In other words, no Senator could initiate a

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43) Sallust, *Cat.* 41; Dion. Hal. 8, 3, 30; Livy 1, 58; 25, 18; 40, 13 and 38; 42, 1 and 18; 42, 1 and 25. Note that it was necessary to give notice before terminating the bond of *Hospitium*. Cfr. Livy 25, 18; Cicero, *In Verrem* 2, 6, 79; Suet., *Calig.* 3.

44) Livy 30, 22; 45, 20. Cfr. Arnaldo MOMIGLIANO, "Senatus", *OCD*, 2nd ed., 1970.

45) In the Republican period any magistrate with *imperium* (consuls and praetors) and Plebeian Tribune could summon the Senate and, of course, preside over it any day except when a *comitium* was in session. In the Imperial period the Senate met regularly twice a month. The meetings were private, i.e., closed to the public, though the doors of the Senate were open.

motion without the presiding magistrate's acceptance. Indeed, no Senator could speak without first being recognized by the presiding officer. In case of a foreign embassy (*legatio*) the presiding magistrate introduced the *princeps legationis*, who then delivered the message.

2. *Interrogatio.* After the report of the motion was made, the chairman generally asked each senator to give his opinion on it. In case of a Foreign *legatio*, the Senators were permitted to ask the *princeps legationis* any questions they wished. During the Republic the senators enjoyed unlimited freedom of speech; that is to say, they could include in their comments any other matter that they pleased and they were not limited by time (46). During the Empire a time-limit was imposed.

3. *Decretum vel senatus consultum.* If several conflicting opinions were presented by the Senators, then the presiding magistrate put to the vote whichever opinions he chose. The voting took place by a *discessio*; that is to say, those who approved the opinion presented for the vote moved to one side and those who rejected moved to the other side. The opinion that received the majority of votes was adopted. The passed resolution (known as *decretum* or more commonly *senatus consultum*) was then signed by the presiding magistrate and by those who approved it. It could be, however, vetoed by any

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46) Cfr. Plutarch, *Cato*, where Cato is said to have ended all his speeches in the Senate with the plea *delenda Carthago*, regardless of the issues discussed at the moment in the senate.

magistrate equal or superior to the presiding magistrate or by any plebeian tribune.

4. ***Senatus acta.*** The Minutes of the Senate were kept by the urban quaestors in the *aerarium.* Caesar had them published in their entirety; Augustus apparently had them screened before publication.

B. The Principle of Inviolability *ex iure gentium.* According to the *ius gentium*, the ambassadors personified their State (47) and as such their persons, their residence and their property (documents, letters, records, etc.) were inviolable. In other words, *ex iure gentium* they could not be harmed or arrested, their residence could not be entered and searched without their permission, and finally their property could not be seized not only in the States to which they were sent (48), but also in the States through which they had to travel (49). Hence, offences committed against ambassadors were deemed to be offences against their State. In Rome the Roman offender might

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47) Livy 1, 24; Cicero, *Philippicae* 8, 8; Suet., *Galba* 10.

48) Pomponius, D. 50, 7, 18. For the inviolability of the Roman *domus*, in general, see Gaius, D. 2, 4, 18; Paulus, D. 50, 17, 103.

49) Livy 39, 25; Polybius 21, 26. Note, however, that permission to travel through Third States was required (Livy 2, 22; 23, 33-4); and that such a transit be innocent was also required.

be extradited to the wronged Nation, banished or executed (50); if the offence was against a Roman Envoy, then, if the wrongdoers were not punished or extradited to the Roman authorities by the foreign government, the Romans might consider such a failure as *iusta causa belli* (51).

C. The Principle of Immunity *ex iure gentium*. Again, according to the *ius gentium*, the envoys enjoyed absolute immunity from delictual prosecution in the host country "as official agents of a foreign country" (52), that is to say, they were not subject to the host country's judicial jurisdiction (53). But they could bring a delictual action (e.g., of *furtum*, of *iniuria*, etc.) against any body in the host country (e.g., in a Roman court) without fear of being subsequently sued on a related charge.

According to the *Lex Gabinia* of 67 BC, in Rome, furthermore, loans to foreign ambassadors, as agents of their

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50) Livy 9, 10; 38, 42; Polybius 15, 2-4; Ulpian, D. 48, 6, 7; Pomponius, D. 50, 7, 18; J. 4, 18, 8. Cfr. T.R.S. BROUGHTON, "Mistreatment of Foreign Legates and the fetial Priests: Three Roman Cases", *Phoenix* 41 (1987), pp. 51ff.

51) Livy 1, 14; 2, 4; Livy 4, 17-32: the case against Fidenae; Polybius 2, 8: the case against Teuta; Tacitus, *Hist.* 3, 80.

52) But, evidently, not from prosecution in their home country on their return.

53) Livy 2, 4, 7. Sallust, *Jugurtha* 32-37 (specifically, see 35, 61); Tacitus, *Ann.* 1, 42; *Hist.* 3, 80; Ulpian, D. 1, 7, 7; Ulpian, D. 5, 1, 2, 3-5; Modestinus, D. 4, 6, 32; Paulus, D. 4, 8, 32, 9; Paulus, D. 5, 1, 24, 1-2; J. 4, 18, 8.

State, were forbidden; that is to say, the Roman court would not enforce them, if a foreign ambassador defaulted (54). Naturally, Ambassadors had the option to waive their immunities and voluntarily submit to any action they chose.

Roman ambassadors, as already indicated, were subject to prosecution in Rome for any delicts (e.g., bribery, extortion, etc.) commited during their embassy as "private persons"(55). There was, however, the problem of distinguishing "official acts" from "private acts", since apparently, in Rome, "official acts" were immune from prosecution, i.e., were protected by the State veil, unless, of course, the envoys acted *ultra vires* or violated a public law.

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54) Cicero, *Ad Atticum* 5, 21, 12 ; 6, 2, 7. Cfr. *Cambridge Ancient History*, vol. IX, p. 345: «Meanwhile Gabinius had been attacking on another front. Provincial communities and foreign States from time to time had business to lay before the Senate, and these legitimate needs had been turned to lucrative account by various influential sections at Rome. Embassies arriving in the capital were met with a strange indifference. A favourable answer to their requests, even admission to the House (of the Senate), seemed impossible to obtain until it was borne in on the unhappy strangers that for sympathy with their case they must pay. Accordingly, large sums were borrowed from the moneylenders for bestowal on the magistrates and such other leading men as it might be necessary to buy. To end this monstrous exploitation Gabinius introduced a bill ... : henceforward, to lend money to provincials in Rome was forbidden, and any loans so made in contravention of the statute were to be irrecoverable at law ... But by itself this was not enough. Bribery had been the normal means of access to the Senate ... So a second law was passed ... whereby during the month of February (and, in alternate years, during the intercalary month as well) the Senate was compelled to make the business of receiving embassies the first call on its time».

55) Sallust, *Jugurtha* 40; Livy 42, 47; 52, 47; Paulus, D. 5, 1, 24, 1-2; Marcianus, D. 48, 11, 1.

As a general rule, an ambassador could be sued for breach of a "private" contract where the contract was concluded (*locus contractus*), only if the contract had been made before his appointment as *legatus*; in this case, the defendant ambassador could transfer the action to the place of his domicile (*ius domum revocandi*) (56). If the contract had been concluded after the appointment as *legatus*, then "as a State Representative" he enjoyed immunity (57). However, if he brought an action *ex contractu* against a Roman citizen in a Roman court, then he was compelled to defend himself against a related subsequent civil action. But if he brought an action *ex delicto* (e.g., *iniuria, furtum, damnum*), then he was not compelled to defend himself against a related subsequent action, as mentioned above (58).

D. The Principle of Neutrality. *Ex iure gentium* the ambassadors should not intervene in the Internal Affairs of the State where they had been sent. So, when the Roman ambassadors, sent to arbitrate between Clusium and the Gauls, intervened in the battle at the side of Clusium, they violated the *ius gentium* (59). The home country of the ambassadors might be asked to extradite the violators (*noxae dedere*).

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56) Ulpian, D. 5, 1, 2, 3-4. Evidently, Ulpian was referring primarily to a *legatus* from one of the city-states within the Roman Imperial Federation.

57) Cfr. the Gabinian law of 67 BC, above.

58) Ulpian, D. 5, 1, 2, 5.

59) Livy 5, 4 and 36; Plutharch, *Camillus* 17.

It appears that, unless the Ambassadors were expressly exempted, they were subject to the indirect, local taxes, such as sale tax.

III. TREATIES

A. The Necessity of Treaties. According to the Traditional (or Mommsenian) View, as a general rule, war (whether active or latent) was a natural and permanent state among the ancient communities; whereas peace was the result of a treaty, so that war, in this case (i.e., against a party of a Treaty) would require a "formal" denunciation that said party had violated the Treaty (60).

According to this theory, then, foreigners had no rights, no protection outside the boundary of their community, except through private or public hospitality, based on a treaty (61) of truce (*indutiae*), of alliance (*societas*) or of friendly relations (*amicitia*). In other words, as a rule, foreigners (not protected by a Treaty) were "suspect" as enemies (62); therefore, they could be enslaved and their property seized as *res nullius* (63). Among the

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60) Cicero, *De Officiis* 1, 36; Livy 1, 32; 3, 25; 30, 26. Cfr. TOMULESCU, *RIDA* 24, p. 433.

61) Cfr. Pomponius, D. 49, 15, 5, 2.

62) Cfr. H.F. JOLOWICZ & B. NICHOLAS, *op.cit.*, p. 41 n. 9.

63) According to Pomponius (D. 49, 15, 5, 2), the people, with whom there was no treaty of friendship or *hospitium*, were not specifically considered as enemies (*hostes*); but whatever belonged to them came under our power, it was ours; and any of them, who was captured by us, became our slave. And viceversa. Cfr. TOMULESCU, *RIDA*, p. 433.

Latin communities, however, originally there was a natural state of peace, which was later formalized by an official treaty.

Many scholars (e.g., CATALANO) today reject the principle of a natural and permanent state of hostility among ancient communities. Instead they hold that there was a customary practice of public hospitality, guaranteed by international customary law (*ius gentium*), whereby the safety and property of *bona fide* foreigners were protected. In other words, today the trend is to view the natural state among Ancient Communities as one of reciprocal legal independence and isolation. The foreigners, therefore, were excluded from the community's *ius civile*. The exclusion, however, was mitigated by the customary *ius gentium*, which was sometimes corroborated by an International Treaty (*foedus*) (64). In short, the ancient communities were legally exclusivist (65).

However, mere groups of people without a defined polity (such as marauders, pirates, robbers, kidnappers, etc.) were outside the *comitas gentium*, because they had no consciousness

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64) *Foedus*, like any other international *negotium*, assumed that the dealing parties had a "juristic personality". Without this there could not be a "juristic *negotium*", except possibly through the legal fiction that there was one.

65) Cfr. J. REYNOLDS, "Cities", in D. BRAUND, ed., *op. cit.*, p. 15: "Originally they were very unwilling to admit foreigners into their full membership or to allow them to own any part of their land, though in the Roman imperial period this exclusiveness was distinctly weakened".

of legal obligations. Being considered as enemies of mankind, they were not, therefore, protected by the *ius gentium* (66).

B. The Binding Force of Treaties. According to Cicero (67), in principle, *pacta servanda sunt* (68). Their coercive power emanates from the very nature of man, i.e., his sociability and rationality. In other words, since the underlying principle of *pacta*, argues Cicero (69), is *bona fides*, they generate a natural (internal) obligation based on Natural Law, emanating from an inborn social consciousness or social bond and implied social contract (70). But again, according to Cicero (71), *pacta servanda non sunt*, if they were made under duress (*metus*) or deceit (*dolus*) and if their fulfilment might be prejudicial either to the promisor or promisee. In other words, according to Cicero, treaties (or contracts, in general) were binding only if they were: (a) properly concluded (or ratified); (b) physically possible; (c)

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66) Cicero, *De Officiis* 3, 107-108; Ulpian, D. 49, 15, 24; Pomponius, D. 49, 15, 5, 2.

67) Cfr. for instance, Cicero, *De Officiis* 3, 5, 23; 1, 11, 34.

68) On the binding force of International Treaties see the "disputatio longa et subtilis" of J.L. BRIERLY in *The Basis of Obligation in International Law*, edited by H. Lauterpracht and C.H.M. Waldock, Oxford 1958.

69) Cfr. Cicero, *De Officiis*, 1, 23: "the foundation of justice is *bona fides*, i.e., truth and fidelity to promises and agreements" (*fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas*) ; see also 1, 31. Cfr. Trans. Loeb Classical Library.

70) For the various levels of social relations ranging from the family one to the *societas humana* or *hominum* see Cicero, *De Officiis* 1, chs. 16-17.

71) Cfr. Cicero, *De Officiis* 1, ch. 10 (31ff).

free from duress (72), fraud and error; and finally (d) consistent with the *ius gentium* and *boni mores*.

According to MOMMSEN, in practice, the Roman treaties were *pacta nuda*, that is, they produced *obligationes naturales*, not *civiles* (73). Again, according to MOMMSEN, the reason was the fact that they were based not on clearly defined sanctions, but generally on oath (*fides*, *pietas*) (74), and exceptionally on hostages (75).

C. The Making of Treaties. The purpose of a *foedus* was to establish either Friendly Relations (*amicitia*, *hospitium*,

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72) The only exception to this principle was the imposition of the terms of peace on the defeated enemy; that is to say, the terms, imposed by the victor, were not considered as coerced, i.e., as accepted under duress by the conquered. Even in these situations, argued Cicero (*De Officiis* 1, 34ff), the conquered (especially those who appealed to the *fides* of the Roman people) should be treated *ex iure naturali* with *iustitia* and *aequitas*.

73) For the binding force of these *obligationes naturales* see A. NUSSBAUM, *Concise History of the Law of Nations* (1947), pp. 150ff; JOLOWICZ & NICHOLAS, p. 159 ; and W.W. BUCKLAND & P. STEIN, *A Textbook of Roman Law*, 3rd ed., Cambridge University Press, 1963, p. 559.

74) According to DE MARTINO (2, p. 45): «la garanzia bilaterale consistente nel giuramento di esecrazione pronunziato da ciascuna parte, invocando i propri dei, dimostra che al fondamento dei vincoli internazionali vi era proprio la convinzione che le due comunità nazionali potevano reciprocamente obbligarsi mediante un comune riconoscimento del vincolo che ciascuna di esse assumeva dinanzi ai propri dei: tale riconoscimento della validità del giuramento era la base del diritto internazionale». Cfr. Livy 1, 24; 1, 30; 6, 9 and 29; 7, 19 and 31; 8, 6 and 25; 9, 5 and 40; 30, 42, 21; Polybius 3, 25, 6; 6, 56. See also JOLOWICZ & NICHOLAS, p. 41 and n. 1.

75) Polybius 10, 18; 15, 18; 21, 17 and 32 and 45; 29, 3; 36, 4; Livy 9, 5; Suetonius, *Augustus* 21.

etc.), a Military Alliance (*societas*) or a Truce (*indutiae*). Evidently, the *foedus societatis* probaly included *amicitia*; whereas the *foedus amicitiae* did not necessarily include *societas*.

Originally, in Rome the State Officials who conducted the preliminary negotiations for an International Treaty were priests (i.e., the *fetiales*) and the Field Commander. Later, the State Officials were Senators, the Field Commander and exceptionally the *fetiales* (76). However, the preliminary negotiations were subject, in the Republican Period, to the ratification of the Roman Senate and People (77), but, during the Empire, to the ratification of the Emperor and Senate (78).

In the archaic period, according to Livy (79), the *fetiales* concluded the terms of the treaty (*foedus*) with a religious

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76) Suetonius, *Claudius* 25.

77) Livy 1, 24, 7; 9, 5, 1; 29, 12; 30, 43; 33, 24; 37, 55; Polybius 1, 62-63; 3, 21.

78) *FIRA* I, p. 155: *Lex de Imperio Vespasiani*, vv. 1-2.

79) Livy 1, 24, 6: *pater patratus ad ius iurandum patrandum, id est sanciendum fit foedus* (= the *pater patratus*' duty is to utter the oath and thus sanction the Treaty). Then Livy adds (1, 24, 7): *legibus deinde recitatis: audi, inquit, Iupiter, audi, pater patrate populi Albani, audi, tu populus Albanus. Ut illa palam prima postrema ex illis tabulis cerave recitata sunt sine dolo malo utique ea hic hodie rectissime intellecta sunt, illis legibus populus Romanus prior non deficiet* (= after the terms were read: Hear, Jupiter, he said, hear, *pater patratus* of the Alban people, hear, you, Alban people. As these terms from first to last have been publicly read from these tablets or wax, without fraud, and as they are here and today most correctly understood, from these terms the Roman people will not be the first to withdraw). Finally Livy concludes (1, 24, 8): *si prior defexit publico consilio dolo malo, tum tu ille Diespiter populum Romanum sic ferito ut ego hunc porcum hic hodie feriam* (= if (the Roman people) should first withdraw from them by public consent and fraudulently, then you, Jupiter, so strike the Roman people as I shall strike this pig here and today).

ceremony, which included an oath-curse formula and the sacrifice of a pig. Apparently, the Romans distinguished the treaty-contract (*foedus*) from the solemn guarantee of the negotiator (*sponsio*); the *foedus* referred to the terms of the treaty, which were binding on the people, because they had been ratified by the people, negotiated by the *fetiales* and sanctioned by the religious ceremony (oath-curse formula and the sacrifice of the pig); whereas the *sponsio* referred to the personal, solemn promise of a non-priestly (i.e., non-fetial) negotiator (i.e., general), which, under the *strictum ius*, bound personally only the negotiator: "The Roman consuls met in conference with the Samnite Representative (Pontius). The Victor (The Samnite Pontius) held that (the Romans) had concluded a *foedus*; whereas the Romans held that there was no *foedus*, because there had been no consent of the Roman people, no *fetiales* and no religious ceremony. Therefore, contrary to the common belief and Claudius' opinion, the Caudine Peace was not a *foedus*, but a *sponsio*" (80). The Samnite Representative, rejecting the noxal surrender of the Roman negotiator (i.e., the general Sp. Postumius), accused the Romans of legal quibble, nay, dishonesty: "you always give your fraudulent behavior the appearance of legality (*semper aliquam fraudi speciem iuris imponitis*)" (81).

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80) Livy 9, 5, 1-2; Livy 9, 8-10; 30, 43, 9. Cfr. F. LA ROSA, "Sulla sponsio delle Forche Caudine", *Iura* 1 (1950), pp. 283ff; K.H. ZIEGLER, "Das Völkerrecht der römischen Republik", *ANRW* I, 1972, pp. 68ff; WATSON, *op. cit.*, pp. 34ff.

81) Livy 9, 11. Cfr. Cicero, *De Officiis* 1, 10 (33) on *Summum ius summa iniuria.*

During the Empire, however, when the Emperor had replaced the people and the *fetiales* had been replaced by imperial envoys, the procedure of Peace-Treaties, according to Gaius, was the *sponsio* in a secular format (82): "It is said that a foreigner can also be bound by this word (i.e., *sponsio*), as when our emperor asks the ruler of a foreign people the question on peace: 'do you promise that there shall be peace?' This is really too subtle, because if there is a breach of the treaty, there is no legal action on the stipulation, but only recourse to the law of war" (83).

D. Types of Treaties. It must be noted that most of the International Treaties of Rome were concluded during the Republican Period. There were only few instances of International Treaties under the Principate (84).

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82) Gaius 3, 94: *Unde dicitur hoc verbo peregrinum quoque obligari posse, veluti si imperator noster principem alicuius peregrini populi de pace interroget: PACEM FUTURAM SPONDES? Quod nimium subtiliter dictum est, quia, si quid adversus pactionem fiat, non ex stipulatu agitur, sed de iure belli res vindicatur.* Cfr. Ulpian, D. 45, 1, 1, 6.

83) WATSON (*op. cit.*, p. 61) believes that "Gaius is being fastidious. The treaty, though cast in the form of a stipulation, is not a stipulation because it does not give rise to the action appropriate to a *stipulatio.* Indeed, he is saying, there is is no action at law". But how could there be an action at law, since there was no International Court? The final recourse to an international dispute was perforce self-help, i.e., war, not an action at law.

84) Cfr. N. LEWIS and M. REINHOLD, *Roman Civilization. Source Book I: The Republic* (treaty with the Latin League pp. 68-84; with Carthage pp. 70-73; 153-155; 171-172; with the Samnites p. 78; with Aequi p. 86; with the Aetolian League pp. 169-171; 178-179; with Philip V pp. 172-174; with Antiochus (Treaty of Apamea) pp. 179-184; for the procedure of concluding a Treaty pp. 139-140; 384); *Source Book II: The Empire* (with

The most common Latin term of International Treaty was *foedus* (85), and the terms of most common types of International Treaties were *hospitium publicum* (Public Hospitality) (86),

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Parthia pp. 18; 42-43; 104 ; 567; with the Marcomanni pp. 19n; 110; 116-118), New York: Columbia University Press, 1966.

85) It appears that the terms *amicitia*, *hospitium* and *societas* primarily designated the nature of the International Treaties, whereas the term *foedus* designated the form, namely the oath-formula or the *sponsio*. The term *foedus*, therefore, could be applied to the *amicitia*, *hospitium* and *societas*, if they were concluded with an oath-formula. In other words, *amicitia*, *hospitium* and *societas* were informal International Treaties, but they became formal, when concluded with the formalities of the oath.

86) *Hospitium publicum* probably included: (a) privilege to reside in the Roman Territory; (b) privilege to receive hospitality from the State (in case of *hospitium privatum*, from a Private Citizen), i.e., room, board, clothing, etc.; (c) protection in and out of court; (d) assistance in case of illness; (e) privilege to trade (*commercium*); etc. Originally, a Treaty of *hospitium publicum* was an agreement between Equals; later, it became a concession of Rome to client peoples. Note that in case of dispute between a Roman *civis* and a *hospes*, there is no proof that the *hospes* could claim: (i) a co-national *iudex*, and (ii) his national law. Cfr. Livy 5, 28; Gellius 5, 13; 16, 13; Plutarch, *Camillus* 8; OGILVIE, p. 690, p. 740; *NNDI*, "Hospitium"; BERGER, *EDRL*, "Hospitium". Note also that these privileges of Public Hospitality (*aedes liberae et lautia*) were applicable only to Foreign Envoys (see Section on Envoys) and to important foreign personalities. The "foreign common traveller or merchant" hardly enjoyed such privileges; he probably tried to get lost in the crowd.

amicitia (Friendly Relations (87), *societas* (Alliance) (88), *commercium* (Commerce) (89), *indutiae* (Truce), etc (90).

Modern international jurists distinguish various types of treaties, namely: of peace, of commerce, of friendly relations, etc. According to Livy (91), in Roman times, there were three types of International Treaties, namely: (a) Unilateral Treaties, concluded when the enemy was conquered; (b) Mutual Agreements to stop hostilities, concluded when the enemy was not conquered; (c) Alliances, concluded outside of hostile situations. According to the jurist Pomponius (92), also, there were three types of International Treaties, namely: *amicitia*,

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87) *Amicitia* included *hospitium*, namely the obligation to protect the freedom and the property of each other's citizens, but the obligation was only moral.

88) *Societas* not only included *hospitium* and *amicitia*, but also imposed a positive, "legal" duty to assist each other militarily and economically when in need.

89) Evidently, the existence of International Commerce (cfr. Twelve Tables 3, 5; 6, 4) entailed the existence of *hospitium* and of a Judicial System to safeguard it. But in the archaic period this judicial system could not have been the nuncupative *ius civile* of the *legis actiones* (stricly applicable only to citizens), but something less ritualistic, more secular and based on "natural" *fides*. Naturally, when an international Treaty was concluded, it certainly must have regulated international private and public relations (cfr. the Treaties with Carthage), and these international rules must have been based on existing international Customs, Uses and Practices.

90) MOMMSEN, apparently, gouped them into three classes, namely: (a) *Indutiae*, i.e., Temporary Treaties; (b) *Foedera*, i.e., Permanent, Formal Treaties, based on oath; and (c) *Amicitia, hospitium publicum*, i.e., Permanent, but Informal Treaties.

91) Livy 34, 57, 7-9.

92) Pomponius, D. 49, 15, 5, 2.

hospitium, and *foedus*. Proculus, another Roman jurist (93), however, distinguished two types of International Treaties, namely the *foedera aequa* (in principle, bilateral treaties) and the *foedera iniqua* (i.e., unilateral treaties).

The *foedera aequa* did not recognize the hegemony of Rome; they were based on the priciples of equality and reciprocity. The best examples of *foedera aequa* were the *foedus Cassianum* with the Latins (it later included the *Hernici*), those with Carthage, the Treaty with Tarentum and those with Parthia.

Basically, the terms of the *foedus Cassianum* (94) were: (a) mutual military assistance; (b) equal distribution of booty; (c) contractual disputes between citizens of these communities were to be resolved by the court of the community where the contract was concluded (*lex loci contractus regit actum*) (95); (d) nothing was to be added or removed from this agreement without the mutual consent of the parties; (e) no citizen of any of the constituent States could be enslaved within the territory of the confederacy; (f) a citizen of any of the constituent States of the confederacy could migrate, trade and marry in any of the States of the confederacy; (g) each community maintained its local

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93) Proculus, D. 49, 15, 7; 1. Cfr. Cicero, *Pro Balbo* 16 (35); Livy 34, 57, 7-9; 38, 11, 2.

94) Probable date, 493 BC. Cfr. M. CARY & H.H. SCULLARD, *A History of Rome*, 3rd ed., New York: St. Martin's Press, 1979, chap. 8, n. 2.

95) Cfr. Polybius 3, 27; 6, 12.

autonomy, though the *ius civile* both in form and in substance was practically the same throughout the confederacy (96).

According to Polybius (97), there were three treaties between Rome and Carthage. The first treaty was concluded in 509 BC and its terms basically were: (a) protection of each other's allies; (b) no violation of each other's territorial waters (i.e., Roman ships could not sail beyond the Gulf of Carthage), except when in distress due to weather, to enemy pursuit or repairs; but the ship had to leave within five days; (c) protection of civil rights, such as right of freedom, of property, of trade (provided the transaction were witnessed by local officials), of access to local courts, etc.

The second treaty between Rome and Carthage (98) was concluded in 306 BC and its terms basically were: (a) demarcation of zones of influence; (b) demarcation of commercial zones; that is to say, some areas were open to each other's trade; other areas were closed to the other party; (c) no raiding each other's territory or allied territory; (d) each party could take provision from the other's territory, provided no injury was caused to it; where injury had occurred, the local government

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96) Cfr. Polybius 4, 25, 7; Livy 1, 24; 2, 23 and 33; 2, 53; 5, 1; 8, 2 and 4 ; 28, 45; 33, 32; 35, 46; Dion. Hal. 5, 61; 6, 21 and 95; 8, 70-77; Tacitus, *Hist.* 3, 72.

97) Polybius 3, 22, 8-10 and F.W. WALBANK, *A Commentary on Polybius*, Oxford 1957. Cfr. C. PHARR, ed. (*Ancient Roman Statutes*, University of Texas: Austin, 1961), pp. 7-8; N. LEWIS & M. REINHOLD (*op. cit.* I), pp. 70ff; H. BENGTSON, *Die Verträge der griechisch-römischen Welt*, Munich 1962.

98) Polybius 3, 24, 12-13.

(*forum loci delicti*) had judicial jurisdiction over the alleged wrongdoer; (e) if storm or enemy pursuit drove a ship of the either party into the zone of the other, the ship had to leave within five days.

In both these Treaties, for the validity of a sale contract, there was required that the contract (between a Roman and a Carthagenian) be concluded in the presence of two officials, namely a herald and a recorder to register the transaction, so that it could be protected by the State. In other words, for a breach of contract, performed in accordance with the clauses of the Treaty, the Roman merchant could petition the Carthagenian magistrate for legal action (*actio ex foedere*); viceversa, the Carthagenian merchant could petition the Roman magistrate for legal action *ex iure foederis*.

The third treaty between Rome and Carthage (99) was concluded in 279 BC and it was brought about apparently by the alliance of the Italian Greeks with Pyrrhus, king of Epirus. Its terms basically contained mutual military assistance and, probably, a general endorsement of the existing agreements.

Another international treaty, recorded by ancient sources, was that between Rome and Tarentum. According to Appian (100), Tarentum (sometime during the Samnite War, ca. 334-305 BC) had concluded a Treaty with Rome whereby the Romans

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99) Polybius 3, 25.

100) Appian, *Roman History*, Bk 3, 7 (Samnite War).

bound themselves not to sail beyond the promontory of Lacinium (101).

Finally, among the *foedera aequa*, we must mention those between Rome and Parthia (102). According to Tacitus (103), the known world of his times was divided into two major powers (*maxima imperia*), namely Rome and Parthia; and between these two powers there had been a continous exchange of diplomatic dialogue (*continuum foedus*) (104) from Augustus to Trajan (ca. 20 BC - 113 AD), though, of course, there occurred various incidents of breaches on account of Armenia (105), in spite of the fact that both parties had a great interest of keeping the lines of

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101) Around 282 BC a small Roman flotilla appeared in the territorial waters of Tarentum in violation of this old Treaty, and the Tarentines promptly attacked it, sank some of the ships and captured the rest. The scholars still speculate on the motives of the Roman violation of the Tarentine Waters. Some claim that they were on route to the Roman colonies on the Adriatic sea (MOMMSEN); others claim that they came to help an oligarchic coup against the democratic government in Tarentum; and finally others claim that it was an error of the Roman commander (maybe he hoped that the Tarentines, who at the time were celebrating a Dionysian festival, would invite his sailors to spend a night in town). Whatever the reason, the consensus appears to be that the Tarentines overreacted and miscalculated the Roman Might. Today, perhaps, a Roman note of protest and a Tarentine note of apology would have been sufficient.

102) Cfr. A. BARZANO, "Roma e i Parti tra Pace e Guerra fredda nel I Secolo dell'Impero", in M. SORDI, ed., *op. cit.*, pp. 211-227.

103) Tacitus, *Ann.* 2, 56, 1. Cfr. Pliny the Elder, *N. H.* 5, 88; BARZANO, *op.cit.*

104) Tacitus, *Ann.* 15, 1, 1; *Ann.*. 2, 58, 1ff. Cfr. BARZANO, *op.cit.*

105) Cfr. C.L. CHAUMONT, "L'Arménie entre Rome et l'Iran: De l'avènement d'Auguste à l'avènement de Dioclétien", *ANRW* II, 9, 1 (1976), pp. 71-194.

communication open (106). This International Treaty of Friendly Relation (*foedus amicitiae*) (107) apparently included not only rules concerning *hospitium* and *commercium*, but also rules of extradition (108).

The *foedera iniqua*, however, recognized the leadership of Rome. They were based on the principle of inequality (hence, *foedera iniqua*), one being superior and the other inferior (or subordinate). They are also known as Vassalage Treaties (109).

Infact, due to a military defeat, to a need of protection or to some other reasons, some communities entered into a special agreement with Rome in a subordinate role (110). The superior power assumed the role of a patron, whereas the inferior power assumed that of a client. The duties of the client State generally included the following terms: (a) the inferior had to provide military assistance on request; (b) the inferior could not provide aid and confort to the enemies of Rome; (c) the inferior could not make alliances with third parties without Rome's consent; (d)

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106) Tacitus, *Ann.* 12, 49; *Ann.* 15, 1, 1 and 5, 3.

107) Tacitus, *Ann.* 2, 58, 1.

108) Cfr. BARZANO, *op.cit.* For specific trade restrictions with Persia see C. 4, 63, 4 (ca. 408-9 AD). For international trade restrictions in general see C. 4, 41.

109) Proculus, D. 49, 15, 7, 1; Livy 9, 20, 8-9. Cfr. D. BRAUND, "Client Kings", in D. BRAUND, ed., *op.cit.*, p. 69; E. BADIAN, *Foreign Clientelae*, Oxford 1958.

110) Cicero, *Pro Balbo* 16 (35); Proculus, D. 49, 15, 7, 1; Livy 34, 57, 7-9; 38, 11, 2; Livy 7, 31; 8, 2 and 5; 38, 11; Tacitus, *Hist.* 2, 81. Cfr. J. REYNOLDS, "Cities", in D. BRAUND, ed., *op.cit.*, p. 17.

booty captured in war was not to be distributed equally (111); and finally (e) often the territory of the conquered enemy became property of the Roman People; the local people held only possession or usufruct (112).

In short, the inferior community lost its sovereignty in Foreign Affairs, but it kept its autonomy in Internal Affairs under the Roman supervision and protection (113).

E. The Interpretation of Treaties. As already indicated, there was no Permanent International Court for the interpretation of the terms of Treaties. In Greece, however, there was occasionally recourse to Third States or to Amphictyonies. In Rome, we must distinguish disputes between Rome and other States from disputes between city-states within the Roman Power. In disputes between Rome and other States, Rome apparently recognized no international arbitrators. In disputes

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111) Cfr. A. AYMARD, "Le Partage des profits de la guerre dans les Traités d'Alliance Antiques", *Rev. Hist.*, 1957; I. SHATZMANN, "The Roman General's Authority over Booty", *Historia*, 1972.

112) Gaius 2, 7: "the ownership of that land (i.e., provincial) belongs to the Roman People or to Caesar; we (private persons) seem to have only possession or usufruct" in exchange for a fee, i.e., the *vectigal vel tributum* (*in eo solo* (i.e., *provinciali*) *dominium Populi Romani est vel Caesaris, nos autem possessionem tantum vel usumfructum habere videmur*).

113) Polybius 3, 21-22; 20, 9-10; 21, 32; 32, 13 and 15; Livy 8, 2 and 14 and 24; 9, 20 and 43; 26, 33; 34, 45 and 57; 37, 1 and 8; 37, 53-4; 38, 11; Gaius 1, 14 and 26; 2, 7.

between city-states within the Roman Imperium, Rome imposed arbitration (114).

Furthermore, there were no precise rules to determine the interpretation of the terms of Treaties. But there were some general principles governing the interpretation of agreement, in general. Some of these were: (a) the criterion that where there was ambiguity of wording the intentions (*voluntas*) of the parties should prevail over the literal meaning of the words (*verba*) (115); (b) the criterion that where there was ambiguity the meaning most consistent with the practices and usages in International Matters should prevail over the less consistent.

F. The Doctrine of *rebus sic stantibus*. Most International Jurists (116) hold that all Treaties are under the tacit condition of the *rebus sic stantibus clausula*; that is to say, they are binding as long as the the conditions remain unchanged (117). Therefore, (a) they are binding on the successors; and (b) unlike

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114) Cfr. Section on International Arbitration, *infra*.

115) For some examples of chicanery, i.e., subtle and even fraudulent construction of the law see Cicero (*De Officiis* 1, 33, where he argues against the strict, literal interpretation, for *summum ius summa iniuria*).

116) Cfr. NUSSBAUM's *Concise History of the Law of Nations*, 1947; W. L. TUNG, *International Law in an Organizing World*, New York: Queens College Press, 1977.

117) But according to J.E.S. FAWCETT (*The Law of Nations*, New York: Basic Books, 1968), p. 101: "Although the plea that a Treaty has been rendered obsolete owing to fundamental change of circumstamces has often been made, International Tribunals have never accepted it as a genaral rule for the termination of Treaties, and have gone no further than treating a Treaty as ended when its performance or observance has become impossible".

Private Contracts, they cannot be annulled on the ground that they were induced by duress or force (118), because the Law of private Contracts cannot simply be carried over to the Law of International Treaties (119). A few Jurists (120), however, seem to hold that Treaties are valid as long as the State continues to will them. Presently, under the UN Charter a consent, obtained by coercion or duress (121), is considered vitiated and, therefore, null and void (122).

In Roman times, as we saw, the making of a Treaty took the form of a juridical act. Therefore, it created bilateral obligations which, in principle, were rescindable only by force of a *iusta causa*. Grounds for a *iusta causa* would be: (a) Conflicting interpretations of ambiguous clauses (123); (b) Change of

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118) Specifically, the Peace Treaties, concluded after military defeat.

119) Thus, if some territory was first acquired by force or duress and later surrendered by Treaty, the illegality of coercion was considered cured by the consent, expressed in the Treaty, by the injured party. In other words, according to these jurists, a consent, obtained by coercion, was considered to be a legal consent in international agreements. Cfr. also the Unequal Treaties (*foedera iniqua*) with China, Japan, Panama, etc.

120) Cfr. NUSSBAUM's *Concise History of the Law of Nations*.

121) Except, perhaps, those obtained after military defeat, as indicated above.

122) Cfr. *Ratz-Lienert and Klein vs Nederlands Beheers-Instituut* (1956) which "held that the transfer of Sudetenland to Germany as well as the Treaty (i.e., The Berlin Treaty between Germany and Czechoslovakia in 1938) must be regarded as null and void, as they were brought about under unlawful duress exercised upon Czechoslovakia" (FAWCETT, p. 100).

123) See, for instance, the case of Saguntum and the conflicting interpretations of the Treaties between Rome and Carthage in Polybius 3, 29.

conditions (124); (c) Absence of some essential formality in the making of the Treaty (125). In other words, International Treaties were self-imposed obligations without an external authority or coercion and enforced by a self-help justice (126). Therefore, in final analysis, they were operative as long as the intent of the Party/Parties persisted on the ground that the *clausula rebus sic stantibus* could always be invoked to terminate a Treaty (127).

IV. INTERNATIONAL ARBITRATION

A. Public International Court. Just as there were no permanent embassies in Roman times, so, too, there was no permanent "Public" International Court among the Communities

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124) The necessity of *publica utilitas*, as a result of the change of conditions, would justify the rescission of the Treaty, because the "*sic stantibus rebus clausula*" was implied. Cfr. Polybius 9, 32 and 37.

125) E.g., the *sponsio Caudiana*, according to the Romans (Livy 9, 8-10), was not binding to the Roman People, because it had not been expressly ratified by them. But (the Romans claimed) the *sponsor* was bound by it, because the *sponsio* created a personal obligation; hence, he was liable for the breach of the Treaty and, consequently, surrendered to the Samnites (*noxae deditio*). The Samnites, however, Livy (9, 11) added, rejected the Roman noxal surrender of the *sponsor* (i.e., Sp. Postumius) and accused the Roman *fetiales* with: "you always give your fraudulent behavior the appearance of legality" (*semper aliquam fraudi speciem iuris imponitis*). For devious interpretations of the oath-formula and of the terms of the Treaty see Cicero, *De Officiis* 3, 29, 107; Cicero, *ibidem* 1, 10 (33); and Livy 9, 5, 10; 9, 10, 8.

126) Cfr. J.B. SCOTT, "The Evolution of a Permanent International Judiciary", *Am. Journal of International Law*, 6 (1912), pp. 316ff.

127) Cicero, *De Officiis* 1, 3, 9; Livy 42, 47, 9: "but that section of the Senate, to whom profit was more important than honesty, prevailed" (*vicit tamen ea pars Senatus cui potior utilis quam honesti cura erat*).

as such. And Rome was not accustomed to submit its disputes with other States to International Arbitration (128). Nevertheless, Rome was accustomed to act as International Arbitrator (129). Naturally, intercity-states disputes in the Roman Imperial Federation were arbitrated by the Imperial Government directly (governor, Emperor, Senate or a Senatorial Commission) or indirectly (i.e., Rome might suggest that a Third City-State act as arbitrator under the supervision, of course, of the Imperial Government).

But there were (mostly in the archaic period, as seen above) International Treaties which: (a) prohibited marauding expeditions or reprisals; and (b) laid down rules of law and of procedure, such as, for instance, the *Foedus Cassianum* (130) and the *Foedera Punica* in cases of international disputes (131).

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128) There is enough evidence, however, that the Greeks occasionally (in the pre-Roman time) resorted to Voluntary Arbitration in international disputes, but there is no evidence for Compulsory international Arbitration, except, perhaps, under the Hellenic League of Philip II (cfr. his slogan: Peace at home and war against Persia). Cfr. M.N. TOD, *International Arbitration among the Greeks*, Oxford 1913. There seems to be an analogy between the Greek World and the Modern World: both reserve the right to self-help and to voluntary arbitration; H BENGTSON, *Die Verträge der griechisch-römischen Welt*, Munich 1962.

129) Cfr. Polybius 22, 19 and 24; 23, 15; 32, 2 and 17; E. GRUEN, "Adjudication and Arbitration", in *The Hellenistic World and the Coming of Rome*, Berkeley: University of California Press, 1984, pp. 96ff; A.J. MARSHALL, "The Survival and Development of International Jurisdiction in the Greek World under the Roman Rule", *Aufstieg und Niedergang der römischen Welt*, II, 13 (1980), pp. 656-658.

130) Livy 2, 33, 4; Dion. Hal. 6, 95.

131) Polybius 3, 22, 8; 3, 24, 12. *FIRA* I, no. 11.

In Rome's archaic period the administration of Public International Law was entrusted to the *fetiales*. It was they who investigated whether or not there was a breach of International Law and accordingly advised the Senate. Infact, their functions were: (a) to determine the culpability or innocence about a delict, whether committed by a Roman or by a foreigner; and (b) to demand from the wrongdoing City-State both to pay for the damages (*res repetere*) and to surrender the culprit (*in noxam dare*); and viceversa, to ask the Senate to pay damages and surrender the Roman culprit to the injured community (132). In the archaic period the *iudicium fetiale* intervened regardless of whether there was a treaty or not (133).

But later when the institution of the *fetiales* became obsolete, then, in "Public" International Matters the Senate assumed the responsibilities by the appointment of senatorial commissions (which replaced the *fetiales*). This change somehow coincided with the appearance of the *foedera iniqua* (unequal treaties).

B. Private International Court. Though there was no permanent "Public" International Court in Roman times, there were, however, "Private" International Courts in diversity of citizenship cases. In Rome (134) the Court of "Private"

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132) See Section on *Extradition*, below.

133) Livy 7, 32.

134) In the provinces the administration of Private International Law varied from city-state to city-state, but under the general supervision of the Roman governor, who could act as a court of first instance. See, for

International Law (*iudicium recuperatorium*) was administered from about 242 BC by a magistrate, known as *praetor peregrinus* (*qui inter cives et peregrinos vel inter peregrinos in urbe Roma ius dicit* = who declares the law in Rome in disputes between citizens and foreigners or between foreigners) (135). The proceedings before this aliens' court were divided in two stages, namely: the Pleading Stage (or Preliminary Hearings) and the Proof-taking Stage (or Trial).

1. *The Preliminary Hearings.* The preliminary hearings took place before the *praetor peregrinus*. Their purpose was for the parties involved (i.e., the litigants and the judicial official) to reach an agreement (*litis contestatio*) concerning: (a) the issues in dispute; (b) the applicable rule of law, which might be a specific rule or a discretionary rule (*quidquid dare facere oportet ex bona fide* = whatever (the defendant) ought to give or do in good faith); and (c) the selection of a board of arbitrators (*recuperatores*) or of one arbitrator. This agreement took place before witnesses (*testes*).

Evidently, the procedure of the preliminary hearings before this *aliens' court* was simple, expeditious, flexible and far less ritualistic than the procedure of the *citizens' court* under the old civil law (*ius civile vetus*). As to the applicable law to the case at bar, the Roman court resorted either to the rules of the

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instance, Augustus' Cyrene Edicts (N. LEWIS & M. REINHOLD, *op.cit.*, II, p. 36ff.

135) Cfr. N. LEWIS & M. REINHOLD, *op.cit.*, I, p. 332ff.

International Treaty (if there was one) or to the Roman *ius gentium* rules.

Originally, the Roman judicial magistrates resorted to the established customary rules of the *ius gentium* (as ascertained by the litigants and the presiding magistrate) (136), applicable to the case at bar (137). By the end of the Third Century BC, however, in Rome the *praetores peregrini*, with the assistance of jurists, had begun to develop a number of specific *formulae* or writs, which they published at the beginning of their annual term (138). These *formulae*, incorporating rules of procedure and of laws, were based on considerations of *bona fides* and intuitive notions of equity, on customary practices and decisions rather than on the rules of the citizens' archaic *ius strictum* (i.e., *ius civile vetus*), which emphasized rituals (thaumaturgic words, etc.), sometimes at the expense of the merits of the case at bar. Eventually, these *formulae* (in the form of Edicts) of the *praetores peregrini* grew

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136) Whatever these customary international rules were, they must have been few and vague.

137) So, if the dispute was between two foreigners from the same town (e.g., Aricia), then the Roman court would probably apply the law of that town. If the dispute was between two persons from two different towns, then the Roman Court would, if possible, reach a compromise between the applicable laws of both towns; or it would apply what seemed *aequum et bonum* to the court.

138) Both the urban praetor and the peregrine praetor had no legislative power; therefore, they could not create rights. But they could grant an action and thus provide remedies. By providing remedies, however, they indirectly created rights, i.e., the edictal law, also known as *ius honorarium*.

so much that they constituted a Roman version of the *ius gentium* (or, if you will, a Romanized *ius gentium*) (139).

2. *The Trial.* The trial took place before the tribunal of judges (*recuperatores*), selected in the preliminary hearings. The procedure of the trial opened with the recitation of the *litis contestatio* and with the testimony of the *testes* on whether the *relatio* of the *litis contestatio* before the *recuperatores* was accurate. Then there came the presentation of the evidence and of the arguments, and, finally, the sentence.

C. The Issue of the *iudicium recuperatorium* (140). First of all we must distinguish between international *recuperatores* and domestic *recuperatores*.

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139) "Historically", the *ius gentium* referred to the customary International Law, which the Roman sources contrasted to the *ius naturale* (*quae sunt naturali contrariae*); cfr. Florentinus, D. 1, 5, 4 pr-1; Tryphoninus, D. 12, 6, 64; J. 1, 2, 2. "Theoretically", the *ius gentium* was equated with the *ius naturale vel rationis*; cfr. Gaius 1, 1; J. 2, 1, 11. The instruments which translated the dictates of *ratio* into legal rules (the Roman *ius gentium*) were the magistrates and the *iurisprudentes*, so that the *ius naturale*, the Roman version of the *ius gentium* and the *ius jurisprudentiale* became synonyms. The foundations of the *ius naturale* are: (a) the Principle of self-preservation (a primordial, inborn right); (b) the Principle of self-realization (a primordial, inborn right); and (c) the Principle of mutual assistance for self-preservation and realization (a corollary right, derived from the rights of (a) and (b), and rooted in the human nature). These rights apply to both individuals and nations and, as noted, emanate from their very being. However, though the rights of self-preservation and self-realization are absolute, in the sense that they are compulsory by force of the human nature, the right of mutual assistance is not absolute, in the sense that compliance with it is subordinate to other duties that the individuals and the nations have to themselves. See Introduction, above.

140) Cfr. "Recuperatores", *NNDI* and BERGER's *EDRL*.

1. *International Disputes.* In regard to the *recuperatores* in international disputes, Festus (141) wrote: *reciperatio est, ut ait Gallus Aelius, cum inter populum et reges nationesque et civitates peregrinas lex convenit, quomodo per reciperatores reddantur res reciperenturque, resque privatas inter se persequantur*, that is, *recuperatio* existed when there was an agreement between the Roman people and a foreign country (king, nation or community) in order that through a panel of arbitrators (*recuperatores*): (a) property (probably territory seized by one part from the other) might be returned and retaken; and (b) individuals might pursue private matters between themselves.

Some scholars claim that the word *lex* (instead of *foedus* in Festus' text) indicates that the appointment of the *recuperatores* was a unilateral act of the Roman people imposed on the other party; that is to say, a panel of Roman arbitrators decided the dispute. Other scholars, however, argue that the phrase *convenit inter populum Romanum* and *reges nationesque et civitates peregrinas* indicates that there was a bilateral agreement; and that the word *lex* referred to a clause of the treaty (implied) specifying the manner according to which disputes were to be resolved (142); that is to say, a panel of arbitrators, selected by both parties, either in accordance with a Treaty (if there was one) or *ad hoc* in accordance with the *ius gentium*.

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141) Festus, "Recuperatio", in *De Verborum Significatu.*

142) The word *lex*, indicating the conditions or the terms in agreements (treaties, contracts, wills, etc.), was common in Roman law. Cfr. Livy, 30, 43, 10; 34, 57, 7-8; BERGER, "Lex", *EDRL.*

It seems that in the archaic period, when the *foedera aequa* prevailed, the *recuperatores* were selected according to the treaty (if there was one) or according to an *ad hoc* agreement between the nations; but when the *foedera aequa* were replaced by the *foedera iniqua*, the senatorial commissions replaced the *fetiales* and the peregrine praetor was introduced, then the *recuperatores* were probably imposed by Rome, i.e., selected according to a Roman formula. Thus, it can be argued that within the Imperial federation the international court became a domestic (Roman) court.

2. *Domestic Disputes.* In regard to the *recuperatores* in domestic disputes, we must distinguish: (a) Disputes between Roman "citizens" themselves under the *ius civile*. In the history of the Roman domestic procedure the *recuperatores* do not appear in the formal procedure of the archaic period, i.e., of the *legis actiones* (143); however, they often appear in the formulary procedure, both civil and criminal, during the classical period; they disappear in the *cognitio* procedure of the post-classical period. (b) Disputes between Roman subjects and Roman officials. The earliest recorded case of these *recuperatores* occurred in 171 BC, when envoys (Roman subjects) from the province of Spain lodged a complaint against some Roman governors before the Roman Senate, which led to the appointment of a panel of *recuperatores*, consisting of Roman

143) The oldest reference to *recuperatores* between Roman citizens appears during the 2nd Carthagenian War, when Scipio appointed three *recuperatores* to determine who had first scaled the wall of Nova Carthago in Spain. Cfr. Livy 26, 48, 8.

Senators (144). (c) Disputes between Roman "subjects" (*peregrini*) themselves or between Roman "citizens" and Roman "subjects" under the *ius gentium* of the *praetor peregrinus* (145).

It can be argued that the institution of these domestic *recuperatores* was based on the model of the international *recuperatores*, except that the international *recuperatores* probably consisted of arbitrators of both nationalities in accordance with a treaty (146); whereas the domestic *recuperatores* (who appeared in the 3rd century BC after the unification of Italy by Rome) probably consisted of Roman arbitrators, except in the provinces, where there they might be of different subject nationalities (147).

The functions of the domestic *recuperatores* were to determine: (a) whether there was liability or not as a result of a delict or of breach of contract or some other reason; and (b) to assess damages, if there were any.

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144) Cfr. Livy, 43, 2, 1-20. Note that this senatorial panel probably became the model for the *Lex Calpurnia* of 149 BC, which established the first permanent court on provincial extortion: the *quaestio perpetua de repetundis.*

145) For the Roman version of the *ius gentium* see the Preliminary Hearings (right above) and the Introduction.

146) Cfr. the *foedus Cassianum* (Dion. Hal. 6, 95; Livy, 2, 33, 4) and the *foedera Punica* (Polybius 3, 22; 3, 24). See also A. GUARINO, *Storia del Diritto Romano* (6th ed., Napoli 1981), pp. 263-4; H.F. JOLOWICZ and B. NICHOLAS, pp. 102-107, 203 n. 7.

147) Cfr. Augustus' Cyrene Edicts in N. LEWIS & M. REINHOLD, *op. cit.*, p. 36ff.

D. Distinction between *iudicium fetiale* and *iudicium recuperatorium*. It appears: (a) that the *iudicium fetiale* dealt with disputes between States; (b) that, if the Parties were not willing to arbitrate the dispute (i.e., to restore the property or make compensation) in accordance with the Treaty (*foedus*) or *ius gentium*, such a refusal to arbitration could lead to an ultimatum and eventually to a declaration of war. It can be argued, therefore, that the *iudicium fetiale* implied the equality of the Parties.

The *iudicium recuperatorium*, however, implied that the Parties had agreed to resolve the dispute by the appointment of *recuperatores* (regardless of whether the agreement to arbitration was voluntary or imposed by Rome), who would determine: (a) the liability; and (b) the restitution or compensation.

V. EXTRADITION

A. Procedure of Extradition. According to PHILLIPSON (148), "it was an old tradition of the Italic peoples that the offender against an ally should be tried in the country and by the tribunal of the latter".

In the early archaic period, if the victim was a Roman citizen, then he petitioned the *fetiales* to conduct a preliminary

148) Cfr. PHILLIPSON, vol. I, p. 364ff. Cfr. Gaius 4, 9; J. 4, 9. Cfr. Livy, 1, 24 and 32; 8, 39; 9, 1; Dion. Hal. 2, 72.

investigation (149). If the *fetiales* found adequate evidence for an indictment, then the Roman Government might make a request for extradition of the alleged wrongdoer to the foreign government.

If the foreign government refused to extradite the alleged wrongdoer, then the private wrong became a public wrong against the *maiestas* of Rome, committed by the foreign Government. The Senate and the People might decide to send an ultimatum: either surrender the culprit and the things taken (alternatively, their value) or have war (150).

If the foreign government extradited the alleged wrongdoer, then the case was submitted to a tribunal of *recuperatores* for the final resolution.

If the victim was a foreigner, then he petitioned his government to request the Roman Government (generally, the Senate) to extradite the alleged Roman wrongdoer (151).

The Roman Government might order the *fetiales* to conduct a preliminary investigation and, if they found for the Foreign Government, might order the surrender of the alleged Roman wrongdoer to the Foreign Government for trial (152).

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149) Evidently, we are dealing mostly with frontier incidents and maybe with a Roman citizen in the foreign territory.

150) Cfr. the case of Tarentum and the case of the Illyrian pirates.

151) Livy 1, 15 and 38; 2, 13; 4, 30; 9, 1; Dion. Hal. 2, 72.

152) In general, for the legal principe of noxal surrender in Roman Law see Gaius 4, 75ff and J. 4, 8.

B. Grounds for Extradition *ex iure gentium*. The most common grounds for extradition *ex iure gentium* were: (1) Harm done to Ambassadors (153); (2) Breach of Neutrality by Ambassadors (154); (3) Instigators of Rebellion or of War (155); (4) Raids into Foreign State (156); (5) Violators of a Treaty (157); (6) War Criminals. Generally, the leaders of the conquered enemy were to be surrendered to the conquerors, such as, for instance, Carthage (Hannibal), Tarentum, Macedonia (Perseus), Gaul (Vergentorix), etc. (158); (7) International Negotiators.

If, on the one hand, the Senate refused to ratify the treaty (*sponsio*), negotiated by Roman Commanders, it might surrender them to the enemy as compensation for the refusal. According to Livy, the Roman claim that the *sponsio* bound no one except the negotiator (*sponsio ... neminem praeter sponsorem obligat*) (159) was alleged to be such a legal contrivance that it was tantamount to fraud under the semblance of legality (*aliqua*

153) Livy 9, 10; 38, 42, 7, where the Romans surrendered to the Carthagenians L. Minucius and L. Manlius for assaulting the Carthagenian envoys. See also Valerius Maximus 6, 6, 3; 6, 6, 5; Nonius 529; Pomponius, D. 50, 7, 18 (17); Ulpian, D. 48, 6, 7; Paulus, *Sent.* 5, 26, 1-2.

154) Livy 5, 36; Plutarch, *Camillus* 17-18.

155) Livy 7, 20; 8, 19 and 39; 9, 24; 29, 3; 33, 29; 36, 28.

156) Livy 1, 24 and 32; 1, 38; 2, 13; 4, 30; 8, 39; 9, 1; Dion. Hal. 2, 51.

157) Livy 8, 39.

158) Livy, 8, 39.

159) Cfr. also Gaius 3, 94.

fraudis species) (160). If, on the other hand, the treaty (*sponsio*), made by the Roman negotiators, had the condition that its validity was subject to ratification by the Senate, then the surrender might not take place (161).

Within the Empire, however, it appears that private crimes in principle came under the jurisdiction of the *forum delicti*, but de facto they were often dealt with in the jurisdiction where the alleged wrongdoer was found, which was mostly the defendant's domicile (*forum rei*).

VI. CONCLUSION

From the foregoing it appears that: (a) ancient communities, as a general rule, were exclusivist; though foreigners were not considered as *hostes*, yet their person and property were not protected by the local *ius civile*; they might be protected, however, by the *ius gentium* (162) and the *ius foederis* (if there was one) (163); (b) Rome, however, appears to have overcome this national exclusivism by the adoption of a foreign policy of gradual, albeit slow, political integration, first of the Latins, later of the Italians, and finally of the provincials, culminating in the

160) Livy 9, 8-12: the case of S. Postumius (Samnite War and the Caudine Forks). Cfr. Plutarch, *T. Gracchus* 7: the case of C.H. Mancinus (Numentine War 137-6 BC).

161) Sallust, *Jugurtha* 39, where the Senate refused to surrender the *sponsores*.

162) Cfr. The customary protection *ex hospitio*.

163) Cfr. Pomponius, D. 49, 15, 5, 2.

Caracalla's Act of 212 AD; (c) there was a "Private" International Customary Law (*ius gentium*), which the Romans gradually nationalized through the edicts of the peregrine praetor; (d) there was a "Public" International Customary Law (*ius pacis et belli*), which the Romans also nationalized to some extent through the *fetiales* (hence, known also as *ius fetiale*); (e) there were International Treaties of two levels, i.e., *foedera aequa* and *foedera iniqua*, the latter being characterized by the "supremacy clause" of the Roman People (*maiestas Populi Romani*) in Foreign Affairs (164); (f) there were International Arbitrations in the Greek world; in Roman times, however, Rome seems to have refused any international interference in its own affairs, but accepted to act as arbitrator between foreign city-states, which were under its hegemony or its zone of influence; (g) there were no permanent embassies, but there was a body of customary international law pertaining to embassies (*ius legatorum*).

164) Cfr. Polybius 21, 32, 2; Livy 38, 11; C. NICOLET, *op.cit.*, pp. 45-47.