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Correlating Thinkers**

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Front cover: *The cut stem of a fir tree in the forest around Vallombrosa Abbey in Reggello, in the Apennines east of Florence. The monastery was founded in 1038, and is surrounded by deep forests tended over several centuries. The concentric rings show the accumulating age of the tree, here symbolising how thought expands and accumulates over time, and how lines or schools of thought are interconnected and cut through periods.*

Back cover: *The forest floor covered by a deep blanket of leaves from past seasons, in the protected forests around Camaldoli Monastery in the Apennines east of Florence. Old leaves nourish new sprouts and growth: the new grows out of the old. We may see this as a metaphor for how thinkers of the past offer an attractive terrain to explore and may nourish contemporary foundational analysis.*

Roman Jurists and the Idea of International Criminal Responsibility: Ulpian and the Cosmopolis

Kaius Tuori*

4.1. Introduction

Discussing the ancient roots of a modern concept is an enterprise fraught with difficulty. International criminal responsibility, the idea that a number of acts result in criminal liability irrespective of national or jurisdictional limitations, is a concept that transcends several of the boundaries of conventional modern law, such as national sovereignty and the powers that are normally associated with it, including the capacity to exercise exclusive jurisdiction and to determine the crimes that this jurisdiction covers. However, because these very ideas of exclusive jurisdiction and national sovereignty are deeply rooted in the modern concept of the nation-State, approaching pre-modern ideas and practices of jurisdiction and its limits enables us to see not only the origins of modern conventions but also the limitations inherent in them.

The purpose of this chapter is to explore the roots of international criminal responsibility, a task complicated by the fact that the notions of ‘crime’, the ‘State’ and the ‘international’ plane were unknown in their modern forms. Using the writings of ancient Roman jurists and especially those of Domitius Ulpianus (circa 170–223), commonly known as Ulpian, the chapter analyses the transformation of concepts such as ‘sovereignty’,

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‘responsibility’, ‘universal jurisdiction’ and ‘authority’. Of particular interest is the influence of the Stoic doctrine of cosmopolis, of the universal community of men, as a framework that informed the transformation of Roman legal thought.¹

For Ulpian, the key to transcending the systemic limits of law was the near-universal authority of the Emperor and its manifestation in law. Rather than understanding the law as a function of power, Ulpian links it with the ethical demands of justice and humanity, presenting a solution to the problem of power as theorised by Seneca. As pre-modern jurisdictional order was commonly based on the personality principle, issues such as citizenship, legal privilege and property were fundamental in the formation of an understanding of sovereignty, jurisdiction and their limits. As modern international law was founded on analogies to Roman private law, this chapter will delve into the ways that Roman legal doctrine was adapted and utilised in the making of the international legal order.²

The role of Roman jurists – and Ulpian in particular – in the development of international criminal responsibility has thus far not been covered in the scholarship. The main recent study on Ulpian, Tony Honoré’s *Ulpian: Pioneer of Human Rights*, does not cover this topic and the studies on Ulpian comprise only some articles, none of which have taken up the same.³ There have been some studies on particular issues such as sov-

¹ On the emergence of the ancient concept of cosmopolis, see Daniel S. Richter, *Cosmopolis: Imagining Community in Late Classical Athens and the Early Roman Empire*, Oxford University Press, Oxford, 2011.

² Hersch Lauterpacht, *Private Law Sources and Analogies of International Law*, Green and Co., London, 1927; Arthur Nussbaum, “The Significance of Roman Law in the History of International Law”, in *University of Pennsylvania Law Review*, 1952, vol. 100, no. 5, pp. 678–87. On the use and reuse of ancient tradition in the making of international law, see David J. Bederman, “Reception of the Classical Tradition in International Law: Grotius’ *De Jure Belli ac Pacis*”, in *Emory International Law Review*, 1996, vol. 10, no. 1, pp. 1–50; Kaius Tuori, “The Reception of Ancient International Law in the Early Modern Period”, in Bardo Fassbender, Anne Peters, and Simone Peter (eds.), *The Oxford Handbook for the History of International Law*, Oxford University Press, Oxford, 2012, pp. 1012–33. On international law in antiquity, see David J. Bederman, *International Law in Antiquity*, Cambridge University Press, Cambridge, 2001; Nadine Grotkamp, *Völkerrecht im Prinzipat*, Nomos, 2009.

³ Valerio Marotta, *Ulpiano e l’impero*, Loffredo Editore, Naples, 2000–2004; Tony Honoré, *Ulpian*, Oxford University Press, Oxford, 2002; Giuliano Crifò, “Ulpiano. Esperienze e responsabilità del giurista”, in *Aufstieg und Niedergang der römischen Welt*, 1976, part II, vol. 15, pp. 734–36; Wolfgang Kunkel, *Die Römischen Juristen. Herkunft und soziale Stellung*, Böhlau, 2001, pp. 245–54.

ereignty and authority, but there are no discussions therein on the theme of international criminal law. Even the concept of jurisdiction in ancient international law is under-developed to say the least, with the last article on the matter dated 1935.⁴

This chapter will first trace the life and career of Ulpian, looking at his transformative influence not only in the Roman legal tradition but equally in the development of jurisprudence in general. Ulpian represents a crossroads in the Roman legal tradition, being a central figure in the Severan revolution of law, whereby the legal system began to fully realise the implications of the unfettered power of the Roman Emperor in the legal field. The following sections will then take on the fundamental concepts and texts wherein Ulpian and his colleagues discuss the implication of that power in the understanding of concepts like ‘sovereignty’, ‘responsibility’, ‘universal jurisdiction’ and ‘authority’. Through these sections, it will become clear the degree of influence that the idea of cosmopolis had on Ulpian’s thought. While the influence of Stoicism in the field of law has been long debated,⁵ in the case of Ulpian, the impact is potentially significant because such ideas may be seen as the beginnings of a fundamental transformation in legal doctrine.

Ulpian was not an international lawyer (an anachronism at the time), but he laid the groundwork for the doctrinal division between different types of law that would later be adapted into international legal discourse. According to Ulpian, while Roman citizens were subject to *ius civile*, the civil law or literally the law of the citizens, all people regardless of status or origin were subject to *ius gentium*, the law of all nations. However, *ius*

⁴ Shalom Kassan, “Extraterritorial Jurisdiction in the Ancient World”, in *American Journal of International Law*, 1935, vol. 29, no. 2, pp. 237–38. Recent books like Cedric Ryngaert, *Jurisdiction in International Law*, Oxford University Press, Oxford, 2008, pp. 44–47, touch upon the matter from a different perspective. The author has a forthcoming chapter in the *Oxford Handbook of Jurisdiction in International Law*, Oxford University Press, Oxford, 2018.

⁵ Honoré, 2002, , p. ix, see *supra* note 3, sees a wider, proto-human rights thought in Ulpian’s thinking: “The values of equality, freedom and dignity, to which human rights give effect, formed the basis of Ulpian’s exposition of Roman law as the law of the cosmopolis”. On Stoicism and law, see also Paul A. Vander Waerdt, “Philosophical Influence on Roman Jurisprudence? The Case of Stoicism and Natural Law”, in *Aufstieg und Niedergang der römischen Welt*, 1994, part II, vol. 36, no. 7, p. 4892; Ulrich Manthe, “Beitrag zur Entwicklung des antiken Gerechtigkeitsbegriffes II: Stoische Würdigkeit und die iuris praecepta Ulpian’s”, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 1997, vol. 114, no. 1, pp. 14–22.

gentium was not international law but Roman law, specifically the rules of Roman law that would apply to all.⁶

The main sources of this chapter are the writings of Ulpian as they are available to us today. Hence, this discussion of the ideas of Ulpian must take into account the convoluted history of textual transmission and preservation. While, in the modern intellectual history of law, one may be relatively certain that the text being read reflects the ideas that the author intended, it is not so straightforward in the case of ancient legal sources. For example, the writings of Ulpian are mainly preserved to us in the work known as the *Digest of Justinian* (hereinafter, the ‘*Digest*’), a post-classical compilation from the 530s of which some 40 percent of the total text is attributed to Ulpian. A part of the collection later called the *Corpus Iuris Civilis*, the *Digest* is a compilation of the writings of Roman jurists mainly from the classical period, roughly the first three centuries of the first millennium AD. The work is a collection of excerpts from the writings of jurists, arranged in books according to the topic of the text. Because the *Digest* sought to present the law as it was understood in the 530s, only the excerpts that reflected contemporaneous valid law were included. Some of the excerpts were even edited to conform to the state of the law at the time. Thus, even though the writings of Ulpian, Paul, Papinian and others were seemingly reproductions of the original texts, they were selected, edited and amended to correspond to the legal situation, sometimes half a millennium later. For the main part, it is impossible to determine with any certainty how many of the texts have been altered by the Justinianic law commission led by Tribonian that compiled the final text of the *Digest*. Besides the *Digest*, there are also other relevant post-classical collections of texts, such as the *Epitome of Ulpian*. These texts sometimes include segments in their purportedly unaltered state.

What is certain is that the re-discovery of the text of the *Digest* in 1135 led to an unprecedented revival in the study of law and the understanding of jurisprudence. Thus, the work of Ulpian is significant not only

⁶ Ulpian divides law into three parts, *ius naturale*, *ius gentium* and *ius civile*. *Digest*, 1.1.1.4: “*Ius gentium est, quo gentes humanae utuntur. Quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit*” (The law of nations is that which all human peoples observe). All translations from the *Digest* are from *The Digest of Justinian*, Alan Watson ed. and trans., University of Pennsylvania Press, Philadelphia, 1998. On the Roman concept of *ius gentium*, see Max Kaser, *Ius gentium*, Böhlau, Vienna, 1993.

due to its crucial importance in the transformation of ancient Roman law, but equally in the way that it transformed the European understanding of law during the Middle Ages.

Due in large part to considerations of space and priority, this chapter will focus primarily on Ulpian's ideas on sovereignty and authority, rather than criminal law itself. For further research, the opinions of Ulpian, for instance in his work *On the Duties of the Proconsul*, were enormously important for the development of the thinking on human dignity and ultimately on human rights. For example, in *Digest* 1.6.2, Ulpian notes that it is the duty of the proconsul to punish a master who had savagely maltreated his slave. This and other notions are indicative of the mentality that, despite the wide leeway that a master was given, rules of definite responsibility were enforced to curtail egregious offences.⁷

4.2. Ulpian, a Roman Jurist from the Severan Period

Ulpian or Domitius Ulpianus, the main character of this inquiry, was a Roman imperial official during the Severan period. Like most of the fundamental characters of a ground-breaking historical development, Ulpian was not truly unique, but rather, a product of the culmination of a number of tendencies and one of many similar characters of that period. What makes Ulpian so important is: first, his extraordinary productivity and the fecundity of his ideas; and second, the way that his work not only resolved many crucial legal problems that had been dividing the legal profession but equally presented jurisprudence with a new philosophical foundation based on the application of the Stoic doctrine.

Ulpian was a provincial, hailing from the Eastern part of the Roman Empire, from the city of Tyre in current Lebanon. During the time of the Roman Republic, his origins would have prevented him from making a career in the highest echelons of the Roman State because the senatorial families were still in control of magistracies. For them, pedigree was paramount and even someone like Cicero would be considered a *homo novus*, a new man, because he lacked the line of ancestors who served the State with distinction. In contrast, during the High Empire, from the second century onwards, Roman citizenship was extended to the provincial elites, who were increasingly entering into imperial service. This development was accelerated when a provincial became the Emperor: after a civil war,

⁷ On Ulpian's ideas on criminal law, see A. Nogrady, *Römisches Strafrecht nach Ulpian*, Duncker and Humblot, Berlin, 2006.

the throne was taken by Septimius Severus, a career soldier from a small town called Leptis Magna in current Libya. This ended a civil war between claimants to the throne that had begun when Commodus died in 192. After a long battle, Severus finally defeated his erstwhile ally Albinus in 197. Severus, having risen to the throne by virtue of his own military prowess and the allegiance of his legions, had little to be thankful for *vis-à-vis* the old Roman elites and proceeded to reform the governance of the Empire according to his own wishes.⁸

A great part of the administrative reforms centred on the strengthening of the imperial council and chancellery and the *curae* in direct imperial control. The Roman administration was based on a dual system. In the transition from Republic to Empire, the old Republican system of city-State governance, where assemblies that voted a series of magistrates the highest of which were the consuls, was retained. The Emperor had no official position but, rather, wielded a collection of powers; sometimes the Emperor could be a consul but that was not really necessary. With the reforms of Augustus, the first Emperor, a new system emerged where salaried officials appointed by the Emperor and answerable only to him were given significant tasks without any consideration to the Republican structures.

Ulpian was one of these new magistrates, who were most often not from the senatorial elite but either former imperial slaves or equestrians, a rank below the senatorial class. Little is known of Ulpian's life, beyond his official career, and of his family. We are fortunate in that there is an honorary inscription dedicated to Ulpian, documenting the *cursus honorum* (that is, the official career and civil and military magistracies that Ulpian, as a Roman in public service, held). This inscription was found in Tyre, his home town. It confirms the highlights of his career as indicated in other sources – the posts of *praefectus annonae*, the prefect of the grain supply, and *praefectus praetorio*, the praetorian prefect. They were both positions of vital importance and enormous power. The *praefectus anno-*

⁸ On Septimius Severus and his reforms, see Achim Lichtenberger, *Severus Pius Augustus: Studien zur sakralen Repräsentation und Rezeption der Herrschaft des Septimius Severus und seiner Familie (193–211 n. chr.)*, Brill, Leiden, 2011; Alison E. Cooley, "Septimius Severus: The Augustan Emperor", in Simon Harrison Swain and Jas Stephen Elsner (eds.), *Severan Culture*, Cambridge University Press, Cambridge, 2007, pp. 385–400; Anthony R. Birley, *Septimius Severus: The African Emperor*, Routledge, New York, 1999; and Anna Marguerite McCann, *The Portraits of Septimius Severus (AD 193–211)*, American Academy in Rome, Rome, 1968.

nae was mainly responsible for the grain supply of the city of Rome, the procurement and transport of grain from all parts of the empire, mainly Egypt, to feed the roughly one million inhabitants of the city. It was a vast logistical enterprise and any disruptions would mean famine and social unrest. His following position was, if possible, even more important. The *praefectus praetorio* was the head of the imperial administration and acted as the Emperor's stand-in. In time, the praetorian prefect became the chief judge and head of the legal service. They are both equestrian positions, and confirm that he was never raised to the rank of a senator. Hence Ulpian's career, like those of many important imperial functionaries, was dependent on the Emperor and his favour. His career spanned almost the whole of the Severan period. He started out in the service of Septimius Severus as an assessor, a junior official in the council of the famous jurist Papinian. During the reign of Caracalla, Ulpian continued in the imperial service as a legal secretary (*a libellis*) responsible for answering legal petitions.⁹

Being reliant on the will and whim of the Emperor exacted a steep price on those willing to advance in the imperial service. Even for serious and conscientious men like Septimius Severus, life at the top was risky. After the death of Severus, the throne was held by a series of more unstable men who were often mere puppets of the strong women of the family of Julia Domna, Severus's wife. The two sons of Severus, Caracalla and Geta, ruled as co-rulers for some time, but infighting led to conflict where Caracalla finally had Geta murdered. In the purges that followed, some twenty thousand allies of Geta were killed, among them innumerable imperial officials. A short-lived interlude followed the death of Caracalla where Macrinus, his murderer, attempted and failed to consolidate his power and Elagabalus was raised to the throne at the instigation of Julia Mamaia, Caracalla's aunt. When he was in turn murdered by soldiers, Severus Alexander, his cousin, was chosen as Emperor. Julia Mamaia, who was Elagabalus and Severus Alexander's grandmother, was once again behind this. The problem of the dynasty was that the quality of the rulers supplied by the family got progressively worse. Caracalla, who is known as a tyrant of the first degree, was still a military man who had the support of the troops. Elagabalus and Severus Alexander were teenagers

⁹ *L'Année Épigraphique* 1988, 1051; Honoré, 2002, pp. 7–12, see *supra* note 3; Crifò, 1976, pp. 708–87, see *supra* note 3; Kunkel, 2001, pp. 245–54, see *supra* note 3.

who had no support themselves and provoked both the populace and the troops. Cassius Dio, an eyewitness, writes that Elagabalus liked to cross-dress and otherwise play with gender roles and would not abide by the duties of the office. Ulpian was among a number of officials banished during the reign of Elagabalus.¹⁰

After the murder of Elagabalus and his mother, Julia Soaemias, Severus Alexander was raised to the throne at the age of thirteen. In the spree of murders that took place, the prefects and most of the high administration officials were also killed. After the excesses of Elagabalus and the popular outcry that this had caused, there was an effort to improve administration. To do this, trusted people from the reign of Septimius Severus were brought in. Among them were both Cassius Dio and Ulpian. Alexander, at the instigation of his grandmother Julia Mamaia, had employed Ulpian to aid the praetorian prefects, which led to his gradual rise to the top of the administrative ladder. Ulpian became a member of his council and *magister scrinium*. He was an excellent lawyer and legislator, but irritated the soldiers, especially the praetorian guard, because he sought to curtail their privileges. After Ulpian was made sole praetorian prefect, he was killed by the praetorians in front of the Emperor and his mother.¹¹

The career of Ulpian was thus one forged in times of instability, mass murder and emperors of murderous tendencies. For the main part of his official duties, he was employed by the Emperor in the imperial legal service, answering petitions and legal queries sent by the populace to the Emperor. Of his writings, none has survived intact. We know the titles of many of his books because they are mentioned in the quotations preserved in the *Digest of Justinian*. His commentary of the praetor's edict, the principal source for legal procedure, contained at least 83 books (one book was equivalent to one scroll, corresponding roughly to a chapter in modern terms). Another major work was a commentary titled *Ad Sabinum*, which was a jurisprudential work, whose title was a reference to the jurist Sabinus, the founder of the Sabinian school of law. He would write numerous works on administration and on the duties of different magistrates, of which *De officio proconsulis* is the best known. A number of his works

¹⁰ Cassius Dio, 80.14.3–4; *Scriptores Historiae Augustae, Heliogabalus*, 16.4.

¹¹ Zosimus, 1.11.2; Cassius Dio, 80.1–2.3; Eutropius, 8.23.

have been found in manuscripts. In total, there are roughly 300,000 lines of text ascribed to him.

Because of the exalted status of Ulpian and the role his writings have had, he is oft-regarded as an intellectual figure. This stems partly from the fact that much of his career corresponded with that of Cassius Dio, one of the most prolific historical and political writers of the era. Dio mentions Ulpian frequently, as do other writers, giving him a level of exposure and visibility that other lawyers of the era did not have. Ulpian's thought and his writings have been seen as a profound influence on the way Rome's legal policy was shaped. The role of Ulpian has been promoted by scholars like Tony Honoré, who claims that Ulpian promoted the idea of the equality of men and the rule of law.¹²

In addition, owing to the fundamental issues of law and humanity in the writings of Ulpian, he has been linked with philosophers of the era. One of the most interesting possibilities that has been raised is the role of Julia Domna, Caracalla's mother and the wife of Septimius Severus. The Greek philosopher Philostratus mentions in his works the circle of intellectuals around Julia Domna when she was in Rome. This circle included many of the most famous scholars of the era, including philosophers and writers. Within the circle were numerous esteemed jurists, of which Philostratus names Papinian, Ulpian and Paul. Critical scholars such as Crifò have raised doubts over the reliability of the information presented by Philostratus and the true nature of the circle.¹³ To many scholars of Ulpian, these indications have been very enticing. Would Ulpian, Papinian and Paul, the most prominent jurists of the era, have been in contact with the brightest intellectuals of their day, discussing the nature of justice and humanity? Is it possible that the new conceptions of law and justice, and Ulpian's idea of law as a true philosophy, were influenced by the circle?¹⁴

¹² Honoré, 2002, p. 81, see *supra* note 3.

¹³ Philostratus, *Vita Apollonii*, 1.3. See also Philostratus (the Elder), *Epistolae*, 73; Glen W. Bowersock, *Greek Sophists in the Roman Empire*, Oxford University Press, Oxford, 1969. On Domna's circle, see Barbara Levick, *Julia Domna: Syrian Empress*, Routledge, New York, 2007, pp. 107–23; Crifò, 1976, pp. 734–36, see *supra* note 3.

¹⁴ *Digest*, 1.1.1.pr. Regarding Ulpian's role in the circle, Laurens Winkel, "Die stoische οἰκείωσις-Lehre und Ulpian's Definition der Gerechtigkeit", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 1988, vol. 105, no. 1, pp. 669–79, pp. 677–78 is positive about its influence in his thought, but both Tony Honoré, *Emperors and Lawyers: With a Palingenesia of Third-century Imperial Rescripts 193–305 AD*, Clar-

We cannot really know, of course, since the information given by Philostratus is rather vague, though it does indicate that there was a shared literary and intellectual culture in which ideas circulated.

4.3. Sovereignty

Ulpian was the main formulator of the conception of the sovereign legal power of the Emperor. According to Ulpian, the Emperor was law animate (*lex animata*) and imperial power was to be truly unfettered. The real contribution of Ulpian in this regard was to define the undefined imperial power and its relationship with the law. Ulpian translated the narrative of imperial sovereignty and absolutism, as they emerged in the Roman legal, historical and political tradition, into the language of law.

The first signs regarding the sovereignty of the Emperor with regard to law emerged quite soon after the reign of Augustus. During the first two centuries of the Roman Empire, the idea of the unrestricted power of the Emperor was formulated mainly in the writings of panegyrists like Pliny or imperial functionaries like the philosopher Seneca. They would soon thereafter start to make their way into law, in the various manners in which the position of the Emperor could be defined. During the accession of Emperor Vespasian, after the fall of the Julio-Claudia dynasty with the murder of Nero in the year 69, a law now called the *Lex de imperio Vespasiani* had numerous paragraphs outlining the different powers of the Emperor based mostly on precedents. Such niceties were largely dispensed with during the Severan period, when there was no real Republican opposition against the sovereign power of the Emperor.

What Ulpian thus did was to first acknowledge the true nature of imperial power, that of sovereignty, but secondly and importantly, to present an ethical ultimatum to the use of that power. Ulpian's great achievement was thus to combine the positivism of imperial law with the ethical demands that he placed on the law. For the international criminal law, these innovations are fundamental. The idea that the sovereign has unfettered power meant that there was a claim of universal authority that is bound by ethical and moral consideration that transcend that power. Thus, even though Ulpian wrote explicitly on imperial power, discussing

endon Press, Oxford, 1994, pp. 81–82, and Crifò, 1976, pp. 734–36, see *supra* note 3, are sceptical.

the Roman Emperor, his ideas transcended the historical boundaries of the Roman State and became universalised in the later jurisprudence.

Ulpian's work established the relationship between the Emperor and the law in a way that had profound implications on how the decisions of the executive power changed law. However, Ulpian would demand that the adjudication be done in the name of imperial power and the Emperor be of the highest intellectual, legal and ethical standard. Thus, law had to be authoritative both in form and in content.¹⁵

Ulpian's most famous line is a passage in the *Digest* where he maintains that the Emperor is free from the power of the law:

The emperor is not bound by law.

*Princeps legibus solutus est.*¹⁶

The line contains a momentous defining task. The Emperor was both free from the compulsion of the laws in his own actions and therefore, legal recourse against the Emperor was not possible. Furthermore, the Emperor was not bound by the laws when he was exercising jurisdiction. In consequence, the Emperor could deviate from the established law. Would that mean that a decision made by the Emperor could be against the law? Was he free to not observe the laws as he saw fit? Or would he be changing it in the process? What is often omitted is that this quotation was initially on a piece of statutory law (*lex Julia et Papia*) which explained that the Emperor was exempt from it.¹⁷

Fortunately, Ulpian clarified the issue. Affirming that the Emperor had a power to make decisions which disregarded the law would have led to considerable logical difficulties if it had not been supplemented by a second statement confirming that the word of the Emperor was law. Ulpian

¹⁵ On Ulpian's conception of justice, see Winkel, 1988, *supra* note 14; Wolfgang von Waldstein, "Zu Ulpian's Definition der Gerechtigkeit (D. 1,1,10pr)", in *FS Flume*, 1978, vol. 1, pp. 213–323.

¹⁶ *Digest*, 1.3.31, Watson ed. and trans., 1998, see *supra* note 6.

¹⁷ The reference to a *lex imperii* comes up also with Severus Alexander in 232 (*Codex Iustinianus*, 6.23.3). Ulpian's statement formed the legal basis of political absolutism in European history and thus the literature on it is vast. The process through which the compilers transformed this into an absolutist statement is a well-known example of 'interpolation by decontextualization'. See Crifò, 1976, p. 778, *supra* note 3, and Filippo Gallo, "Per il riesame di una tesi fortunata sulla solutio legibus", in *Sodalitas: scritti in onore di Antonio Guarino*, Jovene, Naples, 1984, pp. 651–82, for references to older literature. For its vast influence, see Kenneth Pennington, *The Prince and the Law 1200–1600: Sovereignty and Rights in the Western Legal Tradition*, University of California Press, Los Angeles, 1993.

an expressed this through the idea of popular sovereignty and the theory that the Roman people had transferred their legislative power to the prince:

What pleases the prince has the force of law. The *populus* has with the *lex regia* that his *imperium* is founded transferred to him their *imperium* and power.

*Quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat.*¹⁸

Consequently, the Emperor was living law or law animate, his will having a legislative capacity. The theoretical implications of this statement are vast, but they coincide well with what Ulpian's contemporary historian Dio thought of the roots of imperial power. The practical side was more challenging to fathom. Would every word or thought of the Emperor be binding and create law? Ulpian, ever the practical administrator, explained thereafter that the key is the intention of the Emperor – matters that are personal or relate to an individual issue do not necessarily have a general effect (*Digest*, 1.4.1.1–2). If the Emperor means it, his words and intent are precedential and they have a legislative effect.

The imperial legislative power was, in theory, universal. The imperial control over the legal system extended throughout the courts. Thus, Ulpian wrote that if a judge appointed by the Emperor hears a case, restitution cannot be granted by anyone other than the Emperor. According to him, the possibility of appeal is necessary to correct the partiality or inexperience of the judges. It is even possible to successfully appeal against a rescript of the Emperor because it may be that the person writing to the Emperor asked for something else or that matters were misrepresented in the letter.¹⁹

The universal power and sovereignty of the Roman Emperor was something that had been created over a long period of time. By the time of Ulpian, emperors and imperial officials had long understood the dangers of such a power and sought to present limitations. Emperor Antoninus Pius wrote in a rescript in the mid-second century AD that the law of the sea would be the law of the Rhodians, posing this as a self-limitation:

Voluvius Maecianus, From the Rhodian Law: Petition of Euraemon of Nicomedia to the Emperor Antoninus: “Anto-

¹⁸ *Digest*, 1.4.1pr, Watson ed. and trans., 1998, see *supra* note 6.

¹⁹ *Ibid.*, 4.4.18.4, 49.1.1.pr–2.

ninus, King and Lord, we were shipwrecked in Icaria and robbed by the people of the Cyclades.” Antoninus replied to Eudaemon: “I am master of the world, but the law of the sea must be judged by the sea law of the Rhodians where our own law does not conflict with it.” Augustus, now deified, decided likewise.

Maecianus ex lege Rhodia. Ἀξίωσις Εὐδαίμονος Νικομηδέως πρὸς Ἀτωνῖνον βασιλέα. Κύριε βασιλεῦ Ἀτωνῖνε, ναυφράγιον ποιήσαντες ἐν τῇ Ἰταλία διηπάγημεν ὑπὸ τῶν δημοσίων τῶν τὰς Κυκλάδας νήσους οἰκούντων. Ἀτωνῖνος εἶπεν Εὐδαίμονι. ἐγὼ μὲν τοῦ κόσμου κύριος, ὁ δὲ νόμος τῆς θαλάσσης. τῷ νόμῳ τῶν Ῥοδίων κρινέσθω τῷ ναυτικῷ, ἐν οἷς μήτις τῶν ἡμετέρων αὐτῷ νόμος ἐναντιοῦται. τοῦτο δὲ αὐτὸ καὶ ὁ θειότατος Αὐγούστος ἔκρινεν.²⁰

What Antoninus Pius outlines here is the jurisprudence of a universal empire that rests on legal pluralism. He first asserts his sovereignty and universal authority (referring to himself as “master of the world”), but then inserts the self-limitation. The customary law of the sea, that is the sea law of Rhodians, may be applied, but only as long as it is not contrary to the rules of Roman law.

The Roman jurists would thus envision the status of the Emperor as a universal authority that was wielded with sovereign power. However, this sovereign power was one established through a set of limitations imposed by the emperors themselves. The seemingly illogical and contradictory conceptions of universality and particularity were combined through the careful use of grandiose statements and their meticulous definitions seeking to ensure that the imperial theory would not write checks that the imperial power could not cash.

4.4. Responsibility

Ulpian outlined the imperial power over law through two main attributes: positivism and the ethical demand for justice. Positivism was formulated via the concept of legal positivism: the Emperor’s will is law and therefore all issues of law may be resolved through imperial power. The ethical demand for justice meant that law and jurisprudence have an ethical or philosophical dimension, namely to bring justice.

²⁰ *Ibid.*, 14.2.9.

What the two attributes, when combined, led to is a conundrum. The Emperor is given unfettered power and his decisions are assumed to be ethically sound. However, a brief glimpse into Roman history, as with the history of any autocratic government, reveals that human agents tend to be fallible and do not unfailingly fulfil the great demands of ethics. Rather than referring to the actual Roman Emperors, the ethical sovereign has a counterpart in the narratives of kingship. The narrative line of the divine good king who not only represents the living law, but is also virtuous and just, has a rich history in the ancient world. Versions of the stories emerge in the Hellenistic literature and come to the Roman literary tradition mainly through Seneca. In his writings on the young Nero, Seneca would stress these two attributes, the astounding power of the Emperor and his unflinching virtue. As is obvious from the contrast between the ideal and the actual history of the reign of Nero, these two aspects were not easily combined in real life.²¹ Thus, the concept should be seen as an ideal, where the moral and ethical virtue of the ruler is more aspirational rather than something that should be assumed. In his *De Clementia*, Seneca presents a description of the virtues of a good emperor in a fictitious speech by Nero, beginning by describing his terrifying power:

Have I of all mortals proved good enough and been chosen to act as the gods' representative on earth? I make decisions of life and death for the world. The prosperity and condition of each individual rests in my hands.

*Egone ex omnibus mortalibus placui electusque sum, qui in terris deorum vice fungerer? Ego vitae necisque gentibus arbiter; qualem quisque sortem statumque habeat, in mea manu positum est; quid cuique mortalium [...].*²²

While Seneca and Pliny wrote at length about the imperial power and the virtue of the Emperor as the true foundations of justice, the concept took some time before it was incorporated into Roman jurisprudence. When it was, Roman jurists sought to resolve the conundrum by separating the actual person from the legal figure of the Emperor. It is quite clear from even a cursory reading of the history of the Severan period that the Emperors themselves were hardly the perfect ethical and moral persons that the good king narrative described. However, even lazy and murderous

²¹ On the context, see James Romm, *Dying Every Day: Seneca at the Court of Nero*, Knopf, New York, 2014.

²² Seneca, *De Clementia*, 1.1.2.

emperors of the Severan period, like Caracalla or even Elagabalus, seem to leave behind imperial constitutions that are legally sound and within the doctrine of the law. This has led many to think that the emperors (the physical persons) may not have always had that much to do with the drafting of legal resolutions.²³

By separating the private and the public person of the Emperor, the jurists managed to have their cake and eat it. Even if the Emperor as a person may have been a raving lunatic, the imperial bureaucracy, the legally trained secretaries, would write in the manner that the Emperor would need to write and uphold the façade of the law. Michael Peachin has described this in terms of a Weberian separation of the person and the position. For the working of the law, it was deemed important that there be the *institution* of the Emperor and the imperial bureaucracy, not necessarily an emperor knowledgeable in law.²⁴

Related to the development of international criminal law is another change which led to the spread of the idea of the Emperor as a universal judge and legislator: the spread of Roman citizenship. Previously, almost throughout the ancient world, the personality principle had been applied in the administration of justice. This meant that the Greeks would be subjected to the laws of their hometown, the Persians tried according to their own law, and so on. However, Rome became the great exception, bestowing citizenship to allies and even former slaves, leading to the growing influence of Roman law. This development came to a head with the impact of the so-called *Constitutio Antoniniana* by Caracalla that granted Roman citizenship to the inhabitants of the Empire in the year 212.²⁵ The true impact of the *Constitutio* was unclear even to the ancient Romans. Cassius Dio wrote that Caracalla's aim with the grant of citizenship was

²³ Honoré, 1994, p. 95, see *supra* note 14. Examples of Elagabalus's rulings: Visigothic epitome of *Codex Gregorianus*, 13.14.1; *Corpus Inscriptionum Latinarum*, VI 21046.33.

²⁴ Michael Peachin, *Iudex vice Caesaris: Deputy Emperors and the Administration of Justice during the Principate*, Franz Steiner Verlag, Stuttgart, 1996, p. 203.

²⁵ *P.Giss.* 40.1; Cassius Dio, 77(78).9.4; *Digest*, 1.5.17; Christoph Sasse, *Die Constitutio Antoniniana*, Otto Harrassowitz, Wiesbaden, 1958; Hartmut Wolff, *Die Constitutio Antoniniana und Papyrus Gissensis 40 I*, Universität zu Köln, Cologne, 1976; Kostas Buraselis, *Theia Dorea. Das Göttlich-Kaiserliche Geschenk. Studien zur Politik der Severer und zur constitutio Antoniniana*, Verlag der Österreichischen Akademie der Wissenschaften, Vienna, 2007; Ari Z. Bryen, "Reading the citizenship papyrus (*P.Giss.* 40)", in Clifford Ando (ed.), *Citizenship and Empire in Europe 200–1900: The Antonine Constitution after 1800 years*, Franz Steiner Verlag, Stuttgart, 2015, pp. 29–37.

to expand the tax base by increasing the number of citizens who paid the full tax burden (78.9). Nevertheless, Dio's explanation does not truly hold water, because most of the members of the elite who paid the lion's share of taxes were already citizens and even non-citizens paid taxes of their own.

Ulpian wrote simply that Caracalla made all people in the Empire Roman citizens:

Everyone in the Roman world has been made a Roman citizen as a consequence of the enactment of the Emperor Antoninus.

*In orbe Romano qui sunt ex constitutione imperatoris Antonini cives Romani effecti sunt.*²⁶

The passage is from his book *Ad edictum*, written during the reign of Caracalla. The conventional date of 212 is repeated in the textbooks, even though critics have pointed out that the date has no reliable foundation.²⁷ The true meaning of the edict has been long debated. Did it mean that Caracalla switched from the long-standing personality principle of law in favour of the area principle? Would everyone be granted citizenship, even those who were simply visiting?

According to Ulpian, the old distinctions between Romans and Latins became redundant. However, the status of the peregrine, that is foreigners, continued to be relevant. Because the Roman Empire was vast and communication between areas slow, it is highly unlikely that such a drastic reform would have been immediately applied to the administrative practices of the provinces.²⁸ A papyrus published in 1910, the Giessen papyrus 40.I, provides a crucial contemporary confirmation for the law that many had considered to be a false flag, but in doing so it raised numerous new questions about what the constitution could actually mean. In the text, there were limitations that would bar unsought persons, including in particular 'uncultured' Egyptians and primitive tribes conquered by the

²⁶ *Digest*, 1.5.17, Watson ed. and trans., 1998, see *supra* note 6.

²⁷ Fergus Millar, "The Date of the Constitutio Antoniniana", in *The Journal of Egyptian Archaeology*, 1962, vol. 48, pp. 124–31.

²⁸ Wolff, 1976, pp. 26–28, 272–73, see *supra* note 25; Valerio Marotta, *La cittadinanza romana in età imperiale, secoli I–III d.C.: Una sintesi*, G. Giappichelli, Turin, 2009; Clifford Ando, "Introduction", in Clifford Ando (ed.), *Citizenship and Empire in Europe 200–1900: The Antonine Constitution after 1800 years*, Franz Steiner Verlag, Stuttgart, 2015, pp. 22–24.

Romans, from enjoying the benefits of citizenship, even though they were inside the Empire. Thus, they were to remain *dediciti*, vanquished enemies.²⁹ This demonstrates how persons who were incapable of cultivation and civilization, which essentially means becoming Romanized, were excluded from citizenship.

For the newly-minted citizens in the provinces of Rome, the grant of citizenship meant that they were able to petition the Emperor and bring their cases to Roman courts, appealing all the way to the Emperor. This would mean that the potential number of petitions would be expanded dramatically.

It has been claimed that this would have meant that the Roman Empire became a huge single area of legal unity, a kind of cosmopolis where each and every person was entitled to seek legal recourse equally from the Emperor.³⁰ Though this may have been true in practice, the evidence from imperial legal practice is inconclusive. The number of rescripts that have been preserved in Justinian's compilation rises considerably after 212.³¹ Because Justinian's compilation includes only the rescripts that were considered to be valid law at the time, it is questionable whether the number of rescripts there corresponds to the total number of imperial rescripts made.³²

²⁹ Clifford Ando (ed.), *Citizenship and Empire in Europe 200–1900: The Antonine Constitution after 1800 years*, Franz Steiner Verlag, Stuttgart, 2015.

³⁰ Yan Thomas, "Origine" et "commune patrie": étude de droit public romain (89 av. J.-C.–212 ap. J.-C.), L'École française de Rome, Rome, 1996; Claudia Moatti, "The notion of *res publica* in the age of Caracalla", in Clifford Ando (ed.), *Citizenship and Empire in Europe 200–1900: The Antonine Constitution after 1800 years*, Franz Steiner Verlag, Stuttgart, 2015, pp. 63–98.

³¹ During the eight decades of the Antonine emperors, there are 648 constitutions preserved, thus on average 7.9 per year. In contrast, from the Severan period there are 1230 imperial constitutions, equalling 33.2 per year.

³² Legal scholars working on legal sources (for example, Max Kaser, *Das römische Privatrecht* 2, Beck, 1975, p. 53) are very clear that the result was the removal of the distinction between *ius gentium* and *ius civile* and the extension of Roman law to all of the empire. The controversy on the CA revolves around the contradictory evidence from blanket statements and the epigraphical and papyrological evidence found in the provinces. Adrian Nicholas Sherwin-White, *The Roman Citizenship*, Clarendon Press, 1973, pp. 380–92. Even Sasse, 1958, p. 17, see *supra* note 25, was doubtful of its practical implications, but see Georgy Kantor, "Local law in Asia Minor after the Constitutio Antoniana", in Clifford Ando (ed.), *Citizenship and Empire in Europe 200–1900: The Antonine Constitution after 1800 years*, Franz Steiner Verlag, Stuttgart, 2015, pp. 52–56.

On an ideological level, there was a dramatic change in how much the law was thought to correspond with conceptions of right and justice. Based on his writings, Ulpian was one of the chief architects of this change in ideological link between law and justice. According to Ulpian, law and lawyers should cultivate “the art of goodness and fairness” (*ars boni et aequi*), the “virtue of justice and claim awareness for what is good and fair” (*iustitiam namque colimus et boni et aequi notitiam cupientes*). Ulpian expanded the realm of the law by defining it as the “true philosophy” of determining the licit from the illicit. Its task was to examine not only positive law, but also natural law and *ius gentium* (*Digest*, 1.1.1.pr–1).

Ulpian’s theory of law was founded on the idea of natural law as the morally superior corrective to the traditional sources of *ius civile* and *ius gentium*, the law between citizens and the law between citizens and foreigners (*peregrini*). Ulpian defied even the basic tenets of ancient culture, such as slavery, and took up radical positions, like the equality of man. He wrote that slavery is an institution of *ius gentium* but not of *ius naturale*, establishing the fundamental unity and equality of man. Separating the conventions of law in force from the ideals of law allowed for the simultaneous upholding of the social and legal institution as an existing fact and the philosophical statement of the equality of man. It enabled not only the introduction of possibly Stoic philosophical tenets with legal theory, but also the internal criticism of law.³³ For Ulpian, the conviction of the institution of the Emperor representing living law was true and necessary for the edifice of the law to function. Even though individual lawyers and emperors could be fallible, their fundamental task was to bring justice equally to all.³⁴

The fact that the inhabitants of the Roman Empire all became citizens, and thus Roman law would have applied to them after the enactment of the *Constitutio Antoniana*, did not mean that Roman law would have been imposed on them or that local laws would have disappeared. Though, in theory, one could argue that legal centralism would have replaced legal pluralism, in practice, local laws continued their existence and validity in the provinces. Scholars working on the provincial, mostly Egyptian,

³³ *Digest*, 1.1.4; Honoré, 2002, pp. 77–81, see *supra* note 3. Ulpian uses natural law and nature in a number of other instances: *Digest*, 9.2.50, 25.3.5.16, 37.15.1.1, 50.17.32.

³⁴ Crifò, 1976, p. 782, see *supra* note 3; Honoré, 2002, see *supra* note 3.

sources have maintained that local laws and customs were still in use. The two viewpoints have been reconciled through suggestions that though Roman law had, in principle, subjected other legal systems to its power and to the role of local customs, they were tolerated as long as they were not considered to be repugnant (such as endogamic marriages) or violating the rules of Roman law.³⁵ At the same time, the influence of Roman law grew because the growth of the imperial legal apparatus made it possible for more people to use Roman law to advance their claims. The use of Roman law gave access to legal protections perhaps not available in local laws. Simon Corcoran, a scholar of the later imperial administration, wrote that the efficient use of imperial adjudication was the foundation of the whole system of government and the unitary nature of the Roman Empire:

The tetrarchic emperor remained highly approachable and the system served even those of traditional low status in the ancient world, such as women and slaves.³⁶

The provincial governors implemented the orders of the Emperor and applied his justice in the provinces.³⁷ However, one should not consider the process as a purely top-down imposition. Because there were many Roman citizens in the provinces even before the universal granting of citizenship, elements of Roman law made their way into the provinces much earlier, making the process of Romanisation a gradual one.³⁸

Ulpian's main contribution to the debates over imperial sovereignty and jurisdiction was the combination of the practical and the ethical sides of the imperial legal role. The Emperor's will was law and thus extreme care should be exercised in the way it was used in practice, lest the doctrine of the law be disturbed. Ulpian was the first legal author to tie the

³⁵ Mario Amelotti, "Reichsrecht, Volksrecht, Provinzialrecht: Vecchi problemi e nuovi documenti", in *Studia et documenta historiae et iuris*, 1999, vol. 65, pp. 213–14; J. Méléze Modrzejewski, "Diritto romano e diritti locali", in Aldo Schiavone (ed.), *Storia di Roma III.2*, Einaudi, Turin, 1993, pp. 988–1005.

³⁶ Simon Corcoran, *The Empire of the Tetrarchs: Imperial Pronouncements and Government AD 284–324*, Clarendon Press, 2000, pp. 293, 295.

³⁷ *Ibid.*

³⁸ L. Migliardi Zingale, "Diritto romano e diritti locali nei documenti del vicino oriente", in *Studia et documenta historiae et iuris*, 1999, vol. 65, p. 223; Kaius Tuori, "Legal Pluralism and the Roman Empires", in John W. Cairns and Paul J. Du Plessis (eds.), *Beyond Dogmatics: Law and Society in the Roman World*, Edinburgh University Press, Edinburgh, 2007, pp. 39–52.

sovereign power of the Emperor to the ethical and moral demands of justice. While many of the earlier writers were content to maintain that the Emperor should be virtuous and bring justice, Ulpian sought to posit that the Emperor should actually fulfil these demands set by the image of the ideal Emperor.

The linkage between the ideas behind Ulpian's idea of Roman imperial jurisdiction and those of international criminal law should be seen through the principles of universalisation and abstraction, not the concrete examples of the usages of the legal administration of the autocratic Emperor. The Emperor was a universal ruler and thus one of his main virtues was his approachability to petitioners. Not only did one have the theoretical possibility to gain an audience and to present one's grievance, but the Emperor also had to demonstrate the virtue of *megapsykhia*, the greatness of spirit that meant that he would need to give his subjects a sympathetic hearing. Much like the international legal order, the Emperor was a corrective, an elusive but virtuous provider of justice. While the narratives of the good king as the source of justice in the ancient world were for the main part just that – half-legendary stories of instances where a good king would right wrongs – the Roman example is quite different. The imperial legal administration, represented by jurists like Ulpian, sought to make the ideal and the illusion a reality. The imperial sovereign sought to provide the inhabitants of the universal Empire just law, law that would be uniform and would prevent local abuses of power. Justice for all. The great conundrum was how the fallible emperors would themselves often take on the challenge and engage conscientiously with the cases to bring justice that was ethically and morally sound. The sources abound with examples of direct imperial involvement, where emperors would show indignation for injustices and bring their own power to bear. For example, Paul writes of a case regarding legates in which an emperor engaged in questioning the litigants.³⁹

4.5. Universal Jurisdiction and Authority

One of the more complicated theoretical issues of universal jurisdiction is how one could both have universal authority and refrain from using it. In modern national jurisdictions, there is a distinct tendency to compel the judiciary to resolve issues that fulfil certain criteria that fall under their

³⁹ *Digest*, 32.97.

jurisdiction. The Roman imperial jurisdiction outlined by Ulpian was different in a number of ways that are interesting in the foundations of international criminal law. First, that the jurisdiction was apparently universal, not bound by jurisdictional boundaries. Second, that the Emperor had wide discretion regarding the cases he would take.

Under Ulpian, Roman imperial jurisdiction was both voluntary and universal, meaning that the Emperor could choose whether to hear a case and to give his ruling. However, this was a result of a long historical development and not without its peculiarities. There were no set rules that would limit imperial jurisdiction or assign certain cases exclusively to the Emperor, even though some established practices were formed. This meant that the Emperor was capable of exercising jurisdiction universally if he so wished.⁴⁰ Some emperors would insert themselves in cases where they had been petitioned. Indeed, there seem to be ample cases where the Emperors thought they needed to decide the course of action. Some cases are quite extraordinary in this respect. For example, Augustus, the first Emperor, was petitioned to bring to justice a person accused of manslaughter in the Greek city of Cnidos in the year 6 AD. Instead of handing the person over to local authorities, Augustus decided to investigate the matter, appointing a high-ranking official, the governor of a neighbouring province, to hear witnesses and to get to the bottom of things. After the material truth had been uncovered by his associates, Augustus gave his own ruling based on Roman legal principles. This was despite the fact that Cnidos was nominally a free Greek city that should have had independent

⁴⁰ Kaius Tuori, *Emperor of Law*, Oxford University Press, Oxford, 2016; Mariagrazia Rizzi, *Imperator cognoscens decrevit. Profili e contenuti dell'attività giudiziaria imperiale in età classica*, Giuffrè, Milan, 2012; Andreas von Schilling, *Poena extraordinaria: Zur Strafzumessung in der frühen Kaiserzeit*, Duncker & Humblot, Berlin, 2010; Veronika Wankerl, *Appello ad principem*, Beck, Munich, 2009; Jean-Pierre Coriat, *Le prince législateur: la technique législative des Sévères et les méthodes de création du droit impérial à la fin du Principat*, École française de Rome, Rome, 1997; Tor Hauken, *Petition and Response: An Epigraphic Study of Petitions to Roman Emperors 181–249*, The Norwegian Institute at Athens, Athens, 1998; Honoré, 1994, see *supra* note 14; Fergus Millar, *The Emperor in the Roman World*, Duckworth, London, 1992; Jochen Bleicken, *Senatsgericht und Kaisergericht: Eine Studie zur Entwicklung des Prozessrechtes im frühen Prinzipat*, Vanderhoeck & Ruprecht, Göttingen, 1962; John Maurice Kelly, *Princeps Iudex*, Hermann Böhlhaus, Graz/Cologne, 1957; Hans Volkmann, *Zur Rechtsprechung im Principat des Augustus*, Beck, Munich, 1969.

jurisdiction.⁴¹ What remains a mystery is why Augustus acted the way he did, making a claim to jurisdiction where he need not have. Was it perhaps clear that the accused would not have received a fair trial in Cnidos? Or was the real reason that Augustus wanted to demonstrate his power in a symbolic way by ensuring justice was served in a case that had caused uproar? Whatever the motivation, Augustus was suddenly claiming universal jurisdiction.

While the jurisdiction of the Roman Emperor was not defined in any concrete way, there were important elements that had a crucial impact in the way the power that the jurisdiction entailed was formulated. The primary one was *imperium*, the commanding power of the executive. Each of the higher Roman magistrates had a commanding power defined as *imperium* and as its sign, they were accompanied by lictors bearing the axe and the rods as its symbol. That *imperium* was defined through the tasks of the magistracy and thus a governor, for example, had *imperium* in the province that he was assigned to. The Emperor had *imperium maius* (a greater *imperium*) that was general and not defined temporally. Thus, imperial *imperium* (a tautology to show etymology) surpassed those of the traditional magistrates and gave the Emperor unfettered power in theory.⁴²

The way that the Emperor used his jurisdiction varied from emperor to emperor, but though the Emperor was unequivocally the voice of the law, the draftsmen behind that voice were some of the best jurists of the era. Ulpian, Papinian and Modestinus, along with other best jurists of their day, worked as *a libellis*, the secretaries that drafted the imperial rescripts.⁴³ Within the *Digest*, there are some examples of how answers to rescripts were crafted. A famous example is *Digest*, 37.14.17pr from Ulpian, which describes the decision-making process regarding *bonorum possessio* by joint Emperors Marcus Aurelius and Lucius Verus. In the discussion, the Emperors considered the previous opinion of Proculus, their

⁴¹ The details are known through a letter of Augustus engraved in marble (*Inscriptiones Graecae*, XII 3.174; *Fontes Iuris Romani Ante Iustiniani*, III 185) found in Astypalaia. See Tuori, 2016, pp. 84–89, see *supra* note 40, on this case.

⁴² John Richardson, *The Language of Empire: Rome and the Idea of Empire from the Third Century BC to the Second Century AD*, Cambridge University Press, Cambridge, 2008. On the later significance of the Roman concept of *imperium* for universal claims of sovereignty and jurisdiction, see, for example, James Muldoon, *Empire and Order. The Concept of Empire, 800–1800*, Macmillan Press Ltd, New York, 1999.

⁴³ On imperial secretaries and their work, see Honoré, 1994, see *supra* note 14.

own earlier decisions, the advice of Maecianus and a number of other renowned jurists after him.⁴⁴ The way that the Emperors refer to lawyers is a good way of deciphering their status. For example, Severus Alexander made a reference to a response by Ulpian, who is mentioned as *praefectus annonae*, jurist and his friend (*amico meo*; *Codex Iustinianus*, 8.37.4). This meant not that Ulpian and the teenage Emperor would have been best friends, but that Ulpian was a member of the imperial council.

That a State would claim to have universal jurisdiction was fairly typical in the ancient world. The Roman State, like the Greek or Hellenistic city-States, considered itself as having universal jurisdiction.⁴⁵ Thus, the Romans would, if necessary, extend their jurisdiction over the aliens (*peregrini*) residing in Rome, as the Greek city-State would sentence an alien in its midst without hesitation. The Roman world had numerous overlapping jurisdictions and thus an individual had numerous different obligations and rights to different parties. One could be the citizen of a nominally independent city, but still under Roman rule, the *imperium populi Romani*. This concept of rule and influence over a set province was sometimes defined through territory (such as a governor's power over a province), or on occasion it would be defined through a set of tasks or subject matter.⁴⁶

The Roman idea of territoriality was thus fluid and usually based on land. There was never in the Roman political or legal discussion a claim presented that Rome should rule the waves or claim sovereignty over the sea. The sea was legally understood as a *res communis*, a shared thing. Even when Romans battled pirates that imperilled the grain imports, there was never a claim that Rome would have the exclusive right to rule the sea.⁴⁷

⁴⁴ A.J.B. Sirks, "Making a Request to the Emperor: Rescripts in the Roman Empire", in Lukas de Blois (ed.), *Administration, Prosopography and Appointment Policies in the Roman Empire: Proceedings of the First Workshop of the International Network Impact of Empire (Roman Empire, 27 B.C. – A.D. 406)*, J.C. Gieben, Amsterdam, 2001, pp. 124–25.

⁴⁵ Dieter Nörr, *Imperium und polis in der hohen Prinzipatszeit*, Beck, Munich, 1966.

⁴⁶ On the evolution of law in the relationship between power and sovereignty, see Luigi Capogrossi Colognesi, *Law and Power in the Making of the Roman Commonwealth*, Cambridge University Press, Cambridge, 2014.

⁴⁷ Cassius Dio, 36.20–36; Philip De Souza, *Piracy in the Graeco-Roman World*, Cambridge University Press, Cambridge, 2002, pp. 149–76.

The issue of piracy was also significant in another way regarding jurisdiction and the ideas behind international criminal law. Since piracy was an existential threat, with interruptions in the grain supply meaning starvation for the rapidly expanding urban population of Rome, the pirates caught were dealt with quickly and painfully. Cicero called pirates the enemies of all (*communis hostis omnium*; Cicero, *De Officiis*, 3.107, which is the probable source for the expression *hostis humani generis*, enemies of humanity). Pirates and bandits were not even granted a trial.⁴⁸

The importance of the Roman conceptions of sovereignty, territoriality and jurisdiction rests in the way that they were re-used during the Middle Ages and early modern period to justify claims of universality and sovereignty. Through this usage, the Roman language slowly made its way into the modern terminology of international law. It began in the medieval battles over supremacy between emperors, kings and popes, Roman texts and precedents were used to great effect. For example, in the case of Charlemagne, the first Holy Roman Emperor, the debates over his supposed universal monarchy and authority were justified with the accounts that the Pope had named him Emperor and Augustus, using the Roman terminology and calling him the ruler of the world. Similar claims and dubious lineages were used by successors of Charlemagne such as Frederick I Barbarossa (1122–1190).⁴⁹ Thus, the doctrine of the Emperor being the lord of all the world, founded on the earlier mentioned statement by Antoninus Pius, reversed Pius's original meaning. The point was later taken up by the *Glossa ordinaria* (1.6.34) and spread elsewhere in the civilian literature.

Medieval legal doctrine returned to the distinction between the personality principle and the territoriality principle, but Roman law would serve as a kind of shared law, *ius commune*, which would have universal validity if no other law was applicable.⁵⁰ In the logic of the medieval jurists, the choice of law was equally a choice of jurisdiction, meaning that

⁴⁸ Robert C. Knapp, "Legally marginalized groups", in Paul Du Plessis, Clifford Ando, and Kaius Tuori (eds.), *Oxford Handbook for Roman Law and Society*, Oxford University Press, Oxford, 2016, pp. 370–72.

⁴⁹ Muldoon, 1999, pp. 23–24, see *supra* note 42; Anne A. Latowsky, *Emperor of the World. Charlemagne and the Construction of Imperial Authority, 800–1229*, Cornell University Press, Ithaca, 2013.

⁵⁰ Ryngaert, 2008, pp. 45–47, see *supra* note 4.

according to many jurists the use of Roman law implied the acceptance of the imperial supremacy.⁵¹

In medieval discourse, universal claims were made with some regularity. Like the Holy Roman emperors, Byzantine emperors were eager to present themselves as universal rulers. Later, the Habsburg emperors and the Spanish kings of the sixteenth century had presented the idea of a universal empire in different forms. Where the doctrines of sovereignty or property were not applicable, the early scholars of international jurisdiction were sometimes at odds on how to justify the existence of jurisdiction beyond the traditional realms. Grotius resolved this issue with a theory based on natural law that sought to derive jurisdiction from the state of nature itself, meaning that it would be prior to the jurisdiction of the State. In *De iure praedae*, Grotius assigns the power to punish to the State by the law of nations:

Is not the power to punish essentially a power that pertains to the state? Not at all! On the contrary, just as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals; and similarly, the power of the state is the result of collective agreement. [...] Therefore, since no one is able to transfer a thing that he never possessed, it is evident that the right of chastisement was held by private persons before it was held by the state. The following argument, too, has great force in this connexion: the state inflicts punishment for wrongs against itself, not only upon its own subjects but also upon foreigners; yet it derives no power over the latter from civil law, which is binding upon citizens only because they have given their consent; and therefore, the law of nature, or law of nations, is the source from which the state receives the power in question.⁵²

Using the idea of natural law, Grotius reverses the Spanish international legal doctrine based on the idea of territory (*De iure belli ac pacis*

⁵¹ Muldoon, 1999, pp. 96–97, see *supra* note 42.

⁵² Hugo Grotius, *De Iure Praedae Commentarius*, Gwladys L. Williams and Walter H. Zeydel eds. and trans., Oxford University Press, Oxford, 1950, pp. 1:91–92. This Carnegie edition consists of both the translation and the original edition of the Latin text by H.G. Hamaker (Martinus Nijhoff, The Hague, 1868).

1625, tr. *On the Law of War and Peace*, 2.20.40.4). Until then, the Iberian rule had been to assign ownership and to derive jurisdiction from that.⁵³

Grotius's source for natural law was mainly Roman law. He shows that institutions like ownership and property are in fact not dependent on the State, but that they are institutions in the state of nature and thus their enforcement must be universal. What Grotius proposes (*De jure belli ac pacis*, 1.3.2.1) is that, while there are now tribunals that can enforce rights, these rights must be enforceable even elsewhere. Thus, where there is no government, such as the high seas, the wilderness or desert islands, the need and legitimacy for jurisdiction remains. In extreme cases, where either the judges do not take the case or the opponents are not subject to the judge's jurisdiction, there is still the possibility of self-help.⁵⁴ There was thus a natural right to punish. While Grotius uses the universal and natural right to punish to justify the power of the State, his theory extends the other way, to the foundation of a universal criminal law.

4.6. Conclusion

The work of Ulpian forms the foundation of much of the basic framework of international jurisprudence. In their different forms, Roman jurisprudential doctrine informed theories of sovereignty and jurisdiction that are crucial to the way the legal formulation of the international criminal law was done. Universal authority, natural law and supranational jurisdiction, the ethical foundations of law in the theories of human equality and the cosmopolis have roots in the thinking of Ulpian. As is typical in developments with extraordinary length, arguments from Roman jurists and ancient authors in general were misattributed, taken out of context and sometimes used to justify opposing views.

⁵³ Benjamin Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law*, Cambridge University Press, Cambridge, 2015, pp. 28–29, 216; Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, Oxford University Press, Oxford, 1999.

⁵⁴ Straumann, 2015, pp. 188, 200, see *supra* note 53.

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Philosophical Foundations of International Criminal Law: Correlating Thinkers

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