War and Sovereignty in Medieval Roman Law

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The theory of just war in medieval canon law and theology has attracted to it a large body of scholarship, and is recognized as an important foundation for Western approaches to the study of ethics in war.[1] By contrast, the tradition on war in medieval Roman law has not received much attention, although it developed doctrines that are distinct from those in canon law and theology.[2] The oversight is notable because medieval Roman law on

1. On just war theory in the Middle Ages, useful works include Frederick H. Russell, "Just War," in *The Cambridge History of Medieval Philosophy*, ed. Robert Pasnau and Christina Van Dyke (Cambridge: Cambridge University Press, 2010), 2:593–606; Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975); Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris: Presses Universitaires de France, 1983); James T. Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200–1740* (Princeton: Princeton University Press, 1975); Roland Bainton, *Christian Attitudes toward War and Peace* (Nashville: Abingdon Press, 1960); and Robert Regout, *La Doctrine de la Guerre Juste de Saint Augustin à Nos Jours* (Paris: A. Pedone, 1935).

2. Russell, *The Just War*, 40–54; and Haggenmacher, *Grotius et la doctrine de la guerre juste*, are notable exceptions.

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war influenced subsequent tradition, forming with canon law the essential basis for early modern legal thought on war and peace.[3] While the main canonistic contributions to legal theory on war came in the twelfth and thirteenth centuries, Roman jurists added new opinion in the fourteenth and fifteenth centuries, which can be related to the political life of Italy and to the growth of the independent cities. By the fourteenth century, Roman lawyers (or civilians) often considered licit war from a secular and pragmatic perspective, and associated a right of war with sovereignty. Here, I would like to trace the development of this theory, from roughly 1250 to 1450, and particularly a view that sovereigns licitly judged the justice of their own causes, as a remedy for a lack of superior authority.

A secondary goal in what follows is to consider, briefly, how views on war in medieval Roman law may have influenced early modern thought on the rights of war among sovereigns. On this latter subject, and perhaps most influentially, Richard Tuck has argued that two schools of thought on war, and on relations between nations, exerted influence in the early modern period and shaped the thinking of writers as diverse as Grotius, Hobbes, Locke, and Kant.[4] The first, classified by Tuck as "humanist," is marked by the influence of classical literature, and classical moral theory, in the Renaissance. The second, a "scholastic" school, is rooted in an Augustinian tradition and influenced by medieval Thomism.[5] For Tuck, the humanist school gives a "thin" account of relations between nations, highlighting strong rights of self-preservation, war, and colonial expansion for European sovereigns. The scholastic tradition, on the other hand, offers a somewhat narrower scope for legitimate war. I do not want to weigh the far-reaching implications of Tuck's argument, but would like to show that medieval Roman law on war—which had a foundation in canon law—provided a basis for some "humanist" juridical thought, and helped to shape the conceptions of a state of nature found later in Hobbes and Locke. In Roman law, the rights of the emperor, applied to various European polities, rights of defense first elaborated for individuals, and a theory of licit self-help in the absence of superior

3. This can be seen partly in the citations to classical Roman law and medieval commentaries on it, found in the writings of early modern jurists like Alberico Gentili and Hugo Grotius. See Alberico Gentili, *De Jure Belli Libri Tres*, ed. J. B. Scott and trans. J. Rolfe (Oxford: The Clarendon Press, 1933; repr. New York, 1964); and Hugo Grotius, *The Rights of War and Peace,* ed. R. Tuck, from the edition by J. Barbeyrac (Indianapolis: Liberty Fund, 2005).

4. Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999).

5. Ibid., 16–50 and 51–77, on the "humanist" and "scholastic" traditions on war, respectively.

jurisdiction, combined to offer strong rights of war, which were carried into the early modern period.

I. Canon Law

It may be useful first to outline the main elements of just war theory in canon law, to contrast medieval Roman and canon law on war, and indicate some of their mutual influence. Saint Augustine of Hippo (354–430), who is generally considered the founder of the just war tradition, made comments on war in a few works, which reflect a set of attitudes rather than a systematic theory.[6] In describing just wars, Augustine included both secular and religious elements. Relying on a definition likely derived from Roman legal sources, he wrote that just wars avenged or punished injuries (*injuriae*: any wrongs done to another), after one people or nation had failed to restore what they had taken unjustly, or failed to rectify something they had done illicitly to another nation.[7] According to Augustine, these just wars could only be taken up by a legitimate public authority. In a more religious vein, he accepted that wars waged on God's authority, to humble those who offended Him, were naturally just.[8] Although Augustine saw that only necessary wars should be undertaken, and only for the sake of peace, war had an important dimension of divinely guided

6. On Augustine's comments on justified violence and war, see Russell, "Just War," 594–97, and idem, *The Just War*, 16–39; Robert A. Markus, "Saint Augustine's Views on the 'Just War,'" in *The Church and War*, ed. W. J. Shiels (Oxford: Oxford University Press, 1983), 1–13; Richard S. Hartigan, "Saint Augustine on War and Killing," *Journal of the History of Ideas* 27 (1966): 195–204; Herbert A. Deane, *The Political and Social Ideas of St. Augustine* (New York: Columbia University Press, 1966), 154–71; Peter Brown, "St. Augustine's Attitudes to Religious Coercion," *Journal of Roman Studies* 54 (1964): 107–16; and Regout, *La Doctrine de la Guerre Juste,* 39–44.

7. Augustine, *Quaestiones in Heptateuchum*, vi, 10, in *Corpus Scriptorum Ecclesiasticorum Latinorum*, ed. J. Zycha (Prague: F. Tempsky, 1895), vol. 28, pt. 2, 428, "Iusta autem bella ea definiri solent quae ulciscuntur injurias, si qua gens vel civitas quae bello petenda est, vel vindicare neglexerit quod a suis inprobe factum est, vel reddere quod per iniurias ablatum est." Compare with *Cicero, De re publica*, ed. J.G.F. Powell (Oxford: Oxford University Press, 2006), 3.35: "Illa iniusta bella sunt, quae sunt sine causa suscepta. Nam extra ulciscendi aut propulsandorum hostium causam bellum geri nullum potest." ("Those wars are unjust which are undertaken without cause. For no war can be waged except those for the sake of punishing or repulsing the enemy.") (Translations are mine, unless otherwise noted.)

8. Augustine, *Contra Faustum Manichaeum,* xxii, 74, in *Corpus Scriptorum Ecclesiasticorum Latinorum* (hereafter CSEL), 25:672; *Quaestiones in Heptateuchum*, vi, 10, in *CSEL*, vol. 28, pt. 2, 428.

punishment and correction for sin. For Augustine, soldiers and their leaders were to wage war with virtuous intentions, but obedience was the soldier's main duty.[9] The soldier was guiltless in the execution of unjust commands, although able to resist orders that directly contravened divine precepts.[10] With his few and fairly scattered comments, Augustine came to stand at the head of the medieval just war tradition.

Canon law adopted Augustine's views on war through Gratian's *Decretum*, the landmark collection of law in circulation by the mid-twelfth century. The tradition of war that developed in the *Decretum* and its glossators, the Decretists, is nuanced, but evolved within Gratian's framework.[11] The Decretist Rufinus (fl. 1150–91), as an example of the tradition, viewed war as a way to repel unjust injuries immediately or to inflict punishment for prior injuries.[12] No clear line was drawn in Decretist thought between these kinds of wars, although the view that any just war was based on justified defense was common.[13] Decretists also shared an assumption that justice in war operated on one side only, with the result that the unjust side defended itself unjustly.[14] The unjust side was thought to merit the war waged against it, on account of an offense or a moral fault, and was to restore taken or violated goods or

9. Augustine, *Contra Faustum Manichaeum*, xxii, 74, in *CSEL*, 25:672.

10. Russell, "Just War," 595; and Hartigan, "Saint Augustine on War and Killing," 202. Augustine argued that service and killing in war could be justified, which otherwise would seem a violation of precepts such as "turn the other cheek" (Luke 6:29). He urged those restraining injustice and wickedness to maintain inward patience and virtue.

11. Russell, *The Just War*, 55–126.

12. Rufinus, *Summa Decretorum*, ed. Heinrich Singer (Paderborn: F. Schöningh, 1902), 404, to C. 23 q. 1: "Laicis itaque ex iusta causa – vel pro vindicta inferenda vel pro iniuria propulsanda – militare non est peccatum." ("So it is not a sin for laymen to fight on account of a just cause: either to inflict punishment or to repulse injuries.")

13. Gratian had listed separately the apparently immediate repulsion of injuries, and the retribution or punishment of injuries. See Gratian, *Decretum Gratiani*, in *Corpus Juris Canonici*, ed. A. Friedberg, 2 vols. (Graz: B. Tauchnitz, 1879; repr. Graz, 1955), I:C. 23 q. 1 d.a.c. 1, col. 889. Compare with Charles J. Reid, Jr., "The Rights of Self-Defense and Justified Warfare in the Writings of the Twelfth- and Thirteenth-Century Canonists," in *Law as Profession and Practice in Medieval Europe: Essays in Honor of James A. Brundage*, ed. Kenneth Pennington and Melodie H. Eichbauer (Burlington, VT: Ashgate, 2011), 73–92.

14. Hostiensis, *Summa Aurea,* to X.1.34 (*De treuga et pace*) (Venice, 1574), col. 359, noted that the unjust side in war should accept correction rather than resist: "In supradictis et consimilibus casibus, is qui gladio utitur, iuste facit: et per consequens, is qui defendit se, temerarie se defendit: sapienter autem faceret, si se emenderet et corrigeret vitam suam." ("In the above and similar cases, he who uses the sword does so justly: and by consequence he who defends himself does so rashly. He would do wisely if he should emend himself and correct his life.")

rights, and to accept just punishment rather than contumaciously resist.[15] Although normally, medieval jurists considered individual self-defense to be a natural right, the limitation of war to those who waged it justly fit well with an objective view of justice and an overriding canonistic concern for war guided by moral authority.[16] The notion of war as moral punishment and correction also bore similarities to the canonistic treatment of heretics, who were likewise to accept correction.[17] For Gratian and his successors, the just side had a thoroughgoing moral and legal authority over the unjust side, although punishment was not to exceed the offense or fault.[18] By the time the canonist Raymond of Penafort (c. 1180–1275) treated the just war, it included the criteria that would become familiar in the definition of Thomas Aquinas (1225–74): proper authority for war, a just cause, and the right intention.[19]

In the thirteenth century, jurists who commented on a new, official collection of canon law, the *Decretals* of Gregory IX, sometimes took a more pragmatic approach. This was partly because of the more specific legal questions they confronted in their texts. In particular, the commentary of Pope Innocent IV (c. 1195–1254) had an influence on civilian analyses

15. Rufinus, for example, noted that a war was just when the unjust side merited it; when in doubt, it was to be judged "by just presumptions" that the adversary deserved the war; Rufinus, *Summa Decretorum*, 405.

16. For self-defense as a right under natural law, see Gratian, *Decretum*, to D. 1 c. 7, and Justinian's *Digest* 1.1.3, where it arises under the law of nations (*jus gentium*), generally considered by civilians as the natural law pertaining to humankind. Medieval canonists in particular considered that rights would be exercised in accord with natural moral law, ultimately of divine origin. At least, resistance to correction when guilty put the unjust side in a state of graver guilt and afflicted the just, which compounded the offense. Self-defense created potential difficulties that seem to go untreated by canonists; as one example, as soldiers were to obey commands, and did not generally sin by fighting in an unjust war, it was not clear that they would lose their individual rights of defense. In a related case, the theologian Henry of Ghent did give a prisoner justly condemned to death a right (even a duty) to preserve his own life and escape, but only if the opportunity arose through negligence; see Brian Tierney, "Natural Rights in the Thirteenth Century: A *Quaestio* of Henry of Ghent," *Speculum* 67 (1992): 58–68. Other examples are in John Doyle, "Two Thomists on the Morality of a Jailbreak," *The Modern Schoolman* 74 (1997): 95–115.

17. Gratian gathered comments on war and the coercion of heretics under *Causa* 23 (e.g., C. 23 q. 4 cc. 36–50), and particularly on heretics, *Causa* 24.

18. On punishment, Gratian quoted Augustine that the mode of punishment should not exceed the sin (C. 23 q. 4 c. 40). Although there was no necessary mercy to be shown to opposing combatants during war on a canonistic view, the *Decretum* maintained that pilgrims, clerics, monks, preachers, women, and the unarmed poor should be free from violence and war, on pain of penance or excommunication; see C. 24 q. 3 cc. 22–5.

19. Raymond of Peñafort, *Summa de paenitentia*, ed. Xavier Ochoa and Aliosius Diez (Rome: Commentarium pro religiosis, 1976), II.5, sec. 17, cols. 485–86; Aquinas, *Summa theologiae*, IIa IIae, q. 40.

of war, as well as subsequent canon law, and he based his arguments fairly extensively on Roman law. As a canonist, Innocent was comfortable with topics like war, just as he proved to be a capable strategist as pope at war against Frederick II and in his dealings with Mongols. In his commentary, he treated war and licit violence in depth, in a section of the *Decretals* that considered whether ecclesiastics could repossess—by force if necessary—property occupied illegitimately.[20] Rather than focus on the just intention, to which the Decretists often referred, or the moral guilt of the enemy, Innocent laid emphasis on the question of proper authority for war, for which he created a detailed hierarchy. At the highest level of justifed violence, he asserted that a full public war could be licitly declared only by a prince who did not have a superior (*princeps non superiorem habet*).[21] This was a notable contribution, as the Decretists had usually been less clear about which public, secular authorities had the capacity to wage wars.[22]

The significance of Innocent's formulation can be gauged from contemporary papal law, and particularly the bull *Per venerabilem*, promulgated in 1202 by Pope Innocent III. Among other things, the bull observed briefly that the king of France recognized no superior authority in temporal affairs.[23] As has been well observed, some jurists, and often those from the monarchies of France, Sicily, Spain, and England, in the course of the thirteenth century declared that their kings recognized no secular superior and were sovereigns in their own territory.[24] To make these

20. Innocent IV, *Apparatus in quinque libros decretalium*, to X.2.13.12 (*De restitutione spoliarum*) (Frankfurt, 1570), fol. 230rb–232rb.

21. Innocent IV, *Apparatus in quinque libros decretalium*, to X.2.13.12, fol. 231vb: "Bellum autem secundum quod proprie dicitur solus princeps qui superiorem non habet indicere potest." ("War properly called, however, can only be declared by a prince who has no superior.") On Innocent IV's analysis of war, compare with Russell, *The Just War*, 145–47, 172–76; Regout, *La Doctrine de la Guerre Juste*, 69–72; and Haggenmacher, *Grotius et la doctrine de la guerre juste*, 259–62, 280–83.

22. Rufinus, for example, had indicated that a plurality of legitimate public authorities could wage war, and Gratian himself allowed generally that "princes" (*principes*) could do so. See Rufinus, *Summa*, 404; and Gratian, *Decretum*, C. 23 q. 1 c. 4, where he changed Augustine's *principem* to the plural.

23. *Decretales Gregorii IX*, in *Corpus Juris Canonici*, vol. 2, to X.4.17.13, referring to the king of France who "ipse superiorem in temporalibus minime recognoscat." ("he himself does not recognize a superior in temporal matters.")

24. Walter Ullmann, "The Development of the Medieval Idea of Sovereignty," *English Historical Review* 44 (1949): 1–33, provides a still valuable account. Other older but valuable accounts include Francesco Ercole, *Da Bartolus all'Althusio. Saggi sulla storia del pensiero pubblicistico del rinascimento italiano* (Florence: Vallecchi, 1932), and Francesco Calasso, *I Glossatori e la teoria della sovranità: Studio di diritto comune pubblico*, 3rd ed. (Milan: A. Giuffrè, 1957).

arguments, the jurists asserted that European kings could and did possess in their own territory the same rights that the emperor possessed in his (*rex in regno suo est princeps*), which issued in a full power to order their internal and external secular affairs. These were important developments, as according to a fiction that perpetuated the unity of the classical Roman Empire, political entities in Europe were often argued in law to have a *de jure* superior in the medieval Roman emperor, an elected German prince. An assertion of freedom from any higher jurisdiction (*superiorem non habet*) expressed the independence of some nations from the empire, at least *de facto*.[25] Certainly, Innocent IV appeared to use this formula to indicate that some kings were sovereign, and possessed a power to wage war on their own authority.[26]

Innocent's war waged by a prince who had no superior roughly corresponded to the public war described in Roman law as declared by the emperor, and carried with it some rights of Roman war. In these wars, now waged also by other sovereigns, acquisition of territory was licit, although the enslavement of captives was not generally practiced in wars within Christian Europe.[27] For those wars in which captives could be enslaved—those fought beyond Europe and (in theory) fought by the emperor against his own rebellious subjects—there was a right of *postliminium*, whereby captives lost their civil rights and saw them restored when they were released or escaped to safety.[28] There was little sense in which judgments concerning the justice of these public wars could be obtained from other temporal powers without the consent of the contending parties.[29]

25. Ullmann, "The development," 11, n. 2, cites as one example Jean de Blanot, who held that a baron falls into the *crimen laesae majestatis* against the king, "nam rex in regno suo princeps est, nam in temporalibus superiorem non recognoscit." ("for the king is an emperor in his own realm, since in temporal things he does not recognize a superior.")

26. Ullmann, "The development," 9.

27. It was not generally practiced among Christians, but the very prevalent practice of ransom involved a loss of freedom and was thought of as analogous to slavery by some jurists; see, for example, Angelus de Ubaldis, *In I. atque II. Digesti veteris partem commentaria*, to D.3.5.21 (Venice, 1580), fol. 98va. For historical context on ransom in the period, Philippe Contamine, "The Growth of State Control. Practices of War, 1300–1800: Ransom and Booty," in *War and Competition Between States,* ed. Philippe Contamine (Oxford: Oxford University Press, 2000), 163–93.

28. On *postliminium*, a term from Roman law, see D.49.15 and note 40, below.

29. In contemporary practice, arbitration by secular third parties was possible. For arbitration among the Italian cities during the period, see Lauro Martines, *Lawyers and Statecraft in Renaissance Florence* (Princeton: Princeton University Press, 1968), 347–59. For the legal theory of arbitration (pertaining to individuals), see Luciano Martone, *Arbiter-Arbitrator: Forme di giustizia privata nell'età del diritto comune* (Naples: Jovene, 1984); and Karl S. Bader, "'Arbiter, arbitrator seu amicabilis compositor,'" *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (Kan. Abt.) 77 (1960), 239–76.

The important legal and moral limitation on secular authority was the intercessory power of the papacy in temporal affairs. At the far end was the claim, made by some canonists and controversialists, and particularly in the thirteenth century, that the papacy had a supreme secular jurisdiction over Christendom; however, Roman lawyers were not generally attracted to this view.[30] The papacy did, more successfully, assert a right to judge broken peaces and truces among Christians, as well as a right to intervene in secular affairs, on account of sin (*ratione peccati*).[31] The church had also claimed, from the tenth century, a leading role in peacemaking efforts, in the Peace and Truce of God movements. The activity of the papacy in hearing appeals and arbitrating disputes was not insignificant, particularly in the thirteenth century, but it faced real limitations in ending disputes between the leading monarchies.[32] In describing the right of independent powers to wage war, Innocent was not spurning the peacemaking role of the papacy, but rather was realistic about the legal effects that flowed from wars, particularly those between monarchs.

The more limited kinds of sanctioned public violence in Innocent's account reflected a broad scope of thought. These licit uses of public force can be fitted into four categories: limited wars on superior authority, punitive restraint of rebellious subjects, immediate self-defense, and reprisals. War on superior authority was generally intended to restrict petty feudal wars by requiring subordinates to appeal to their jurisdictional superiors for permission to wage war for the sake of recuperation, and reflected the

30. For a classic treatment of the controversy over papal supremacy, see Michael J. Wilks, *The Problem of Sovereignty in the Later Middle Ages* (Cambridge: Cambridge University Press, 1963).

31. Pope Innocent III's decretal, *Per venerabilem*, also claimed for the papacy a broad power to intervene in secular affairs, although the interpretation of it has been disputed. Brian Tierney, "'Tria Quippe Distinguit Iudicia…' A Note on Innocent's Decretal *Per Venerabilem*," *Speculum* 37 (1962): 48–59, gives a summary of the debate and offers a careful reading of the decretal; James Powell, ed., *Innocent III: Vicar of Christ or Lord of the World?* (Washington, DC: Catholic University of America Press, 1994), collects articles representing some of the range of opinion on Innocent's vision of papal authority. For the power to judge broken peaces and truces, as based on oaths, see X.2.1.13 (*Novit ille*).

32. On the role of the papacy in disputes, see Jean Gaudemet, "Le Rôle de la Papauté dans le réglement des conflits entre états aux xiii et xiv siècles," *Recueils de la Societe Jean Bodin* 15 (1961): 79–106; and Walter Ullmann, "The Medieval Papal Court as International Tribunal," *Virginia Journal for International Law* 11 (1971): 356–71. As Ullmann notes, the papacy symbolized the closest thing there was in medieval Europe to an international tribunal; however, again in secular disputes between monarchs it faced real limitations. For an example involving Innocent III, see James R. Sweeney, "Innocent III, Hungary and the Bulgarian Coronation," *Church History* 42 (1973): 320–34.

customs of feudal society.[33] The restraint of rebellious subjects Innocent termed an "exercise of jurisdiction," by which anyone with territorial jurisdiction (in Innocent's example, a prelate) could pursue rebellious or lawless subjects and all those who helped them.[34] There was also self-defense against immediate (*incontinenti*) violence to person or property, which was available to all without the authority of a superior. Innocent wrote that this was not properly termed a "war," and did not carry with it the rights of war.[35] Unlike some earlier canonists, Innocent was thus able to separate immediate defensive actions from public wars.

It was Innocent's reference to reprisals, however, that drew attention to the legal issue underlying the power of independent authorities to wage war. Under the procedure for reprisals, an individual from one jurisdiction who had suffered a legal injury could seek justice from the authority who had jurisdiction over the offending party.[36] If justice was denied, a judge from the injured party's own jurisdiction could grant a license to recover damages from anyone of the foreign jurisdiction.[37] Although reprisals were often a nonviolent remedy for aggrieved merchants, Innocent and other jurists included them as a species of war. Importantly, Innocent added that if there was no judge before whom the injured party could obtain justice, the party had the power to recuperate what he had lost on his own authority.[38] It was this last point that Roman jurists would also take up in outlining a clearer juridical foundation for war among sovereigns. For some civilians, the lack of a judge would result in a right to judge one's own causes and wage war when (the offended party judged it) necessary based on prior injuries. Innocent's complex and careful

33. Innocent, *Apparatus,* to X.2.13.12, fol. 231va, n. 8. The point on limiting warfare in Innocent is made well by Frederick Russell, "Innocent IV's Proposal to Limit Warfare," in *Proceedings of the Fourth International Congress of Medieval Canon Law, Toronto, 21–25 August 1972*, ed. Stephan Kuttner (Città del Vaticano: Biblioteca Apostolica Vaticana, 1976), 390.

34. Innocent, *Apparatus*, fol. 231vb.

35. Ibid., fol. 231va. Incidentally, Innocent also observed in his discussion of war that immediate self-defense was available to all, and did not restrict it to the just.

36. On reprisals in medieval Italy, see the older but detailed treatment of A. del Vecchio and E. Casanova, *La rappresaglie nei comuni medievali e specialmente in Firenze, saggio storico* (Bologna: A. Forni, 1894); and, more recently, Martines, *Lawyers and Statecraft in Renaissance Florence*, 359–82 and *passim*; and Antonella Astorri, *La mercanzia a Firenze nella prima metà del Trecento: il potere dei grandi mercanti* (Firenze: Olschki, 1998), 186–95.

37. Innocent, *Apparatus,* fol. 232ra.

38. Ibid., "si vero non habet iudicem coram quo posset suam iusticiam obtinere, tunc sibi licet sua auctoritate recuperare sua." ("if however he does not have a judge before whom he may obtain his justice, then it is licit for him to recover his possessions on his own authority.")

treatment undoubtedly aimed to limit war, particularly among feudal nobles; however, his acceptance of secular sovereignty in Europe pointed to his understanding of political reality.[39]

II. Roman Law

Unlike canon law, Roman law, as it was recovered by medieval Europe in the eleventh century, and which became a foundation of legal training in continental schools for centuries, featured no theory to justify war. This fully recovered body of law, the *Corpus juris civilis* of Justinian, pertained to Roman citizens, and did not greatly concern itself with relations between nations.[40] Moreover, for medieval Roman lawyers in particular, the Roman emperor was often accepted to have valid claims as the *de jure* secular authority over Europe, if not beyond. Wars of subordinate European authorities without the permission of the emperor typically seemed illicit to civilian jurists until the later thirteenth and fourteenth centuries.[41] On the other hand, the *Corpus juris civilis* offered some stimulus to discussion, by accepting war as a natural phenomenon. A noted passage in Justinian's *Digest*, D.1.1.5, stated that war developed under the law of nations, along with distinct peoples or tribes, the first governments, private property, and commercial relations.[42] The law of nations (*jus gentium*) was generally identified by medieval civilians as "secondary" natural law, or

39. More conservative on war, at least in some places, was Innocent's great contemporary Hostiensis, who deplored the frequent warfare in Europe and considered most wars unjust. His remedy went to the heart of the problem of war in Europe: he urged that all disputes should go to a judge, and at last resort to the pope (see Russell, *The Just War*, 142, 182).

40. Justinian's substantive texts on war are confined to practical regulations governing soldiers. The main *loci* are D.49.15–18. The most well-known texts pertain to the right of *postliminium* (D.49.15), by which a Roman soldier who escaped to safety (jurists discussed the *patria* or another safe harbor), or was released from capture, regained his rights as a Roman citizen, which had been lost upon capture. Marriage, however, had to be renewed voluntarily. Beyond military law, there is a brief section in the *Digest* on the rights of ambassadors, including foreign ambassadors (D.50.7.17), and limited aspects of maritime law at D.14.2, under the *Lex rhodia de iactu*.

41. For example, Azo of Bologna and Odofredus thought the emperor's permission was required; see Russell, *The Just War,* 45–46.

42. Theodor Mommsen, Paul Krueger, Rudolf Schoell, Wilhelm Kroll, eds., *Corpus juris civilis* (Berlin: Weidmann, 1892–95), vol. 1, to D.1.1.5: "Ex hoc iure gentium introducta bella, discretae gentes, regna condita, dominia distincta, agris termini positi, aedificia collocata, commercium, emptiones venditiones, locationes conductiones, obligationes institutae: exceptis quibusdam quae iure civili introductae sunt." ("From this law of nations wars were introduced, distinct peoples, realms were established, ownerships, boundaries were set upon lands, buildings were erected; commerce, purchases, sales, leases and hires, and

that part of natural law that pertained to humans alone, by virtue of their capacity for reason.[43] As a result, war appeared as a natural and permanent custom, which under the right conditions was consonant with, or even required by, reason.[44] This also harmonized with canon law, but unlike war in most canon law, the Roman law in Justinian's collection lacked a notion of war as punishment for sin or as guided by divine providence.[45]

Medieval civilians took this limited Roman material and slowly developed definitions of legally acceptable or licit war, based on a mixture of the rights of the Roman emperor and on principles drawn from Roman private law, which could be applied to independent polities in Europe. Franciscus Accursius (c. 1182–1263), author of the standard gloss on Roman law, described two kinds of licit war. The first were the wars of the Roman emperor, which appeared licit simply by the fact that he declared them.[46] The second were wars fought to repulse injuries, which Accursius justifed by observing that a right of defense was available to all, according to natural law and the law of nations.[47] Elsewhere in his gloss, the jurist admitted that there were free peoples and sovereigns who were not subject to the emperor, and suggested that fighting for one's country (*patria*) might be a duty.[48] Although Accursius likely had the rising European monarchies in mind, he did not clearly identify the

obligations were instituted, with certain exceptions which were introduced by the civil law.") Compare with *Institutes* 1.2, in *Corpus juris civilis*, vol. 1.

43. For example, Odofredus, *Lectura super Digesto veteri*, to D.1.1.1 (Lyon, 1550; repr. Bologna: Forni, 1967–68), vol. 1, fol. 6vb; and Albericus de Rosate, *Commentaria super Digesto veteri*, to D.1.1.5 (Lyon, 1545), fol. 14vb.

44. For the elements of reason and evolving human custom, see Inst.1.2.

45. In general, however, Roman wars were not divorced from the sacred or divine. Roman fetial law required that war have the blessing of priests who considered the propitiousness and justice of the conflict.

46. Accursius, *Corpus iuris civilis Iustinianei, cum commentariis Accvrsii* [*Glossa ordinaria*], to D.1.1.5 (Lyon, 1627; repr. Osnabruck: O. Zeller, 1965), vol. 1, col. 17, s.v. "*ex hoc iure*."

47. Accursius, *Glossa ordinaria,* to D.1.1.3, vol. 1, col. 16.

48. Ibid., to D.49.15.24, vol. 5, col. 1669, s.v. "*hostes*": "Tertium populi liberi, qui nec nobis nec alicui sunt subditi sive sint nobis foederati, cum prius erant forte hostes, sive non, et in his non est opus postliminii." ("Third there are free peoples, who are neither subject to us nor to another, or are federated with us, when before they were perhaps enemies, or not. For these, *postliminium* has no place.") On fighting for one's country, ibid., to D.1.1.2, vol. 1, col. 16, s.v. "*patria*." On the significance of the phrase *pugna pro patria* in medieval law, see Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100–1322* (Princeton: Princeton University Press, 1964), 435–52; and for a later period, see Norman Housely, "*Pro deo et patria mori*: Sanctified Patriotism in Europe, 1400–1600," in *War and Competition between States*, ed. Philippe Contamine (Oxford: Oxford University Press, 2000), 221–48.

sovereigns to which this applied. In fact, he was more exercised by his contemporary Italy, in which he generally held that cities were not legitimate combatants (*hostes*) when they fought against each other, as they had a common superior in the emperor.[49] The view cast doubt on the power of the Italian cities to engage in anything except immediate self-defense.

Although there was limited material in Roman law that directly addressed war, there were texts on personal self-defense and the recovery of despoiled property which contributed to juristic thought on the subject. Roman law held that "all laws and rights" allowed the use of defensive force against force, and medieval commentators developed two basic standards for defense, based on Roman texts.[50] The first required that violence be repulsed immediately (*incontinenti*), whereas the second demanded that no more than a "moderate" amount of blameless violence be used in defense.[51] These standards were often interpreted broadly by medieval civilians. The criterion of moderation included, according to many medieval jurists, a right to strike first in case of a threat of violence, as it was reasoned that the initial attack could be deadly.[52] Granting a strong right of defense to individuals is not surprising in a period in which armed violence was reasonably frequent, but it is the later application of this theory to relations between nations that is significant for questions of war. This same medieval "pre-emptive" strike in Roman law, valid among individuals, was later cited in the sixteenth century by the civilian jurist Alberico Gentili

49. Accursius, to D.49.15.24, vol. V, col. 1669. Accursius placed warring cities that were subordinate to the empire in the category of thieves (*latrunculi*), and not legal combatants (*hostes*) with the right of *postliminium*.

50. D.9.2.45.4: "vim enim vi defendere omnes leges omniaque iura permittunt." ("all laws and rights permit one to defend against force with force.") See also D.43.16.1.27; D.9.2.4.

51. The standard on defense can be found in civilian commentary already in the twelfth century. See, for example, Placentinus, *Summa codicis*, to C.8.4 (Mainz, 1536; repr. Turin: Bottega d'Erasmo, 1962), 374. The criteria were rooted in classical Roman law: immediacy came from D.43.16.3.9, whereas the criterion of moderation came from C.8.4.1, on the interdict *Unde vi.*

52. Concerning the pre-emptive strike, the civilian Jacobus de Ravanis held that the attacker should have a reputation for violence: Jacobus de Ravanis, *Lectura super Codice*, to C.8.4 (Paris, 1519; repr. Bologna: Forni, 1967), fol. 367vb. The jurist Odofredus de Denariis likewise accepted the pre-emptive strike: Odofredus, *Lectura super Codice*, to C.8.4 (Lyon, 1550 and 1552; repr. Bologna: Forni, 1968–69), vol. 2, fol. 140va-b. The jurist Azo offered a right of pre-emptive strike to the property holder, noting that the attacker's first strike could be the last: Azo of Bologna, *Summa Azonis*, to C.8.4 (Lyon, 1533), 307ra: "Sed certe forte nunquam percuteret postea. Satis est ergo quod alius petit possessorem invadere armis, vel armis terreat ipsum, ut sic possessor contra eum utatur armis." ("But perhaps he would never strike him [if struck first] afterward. It is sufficient therefore that another seeks to invade a possession with arms, or threatens the possessor with arms, for the possessor to use arms against the invader.")

(1552–1608), to help justify pre-emptive strikes between nations.[53] Gentili expanded the notion to include war to prevent threats that were not immediate but only probable, or merely possible, and this more fully "humanist" account of justified war was supported by reference to classical historians.[54] The first stated basis of the argument, however, was medieval Roman law and the opinions of civilian jurists, just as Thucydides was utilized to add a further dimension to the view.

The timing of defensive violence in medieval law was likewise important. In the *Corpus juris civilis*, anyone unlawfully dispossessed of property was to seek a judicial interdict to have the despoiled possessions restored.[55] The interdict was open to anyone ejected from property by force, not only the just possessor. Such was the importance of judicial intervention, and the dim view taken in this case of self-help, in the classical sources. However, the medieval interpretation of self-help was again more generous. The French civilian Jacobus de Ravanis (or Jacques de Revigny, d. 1296), for example, held that someone ejected from his rightful property could wait and gather his friends for over a year, without judicial intervention, before returning to eject the unjust possessor by force.[56] The standard for this criterion of immediacy, necessary for justified defense, was that the victim had not turned his mind to other affairs, which could be extended quite far in time. Certainly the standards of moderation and immediacy could be and were interpreted to support expansive rights of licit, extrajudicial force in defense of person and property. Jurists responded to contemporary social conditions in creating these rights, but had to balance their opinions against the possibility of licensing private vengeance.

53. Gentili, *De Iure Belli Libri Tres*, 62, citing the civilians Baldo degli Ubaldi (1327–1400), Alessandro Tartagni (1424–77), and Filippo Decio (1454–1535) in support. Tuck, *The Rights of War and Peace*, 18–31, discusses the theory of pre-emptive strike as a feature of a "humanist" school of thought on war, taking classical sources as its exclusive origin.

54. Gentili, *De Iure Belli Libri Tres*, 63–66, citing Thucydides, Livy, Herodotus, and others.

55. For the interdict to recover possession of immovables, against force, see D.43.16.1 (*De vi et vi armata*); C.8.4.1 (*Unde vi*).

56. Jacobus de Ravanis, *Lectura super codice*, to C.8.4, fol. 367va. Not all agreed with Jacobus, however; Odofredus criticized this kind of broad interpretation, writing, "[s]ed quare non licebit mihi usque ad mensem, vel usque ad annum te expellere de possessione fundi mei; quia forte tunc non potui te deiicere, sed modo possum quia convocavi amicos meos. . .hoc mihi non licet, quia ex hoc posset multus tumultus accidere, et multa mala possent oriri ." ("but why should it not be licit for me all the way to a month, or to a year, to expel you from possession of my estate: because perhaps then I would not be able to eject you; but I can only do so because I have called together my friends. . .this is not licit, because from it a great disturbance can occur and many evil things.") See Odofredus, *Lectura super codice*, to C.8.4, vol. 2, fol. 141ra.

Medieval jurists were aware of the issue of self-help, and sought to accommodate it within a legal framework in some cases. They had to contend, however, with Roman law texts that disallowed it. A passage in Justinian's *Code* (C.1.9.14) expressly held that one could not take vengeance for injuries oneself, and another, C.3.5.1, held that individuals could not be judges in their own (legal) causes or decide law for themselves (*ne quis in sua causa iudicet vel sibi ius dicat*).[57] However, medieval civilians, from an early period, also considered the situation in which there was no judge to decide a dispute or settle the law. This was the same question that would arise for jurists when treating disputes—over rights, or any range of alleged injuries— between secular authorities who claimed jurisdiction over a given territory and independence from higher authority. Discussions on the topic developed by the twelfth century, when a right of punishment was contemplated for individuals in the absence of a judge. The early civilian, Placentinus (d. 1192), denied that one could have a right to punish others for alleged transgressions, even if a judge to adjudicate the matter was lacking.[58] The influential Azo of Bologna (c. 1150–1230) considered another possibility more favorably, holding that when the judgment of a magistrate could not be had, the recuperation of what was rightful—although not punishment—could be licit on one's own authority.[59]

Jurists who contemplated licit self-help in the absence of a magistrate, eventually brought their insights to bear on the question of war. In the generation after Accursius, Jacobus de Ravanis enumerated four kinds of licit war, two of which echoed the great glossator.[60] Jacobus named the wars waged in strict self-defense against force, and those waged by the Roman people or emperor, as legitimate.[61] The following two were novel, however. The first was drawn from a text of Justinian, which offered an exception to the Roman prohibition on punishing offenders without judicial

57. C.1.9.14: "…idcirco tamen iudiciorum vigor iurisque publici tutela videtur in medio constituta, ne quisquam sibi ipse permittere valeat ultionem." ("nevertheless the vigor of judgements and the safeguard of public law seems established so that no one may permit himself to exact vengeance.")

58. Placentinus, *Summa Codicis*, to C.1.9, p. 13: "Contrarium intellectum non admitto, ut si nullus iudex sit in medio, valeat sumi ultio." ("The contrary understanding I do not allow, that if there is no judge, punishment can be exacted.")

59. Azo of Bologna, *Summa Azonis*, to C.1.9, fol. 8rb, "…ut deficiente vigore iudicum possit sibi quis dicere jus, causa recuperandi nostrum vel nobis debitum; non ut ultio in personam ipsam fiat vulnerando vel occidendo…" ("…that with the lack of judges, it is possible to judge the law for ourselves, for the cause of recuperating what is ours or what is owed to us; [but] not so that punishment may be made upon the person by wounding or killing…")

60. Jacobus de Ravanis, *Lectura Institutionum*, to Inst.1.2 (Lyon, 1536; repr. Bologna: Forni, 1972), 78–80.

61. Ibid., 78–79.

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recourse.[62] The passage granted any citizen a license to immediately apprehend and punish grievous offenders against public order, which included individuals who devastated fields at night or ambushed travelers on roads. The second was the case in which a creditor seized his fleeing debtor and took what was owed to him.[63] Both were examples from private law, and seemed to rely for justification on immediate, grievous, and potentially unpunishable harm, but Jacobus cited these as examples of licit war and as analogies that could legitimize judgment and punishment in the absence of a judge.

Jacobus willingly referred his comments to his contemporary political context, applying his interpretation of private law to relations between polities. He noted that political adversaries might formally be part of the Roman Empire, but that when judgments from the emperor were not available, the adversaries could judge their own causes and wage war.[64] The same applied, Jacobus observed, to polities that recognized no superior. While monarchs in England or France might assert their complete independence from the empire, it was particularly in Italy— where again the emperor's formal overlordship was usually accepted—that a lack of the *copia superioris,* or access to the judgment of the rightful superior, could be used to signify in law that the emperor was absent or impotent as a judicial authority. For Jacobus and subsequent discussion in Italy, the absence of the *copia superioris* was a recurrent feature in comments that cities could exercise a right to judge their own causes and wage war.[65] The practical failure of the emperor's jurisdiction, however rightful, would likewise become a basis for asserting the

62. Ibid., 79; basing his argument on C.3.27.1: "Liberam resistendi cunctis tribuimus facultatem, ut quicumque militum vel privatorum ad agros nocturnus populator intraverit aut itinera frequentata insidiis adgressionis obsederit, permissa cuicumque licentia dignus ilico supplicio subiugetur ac mortem quam minabatur excipiat et id quod intendebat incurrat. Melius enim est occurrere in tempore, quam post exitum vindicare." ("We give to all the free power of resisting, so that whichever soldier or private citizen despoils fields at night or lays ambushes on roads, he may be punished there on the spot, by a licence deservedly permitted to all; and [the offender] may receive the death which he threatened and incur what he intended.")

63. Ibid., 79–80; based on D.42.8.10.16.

64. Ibid., 80: "Ex isto quarto genere dicunt quod illi qui non habent superiorem: tales de imperio licite adinvicem possunt debellare: ubi debitor meus vult fugere cum non habeo copiam iudicis, possum ipsum auctoritate propria capere. Ergo cum unus de imperio alii velit rem auferre cum non habent iudicem adinvicem possunt debellare." ("They say of that fourth kind that those who do not have a superior [can wage war]: such ones who are of the empire are able to war against each other licitly. When my debtor desires to flee and I do not have access to a judge, I can seize him on my own authority. Therefore when one [polity] of the empire wishes to take away the thing of another, when they do not have a judge they are able to war against each other.")

65. For classical uses of the term *copia* in Roman law, in a similar sense, see, for example, D.4.6.26.4, D.22.6.9.3, and further references in Hermann Heumann and Emil Seckel,

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independence and effective sovereignty of the northern Italian cities in the fourteenth century.

The Italian civilian Cinus de Pistorio (Cino da Pistoia, c.1270–1336/7) followed Jacobus in his analysis of licit war, although somewhat more conservatively.[66] Cinus asked whether political authorities subordinate to the emperor could wage war against one another when the seat of the empire was vacant, as in that case, recourse to the judgment of the superior was unavailable.[67] As a northern Italian himself, Cinus's question had reference to the Italian cities, and he held that defensive wars could be taken up when the empire was vacant.[68] Cinus's younger contemporary, Albericus de Rosate (c.1290–1360), went further on the issue, but likewise did not ask whether the emperor's judgments might be regularly, or permanently, unavailable. Albericus considered whether, as "canonists said," the church succeeded to the place of the emperor when the seat of the empire was vacant. He denied the possibility, arguing that the empire and church were independent of each other and could not succeed to each other.[69] As a consequence, with the empire vacant, "arms were able to be taken up without [imperial] license."[70] Like Jacobus, Albericus noted that it could be licit to pass judgment or give law to oneself (*sibi ipsi dicere ius*) and to punish transgressors.[71] It was again

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Handlexikon zu den Quellen des römischen Rechts (Graz: Akademische Druck- u. Verlagsanstalt, 1958), 108.

66. Cinus de Pistorio, *In Digesti veteris libros commentaria*, to D.1.1.5 (Frankfurt, 1578), fol. 4va: "Primus, quando fit ad propulsionem illatae iniuriae in continenti, et cum moderamine. . .Secundo, quando fit authoritate legis scriptae. . .Tertio, quando fit in hostes populi Romani, vel econtra. . .Quarto, quando fit in defectum iudicis." ("First [war is licit], when it is made to repulse injuries inflicted immediately, and with moderation. . .second, when it is made on the authority of written law. . .third, when it is made against enemies of the Roman people, or vice versa [i.e., non-Europeans]. . .fourth, when it is made in the absence of a judge.")

67. Ibid., "Et per hoc dicunt quidam, quod qui sunt de imperio, vacante eo, possunt ad invicem debellare, quia non est superioris copia et recursus." ("And due to this, certain jurists say that whoever is of the empire, but with the empire vacant, are able to fight against each other, since there is no recourse to a superior.")

68. Ibid.

69. Albericus de Rosate, *Commentaria super Digesto veteri*, to D.1.1.5 (Lyon, 1545), vol. 1, fol. 14va, n. 7: "Sed canonistae dicunt quod vacante imperio succedit ecclesia romana. . .non puto verum, cum nec imperium ab ecclesia nec econverso dependeat, sed simul ortum habuerunt." ("But canonists say that with the empire vacant the Roman church succeeds to its place. . .I do not think that this is true, since neither the church nor empire depend on each other, but have an origin together.")

70. Ibid., "[p]uto quod vacante imperio assumi possint arma sine eius licentia."

71. Albericus, *Commentaria*, to D.1.1.5, fol. 13rb, nn. 6–7: "Possent addi et alii duo modi quibus est iustum bellum, scilicet quando authoritate legis scripte quis potest se vindicare, et sibi ipsi ius dicere, ut C. quando lice. unicui se si iudi vindi, et in multis casibus quos not. C. de iude., l. nullus, et unus ex illis propter defectum iudicis, ut in frau. cred., l. ait pretor, sec.

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the *de facto* absence of a rightful jurisdictional superior, or his inability to pass effective judgment, that led to a right of self-judgment.

A student of Cinus, Bartolus de Saxoferrato (1313/14–1357), made perhaps the most important contribution to the question in medieval Roman law. One of the outstanding jurists of the Middle Ages, Bartolus is noted in medieval political thought as the first to articulate a theory of sovereignty for the Italian cities. As Cecil Woolf described in his classic study, the cities' non-recognition of the emperor as a superior (*non recognoscens superiorem*), was at the heart of Bartolus's argument that the cities were independent and effectively sovereign.[72] Beyond a mere assertion of independence from the empire (accomplished effectively by usurping imperial rights and jurisdiction in their territories), the cities might exercise the rights of sovereignty by imperial concession, or by custom or prescription.[73] As a result of their independence, Bartolus argued, some cities could exercise sovereignty within their territory, based on an analogy to the emperor's power over his own territory: a city could be an emperor unto itself (*civitas sibi princeps*).[74] In reality, cities such as Florence or Venice had been sovereign for a long time, and their power could be seen (at least within city walls) in the control they exercised over their own secular affairs, including control over fiscal matters, the power to judge and punish secular cases, and exclusive power to make secular law.[75] Another attribute was the right of the cities to wage war on their

si debitorem." ("There can be added two other kinds of just war, namely when someone is able to avenge himself on the authority of written law, and judge the law for himself [citing C.3.27.1, C.1.9.14], and one on account of the failure of a judge [when he can judge his own cause] [citing D.42.8.10.16].")

72. Cecil N. S. Woolf, *Bartolus of Sassoferrato: His Position in the History of Medieval Political Thought* (Cambridge: Cambridge University Press, 1913), 134ff.

73. All of these have been discussed as justifications for the cities' exercise of *merum et mixtum imperium*, or sovereignty. See Walter Ullmann, "*De Bartoli Sententia: Consilium repraesentat mentem populi*," in *Bartolo da Sassoferrato, Studi e Documenti per il VI Centenario*, ed. Danilo Segoloni, 2 vols. (Milan: Giuffre, 1962), 2:707–33, on the theory of custom and legislative authority. Woolf, *Bartolus of Sassoferrato*, 142, notes that Bartolus was uncertain whether imperial rights were prescribed (by *praescriptio longissimi temporis*), largely because he faced, in his own day, a vacant empire or schismatic emperor, which made prescription doubtful. More recently Magnus Ryan, "Bartolus of Sassoferrato and free cities," *Transactions of the Royal Historical Society*, 6th ser., 10 (2000): 65–89, offers a fine-grained discussion of the logic and inconsistencies of Bartolus's views on the independence of the cities.

74. Woolf, *Bartolus of Sassoferrato*, 154–62.

75. Francesco Maiolo, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (Delft: Eburon, 2007), 231–35, gives a brief summary of scholarly views on the nature of Bartolus's conception of sovereignty. And, in practice, the diverse strategies of territorial control in Italy allowed varying degrees of autonomy to subject cities.

own authority, and Bartolus made comments on war that were inseparable from his theory of sovereignty, and partly underpinned it.

Bartolus argued for the cities' non-recognition of the emperor, but also observed the changed conditions in medieval Italy. He discussed the contemporary state of affairs at the beginning of his *Treatise on Reprisals* (*Tractatus represaliarum*), a work that gives a detailed procedural framework for reprisals and seeks to bring that quasi-judicial practice within the learned legal tradition.[76] Like Jacobus, Bartolus cited the inability of the emperor to act effectively as the highest superior of the Italian cities, which left the cities to settle disputes among themselves. This was the other side of the argument on *non recognoscens superiorem*: while the cities in some cases grasped independence through non-recognition, they also had it thrust upon them by the inability of the emperor to effectively exercise jurisdiction. At the opening of the *Treatise on Reprisals*, Bartolus noted that in the time of the ancient Roman Empire, the emperor ruled effectively and no cause arose for dispute, reprisals, or war between the Italian cities.[77] The contemporary situation, by contrast, was one in which the Roman Empire was helpless, and temporal authorities did not recognize it *de facto*. As a result, there was no recourse to a superior in disputes.[78] Although Bartolus was discussing reprisals, the same conditions held for war; and although formally, the injured side was to first petition the other side for redress, the power to judge when retaliatory action or war was necessary rested finally with the injured party.[79]

76. Bartolus, *Tractatus represaliarum, in Omnia, quae extant, opera* (Venice, 1590–1602), X (*Consilia, qvaestiones, et tractatvs*), fol. 119vb–124va.

77. Ibid., fol. 119vb: "Represaliarum materia, nec frequens, nec quotidiana erat tempore, quo in statu debito Romanum vigebat Imperium: ad ipsum enim tanquam ad summum Monarcham habebatur regressus, et ideo hanc materiam legum Doctores, et antiqui iuris interpretes minime pertractaverunt." ("The matter of reprisals was neither daily nor frequent in that time in which the Roman Empire thrived in its proper state. Recourse was had to the Emperor as to the highest monarch, and therefore the doctors and old interpreters of the law did not treat this matter.")

78. Ibid.: "Postea vero peccata nostra meruerunt, quod Romanum Imperium prostratum iaceret per tempora multa, et Reges et Principes, ac etiam civitates maxime in Italia, saltem de facto in temporalibus dominum non agnoscerent, propter quod de iniustiis ad superiorem non poterant haberi regressus. . .;" ("Afterwards, however, our sins merited that the Roman Empire would lie in ruins for a long time, and kings and princes, and also cities (particularly in Italy), would not *de facto* acknowledge a lord in temporal affairs, on account of which no recourse could be had to a superior concerning injustices.") See also the comments in Diego Quaglioni, "Le ragioni della guerra e della pace," in *Pace e guerra nel basso medioevo. Atti del XL Convegno storico internazionale, Todi, 12–14 ottobre 2003*, ed. Enrico Menestò (Spoleto: Fondazione Centro italiano di studi sull'alto Medioevo, 2004), 125–29.

79. Compare with Haggenmacher, *Grotius et la doctrine*, 167–70, on reprisals and the significance of the denial of justice as a formal cause for war.

Bartolus also gave further attention to the natural right of self-defense. In the *Treatise*, he affirmed that bodily protection was licit, according to the law of nations (or secondary natural law), and used medieval corporation theory to draw an analogy between an individual's right of defense and a collective right of defense that could be extended to political bodies. It was a point that was assumed earlier, in Accursius, and was not apparently questioned in medieval Roman law. However, Bartolus made the analogy clearer:

> . . .and war is licit from the aforesaid causes, which is proved because what one does for the protection of his body comes from the law of nations, [and] seems to have been done justly. . .[as] I understand the body, either we may speak of one individual, or of one mixed body. From which fact a city is able to wage war for the protection of one citizen, just as one particular [person] is able to wage war against all for the protection of his person and his things, where the judgment of a superior [*copia superioris*] or another remedy cannot be had, as with the said laws. . .[a]nd I think the aforesaid things are in accord with the law of nations and civil truth.[80]

The comment alluded to a city as a mixed body (*corpus mixtum*), referring not only to its composition from a number of individuals but also to its corporate nature. Self-defense was permissible for the corporate polity *qua* whole or, as Bartolus noted, on behalf of an individual. Just as the individual could bear legal rights and duties, so too could the political body, according to a medieval legal theory by which the collective or corporate body was accepted as a *collegium* or *universitas*, and could be represented as a *persona ficta*, or single juridical person.[81] The right of self-defense

80. *Tractatus represaliarum,* fol. 120ra, nn. 5–6: "Et bellum licitum est ex causis praedictis, quod etiam probatur, quia de iure gentium est, quod id quis ob tutelam sui corporis fecerit, videtur fecisse iuste. . .corpus intelligo sive loquamur de uno individuo, sive de uno corpore mixto. Unde ob tutela unius civis, potest civitas indicere bellum, sicut unus particularis potest indicere bellum contra omnes ob tutelam personae suae, et suarum rerum, ubi superioris copia vel aliud remedium haberi non potest. . .et praedicta puto iuregentium et veritati civili consonare. . ."

81. See Joseph Canning, "The Corporation in the Political Thought of the Italian Jurists of the Thirteenth and Fourteenth Centuries," *History of Political Thought* 1 (1980): 9–32. The foundational work on the subject is still Otto Gierke, *Political Theories of the Middle Age*, trans. Frederic Maitland (Cambridge: Cambridge University Press, 1900). On corporation theory in relation to monarchies, see Ernst Kantorowicz, *The King's Two Bodies* (Princeton: Princeton University Press, 1957). As on many issues, Innocent IV was an important early pioneer of the argument; see Manuel Rodriguez, "Innocent IV and the Element of Fiction in Juristic Personalities," *The Jurist* 22 (1962): 287–318; also Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism*, enl. new ed. (Leiden: Brill, 1998), 89–108; and Pierre Quantin-Michaud, Universitas. *Expressions du mouvement communautaire dans le moyen-âge* (Paris: Vrin, 1970).

could thus be applied through a familiar juridical concept to independent polities, including cities; and medieval corporation theory in general helped jurists to apply rights and principles drawn from private law to political bodies or "public" persons, and to disputes among them. It was a practice that became common in early modern "international" law and has continued (with and without theoretical justification) into modern international law.[82]

Like any medieval jurist, Bartolus considered self-defense to be a natural right, and it was a right that could not easily be denied to political entities. This was in contrast to many canonists, particularly the Decretists, who, as noted, did assume that the unjust (and guilty) side in war defended itself unjustly against just punishment.[83] For Bartolus, independent polities possessed a strong right of self-defense and judged the justice of their wars, a view that is some testament to the growing power of independent polities in Europe, and the often more frank recognition in Roman law that war related to a question of jurisdiction. As something of a further step, Bartolus's right of defense, under which one could wage war (even "against all") for self-protection and the protection of goods, vaguely calls to mind Hobbes's "warre of every man against every man" in his well-known depiction of a state of nature.[84] Although apparently a distant comparison, there is at least some reason, which will be discussed, why Hobbes's state of nature might be considered not only from a legal perspective, but also in the context of the tradition on judging one's own cause.

Civilians following Bartolus typically allowed the independent Italian cities a right to wage war. In some cases, jurists explicitly reduced the criteria for licit war to proper authority, after considering the difficulty of adjudicating the just cause; although without dismissing the concept of a just cause. One of Bartolus's students, Angelus de Ubaldis (c.1327–1407), addressed the issue in a *quaestio* in which he asked whether two Italian cities had a right to wage war against each other.[85] Angelus found that the cities, Verona and Padua, exercised sovereign rights in

82. For example, see the important study of Hersh Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green & Co., 1927), and recently Randall Lesaffer, "Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription," *European Journal of International Law* 16 (2005): 25–58.

83. See above, notes 14 and 15.

84. Thomas Hobbes, *Leviathan*, ed. Richard Tuck, rev. student ed. (Cambridge: Cambridge University Press, 1996), 90 (bk. 1, ch. 13).

85. Angelus de Ubaldis, *Renovata Guerra*, in *Quaestiones Doctissimae* (Turin, 1580), fols. 22va-24vb. On this *quaestio* and the idea of bilateral justice, compare with Haggenmacher, *Grotius et la doctrine*, 117.

their territories and could go to war. His treatment was not without subtlety, as both cities were said to recognize the emperor, but because they held imperial vicariates by concession, each possessed *merum et mixtum imperium* in their own territories, which equated to sovereignty.[86] There was, therefore, no one to judge the dispute in civil law, and Angelus admitted that determining the just side was doubtful.[87] Each city could licitly judge its own cause, defend its rights, and also take spoils in war.[88] Angelus was, perhaps, the first civilian to point to the difficulty of discerning the just side in war. This early development of the concept of bilateral justice in civilian analysis largely depended on Bartolus and the recognition of the lack of an effective tribunal among the cities, although Angelus used the concept of imperial concession to skirt the problem of the emperor's weakness as a judge.[89]

In the generation after Angelus, two civilians who made contributions to legal discussions on the justification of war were Raphael Fulgosius (1367–1427) and Paulus de Castro (d. 1441). Both furnished theories of war that were sensitive to the Italian context in which they worked, and both built on earlier thought, discussing the problem of war in relation to a lack of common judicial authority. Like Jacobus, Bartolus or Angelus, they appeared to move away from the just war tradition, which had often raised the question of moral intention as well as just cause and authority. Fulgosius treated the equality of adversaries in the absence of common superior authority, although he arrived finally at a traditional solution, in

86. Angelus, *Renovata Guerra*, fol. 23ra, "tamen quia quilibet dominorum dictorum in terris et territoriis suis habent merum et mixtum imperium et omnimodam iurisdictionem sui imperii, suaeque iurisdictionis, suique territorii, licitum est contra alium bellum indicere." ("nevertheless, since each of the said lords has *merum et mixtum imperium* [sovereignty] in their lands and territories, and every kind of jurisdiction pertaining to their authority, jurisdiction and lands, it is licit for them to declare war against another.")

87. Ibid., "...tamen quis habeat iustam vel iniustam dubitatur eo quod quilibet asserit se prius insultatum, et se pro defensa sui iuris facere dictam guerram, quo casu propter dubium ex utroque latere dicere possumus guerram iustam." ("...nevertheless, who has a just or unjust cause is doubted, since both assert that they were insulted first, and that they made war to defend their right; in which case, on account of the doubt, we can say that war is just on both sides.")

88. Ibid.

89. Earlier in canon law, a few jurists contemplated wars that could be *subjectively* just on both sides. The twelfth century canonist Rolandus imagined that a prince could be deceived (for example, from bad information) as to the culpability of his adversary, and excusably believe that his cause was just; Rolandus, *Summa magistri rolandi*, ed. Friedrich Thaner (Aalen: Scientia Verlag, 1962), to C. 23 q. 2, 88. Stephen of Tournai furnished a longer discussion of the same issue; see Russell, *The Just War*, 89–92. Angelus, however, focused on the rights of sovereigns and the frequent uncertainty of the just cause in the absence of a tribunal to judge disputes.

line with some views in canon law. Paulus, for his part, articulated a newly permissive theory of justified war that was rooted in the medieval tradition, but also reached beyond it.

Fulgosius addressed the problem of discerning the just side in war in his commentary on the *Digest* at D.1.1.5. He initially observed that the just side was uncertain among independent authorities in secular disputes, when no judge served as a common superior who could decide the case according to civil law. As a result, "by the best reasoning, the people established that war would be the judge of the thing."[90] It can be noted that Fulgosius understood each party to war as a litigant. The sides judged the justice of their own causes, but they judged, as it were, as petitioners, whereas war judged the matter itself. Fulgosius cited lines from Lucan's *Pharsalia* in support, and then made reference to Northern Africa, which had been captured by the Vandals and later recaptured by Justinian, ostensibly to show that legal effects flowed from just or unjust wars.[91] He held that proper authority was the essential criterion for licit war, and that proper authority depended upon the lack of a superior. The kings of France, Aragon, and Castile, and any free people (including the independent cities of Italy) were given as examples of polities that asserted independence and sovereignty, and could wage war on their own authority.[92]

Fulgosius's opinion and the classical references he included were unusual, but his final solution returned to a position influential in canon law and beyond, which would continue to carry important weight. After arguing that war itself was a judge, he wrote that the pope was the common superior in Europe and that full Roman war was licit only between Christians and barbarians (those outside Europe), not among Christians.[93] Strict self-defense against force was always licit, but

90. Raphael Fulgosius, *In primam Pandectarum partem commentariorum…tomus primus*, to D.1.1.5 (Lyon, 1544), fol. 8ra: "Respondeo quod quia incertum erat utra pars iuste bellum moveret, nec erat iudex communis utrique superior, per quem id possit certum civiliter effici, optima ratione constituerunt gentes, ut eius rei iudex bellum foret. ("I respond that because it was uncertain which side moved the war justly, nor was there a common judge as superior for both, through whom a decision could be brought about by civil procedure, by the best reasoning people established that war would be the judge of the thing.") On Fulgosius, compare with Haggenmacher, *Grotius et la doctrine*, 203–4; also Tuck, *The Rights of War and Peace*, 32.

91. Fulgosius, *In primam Pandectarum*, fol. 8ra, n. 2. His analysis, to the extent that it features some examples from Roman history, appears in line with general humanist concerns.

92. Ibid., fol. 8ra, n. 5.

93. Ibid., fol. 8rb. His support for recourse to the pope in secular, and certainly territorial, disputes had a basis in canonists such as Hostiensis, who like many, wished to see disputes among Christians settled by judges and ultimately the Pope (see above, note 39).

Fulgosius saw a strong role for the pope in mediating and adjudicating European disputes, and bringing two or more sides to peaceful resolution.

III. Paulus de Castro

Paulus de Castro recorded perhaps the most permissive account of war among jurists in the period, and also discussed the question of judging one's own cause in a way that more clearly foreshadowed the states of nature of Thomas Hobbes (1588–1679) and John Locke (1632–1704). Writing on the problem of legitimate authority, Paulus repeated the point that an individual, having been wronged, could wage war against another when recourse to a superior was unavailable. Lacking the possibility of recourse to a superior, Paulus assured that it was licit for the individual to pass judgment himself (*quilibet sibi ipsi poterat ius dicere*), but he was more explicit than Bartolus in suggesting a state in which individuals could act as their own judges. As he wrote in his *Digest* commentary: "For also before there were magistrates, anyone was able to pass judgment himself by the law of nations; after the creation of magistrates, however, it was prohibited for anyone [to judge] on his own behalf. . .if therefore a magistrate is lacking, we remain in the disposition of the law of nations."[94]

The description reinforced Bartolus and others on the right to judge one's own causes or decide law for oneself, but was striking for imagining a general condition of rightful self-help among individuals. The issue seemed to have more than a momentary interest for Paulus, because in a *consilium*, or legal opinion on a particular case, he again described the conditions under which it was licit to pass judgment on one's own behalf. There he returned to the idea of a state lacking civil magistrates, and identified a right of war. "Before laws were made, when there was no judicial order, which then was unknown, anyone pursued his own right (*jus*). But [afterward, there were judgments] either by a royal hand, if there was recourse to a king. . .or if there was no recourse, war was taken up on one's own authority (*auctoritate propria*). Indeed that seemed licit by all divine law, namely natural law and the law of nations."[95]

94. Paulus de Castro, *In primam partem Digesti veteris commentaria*, to D.1.1.5 (Venice, 1582), fol. 4va, n. 3b: "Nam etiam de iuregentium antequam essent magistratus quilibet sibi ipsi poterat ius dicere, post creationem vero magistratum inhibitum est cuique sibi ipsi posse dicere. Si ergo deficit magistratus, remanemus in dispositione iurisgentium."

95. Paulus de Castro, *Consilia* (Frankfurt, 1582), vol. 1, *consilium* 400, fol. 207rb: "Priusquam iura fierent, nullo ordine iudiciario, qui tunc erat incognitus, consequatur quis ius suum. Sed autem regia manu, si regis aderat copia; vel si non aderat, auctoritate propria

With the enactment of civil laws and magistrates to protect the laws, public discipline was established. Prior to civil society, or when magistrates were lacking, Paulus indicated that each individual was effectively sovereign: [It is] otherwise if access to a magistrate is lacking, because it is not enough that laws (*jura*) were created, where there is no one to safeguard them. . .[in that case] we return to our primeval rights (*jura*), by which it is licit for us by every law (*jure*) to pursue our own right (*jus nostrum*), on our own authority (*propria auctoritate*).[96]

Translating the different senses of *jus* in the passage—which can equally mean "law" or "right"—is difficult, but Paulus clearly held that individuals possessed a right or licit power, in the absence of effective authority, to pursue justice for their property and person.[97] Lacking magistrates, individuals were still able to observe those practices and institutions that were rightful under the law of nations (*jus gentium*), taken as the natural law of humankind, and which, for medieval jurists, was a basis for more local laws.[98] According to Roman law, not only war, but liberty and private property, as well as self-defense, obligations, contracts, commerce, and slavery all arose under the law of nations.[99] Jurists such as Paulus in the *jus commune* tradition would hold that the law of nations was valid in the absence of local law, and Paulus's comments in his *consilium* were prefaced to a dispute over land.[100] How property was first acquired under the law of nations cannot be examined here, although medieval thinkers did theorize the first acquisition of property, and opinion (then as now) varied.[101]

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suscepto bello. Quod quidem omni iure licitum videbatur divino, scilicit naturali atque gentium."

96. Ibid., fol. 207rb, n. 2: "Caeterum si deficit copia magistratus, quia parum est iura fuisse condita, ex quo non est qui tueatur ipsa. . .[a]d iura primaeva redimus, quibus omni iure nobis liceat, auctoritate propria ius nostrum consequi."

97. A good recent discussion of the meanings of *jus* in medieval canon and Roman law is found in Jonathan Robinson, *William of Ockham's Early Theory of Property Rights in Context* (Leiden: Brill, 2012), 69–100.

98. Paulus, *In primam partem. . .commentaria*, to D.1.1.1, fol. 3ra–b.

99. D.1.1.5. The Roman law of nations was based on D.1.1.1.4–D.1.1.5, and Inst.1.2; see above, note 42, for D.1.1.5. Liberty was originally common to all, but that condition was subsequently modified by the institution of slavery, which was also considered natural and as a result of war (see note 111 below). Gratian's *Decretum* was similarly a source for the *jus gentium*, both in its treatment of natural law and the law of nations; *Decretum*, D. 1, cc. 7–9.

100. Paulus, *Consilia*, fols. 207va–b. Paulus observed that war could only be just according to reason under the law of nations, and argued that it was repugnant to reason that, if the magistrate should be lacking, individuals would have to give up their right/what was rightful (*ius nostrum*); see fol. 207rb, n. 2.

101. See, generally, Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150–1625* (Grand Rapids, MI: William B. Eerdmans, 1997),

A case in which all individuals had a license to defend and pursue justice for their property and person (and to enforce things such as contracts) against all others, on their own authority, would seem to raise a perennial threat of war. In this connection, there was a greater potential for the development of a Hobbesian state of nature, in which each individual would be a sovereign and judge on one's own behalf, and to which Paulus's conception may bear some brief comparison. As Hobbes wrote in *Leviathan*: "in the condition of Nature, where every man is Judge, there is no place for Accusation."[102] In his *Elements of Law*, he brought up the same problem: "In the state of nature, where every man is his own judge. . .arise quarrels, and breach of peace; it was necessary there should be a common measure of all things that might fall in controversy."[103] For Hobbes, in the state of nature, each individual has a right to everything, as far as the individual thinks it promotes survival. Because there is no authority, and no assurance of what is sufficient for self-preservation—and humans generally act according to fear and self-interest, while exhibiting qualities such as covetousness or vainglory—no one can be secure and the state of nature is a state of perpetual war.[104]

From a legal perspective, it might be suggested that Hobbesian individuals tend to be bad judges of their own causes in a state of nature. Hobbes certainly argued that humans are swayed by their passions and opinions, which are for him self-regarding; but where common judgment and security are absent, reason leads them to preserve themselves by whatever means seem necessary, which issues in an unlimited "right" for all.[105] For Hobbes, in the state of nature there was no injustice. Hobbes's solution to the state of nature supposed that individuals would covenant to set up a sovereign, which individual or assembly would maintain the structure of a civil society. Among other things, the sovereign create and uphold civil laws, what Hobbes identified as natural laws or laws of nature, and would judge disputes and enforce decisions. He would also do so justly, although there was nothing to counter the sovereign.[106]

131–69. In Roman law things that were unowned and open to acquisition were considered *res nullius,* or things of no one. Medieval canonists generally considered that property was first held in common; private property was usually thought to have become necessary sometime after original sin, and was established by a combination of appropriation and consent.

102. Thomas Hobbes, *Leviathan,* 98 (bk. 1, ch. 14).

103. Quoted in Tuck, *Rights of War and Peace*, 131–32.

104. Hobbes, *Leviathan*, 86–90 (bk. 1, ch. 13).

105. Ibid., 32–33 (bk. 1, ch. 5).

106. Notably, Hobbes acknowledged that no one was able to lay down or transfer to the sovereign the right of self-defense, as all rights were laid down for some benefit to oneself (*Leviathan*, 93; bk. 1, ch. 14).

Hobbes had described a very minimal law which individuals acted on in the state of nature. The primary law of nature directed humans to seek peace for the sake of self-preservation, but as the primary right in a state of nature, humans could again preserve themselves by all means. As a second law of nature, individuals were willing to enter into contracts and voluntarily limit their right to all things if others also agreed, although without a common superior authority to enforce them, those agreements were too fragile to be sustained, and were in fact invalid.[107] Hobbes supplied a further list of laws of nature, drawn partly from juridical sources, but these could not be acted on with prudence in a state of nature, since the law or rational precept of self-preservation in such adverse conditions trumped them.[108] For Paulus and any jurist in the *jus commune* tradition, on the other hand, somewhat more substantial legal relations existed between individuals, as well as nations, in the absence of a common superior. These were based on natural law and the law of nations, and a natural justice that all humans were able to recognize and follow by reason.

The state lacking superior authority that Paulus described, if somewhat extrapolated, appears closer to the state of nature found in Locke, who saw the potential for dispute and war, but likewise thought that individuals could follow a somewhat fuller idea of justice in the absence of government.[109] Similar to Paulus and views based on the law of nations, Locke asserted the existence of private property and a natural right to defend it, as well as life (including health) and liberty in a state of nature. He then offered to every individual in that state a striking, universal right to punish any transgressors against those limited rights.[110] From this also came a right to enslave anyone who seriously violated those natural rights, which was not unlike how slavery arose under the Roman law of nations.[111] Locke

107. Ibid., 92 (bk. 1, ch. 14). Hobbes argued that without civil authority to enforce mutual promises, humans tend to break their word for a lack of fear and the sake of advantage (96, 99). Covenants are made valid and enforceable by civil authority.

108. Ibid., 100–11 (bk. 1, ch. 15).

109. John Locke, *Two Treatises of Government: And a Letter Concerning Toleration*, ed. Ian Shapiro (New Haven: Yale University Press, 2003), 103 (bk. 2, ch. 2, § 8): "And thus, in the state of Nature, one man comes by a power over another, but yet no absolute or arbitrary power to use a criminal. . .but only to retribute to him so far as calm reason and conscience dictate, what is proportionate to his transgression. . .[i]n transgressing the law of Nature, the offender declares himself to live by another rule than that of reason and common equity, which is that measure God has set to the actions of men for their mutual security. . ."

110. Ibid., 102–3 (bk. 2, ch. 2, § 7). Hugo Grotius had earlier articulated a very similar right, on which see Benjamin Straumann, "The Right to Punish as a Just Cause of War in Hugo Grotius' Natural Law," *Studies in the History of Ethics* 2 (2006): 1–20.

111. Locke, *Two Treatises of Government*, 110 (bk. 2, ch. 4, § 23). Medieval civilian jurists also saw slavery as a just institution under the law of nations; see for example, Jacobus

explicitly equated this right of punishment with a right of individuals "to be judges in their own cases," which included the right to seek reparations for injuries committed against an individual's own life, liberty, or property.[112]

Locke's state of nature, and his theory of government, depended upon the notion that what was just in respect to the rights of life, liberty, and property could be recognized by individuals, by means of reason and in accordance with natural equity. Against the Hobbesian objection that, as judges in the state of nature, humans were partial to themselves, and that confusion and war would result, Locke admitted that civil authority was more convenient and preferable, but observed that it was susceptible to the same partial and self-regarding actors (i.e., tyrannical government) as would exist in a state of nature.[113] The power to punish grave violations of natural law in regard to life, liberty, and property remained with the people, taken corporately after the formation of civil authority; this power was rooted in the people's capability to justly judge violations, and led to a right to remove tyrannical governments.[114] For Locke, the state of nature and war were distinct: war was a condition of enmity, based on declaration or obvious intention to cause death, whereas the state of nature simply lacked a common superior judge between individuals, as was the case between independent governments.[115]

In Paulus's account of a state of nature, it was unclear (and unlikely) that there was such a generalized right of punishment against any transgressor, although rights in property, liberty, and life could be justly discerned and defended by individuals who possessed them. Following the common

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de Ravanis, *Lectura*, to Inst.1.2, 77. It arose as a merciful alternative that spared the captive in war from death. In a similar way, for Locke, slavery could follow upon a justly punitive act in a state of nature, if the captor saw a utilitarian value in putting the captive to work, rather than death. The slave did not lose the right of self-defense, however.

112. Locke, *Two Treatises of Government*, 105–6 (bk. 2, ch. 2, § 13). Also among Hobbes's further laws of nature, which are maintained in civil society, was that man could not be a judge of his own causes; Hobbes, *Leviathan*, 109 (bk. 1, ch. 15).

113. Locke, *Two Treatises of Government.*

114. Ibid., 197–209 (bk. 2, ch. 19, § 222–43). Locke raised the question of judging again in treating the resistance to and removal of bad government (§240): "Here, it is like, the common question will be made, 'Who shall be judge, whether the prince or legislative act contrary to their trust?'…To this I reply, 'The people shall be judge,'" and compared the government to a deputy or trustee of the people.

115. Ibid., 107–9 (bk. 2, ch. 3): "Want of a common judge with authority puts all men in a state of nature" (§19). Locke noted that a government will also be in a state of war with its people if it routinely abuses power (bk. 2, ch. 19, §222). This seems to undermine the notion that government is a deputy or trustee, whose limited rights could simply be revoked; however, it fit with the idea that also between governments and people there was no higher superior, and that the dissolution of a tyrannical government would not proceed according to a normal judicial process.

medieval assumption that Locke also relied on, Paulus would agree that humans were able to understand what was rightful according to natural law and what was owed to others by reason, and could follow this justice and equity at least to some extent in a state of nature.[116] The situation would apply equally to individuals and to political authorities lacking a superior. On the other hand, Paulus did not consider that a natural (and quite expansive) right of defense among independent political authorities might be limited or invalidated in some cases, which posed challenges for an idea of enduring peace or justice, especially given the common right to judge and pursue one's own rights by war. The problem of the state of nature, at least—for a theorist such as Paulus in the medieval tradition or Hobbes and Locke in the early modern period—related not only to defining spheres of liberty for the individual, but to discerning and following justice in respect to practices and institutions that licitly existed in that state. The questions raised had as much to do with law as they did with rights.

The medieval juridical theory on the right to judge one's own causes in the absence of superior authority was apparently known to Hobbes and Locke, and served as a basic legal foundation of their analyses of a state of nature. Of course, neither Hobbes nor Locke cited legal sources from the medieval *jus commune* directly in discussing their states of nature. Their conceptions are also much richer than that of Paulus or other juristic discussions, and can be fully understood only in the context of their own period. But Hobbes and Locke knew and relied on legal sources, and Hobbes in particular may have been aware of legal questions on war from a near-contemporary like Alberico Gentili, who taught Roman law at Oxford when Hobbes was a student, or certainly from his own knowledge of law.[117] As Gentili wrote, indicating the most basic issue: "there

116. This pertained also to war, where Paulus wrote that wars coming from reason were just, whereas ones coming from the passions were unjust; Paulus, *In primam partem…commentaria*, to D.1.1.5, fol. 4va, n. 3c: "…ut sunt bella iniusta, quando ad illa non moventur homines ex ratione, sed ex sensualite…illa sunt bella licita, quando ad illa moventur homines ex ratione, et illud ius dicitur instinctus naturalis ex ratione proveniens." ("…as are unjust wars, when men are not moved to undertake them by reason, but from sensuality…those wars are licit, when men are moved to them by reason, and that law is called a natural instinct coming from reason.") Paulus followed *jus commune* tradition in tying just wars to their accord with reason and natural law.

117. Tuck, *The Rights of War and Peace*, 17, suggests that Hobbes may have heard Gentili lecture, when the latter was Regius Professor of Civil Law at Oxford and Hobbes was a student, during 1603–5. On Gentili's approach to the rights of war, see Tuck, *The Rights of War and Peace*, 16–50, *passim*. See also the collection of essays on Gentili in *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, ed. Benedict Kingsbury and Benjamin Straumann (Oxford: Oxford University Press, 2011); and Alberico Gentili, *The Wars of the Romans. A Critical Edition and Translation of* De

cannot be judicial processes between sovereigns unless they themselves consent, since they acknowledge no judge or superior."[118] Both Hobbes and Locke responded to the question of justice in the absence of a common superior; Locke interpreted the right to judge one's own causes, when lacking the *copia superioris*, in ways consonant with the medieval tradition, while Hobbes deeply critiqued that tradition.

Paulus, incidentally, articulated another theory of justified war, and this second theory stemmed directly from classical sources and a classical view of relations between nations. Whereas his first theory was a continuation of issues raised within the *jus commune*, the second theory likely relied on Aristotle and Cicero. In his *Digest* commentary, Paulus gave as causes for just war the recovery of goods lost (taken by stealth or open force) which could not be recovered otherwise, and the failure of a ruler to do justice, which went back to Augustine and Roman legal sources,[119] but the jurist added a third kind of just war, the war for the sake of ruling others well. This would easily result in permanent conquest, and he seemed to accept that these wars could be fought for glory:

> Also I think that although by divine law it is not licit to fight for the sake of subjugating men who waged war. . .nevertheless by the law of nations one free people not recognizing a superior is able [to fight] against another free people, if it makes for a good end, with the result that they may rule those people well and govern [them]; otherwise the wars which the Roman people waged for this sole end – for the glory of the Empire – were not licit, nor was their monarchy and rule over them licit; and nevertheless the contrary is true since Christ approved [this] when he said, "render unto Caesar what is Caesar's."[120]

Here Paulus offered a vision of war that departed from Christian just war theory (and part of classical legal tradition) but was not inconsistent with

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Armis Romanis, ed. Benedict Kingsbury and Benjamin Straumann, and trans. David Lupher (Oxford: Oxford University Press, 2011). On Gentili and his career, see Diego Panizza, *Alberico Gentili, giurista ideologo nell'Inghilterra elisabettiana* (Padua: D. P. Via Vergerio, 1981); and Gesina H. J. van der Molen, *Alberico Gentili and the Development of International Law,* 2nd rev. ed. (Leiden: A. W. Sijthoff, 1968).

118. Gentili, *De Iure Belli Libri Tres*, vol. 2, 15. At the same time, however, Gentili, like many jurists, urged sovereigns to consent to arbitration to end disputes. Those who did not were "setting their faces against justice, humanity, and good precedent" (2:16).

119. Paulus, to D.1.1.5, fol. 4va, n. 4.

120. Paulus, to D.1.1.5, fol. 4va, n. 4: "Puto etiam quod licet de iure divino non licet bellare pro subiugando bellatos. . .de iure tamen gentium unus populus liber non recognoscens superiorem possit contra alium liberum si facit ad bonum finem ut illos bene regat et gubernat, aliter bella qui exercuit populus romanus ad hunc solum finem pro gloria imperii non fuissent licita nec ipsorum principatur et monarchia, et tamen contrarium est verum quia Christus aprobavit dum dixit reddite que sunt Cesaris Cesari, et cetera."

other classical views. Cicero had also held that wars could be fought for glory as a secondary aim, but it was Aristotle who argued in the *Politics* that empire for the sake of ruling others well was acceptable and praiseworthy for those of outstanding virtue, over people who were inferior.[121] Nor was Paulus's theory only directed at infidels, barbarians, or other "inferior" peoples outside the borders of Europe. The "free peoples" able to wage these wars included the independent Italian cities, and European monarchies against each other.[122] The war for ruling others well was still virtuous and rational, although it operated according to a classical standard of virtue. This last view of Paulus on wars, applicable within Europe, seems to represent the farthest point reached in Roman law before the late Renaissance or early modern period, from the traditional views on war in canon law.

IV. Concluding Remarks

Despite his last opinion, Paulus's theories of justified war fall generally within a medieval tradition. In large part, this was a medieval Roman law tradition, in which the right of sovereigns to judge their own causes, the shadow of Roman imperial rights, and an idea of pre-emptive defense, made for strong rights of war. Beneath these ideas was the Roman law of nations, understood as a limited set of practices and institutions considered

121. Cicero, *De officiis*, trans. Walter Miller (Cambridge, MA: Harvard University Press, 1913), 41 (1.12.38): "when a war is fought out for supremacy and alien glory is the object of war, it must still not fail to start from the same motives which I said a moment ago were the only righteous grounds for going to war." These were that war should be made after an official demand for redress of some wrong, or an official declaration (1.12.36). Aristotle made his argument with less qualification: see his *Politics*, ed. Stephen Everson (Cambridge: Cambridge University Press, 1988), 178 (1333b39–1334a2). The larger context of Aristotle's comment is his well-known theory of natural slavery, by which inferior peoples could be conquered and ruled by others; see *Politics*, for example, 1256b22–27 and 1.5–7 on slavery generally. The argument on natural slavery was familiar to medieval commentators on Aristotle, but became more popular in some humanist writing in the Renaissance and early modern period. On natural slavery, see Tuck, *The Rights of War and Peace*, 40–44; Anthony Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge: Cambridge University Press, 1987), 27–56; Anthony Pagden, "Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians," in *The Languages of Political Theory in Early-Modern Europe*, ed. Anthony Padgen (Cambridge: Cambridge University Press, 1987), 79–98; and Brian Tierney, "Aristotle and the American Indians—Again: Two Critical Discussions," *Cristianesimo nella storia* 12 (1991): 295–322.

122. It would be less surprising if Paulus argued that only infidels should face this kind of war, but he was clear on the point, describing the Venetians as a free people (*In primam partem. . .commentaria*, fol. 4va, n. 5d).

natural and rational for human societies, and that accorded with the necessities of common human practice.[123] The law of nations existed prior to and in the absence of local laws and customs, was not invalidated by them, and created very modest or minimal obligations between individuals or polities. It can be suggested that rights of war coming out of Roman law, based on an awareness of the problem of jurisdiction between sovereigns and featuring few laws between them, exerted a measure of influence on early modern accounts of morality that, as Tuck argued, featured strong rights of self-preservation and emphasized individual self-interest.[124] At the same time, however, Roman private law provided the largest quarry of legal principles for early modern treatises on laws of war, allowing for more detailed regulations, which could be labeled as a much expanded law of nations and early international law.[125]

The argument by at least one civilian jurist that wars might be justified for the sake of ruling others well, and for the sake of glory, is outside of the tradition of war in medieval legal thought, and appears to share an element of a "humanist" approach on Tuck's classification. These views are believed again to validate robust rights of war based on classical sources, and to emphasize the secular, civilizational superiority of ancient Greece and Rome (and early modern Europe) over and against inferior barbarians and outsiders. As importantly, Tuck's account identifies classical skepticism and Stoicism as key early modern foundations for a minimal, universal set of norms, reducing largely to self-interest, which were applicable between individuals in a state of nature, as well as between nations, and even within

123. For the idea that the law of nations conformed to common practice and human necessities, Inst.1.2: "nam usu exigente et humanis necessitatibus gentes humanae quaedam sibi constituerunt." ("For with custom and common human necessities demanding it, some human peoples established these laws for themselves.") Medieval civilians also understood, from the text of Justinian as well as the influence of theology, that the *jus gentium* ultimately had divine origins: "sed naturalia quidem iura, quae apud omnes gentes peraeque servantur, divina quadam providentia constituta, semper firma atque immutabilia permanent" (Inst.1.2). ("But indeed these natural laws, which are observed equally among all peoples, having been established by a certain divine providence, always remain firm and immutable.")

124. Tuck, *The Rights of War and Peace*, 1–15.

125. Underlying the use of any specific Roman law precept in early modern international law was an old view that it was not merely positive law but a kind of written reason (*ratio scripta*), often traces of which could be found reflected in various customs among human societies, historical or contemporary. This can be related again to a belief in the transcendent foundation of the law. Canon law also contributed principles to early modern international law, from the important principle of noncombatant immunity, to influential views on contracts. On contracts, see Randall Lesaffer, "The Medieval Canon Law of Contract and Early Modern Treaty Law," *Journal of the History of International Law* 2 (2000), 178–98.

civil society.[126] Paulus's "humanist" contribution was more modest: he likely relied on familiar texts from Cicero and Aristotle's *Politics,* although his use of them was unusual in law.

Paulus's theory of war for conquest, insofar as it has a humanist aspect, is probably best viewed in his own historical and political context, and perhaps as the jurist's acceptance of some of the territorial aims of the ambitious northern Italian city-states in which he worked.[127] The governments of the competitive cities of early fifteenth century Italy were flattered by praise and even imperial rhetoric from urban humanists, following on their foreign interventions, bellicose expansionism, and pursuit of glory within the Italian peninsula.[128] This is one part of the well-studied early Renaissance culture of "civic humanism," which flourished during Paulus's career.[129] However, humanism did not seem to influence Paulus or his legal thought unduly. For a truly "humanist" view on war, or at least the kind of realism found in Hobbes or earlier in Machiavelli, new

126. Tuck, *The Rights of War and Peace*, 16–50, argues for the influence of some of these classical attitudes on war in the late Renaissance and early modern period. See also his *Philosophy and Government 1572–1651* (Cambridge: Cambridge University Press, 1993), where he considers in greater detail the traditions of Stoicism and skepticism, which were introduced into Renaissance political discourse.

127. For biographical information on Paulus, see Hermann Lange and Maximiliane Kriechbaum, *Römisches Recht im Mittelalter*, 2 vols. (Beck: Munich, 2007), II:813–26; Lauro Martines, *Lawyers and Statecraft*, 87, 186, 499–500; Julius Kirshner, "Paolo di Castro on 'Cives ex Privilegio,'" in *Renaissance: Studies in Honor of Hans Baron*, ed. Anthony Molho and John A. Tedeschi (Dekalb, IL: Northern Illinois University Press, 1971), 229–64.

128. Mikael Hörnqvist, "The Two Myths of Civic Humanism," in *Renaissance Civic Humanism: Reappraisals and Reflections,* ed. James Hankins (Cambridge: Cambridge University Press, 2000), 104–42; and Mikael Hörnqvist, *Machiavelli and Empire* (Cambridge: Cambridge University Press, 2004), explore the themes of civic praise, expansionism, and empire in early fifteenth century Italian humanist work; touched on also by James Hankins, "Rhetoric, History and Ideology: The Civic Panegyrics of Leonardo Bruni," in *Renaissance Civic Humanism: Reappraisals and Reflections*, 143–78.

129. The seminal and controversial discussion of Renaissance "civic humanism" is found in Hans Baron's *The Crisis of the Early Italian Renaissance*, 2nd ed. (Princeton: Princeton University Press, 1966). Although parts of Baron's thesis have been rejected, it is agreed that early quattrocento humanism featured classicizing and patriotic rhetoric, praising the government and institutions of some of the emergent Italian cities. On the origins of this political rhetoric, see Quentin Skinner, "Machiavelli's *Discorsi* and the Pre-Humanist Origins of Republican Ideas," in *Machiavelli and Republicanism,* ed. Quentin Skinner and Maurizio Viroli (Cambridge: Cambridge University Press, 1990), 126–34; and his *The Foundations of Modern Political Thought*, 2 vols. (Cambridge: Cambridge University Press, 1978), 28–84, where he argues that "civic humanist" political discourse of the quattrocento had its roots in a thirteenth and fourteenth century urban civic discourse in Italy. For revisionist views on the significance of civic humanism, a term Baron coined, see the essays in *Renaissance Civic Humanism: Reappraisals and Reflections*.

assumptions about human nature and its capacity (or incapacity) to fulfill the dictates of natural law would be needed. Indeed, the character and status of natural law would have to be redefined in some cases. As Tuck argued, an engagement with classical history and classical moral theory could aid this shift. On the question of war, Paulus stood on the threshold of some of these Renaissance and early modern developments, but remained within an older and influential tradition.[130]

Taken together, Roman jurists in the late Middle Ages contributed new opinion on war, and their interpretation of licit war typically differed from the earlier canonistic tradition of just war. For civilians, given proper authority to wage war, it was in practical terms acceptable to do so unless, as one civilian later wrote, the cause for war was "manifestly" unjust.[131] The jurists' contributions arose from a society in which effective political authority was often local, but also tracked, to some extent, the rise of powerful, sovereign polities in Europe. With Paulus de Castro excepted, the goals of secular wars within Europe were generally the same across the medieval *jus commune*, and were to relate to defense, recuperation, or punishment of specific injuries to property, person, or other rights. Given the legal independence of sovereigns, forms of mediation and legal arbitration would have to play a role in resolving, deferring, or lessening the intensity and duration of conflicts,[132] but from a Roman perspective in particular, it was doubtful that a right of defense, or other rights without consent, could be limited or forfeited by sovereigns on account of alleged violations and injuries. By granting sovereigns robust rights of war, medieval civilians were attempting to respond to their own fractious, contemporary environment, much in the way that Gentili or Grotius, or indeed Hobbes or Locke, would do later.

130. Even Paulus recited the standard elements of just war on a canonistic or theological view, in a *repetitio* on D.1.1.5 printed with his commentary (Paulus, *In primam partem. . .commentaria*, to D.1.1.5, fol. 5va, n. 6b).

131. Andrea Alciato, *In aliquot titolos tomi tertii Pandectarum. . .commentaria*, to D.41.2 (Lyon, 1550), 139, n. 8. Alciato held that when in doubt—which might be no more than a colorable claim—the war should be presumed just. Compare with the canonist Francesco Accolti, for whom the war should be presumed unjust if in doubt; Acccolti, *Consilia seu responsa* (Venice, 1572), fol. 16vb.

132. From a historical viewpoint, intermarriage and kinship created important ties between formally independent kingdoms in Europe, as did mutual interests and common pressures, although the history or sociology of these polities can be separated from their legal construction.