




The Theory of International Relations

SELECTED TEXTS FROM GENTILI TO TREITSCHKE

INTRODUCED AND EDITED BY
**M. G. Forsyth, H. M. A. Keens-Soper,
P. Savigear**



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**M.G. Forsyth, H.M.A Keens-Soper,
and P. Savigear, editors**

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INTRODUCTION

This volume contains selections from nine authors, arranged in chronological sequence from Alberico Gentili, writing in 1598, to Heinrich von Treitschke, lecturing in Berlin at the end of the nineteenth century. Some of the selections are complete in themselves, others have been extracted from larger works. All are concerned with the nature of international politics. Why has this anthology been made, and in what sense does it contribute towards the theory of international relations? These are the questions which this introduction will try to answer.

There can be little doubt that the great writers of the past are at present neglected by students of international relations. It is significant that Gentz's essay on the balance of power has not appeared in English since 1806, while Rousseau's writings on international politics have never been fully translated at all. The American series called 'The Classics of International Law' (New York: Oceana Publications, Inc.), to which the editors of this volume are heavily indebted, have provided a magnificent service in republishing and translating several major texts. The size and complexity of many of these texts can, however, act as a deterrent to the inexperienced.

There is then a *prima facie* case for presenting in a manageable form the writings of the classic authors; such a case can only be made convincing if the relevance of these writings is also demonstrated. Do they genuinely deepen our understanding, or are they merely curiosities, part of the pre-history of a subject which is only now entering into its truly scientific phase? This is not the place to examine the merits of the behavioural or 'systems' approach to international relations. Suffice it to say that the editors of this volume believe that the most fruitful theoretical approach to this particular subject does not lie in the construction of all-embracing systems, nor in the deduction of scientific laws from the empirical observation of facts. To theorize about international relations is, in their opinion, to reflect philosophically and historically about this area of human activity.

It is not intended at this point to give a full exposé of the philosophical and historical methods of study; such a task would require

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a book of its own. A brief definition may, however, be suggested. By philosophical reflection is meant the identification and clarification of the universal features, or concepts, implicit in experience. Experience for the philosopher is not a set of separate 'facts' to be weighed and measured in order to reveal regularities or laws. Nor is it a chaos which has to be reduced to order by heuristic constructions which exist solely in the mind of the observer. Experience for the philosopher is essentially thought, a rational, self-critical activity. The philosopher's task is to re-think experience, and to elicit the basic, universal assumptions which are contained within it. Such a task is, needless to say, enormously difficult. It is linked intimately to the historian's task. The emphasis of the two subjects is different – the philosopher strives to distinguish the universal in experience, while the historian strives to identify experience within its particular temporal context – but the two activities are complementary, not mutually exclusive, and they share a common notion of experience. Without accurately identifying experience in an historical sense, philosophy can take place but be grossly misleading; without philosophical questioning, historical research can take place but be merely trivial. It is interesting that it was Kant, seemingly the 'purest' of philosophers, who stressed that the philosophical mind must *as such* be thoroughly versed in history (see page 191).

If it is accepted that theorizing about international relations takes the form of a philosophical-cum-historical investigation of the type sketched above, then the selections included in this volume are not peripheral, but central to it. Indeed, in studying them, the philosophical and historical components of theorizing are very nearly in equilibrium. On the one hand the selections consist of thought at a fairly high level of abstraction, which is the form of experience most congenial to philosophy; on the other hand they consist of thought most definitely 'in the past', and this is the experience relevant to historians.

Having examined very briefly the methodological starting-point, a further question remains to be answered. Why these particular texts? Why Gentili to Treitschke? Why not Thucydides to Lenin? And why have Pufendorf and Saint Simon been left out, while Cobden and Vattel are included?

Let it be said immediately that the editors do not consider this

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particular selection to be definitive. It is intended as a preliminary *tour d'horizon*, a set of stepping-stones to further study. A vast amount of exploration requires to be done in this field, and undoubtedly new perspectives will be developed and other writers emerge into prominence as it progresses. In starting with this particular selection the editors had three main considerations in mind.

The first was that the writers chosen spanned a vital period – and area – in the development of international relations. It was in Europe between the sixteenth and nineteenth centuries that many of the underlying features of modern international society were developed. Perhaps the main developments were the emergence of *interstate* relationships as the key feature of international politics and the realization that these new relationships had their own specific rules and imperatives. The writings of the period reflect these developments in two ways. On the one hand they show a negative process, a desire to strip away the old, mediaeval, and primarily religious rules for international behaviour. On the other hand they attempt to develop new secular concepts to keep war within bounds – for example, the law of nature, international law, the balance of power, the league of nations, and the policy of non-intervention. It is primarily in order to illustrate these two themes that the writings which follow have been selected. They do not form a smooth, unilinear progression; each writer contributes his own distinctive viewpoint.

A second criterion which influenced the choice of writers was accessibility. The editors have given preference wherever possible to works which were difficult to obtain. Extracts will therefore not be found from Hobbes' *Leviathan*, Machiavelli's *The Prince*, or Rousseau's *Social Contract*, which all contain relevant material, but are readily available.

A final criterion was length. The editors did not wish to make the book into merely a collection of snippets illustrative of their own ideas! Although, inevitably, there are some very short excerpts included, preference has been given to pieces in which the argument is sufficiently sustained for the reader to make up his own mind, and form his own judgment. Burke and Pufendorf have been omitted largely because of the difficulty of finding such passages in their writings on the themes in question. For the same reason the editors' introduction to each writer has also been kept short.

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It should be emphasized that the editors by no means consider that constructive thought about international politics ended with Treitschke. They hope to carry the story forward to the present in a further collection at a later date.

NOTE. All insertions or summaries by the editors or translators have been indicated in the texts by square brackets.

ALBERICO GENTILI

Alberico Gentili was born in San Ginesio, Italy, in 1552. He studied at Perugia University, from which he received the degree of Doctor of Laws in 1572. Being Protestant, the Gentili family came under the scrutiny of the Inquisition and was eventually forced to flee Italy. After considerable wandering Alberico arrived in England in 1580 and, largely through the influence of the Earl of Leicester, he secured a position at St John's College, Oxford. In 1584 he achieved considerable fame through his part in the case of the Spanish ambassador, Mendoza, whom the Privy Council wished to punish for his complicity in a plot against Queen Elizabeth. Gentili argued strongly in favour of ambassadorial inviolability, and it was his viewpoint which eventually prevailed. In 1586 Gentili left England, but he returned to become Regius Professor of Law at Oxford (1587). After 1598 he became increasingly engaged in forensic practice and resided chiefly in London, dying there in 1608. Gentili wrote prolifically, his main works in the field of international law being the *De Legationibus* (1585), the *De Jure Belli* (1598), and the *Advocationes Hispanicae*, published posthumously in 1613.

Gentili's position as the founder of modern thought about international relations rests on his determination to examine the subject from a secular rather than a theological standpoint. His celebrated cry '*Silete theologi in munere alieno*' – Let theologians keep silence about matters outside their province! – marks Gentili sharply off from his scholastic predecessors and expresses the advent of a new era. Nowhere does Gentili's fresh approach find better expression than in his firm rejection of war for religion's sake (Extract 3). His discussion of the 'just war' also reveals his secular standpoint (Extract 2).

Gentili's ability to shake off the past must be ascribed partly to his Protestantism, but it is important to realize that he was a Protestant of a particular type, able to separate clearly the claims of the state from those of religious conscience. Perhaps he is best seen as the counterpart, in the international field, of the French 'Politiques' – it is significant that he was well acquainted with the writings of Jean Bodin.

Gentili did not merely adopt a secular standpoint, he also tried to distinguish the international sphere from the national. In the first chapter of *De Jure Belli* (Extract 1) one can sense him struggling to give international law its own standing alongside civil law. At the

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same time his sketch of the sources of international law in this chapter provide a useful starting-point for subsequent discussions by later writers.

Gentili exercised a considerable influence on Grotius, as Grotius himself acknowledged (p. 57). But it is wrong to see Gentili merely as a forerunner of the Dutch writer. In several respects Gentili is both clearer and more 'modern' than Grotius.

The extracts which follow are all taken from the Translation by John C. Rolfe of the 1612 edition of the *De Jure Belli Libri Tres*. This is published in the series 'The Classics of International Law' edited by James Brown Scott (reprinted 1964). The extracts comprise pp. 3-5, 7-8 and 9-11; pp. 31-3; and pp. 38-41 of the volume. Gentili's marginal references have been printed as footnotes.

Suggested Reading

Dr Gesina H. J. Van Der Molen, *Alberico Gentili and the Development of International Law*, 1968.

Book I

CHAPTER I

ON INTERNATIONAL LAW AS APPLIED TO WAR

Great and difficult is the task that I essay in undertaking to write on the Law of War, a subject which is hidden in Nature's inmost heart, which has manifold aspects, and is widely diffused. For this form of law is not assembled and given expression in the books of Justinian; otherwise we could readily refer to those works, or masters wiser than ourselves could direct us to them with no great difficulty. But those books do not discuss the variety of law, nor do any others in existence. For the brief treatises of the philosophers, several of which some one might suggest to me, treat the subject merely in a general way and in some cases only in outline, not going into its various phases with the view of explaining them with more precision. Even Marcus Tullius, after a very few observations on the subject, remarks: 'I have said enough about the obligations connected with war'.¹

In fact, it does not appear to be the function either of the moral or of the political philosopher to give an account of the laws which we have in common with our enemies and with foreigners. For the moralist, whether he treats of the private customs of individuals or aims at the highest good in some other way, always confines himself within the city-state, and rather limits himself to the foundations of the virtues than rears lofty structures. Neither is it the part of the political philosopher to set forth the Law of War, since this relates, not to a single community, but to all.² It is for this reason that Aristotle separates from political

¹ Cicero, *On Duties*, I [xiii, 41].

² Piccolomini, *Universa philosophia de moribus*, Introd., vii, viii, ix; *Libri ad scientias de natura attinentes*, Introd., iii.

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philosophy the part which has to do with the pursuit of arms and with military training.¹ This philosophy of war belongs to that great community formed by the entire world and the whole human race. Aristotle also writes that the political philosopher is not concerned with the injustice of those who do not belong to the state. Nevertheless, in writing of war he discusses this subject, inasmuch as he gives directions for defence against others outside the state, as well as for the punishment of their injustice.

Plato, it is true, declares that military science and the theory of warfare form a part of the art of citizenship, referring here to skill in the use of arms.² Aristotle also makes this same statement and we accept it as thoroughly true.³ But what we maintain is this, that those philosophers have given no account of the laws of war, or even of military exercises, except with reference to the needs of their own states; whereas military science and the law of war are not confined within the bounds of communities, but on the contrary always look outward and have special reference to foreigners.

In the same way, too, our own Justinian, who made laws for his countrymen, did not go beyond the boundaries of the state which he desired to furnish with those laws. And although he discussed the law of nature and of nations, as the philosophers also did, as well as the cause of wars, prisoners, slaves, and some other topics relating to the subject; he nevertheless considered them all from the standpoint of his own state and explained them with reference to its requirements; for example, the status of a prisoner in his relation to the citizens, his property rights, and other questions of the kind.

What pray, shall I say of the modern interpreters of Justinian's laws, whom Jean Bodin justly declares to be wholly ignorant of this law of war.⁴ Personally, I have read nothing save a few passages of Lignano's treatise on this subject and some scattered references of others; and all these I have read with no little contempt. So unsuitable are they and so lacking in clearness, to say nothing of the fact that these books contain a great deal which relates, not to war and the laws of war with reference to an enemy, but to military science, and the laws relating to our own citizens and

¹ Aristotle, *Politics*, III [VII, ii, 7].

² Plato, *Protagoras* [xii = p. 322 B].

³ Aristotle, *Ethics* [I, ii, 4 ff.].

⁴ Jean Bodin, *De republica*, V, vi.

soldiers. I find no fault with those learned men for that reason; but I repeat the statement, that hardly any knowledge of military law can be gained from the law of Justinian alone. For the greatest students of Justinian, although thoroughly acquainted with all his law, were utterly ignorant of that subject.

I have no patience with the modern commentators, who in this particular criticize their predecessors, while they offer themselves as guides to be followed. I mean the above-mentioned Bodin and Peter Faber, most distinguished jurists of the land of France.¹ For if the earlier interpreters have gone astray in introducing into this subject a bald and often inappropriate discussion of civil law, surely these more modern commentators have likewise erred in giving us a bare recital of history. For because of the diversity and the contradictory nature of the examples, and also because of the weakness of the form of argument, which seems for the most part based on examples, one could not easily derive from this treatment any system of law, and certainly not one which is regarded as natural and definite. Examples and events must, so to speak, be weighed in their own balance and their just value determined by their own standard.

The older legal writers perhaps included in their works this subject of war and other topics of the same kind relating to nations; Mutius, for example, Pomponius and some others, whose surviving fragments in some cases lend no slight support to this hypothesis of ours. Those men, who actively participated in great events and in the affairs of a great empire, as well as always keeping up a wide acquaintance with the other arts and not confining themselves to law, were able to have a clear insight also into these matters; while we, on the contrary, engaged as we are in such petty employments and dependent on the slight information given us by the works of Justinian, make them out darkly through a mist.

In particular, the works on the laws of the Fetiales had an exposition and orderly treatment of these laws of war²; for as a matter of fact the fetial priests were in charge of treaties, peace, wars, embassies, and other matters connected with these foreign relations.³ But of those works nothing has come down to us save

¹ Peter Faber, *Semestria*, II, iii.

² Cicero, *On Duties*, I [xi, 36].

³ Varro, *On the Latin Language*, IV [V, lxxxvi].

the desire for them. For since that branch of the law began to be neglected even as early as the close of the Roman republic, that is to say, from the time when the Romans ceased to manage affairs systematically and began to do everything according to caprice, therefore the books on the fetial law perished, and even their memory and their expounders ceased to exist.

That which is not kept up disappears, and what is not valued is not kept up. Therefore that branch of law is buried in obscurity, and even its very existence will be called in question by some, who stoutly maintain that all law has its origin, not in nature, but in human thought. Accordingly, they will be found to be at variance with us, since we hold the firm belief that questions of war ought to be settled in accordance with the law of nations, which is the law of nature. But I say no more of these foes of nature, whom the arguments of the better philosophers have already refuted,¹ and I regard it as established that some law of nature exists and in accordance with it this subject of war should be discussed.

It remains, however, to investigate the intricate question, what that law is and how we shall prove that it is this or that. For obviously we must not only teach it in the manner of Plato, but because of conflicting opinions we must also demonstrate it in the manner of Aristotle. . . .

[Gentili here attacks the ignorant, who cannot discern natural law, and the perverse, who deny its existence. He also criticizes those jurists who have made international law more uncertain by adopting different and conflicting views about its content.]

And although international law is a portion of the divine law, which God left with us after our sin, yet we behold that light amid great darkness; and hence through error, bad habits, obstinacy, and other affections due to darkness we often cannot recognize it. So the philosophers have stated,² and we ourselves have observed the mania for disagreement which the disciples of Sabinus and Proculus have.

But truth exists, even though it be hidden in a well, and when it is diligently and faithfully sought, it can be brought forth and

¹ Plato, *Statesman*, and *On Laws*, X [p. 890 D]; Cicero, *On Laws*, I [x-xvii]; *On Invention*, II [liii, 160].

² Thomas Aquinas, I, ii, qu. 94, art. 2; Gregorio de Valentia, *Theological Commentaries*, Disp. vii, qu. 4, no. 2.

as a rule is brought forth. Abundant light is afforded us by the definitions which the authors and founders of our laws are unanimous in giving to this law of nations, which we are investigating. For they say that the law of nations is that which is in use among all the nations of men, which native reason has established among all human beings, and which is equally observed by all mankind.¹ Such a law is a natural law. 'The agreement of all nations about a matter must be regarded as a law of nature.'²

This statement, however, must not be understood to mean that all nations actually came together at a given time, and that thus the law of nations was established. The writers to whom I have referred do not make any such statement, and it is not necessary to understand the word *omnes* in such a way that when one speaks of the usage of all nations it should be considered to mean absolutely every nation³; since countless numbers of these, in regions widely separated from us, utterly different in their customs, and of different tongues, remain unknown. Do not be misled by the great jurist Hughes Doneau, who takes the definitions in that sense and therefore finds fault with them also.⁴ But that which has successively seemed acceptable to all men should be regarded as representing the intention and purpose of the entire world, as Ambrose once showed in a treatise of his, as did also St Jerome.⁵ And in fact an unwritten law, such as this, is like a custom and is established in that same manner. Moreover, such unanimity cannot fail to be recognized, just as it is known that all nations and races of men are agreed as to the existence of God. . . .⁶

[Gentili here argues that the jurists use the phrase 'all nations' because the empires of the Romans, of Alexander and of the Parthians did in fact embrace or come into contact with all the peoples of the east.]

But there is another more elegant definition of the law of nations and it is to the same purpose as that which Xenophon has handed down,⁷ namely, that there are everywhere certain

¹ *Digest*, I, i, 1, 9; *Institutes*, I, ii.

² Cicero, *Tusculan Disputations*, I [xiii, 30].

³ Baldus, *On Code*, VI, xxi, 1.

⁴ Doneau, *Commentaries*, I, vi [4].

⁵ Ambrose, *On Ephesians* IV; St. Jerome, *To Titus* [1].

⁶ Cicero, *On the Nature of the Gods*, I [xvii, 44].

⁷ Xenophon, *Memorabilia*, IV [iv].

unwritten laws, not enacted by men (since men could not all assemble in one place, nor were they all of one speech), but given to them by God. For example, the one which takes first place with all men, that one should worship God; and the second, that one should honour Father and Mother. Such laws are not written, but inborn; we have not learned, received, and read them, but we have wrested, drawn, and forced them out of Nature herself. We have not received them through instruction but have acquired them at birth; we have gained them, not by training, but by instinct.¹

Nevertheless, this definition also permits us to ask the question what this natural reason is, or how it is made manifest. To this question the following reply must be made; that natural reason is evident of itself and therefore those who rely upon it are content merely to say: 'This is perfectly clear from nature itself', 'It is evident from natural reason', 'He has a knowledge derived from nature', 'Nature shows'; and there are many remarks of the same kind.² So also 'Just by nature', 'Nothing is so completely in harmony with natural justice', 'It is contrary to nature', 'Nature does not allow', and hundreds of other phrases.³ Moreover, Aristotle says: 'By nature all men desire knowledge', 'All men seem to seek the good', etc.⁴

These things are so well known, that if you should try to prove them, you would render them obscure.⁵ At any rate, it would be useless to prove what is already manifest.⁶ Thus all the interpreters of the law say that things which are well known ought to be stated, but not demonstrated.⁷ It has been made sufficiently clear that natural law does exist, and that if you should transgress it in any particular you would desire to conceal the act through very shame.⁸ Or if you should go so far in shamelessness as to confess and try to justify the action, you would have the same feeling that one has towards those statements which are called

¹ Cicero, *For Milo* [iv, 10].

² *Digest*, XLV, i, 75; XLIV, vii, i; XVIII, vii, 5; L, xvi, 220.

³ *Digest*, XLIII, xxvi, 2; XLI, i, 9; XLI, ii, 3 and 23.

⁴ Aristotle, *Metaphysics*, pref. [I, i], and *Ethics*, pref. [I, i, 2].

⁵ Aristotle, *Rhetoric*, III [xvii].

⁶ Cardanus, *On Wisdom*, I.

⁷ *Digest*, XXXIII, iv, i, §§ 8, 9.

⁸ *Decretals*, II, xxi, v, 31; *Constitutions of Clement*, II, xii, 5.

axioms, namely, you would instinctively feel that the act could not be justified.

'This is the greatest gift of nature, that virtue sheds her light into the minds of all men',¹ 'We feel this by a kind of inner consciousness', says Augustine.² 'What is truly evil', says Tertullian. 'Not even those who are carried away by it will attempt to defend as good, for nature fills every evil thing either with shame, or with fear.'³ Not only justice but shame as well, are said to have been sent from heaven, to govern men and hold them to their duty.⁴ 'Although they may deny this, yet they cannot fail to blush for it', says Ambrose.⁵

In the same way the jurists say that nothing is to be regarded as just which cannot be desired honourably, without shame, with modesty and with reverence.⁶

In this way the law of nations is defended. But it will also be supported in many cases by the utterances of great authorities, which will find a place in our treatise, as they do in all the other arts and disciplines. In fact, it is the habit of philosophers and other wise men to speak according to the promptings of nature. And hence there will be found here the examples of those who are regarded as honourable and of good repute. For they too appear to have acted in accordance with nature. For although one ought not to judge from examples, and that principle is called Justinian's golden rule, yet it is clear that a plausible conjecture may be deducted from examples.⁷ Indeed, in cases of doubt one is obliged to judge from examples, and also when anything has become a custom.⁸ For it is not fitting to change things which have always had a fixed observance, and a decision has greater weight which is supported by the opinion of a large number of men.⁹

What I am to say of the actions of great and good men? These

¹ Seneca, *On Benefits* [IV, xvii, 4].

² Augustine, *On the Unity of Belief* [xvi].

³ Tertullian, *Apology* [I].

⁴ Plato, *Protagoras* [p. 322 C].

⁵ Ambrose, *On Duties*, III, xiv.

⁶ *Digest*, XXII, i, 3, 19; XII, vi, 15; XX, vi, 8; XXIII, ii, 14.

⁷ *Code*, VII, xlv, 13; Alciati, *Consilia*, V, xxxiii, VI.

⁸ Decianus, *Consilia*, III, c.

⁹ Socinus, *Fallentiae regularum*, cclxxx; Cephalus, *Consilia*, XXV [16]; XCVI [24]; CXX [13]; CCCVII [17].

are always to be emulated; for it is foolish and treasonable not to desire to imitate those who were rated so high, again to quote Justinian.¹ 'What the world approves, I do not venture to disapprove', declares Baldus.²

Arguments too and reasoning will play a part here, as we have observed them to do elsewhere. And why not? 'Reason too is an imitation of nature.'³ I shall not give you demonstrations, such as you may get from a mathematician, but the persuasive arguments which this kind of treatise allows. For as Aristotle writes at the beginning of his *Ethics*, 'It is the part of a philosopher to seek an exact explanation in each case, so far as the nature of the subject itself permits'.

There will be not a few things from the civil law of Justinian which it will be possible to adapt to our uses, or scattered references found there to this military law of nations. And most properly; for natural reason varies constantly according to men's intelligence and many are led not so much by the reason as by fantasy. But the laws which were laid down by the philosophers and approved by the judgment of every age undoubtedly possess natural reason, as the wise Alciati declares.⁴

The words which are written in the Sacred Books of God will properly be given special weight; since it is evident that they were uttered not merely for the Hebrews, but for all men, for all nations and for all times. For that these words are of a true nature, that is to say, one which is blameless and just, is most certain. 'These testimonies are forthwith divine; they do not need the successive step which the rest require. They are as simple as they are true, as widespread as they are simple, as popular as they are widespread, as natural as they are popular, as divine as they are natural.'⁵

Come then, since we do not lack material for formulating definitions of this law of war, let us at once begin the discussion itself.

¹ Alciati, *Consilia*, II, xiii; IX, xlv; Justinian, Edict xiii. [De Concept. Dig. I, 3].

² Baldus, *Consilia*, IV, cccxcvi [3].

³ Seneca, *Letters*, lxxvii [lxvi, 39].

⁴ Alciati, *Consilia*, V, xxxviii.

⁵ Tertullian, *De testimonio animae* [v].

Book I

CHAPTER VI

THAT WAR MAY BE WAGED JUSTLY BY BOTH SIDES

But may a war be waged with justice on both sides? The learned Piccolomini raises this question somewhere, but does not answer it.¹ Among our jurists Fulgosius maintained the affirmative against the opinion of the others. Alciati has followed Fulgosius in more than one place.² I too follow him, but with the proviso that there may be reasonable doubt as to the justice of the cause. This same point has been made by our other jurists and by our theologians, who declare that there is justice on one side in reality, but on the other and on both through justifiable ignorance.³ Thus, led by the voice of God, the Jews justly made war upon the Canaanites, and the Canaanites also justly resisted the Jews through ignorance of the divine utterance, acting in self-defence. And so Pius II wisely replied to the Hungarian envoys, who spoke against the Emperor, that he thought that the King of Hungary was not departing from what was honourable; while he also knew that the Emperor was a lover of justice, however much the two might differ as to the sovereignty.⁴ For neither of them thought that he had an unjust cause.

It is the nature of wars for both sides to maintain that they are supporting a just cause.⁵ In general, it may be true in nearly every kind of dispute, that neither of the two disputants is unjust. Aristotle makes an exception only when the enquiry is 'whether

¹ Piccolomini, *Univēsa philosophia de moribus*, VI, xxi.

² Alciati, *Paradoxa*, II, xxi, *On Digest*, I, i, 5.

³ Conn, [Covarruvias], *in c. peccatum* § 10; Soto, *De iustitia et iure*, V, qu. 1, art. 7; Victoria, *Relectiones* [V, xx].

⁴ Pius II, *Commentaries* III.

⁵ Alciati, *Consilia*, VIII, xciii.

the act took place'.¹ And indeed in the case of one's own act our jurists are not in the habit of admitting ignorance as a defence. But they do admit it in the case of another's act, because that happens under different conditions. We are driven to this distinction by the weakness of our human nature, because of which we see everything dimly, and are not cognizant of that purest and truest form of justice, which cannot conceive of both parties to a dispute being in the right. For why, says Maximus of Tyre in this connexion,² should those whose purposes are just engage in strife with one another? And in fact it is either the unjust who fight with one another or the unjust with the just.

But we for the most part are unacquainted with that truth. Therefore we aim at justice as it appears from man's standpoint. In this way we avoid the objection of Baldus, that when war arises among contending parties, it is absolutely inevitable that one side or the other is in the wrong.³ Accordingly we say that if it is evident that one party is contending without any adequate reason, that party is surely practising brigandage and not waging war. All agree on this point, and rightly. And it is quite true that the cause of the party which is in the right receives additional justification from that fact. 'The injustice of an adversary makes wars just', writes Augustine, and referring to the Romans he says: 'The injustice of others furnished them with adversaries with whom they could wage just wars'.⁴

But if it is doubtful on which side justice is, and if each side aims at justice, neither can be called unjust. Thus Baldus himself maintains that war between kings is just, whenever the aim on both sides is to retain majesty and justice.⁵ Those who contend in the litigation of the Forum justly, that is to say, on a plausible ground, either as defendants or plaintiffs, and lose their case and the verdict, are not judged guilty of injustice.⁶ And yet the oath regarding false accusation is taken by both parties. Why should the decision be different in this kind of dispute and in a contest of arms?

¹ Aristotle, *Rhetoric*, III [xv, 2].

² Maximus of Tyre, *Sermones*, xiv.

³ Baldus, *On Digest*, I, i, 5.

⁴ Augustine, *On the City of God*, IV [xv]; XIX [vii].

⁵ Baldus, *Consilia*, II, ccclviii.

⁶ Decio, *On Digest*, L, xvii, 42; Baldus, *Consilia*, V, ccxcix.

In particular Bartolus, Baldus, and some others apply arguments derived from those bloodless contests of the Forum to the strife of arms and the duel.¹ For example, some point is obscure and it is not clear whether a thing belongs to Titius or Sempronius; and since each lays claim to it, each tries to take it from the other. Will you find one of them guilty of injustice?

Baldus says, and it is perfectly evident, that no one ought to surrender his rights without a struggle, but that every possible effort should be made to maintain them.² Cicero appropriately says of the two factions of Julius Caesar and of Pompey: 'There was an element of uncertainty and a contest between leaders of distinction. Many were in doubt as to what was best, many wondered what would be to their advantage, many what was proper, some even what was lawful.'³ And when the struggle is between expediency and honour, there is no slight degree of uncertainty as to which we ought to follow. We may add to the above the words of Severus to Albinus: 'When we fought against Niger, we did not have such specious reasons for our hostilities; for the empire was the prize of victory, and each of us with equal eagerness strove to win it, even while its lawful possession was still a matter of dispute'.⁴

I add here the cases in which one renders aid to allies, friends, kindred, neighbours and others whom one is under obligations to assist, and yet in so doing justly rouses against himself the arms of the adversary whom he is attacking. Thus Livy relates of the people of Caere that they espoused the cause of the men of Tarquinius against the Romans through compassion for their kinsfolk, and as the historian makes their own envoys say, not through design, but through the compulsion of necessity.⁵

This will, moreover, give rise to a third variety of the question, when the war is just on one side, but on the other is still more just. Such a case is of course possible, inasmuch as one man does not cease to be in the right because his opponent has a juster cause. The virtues admit of greater or less degrees, and the middle

¹ Alciati, *On Digest*, I, i, 5; *Consilia*, V, lxiii.

² Baldus, *Consilia*, I, cccxxvi.

³ Cicero, *For Marcellus* [x, 30].

⁴ Herodian, [*Histories*] III [VI, iv].

⁵ Livy, VII [xix, 6, xx, 2 ff.].

ground of a virtue has length and breadth and is not limited to a point.¹

I shall add other instances and other causes for war from time to time and take note of them. Of all our laws, however, that one seems to me the clearest which grants the rights of war to both contestants, makes what is taken on each side the property of the captors, and regards the prisoners of both parties as slaves. While others are endeavouring to evade this law, in opposition to Fulgosius, they are unquestionably indulging in a pleasurable madness²; as was demonstrated by Alciati, who also insists on that equality among enemies of which we made note before.³

But although it may sometimes happen (it will not occur very often, as you will learn forthwith) that injustice is clearly evident on one of the two sides, nevertheless this ought not to affect the general principle, and prevent the laws of war from applying to both parties. For laws are not based upon rare instances and adapted to them⁴; that is to say, on events which are rare in their own class, and which take place only occasionally, contrary to the general nature of the case. This is the doctrine of many of our learned men, and they maintain that the general rule (as I say) is not affected.⁵ 'No law is altogether adapted to every one', said Marcus Cato.⁶ Therefore no change must be made in this law of the enemy and of war; for it is impartial to both sides, just as in the contests of the Forum the law is impartial towards each of the litigants, until sentence has been pronounced in favour of one or the other of them. And then the defeated party, who contended unjustly, will suffer severe punishment at the hands of the victor because of his injustice.

But if the unjust man gain the victory, neither in a contention in arms nor in the strife carried on in the garb of peace is there any help for it. Yet it is not the law which is at fault, but the execution of the law. As Paulus says: 'The law is not to blame, but its application'.⁷

¹ Piccolomini, *Universa philosophia de moribus*, IX, liii.

² [Horace, *Odes*, III, iv, 6].

³ Alciati, *On Digest*, I, i, 5 and L, xxxi, 23.

⁴ *Digest*, I, iii, 3-6.

⁵ Azo, *Summa; On Dig.*, L, xvii, 64; Wesenbeck, *On Iustit.*, I, xix; Doneau, *Com.* I, xv; Alciati, *Paradoxa*, V, vii.

⁶ Livy, xxxiv [iii, 5].

⁷ *Digest*, XXV, ii, 30.

ALBERICO GENTILI

Perhaps you may console yourself by saying with the theologians and the philosophers that there is no sin without retribution, since every wicked deed is its own punishment.¹ As Seneca puts it: 'The first and greatest penalty for sinners is to have sinned'. Fear too is a chastisement, as the same philosopher points out, when he says: 'Fortune exempts many from punishment, but none from fear'. Besides, there is ill repute in the eyes of others and remorse in one's own heart, as the philosophers have made clear. There is also Hell, of which the philosophers have told us by induction, and the theologians from knowledge.

¹ Piccolomini, *Universa philosophia de moribus*, IX, liii.

Book I

CHAPTER IX

WHETHER IT IS JUST TO WAGE WAR FOR THE SAKE OF RELIGION

Now if religion is of such a nature that it ought to be forced upon no one against his will, and if a propaganda which exacts faith by blows is called a strange and unheard-of thing, it follows that force in connexion with religion is unjust.¹ 'To deprive religion of its freedom and to forbid one to believe as one chooses, so that I am not allowed to worship whom I wish, but am compelled to honour one whom I could not desire to honour, this is a justification of irreligion. And therefore even the Egyptians were allowed the privilege of following their vain superstition, which led them to deify birds and beasts and to condemn to death whoever slew any god of that kind', says Tertullian.² And in another passage he declares that religion has a natural power, which Pomponius also asserts,³ as well as that the religion of one man does not injure or benefit another.

'Faith must be recommended, not forced upon one', says Bernard,⁴ and Hilarion declares that it is a new thing for men to be compelled to believe, meanwhile admitting to Constantius Caesar that Arianism, to which Constantius was trying to force him, was the true faith.⁵ 'We cannot command religious belief, since no man is forced to believe against his will', was a decision of the wise King Theodoric,⁶ and King Theodatus also said that sacrifice to the Lord must be voluntary, not made at the command

¹ *Decretum*, II, xxiii, qu. 5, c. 35; *Decretum*, I, xlv, 3; *Decretals*, III, xlii, 3.

² Tertullian, *Apology* [xxiv]; *To Scapula*.

³ *Digest*, I, i, 2.

⁴ St. Bernard, *Sermo in Cantica*, lxvi [12].

⁵ Erasmus, *Hilarion*, preface.

⁶ Cassiodorus, *Variae*, II, xxvii, X, xxvi.

of some one who compelled it. Lactantius declared that religion is not a matter of compulsion; that it is established by words, not by blows; that nothing should be so voluntary as religion; and that the Christians should not be worse than the Egyptians.¹

Josephus expresses the opinion that every man ought to worship God of his own free will, and not at the bidding of another.² 'Religion', says Arnobius, 'is content with its own powers', and speaking against violence and arms he says: 'Because you are mighty with the sword and with the power of the steel, do you think therefore that you are superior in knowledge of the truth?'³ The great L'Hôpital thus expresses himself in a bitter satire: 'We contend with words and with arms to decide which has the truer conviction as to religion, meanwhile scorning the laws and traditions of Moses',⁴ etc.

You have heard the authorities; now listen to argument. Whatever is contrary to the nature of a thing does not tend to establish that thing, but rather to destroy it. To attempt by force what cannot be done by force is madness. A thing which is a matter of choice should not be made a necessity. It is folly to try to support by adventitious oaths a thing which can stand by its own weight. A thing which has its own standard should not be measured by that of another. Every innovation is unjust; what time has approved has almost the force of a law, as the worthy Duaren writes in his *Anniversary Disputations*. So much for the arguments.

Religion is a matter of the mind and of the will, which is always accompanied by freedom, as was brilliantly demonstrated both by philosophers and by others, and by Bernard in his book *On Free Will*. Our mind and whatever belongs to our mind are not affected by any external power or potentate, and the soul has no master save God only, who alone can destroy the soul. Do you understand? Yet hear still one more thing. Religion ought to be free. Religion is a kind of marriage of God with man. And so, as liberty of the flesh is resolutely maintained in the other wedlock, so in this one freedom of the spirit is granted.

But the learned Victoria declares that this principle of not

¹ Lactantius, *Divine Institutes*, V, xx, xxi[xix].

² Josephus, *Life* [23].

³ Arnobius, *Against the Heathen*, III, IV.

⁴ M. de L'Hôpital, *Letters*, IV.

making war from religious motives is approved by all without exception, and that religion was not a just reason for the war of his Spanish countrymen against the Indians.¹ Diego de Covarruvias, also a Spaniard and a learned jurist, names several canonists and theologians who preach this same doctrine²; and Baldus also declared with reference to Innocent that war is not lawful against infidels who live at peace with us and do us no harm.³ Covarruvias himself too holds this opinion, yet does not deny that some take the opposite side, including Aquinas. But he also refutes the views of the others and their reasoning.

It is true that the fathers of Toledo made a decree that heretics should be punished by war, and that their decree was embodied in the canonical law.⁴ And Baldus says that it is undoubtedly lawful to plunder the enemies of the Faith, that is to say of the Church.⁵ Yet he does not support his conviction by a good argument, and in fact his interpretation rests on very doubtful grounds. Therefore it surely cannot be stated as a general principle that one is an enemy to the Faith who is an enemy of the Church, because the Church often wages war, not in behalf of religion and the Faith, but for those things which are called temporal. Elsewhere Baldus allows war against heretics, and (contradicting himself) against infidels, on this ground: that they are without realms of their own because of their heresy and infidelity, since a heretic and an infidel has no true jurisdiction, and it is impossible to live without a magistrate and jurisdiction, inasmuch as these are essentials of the law of nations.⁶ But this argument is utterly inane; for it is God who confers jurisdiction upon them.⁷

There are indeed some things which have been said on this subject which are at variance with the teachers first mentioned and with their general principles; but I do not yet own myself defeated in the argument. 'Against the barbarian religion we waged war to the death', say the Christians, referring to the Saracenic faith; and Bernard, when arousing Louis King of the

¹ Victoria, *Relectiones theologicae* [V, x].

² Covarruvias, in *c. peccatum* [2] § 10.

³ Baldus, *On Digest*, I, i, 5.

⁴ *On Sext*, V, ii, 13; *Decretum*, I, xlv, 5.

⁵ Baldus, *Consilia*, IV, cxi [cl].

⁶ Baldus, *Consilia*, V, cccxxxix.

⁷ *I Peter*, ii; *Romans*, xiii; St Bernard, *Sermo de adventu Domini*, III.

French against Asia, asks: 'Have you any more just cause for war than this holy one?' The Lacedaemonians too, among other charges against the Athenians, alleged that there were violators of religion at Athens; and the Athenians retorted that the Lacedaemonians dragged forth suppliants from the temples and slew them, along with other charges of the same kind.

It is true, however, that these principles are said to be the invention of the most greedy of men and to be cloaks for their dishonesty; and that there is no religion so wicked as to order an attack upon men of a different belief.¹ In this way King Ferdinand, who was called the Catholic, covered almost all his excesses with a respectable mantle of religion, as Guicciardini remarks.² And it was under a similar pretext that the Emperor Charles, the grandson of Ferdinand, veiled his desire for dominion, as Giovio has written.³

Let no one at this point confront me with our own Justinian, who says somewhere that he undertook wars because of a religious motive.⁴ Let no one cite Pepin, who like a dutiful magistrate burned and laid waste everything, since he did it to gratify the Pope.⁵ Let no one cite others.

'Each man declares his own war a holy one. Each one insists that his enemies are godless men. Each names his own cause righteous. Every one has upon his lips the words "sacred" and "pious"; but in purpose, aim, and intention he is otherwise affected. This dispute is about human justice. Remove that ground and there will be no cause for war. At present there is no abominable crime which is not shielded under the name of piety. The name of sacred warfare is given (alas!) to this strife', referring to that with which the King of Naples was assailed by the Pope. Thus at length and often does that great writer express himself.⁶

The acts of Justinian too were for the purpose of defending his subjects either from Persian idolaters or from Gothic or Vandal heretics, who now seized a part of the Roman Empire

¹ Comes, Natalis, *Universae historiae sui temporis*, I.

² Guicciardini, *History of Italy*, XII.

³ Paolo Giovio, *Historiae sui temporis*, XXX [= II, p. 153].

⁴ [Justinian] *Novels*, lxxviii.

⁵ Paolo Emilio, *History of France*, II [xxxii].

⁶ *Ibid.*, VI, VII, VIII.

and now attempted to oppress the subjects of Justinian who dwelt within the Empire. Besides, if Justinian made war to defend the Christians who were subjects of the Persians and were ill-treated by the Persians because of their religion, I tell you on the authority of Covarruvias that those causes were just.¹ So also the wars of the Franks and of the other peoples of Europe are approved, since their motive was to aid those who were harassed by the Turks and to avenge the wrongs of Christ.

But all this is another problem, namely that of defence, which I shall investigate later. Now the question before us is, whether it is lawful to wage war with religion as the sole motive. This I deny and I give as my reason the following: since the laws of religion do not properly exist between man and man, therefore no man's rights are violated by a difference in religion, nor is it lawful to make war because of religion. Religion is a relationship with God. Its laws are divine, that is between God and man; they are not human, namely, between man and man. Therefore a man cannot complain of being wronged because others differ from him in religion.

Other authorities declare that if religion is violated, all men are wronged.² And Marcus Tullius says that if piety towards the gods is abolished, faith is destroyed at the same time, as well as human society, and that most excellent of the virtues, justice.³

But we are not now speaking of those who, living rather like beasts than like men, are wholly without religious belief; for I should hold that such men, being the common foes of all mankind, as pirates are, ought to be assailed in war and forced to adopt the usages of humanity. For of a truth those seem to be dangerous to all men, who, wearing the human form, live the life of the most brutal of beasts; for it is reported and believed that certain even of the brutes have a kind of religion.⁴ These are the men who war with God after the fashion of the giants; 'For what else than resistance to Nature can be called warring with the gods as the giants did?'⁵

¹ Covarruvias, *in c. peccatum*, [p. 2] § 10.

² *Code*, I, v, 4.

³ Cicero, *On the Nature of the Gods*, I [ii, 4].

⁴ Chassaneux, *Catalogus gloriae mundi*, Pr. XII, consid. 78.

⁵ Cicero, *Laelius* [Cato Maior, ii, 5].

Religion is a part of the law of nature and therefore that law will not protect those who have no share in it. And yet I will add this: that no nation exists which is wholly destitute of religion.¹ Name me such a nation, if you can. Those are not without the pale of this law of nature who are victims of human liability to error and who, although led by the desire for what it is good, adopt a religion that is evil. Thus Agathias says that the Alemanni, who are idolaters, are deserving of pity.² Hence they ought to be instructed and patiently dealt with, not constrained nor exterminated. Many interpreters of the law, when consulted in special cases, have also decided that the Jews ought not to be molested or forced to adopt our faith, although since the coming of Christ they do not differ from idolaters.³

But those who separate themselves from the rest of the body politic and arouse one part of the state against the other are disturbers of the public peace, and an injury to the rest of the citizens. These it is who were referred to by the authorities cited above. But if men in another state live in a manner different from that which we follow in our own state, they surely do us no wrong. Therefore, since war against them will be either vindictive or punitive, it can in neither event be just; for we have not been injured, so that we can justly take vengeance, nor are they our subjects, so that it is our part to chastise them, as Covarruvias says. To punish a guilty person whom you have no right to punish is equivalent to chastising an innocent person.⁴

¹ Cicero, *On the Nature of the Gods*, I [xvi, 43].

² Agathias, *Histories*, I.

³ Baldus, *Consilia*, I, cccxvi.

⁴ Alexander of Imola, *Consilia*, VI, ccxxv.



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HUGO GROTIUS

The style of Grotius (1583-1645) is not to modern liking. Endless reference to ancient authorities is burdensome. Yet in Grotius method and argument are closely linked.

As a child of wealthy, educated and well-connected parents he was a prodigy of learning. Before the age of twenty he had gained a European reputation. Although his lasting fame rests on the *De Jure Belli Ac Pacis Libri Tres*, Grotius wrote poetry, drama and criticism as well as works on law and theology. For political reasons, Grotius was obliged to leave Holland and it was in Paris in the diplomatic service of Sweden that he published in 1625 his major work. It is dedicated to Louis XIII.

Grotius' significance lies in the manner of his determination to meet the consequences of two important facts which by the seventeenth century and on the eve of the Thirty Years War had become prominent features of European life. The first was the determined claims by territorial and secular states to assert their complete independence from the traditional and often rival claims of the Holy Roman Empire and the Papacy. This process had been under way for centuries, but in the early seventeenth century the full implications had still to be drawn. The question was what, if anything, could stand between the remnants of a united and Christian Europe and an international anarchy of sovereign states.

The second fact which prompted Grotius was the incidence and havoc of war. He responded by positing a 'great society of states'. The character of this international society in which states are subject to restraint through law is according to Grotius a combination of rules, some of which, the laws of nature, derive from man's rational and social nature which demands order and justice, while others, like the laws of nations, are based on the will and consent of states. One implication of this conception is that states, members of an international society and mutually concerned with its preservation, are subject to restraints both in respect to the morality of war—the distinction between just and unjust wars—and in the conduct of any war declared by the highest public authorities.

Machiavelli argued that 'that war is just which is necessary' and Hobbes that 'Where there is no common power, there is no law; where no law, no injustice. Force, and fraud, are in war the two cardinal