

Introduction: Roman Wars and Roman Laws

How can questions concerning imperial expansion be addressed from the perspective of justice? To what extent does law provide a satisfactory way of making assessments of the justice or rectitude of imperial wars, imperial conquests, and governance within a far-flung empire? How does the law concerning relations within and between empires overlap or differ from the law concerning interstate relations? To what extent are specific practices and legal principles of the Roman empire instantiations of arguments about universal moral principles of justice in imperial and interstate relations applicable also to other contexts?

In *The Wars of the Romans*, first published in its complete form by Wilhelm Anton in Hanau-am-Main in 1599, the Italian jurist Alberico Gentili explicitly deals with the military expansion of the Roman empire from the perspectives of law and justice. The publication of *De armis Romanis* followed the publication in 1598, by the same publisher, of Gentili's most widely known and influential work, *The Law of War (De iure belli libri tres)*. *De armis Romanis* appeared as a single volume, comprising two books. The first book, under the title "Indictment of the Injustice of the Romans in Warfare," constitutes an attack on Roman imperialism in thirteen chapters, accusing the Romans of unjust warfare and culminating in a chapter on "The Tyranny of the Romans." The second book, titled "Defense of the Justice of the Romans in Warfare," aims at rebutting chapter by chapter the accusations of injustice made in the first book, concluding with a eulogy of Roman imperialism in the final chapter, "The Good Fortune of the Roman Empire."

The prosecution of Roman imperialism in the first book is entrusted to "Picenus," while the defense has as its voice that of "a Roman," a Roman, however, familiar with many of Gentili's contemporary authors and thus clearly not of the classical era. "Picenus" means someone hailing from ancient Picenum, the modern Marche d'Ancona in Italy, which is Alberico Gentili's native region; moreover, the Picenus in question is clearly identified as being from San Ginesio,¹ Gentili's place of birth, and as a civil lawyer by education. This poses a puzzle for the reader—the critic of Roman imperialism is given the trappings and vestments of Alberico Gentili, yet Gentili himself as author of the two books seems rather more sympathetic to the point of view expressed in Book 2 by the Roman. This may be simply a literary device to maintain the tension of the debate. A further explanation, suggested by

¹ *The Wars of the Romans* 2. 5, p. 203: "you men of San Ginesio, you San Ginesians."

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David Lupher,² is connected to the history of the development of *The Wars of the Romans*. The work had developed out of a pair of speeches originally devised as public speeches (*actiones*) to be delivered at ceremonial occasions at the faculty of law at the University of Oxford. The first version of the first speech had originally been published by the printer of Oxford University, Joseph Barnes, under the title *De iniustitia bellica Romanorum actio*, accompanied by a dedicatory epistle to the Earl of Essex, Robert Devereux (reprinted, with English translation, as an Appendix to the present volume). The dedication mentions that Gentili had “ready a defense of the Romans and a disputation directly opposed to this one on their justice in making wars,”³ but the second speech was never published in its original form. Lupher suggests that when Gentili revised, and considerably expanded, the speeches for publication as *The Wars of the Romans* in the late 1590s, calling the prosecutor of Book 1 “Picensus” was an ironic way of acknowledging the printed earlier version of the “indictment,” which had appeared under Gentili’s name. When writing in the voice of the Roman defender of imperialism of Book 2, Gentili dismisses ironically the stance of the prosecutor in Book 1 as that of a narrow-minded provincial from San Ginesio.

As the titles of its two books suggest, *The Wars of the Romans* affirms and indeed presupposes that considerations of justice are relevant to international relations and to proper assessment of the behavior and norms of imperial Rome. In writing the arguments for both sides in the debate about the justice of the Roman empire, Gentili does not attribute to either side the claim that there are no moral norms that govern and constrain the external or internal actions of states. To the contrary, both the indictment of Roman imperialism in Book 1 of *The Wars of the Romans* and its defense in Book 2 are predicated on the assumption that it is apposite to judge the expansion of the Roman empire by way of warfare according to certain moral normative criteria—indeed, denying or affirming the justice of the Roman empire is precisely what *The Wars of the Romans* is all about. The accusation against the Roman empire is not framed principally in terms of the prudential considerations that inform much thought in the realist tradition of politics, but instead focuses on criteria of justice; and the defense in Book 2 maintains, not that making claims of justice in the international realm is essentially impossible or undesirable, but that Roman imperialism was *just*. There are nonetheless strands in Book 2 of arguments that attribute some justificatory force to self-interest and *raison d’état*. Gentili’s early interest in Machiavelli’s thought, evident, for example, in his *De legationibus* (1585), can be traced to these aspects of *De armis Romanis*.

² See Lupher’s contribution in B. Kingsbury and B. Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2010).

³ *quoniam Defensionem Romanorum et disputationem huic adversariam de ipsorum iustitia bellica paratam habeo.*

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The contentions between the prosecutor of Book 1 and the defender of Book 2 are frequently framed not as disagreements about what norms apply; rather, the disagreement is often empirical, about historical events and the trustworthiness of certain historians and other authors. While the prosecutor favors such authors as the second-century AD historian Florus and the Fathers of the Church, the defender emphasizes the accuracy and trustworthiness of Polybius, Livy, and Dionysius of Halicarnassus. For example, adducing Florus, the epitomator of Livy who is one of his favorite sources, the prosecutor in Book 1 accuses Romulus of having “seized upon an excuse for war against the inhabitants of Fidenae—as if those men drove off booty from your Roman territory.”⁴ Countering the accusation, the defender of Book 2 first notes that the accusator fails to make mention of a great many of Rome’s expansionary wars, presuming that the historical facts do not bear out the prosecutor’s claims: “[A]s for the very many wars of the Romans, the accuser’s silent admission stands to my account, for despite the vast number of the wars he dared to discuss only a very few.”⁵ He then goes on to undermine the historical credibility of the prosecutor’s source, instead putting forward his own favorite historian, namely Livy. The issue at hand is still Romulus’ conflict with the inhabitants of Fidenae:

But what is the man thinking when he begins with the Fidenates? For did not the Fidenates themselves stir up the war through their depredations and ravaging? But that reliable and careful writer, the esteemed Livy, writes about this—a writer incomparably preferable to Florus. Who is Florus here, that he be trusted against Livy and Dionysius [of Halicarnassus]?⁶

In arguing the case against or for the justice of the Roman empire in terms of contending views of the empirical-historical record,⁷ both Picens, the prosecutor of Book 1, and the Roman defending his city in Book 2 seem implicitly to agree on the normative criteria to be applied, including moral criteria.⁸

The shared criteria for determining whether a particular war that expanded the Roman empire was just or unjust are grounded in the standards of Roman fetial law and ultimately of natural law, in a way strongly reminiscent of the so-called Carneadean dialogue in book 3 of Cicero’s *Republic*.⁹ Gentili’s framing of the question of the justice or injustice of empire and imperial

⁴ *The Wars of the Romans* 1. 2, p. 31.

⁵ *The Wars of the Romans* 2. 2, p. 161.

⁶ *Ibid.*

⁷ See e.g. the discussion of the respective weight and authority of various historical sources in *The Wars of the Romans* 2. 8, p. 232–235. Note also how Gentili motivates his undertaking in the dedicatory epistle to Essex to his earlier *De iniustitia bellica Romanorum actio* (see Appendix to this volume).

⁸ See Diego Panizza’s remark in his *Alberico Gentili, giurista ideologo nell’Inghilterra elisabettiana* (Padua, 1981), 127 n. 56. See also David Luper’s contribution in Kingsbury and Straumann (eds.), *The Roman Foundations*, 85–100.

⁹ See for this argument David Luper’s contribution in Kingsbury and Straumann (eds.), *The Roman Foundations*.

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wars in terms of Roman law and Roman just-war theory is a fundamental feature of *De armis Romanis*. Cicero's text cannot have been known to Gentili directly, but was familiar to him through its partial transmission in Lactantius' and Augustine's works. In Cicero's version (which also had an important impact on the thought of Hugo Grotius), the Carneadean dialogue concerning imperialism and international justice takes place between Lucius Furius Philus, standing in (albeit unwillingly) for the Greek skeptic Carneades and attacking the possibility of justice in international affairs, and the learned Gaius Laelius, who defends the applicability of moral, justice-based arguments in international relations.¹⁰

Carneades' skeptical, "realist" argument, which is reproduced (without being embraced) in Book 1 of Gentili's *Wars of the Romans*, maintains that international affairs are governed only by self-interest and criteria of expedience, not by justice. There simply are no standards of justice to be had in international affairs, according to Carneades, or if there were any, no one could be motivated to adhere to them. The argument is then applied to Roman imperialism, where it is presented as a *reductio*; if the Romans wanted to be just, they would have to give up the gains resulting from their imperialism, a course of action quite obviously lacking in motivational force. In *The Wars of the Romans*, Picenus, the prosecutor in Book 1, cites Cicero's *Republic* in the following passage:

And thus Carneades quite properly told you, Romans, that if you wished to be just, you ought to return to those huts from which you first set forth, and you ought to surrender this empire of the world.¹¹ Was it not from huts you set forth? "Had Rome not moved forth its power into the vast world, she would even now be filled with straw huts."¹²

The Roman imperialist of Book 2 in his direct answer does not have any patience for the *reductio*, but nor does he embrace Carneades. Instead he purports to direct the debate toward empirical evidence: "[I]t is enough and more than enough if we win through some real arguments. Throw away those empty words: . . . the huts, . . . and the straw. Direct your contention over here at the real issues."¹³ However, the whole structure of the argument of Book 2 can be understood as being based on Carneades' challenge, and on Laelius' answer to it in Cicero's *Republic*. It takes seriously the need to defend Rome's expansion in terms of justice, rather than as a prudential, expedient course of action based on successful pursuit of self-interest. Moreover, Book 2 of *The*

¹⁰ For Cicero's treatment of the original Carneadean debate, see J. E. G. Zetzel, "Natural Law and Poetic Justice: A Carneadean Debate in Cicero and Virgil," *Classical Philology*, 91 (1996), 297–319.

¹¹ From Cicero, *De republica* 3. 21, which Gentili can only have known from a passage in Lactantius, *Divinae institutiones* 5. 16. 2–5, the end of which is: *omnibus populis qui florent imperio, et Romanis quoque ipsis qui totius orbis potirentur, si iusti velint esse, hoc est si aliena restituant, ad casas esse redeundum et in egestate ac miseriis iacendum*. The point is made in the context of Carneades' argument that justice consists in stupidity.

¹² *The Wars of the Romans* 1. 8, p. 69. The last quotation is from Ovid, *Amores* 2. 9. 17–18.

¹³ *The Wars of the Romans* 2. 8, p. 249.

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Wars of the Romans also borrows from Cicero's rendering of the Carneadean debate the idea that the international norms of justice to which the Roman empire is held answerable should be couched in terms of a universal natural law and the Roman doctrine of just war.

In Cicero's *Republic*, the standard of justice is natural law, which is put forward in its traditional Stoic form at the beginning of Laelius' defense of Rome's justice thus: "True law is right reason, consonant with nature, spread through all people. It is constant and eternal; it summons to duty by its orders, deters from crime by its prohibitions. . . . [A]ll nations at all times will be bound by this one eternal and unchangeable law."¹⁴ When applied in Cicero to the specific question of the justice of Roman imperialism, the natural law argument for Rome's empire rests on two central claims. First is the claim that the empire had been gained by virtue of just wars.¹⁵ Second is what might be called the "civilizational" claim, that Rome's conquest and rule had made the conquered better off by taking away the right to do injury "from wicked people."¹⁶

This is the background tradition within which *The Wars of the Romans* is to be situated.¹⁷ The two claims on behalf of Roman imperialism as put forward in Cicero's *Republic* by Laelius constitute the foundation on which the Roman defender of Book 2 of *The Wars of the Romans* builds his argument, an argument provoked by a self-conscious invocation of Philus' Carneadean challenge to those claims. The following passage from the accusation in Book 1 illustrates this with regard to the first claim. Adducing Lactantius, who in turn is giving a summary of Philus' speech in Cicero's *Republic*, the accuser, Picensus, asserts that Roman just-war doctrine was void of any moral content. Accusing the Roman people of being "passionate with love for wars and ready to inflict war upon peoples when there was often no just reason," Picensus goes on to discuss the adoption of the fetial laws and the legal formalities of just-war doctrine by the Romans:

But are we to call it [i.e. just-war doctrine] a remedy—or rather a sticking plaster and rouge? Rouge would be the better term. Look what . . . Firmianus Lactantius tells us: "Just how far utility stands from justice the Roman people itself teaches us, for by declaring wars through the fetial priests and imposing wrongs under cover of law and by always craving and plundering other peoples' things they acquired for themselves possession of the entire world."¹⁸

¹⁴ Cicero, *De republica* 3. 33: *Est quidem vera lex recta ratio, naturae congruens, diffusa in omnis, constans, sempiterna, quae vocet ad officium iubendo, vetando a fraude deterreat. . . et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit. . . .* This passage from the *Republic* was known to Gentili through the Christian apologist Lactantius. For Cicero's formulation of Stoic natural law doctrine, see also Cicero, *De legibus* 1. 22 ff.

¹⁵ Cicero, *De republica* 3. 34–5.

¹⁶ *Ibid.* 3. 36. Translations from the *Republic* are from Cicero, *On the Commonwealth and On the Laws*, ed. J. E. G. Zetzel (Cambridge: Cambridge University Press, 1999).

¹⁷ See David Luper's contribution in Kingsbury and Straumann (eds.), *The Roman Foundations*.

¹⁸ *The Wars of the Romans* 1. 3, p. 35. The Lactantius passage is from *Divinae institutiones* 6. 9. 3–4 (= Cicero, *De republica* 3. 20).

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Against this accusation, Gentili has Rome's defender in Book 2 of *The Wars of the Romans* use the language of Roman just-war theory, stressing those elements in the fetial law concerning the waging of a just war that carry some moral weight and are not mere legal formalities; defending the record of King Tullus, the Roman says: "Tullus also declares war against the Sabines because there were wrongs done (*iniuriae factae*) on both sides, and things seized were sought back (*res repetitae*) in vain."¹⁹ The seeking of redress (*rerum repetitio*) after an injury (*iniuria*) has been done is, according to the fetial law, one of the necessary conditions for the waging of a just war. It is described, along with the other conditions, by Laelius in Cicero's *Republic*: "No war is considered just unless it is announced and declared and unless it involves recovery of property."²⁰ This can also mean the recovery of property on behalf of allies; the Roman empire is thus said to have "gained control of the entire world through defending its allies."²¹ This doctrine is invoked by Gentili's Roman defender, who argues that the Samnite War had been undertaken not on behalf of the Romans themselves, but—"something much more respectable"—on behalf of their allies, the Campanians.²² Against the charge that it was "cheating, perfidy, avarice, audacity, cruelty that brought forth" Roman rule and the empire,²³ Rome's defender in Book 2 asserts that all of Rome's wars had been waged as just wars according to the criteria of the Roman just-war doctrine; relying on Livy and Dionysius of Halicarnassus, he states that "it is fitting to affirm the testimony of the most serious men, who record that the Romans never took up arms except in just causes."²⁴

As in Cicero, there is a strong sense in *The Wars of the Romans* that the specifically Roman institution of fetial law, with its just-war procedure, has the source of its validity in natural law—or at least that natural law is the source of the morally relevant parts of Roman just-war doctrine, particularly those concerned with the recovery of property. This normative kernel is acknowledged by Picens in the first book and by Rome's defender in the second,²⁵ as in the following claim: "But our activity was not solely directed at acquiring an empire, but also at acquiring it honestly, through just causes."²⁶

¹⁹ *The Wars of the Romans* 2. 3, p. 168f: *Bellum et Sabinis indicit Tullus: quod utrinque factae essent iniuriae: et res nequidquam repetitae essent*. See for Tullus' war against the Sabines, Livy 1. 30. 4 ff.

²⁰ *De republica* 3. 35: *Nullum bellum iustum habetur nisi denuntiatum, nisi dictum, nisi de repetitis rebus*. Gentili knows this passage from Isidore of Seville, *Etymologiae* 18. 1. 2–3; cf. Cicero, *De officiis* 1. 36. See also Cicero, *De republica* 2. 31 (a passage Gentili could not have known).

²¹ *De republica* 3. 35: *Noster autem populus sociis defendendis terrarum iam omnium potitus est*.

²² *The Wars of the Romans* 2. 7, p. 227. This argument was subsequently made by Grotius in *De iure praedae* (1604–8) in defending Dutch actions against Portuguese vessels in the East Indies on the grounds that the Dutch were coming to the aid of their ally, the Sultan of Johore, who had been a victim of Portuguese depredations.

²³ *The Wars of the Romans* 1. 1, p. 17.

²⁴ *The Wars of the Romans* 2. 7, p. 215.

²⁵ Cf. *The Wars of the Romans* 1. 7, p. 57: "Or is there no justification in nature for the principle that profits acquired by others not be taken away from them?"

²⁶ *The Wars of the Romans* 2. 12, p. 331.

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The second, civilizational, claim made by Laelius in the *Republic*, namely that Rome's conquest and rule had made the conquered better off by taking away the right to do injury "from wicked people," has equally important reverberations in Gentili's late sixteenth-century framing of the debate on *The Wars of the Romans*. In the following passage, Picens makes the case that, compared to the Roman empire, the Ottoman empire of his own day hardly qualifies as barbarian, then cites from Tacitus' *Agricola* the Caledonian chieftain Calgacus' famous anti-Roman speech:

Go off and tell me about Turkish barbarity! You hear of provinces conquered with the blood of provinces. Where they have made a solitude, there they used to allege that they had established peace, as the Briton [Calgacus] complained.²⁷ Robbers of the whole world, whom neither the East nor the West will have satisfied, and who, although they have shut up the whole world in that city of theirs, nonetheless coveted the little huts of the Britons—as the Briton [Calgacus] cries out in the same place.²⁸ "Like a stomach that can't be filled is Rome, consuming everything and always hungry still, since into its lap are gathered the riches scraped away from all the overthrown cities and the denuded lands"—and so on. (The pious and religious witness Orosius writes these things.²⁹) "The one and only state born for the destruction of the human race," says Arnobius,³⁰ a holy man.³¹

To answer this hyperbole, the defender in Book 2 asserts the civilizing effect of Roman rule. Far from making a solitude and calling it peace, the Romans had pacified the territories of the subjugated peoples by eliminating "kings and chieftans, who were the sources of internal wars there," and, what is more, Rome thus established "public tranquility and, so to speak, the health of a single well-joined body." The peoples of Italy, the defender maintains, "before the time of the Roman Empire . . . were considered barbarians not only by the Greeks but even by the barbarians themselves, but soon emerged as the most cultivated people and rulers of everything." To the Germans Roman rule had bestowed "all the arts of civilization," turning them "from rude and rustic men into the most polished."³² As for the criticism, leveled by Calgacus, that Roman imperialism was motivated by nothing but material greed, epitomized by the excessive levying of tributes, the defender cites the famous speech by the Roman general Petilius Cerialis as put forward in Tacitus' *Histories*:

²⁷ Tacitus, *Agricola* 30. 6. Gentili offers a cumbersome version of Calgacus' terse *atque ubi solitudinem faciunt, pacem appellant*.

²⁸ A free paraphrase of Tacitus, *Agricola* 30. 4–5.

²⁹ Orosius, *Historiae adversus paganos* 5. 18.

³⁰ Arnobius, *Disputationes adversus gentes*.

³¹ *The Wars of the Romans* 1. 13, p. 117. For Gentili's criticism of Roman imperialism and his use of the Roman tradition and Tacitus, see Kaius Tuori, "Alberico Gentili and the Criticism of Expansion in the Roman Empire: The Invader's Remorse," *Journal of the History of International Law*, 11 (2009), 205–19.

³² *The Wars of the Romans* 2. 1, p. 129.

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As for tributes and levies, Cerialis has answered: “By the right of victory we have imposed upon the defeated only that amount by which we might be able to maintain peace. For it is impossible to have peace among peoples without arms, or arms without soldiers’ pay, or soldiers’ pay without tributes. Everything else has been placed in common between us. The defeated themselves have for the most part been appointed as commanders over the legions and as magistrates over the provinces. Nothing is set apart or put off limits.”³³ It is in *this* way that the provinces were conquered by the blood of provinces.³⁴

A further important argument Gentili presents for Roman imperial rule is its incorporation of members of conquered groups into the ranks of Roman citizens. Roman rule thereby ceased to be foreign rule for the new citizens. Access to power is open to those under Roman rule as well and not exclusive to the conquerors—everything “has been placed in common between us,” nothing is “set apart or put off limits.” This is articulated by Gentili’s Roman defender: “We have wished our enemies to be friends, allies, citizens. Behold, gradually the citizenship was given to all who lived in the Roman world. Behold: Rome, the common fatherland.”³⁵ This argument of Roman inclusivity reinforces the claims relating to its civilizing and pacifying effects as arguments for the overall benignity of Roman imperial rule.

The alternative to civilized Roman rule is a state of nature, which Gentili conceives, anticipating Thomas Hobbes in an original manner, as a war of all against all. The underlying anthropology is Hobbesian, or rather Tacitean; as Cerialis in the same speech has it: “There will be vices as long as there are men.”³⁶ Therefore, “should the Romans be driven out . . . what can result but wars between all these nations?”³⁷ This is echoed at the very end of Gentili’s *Wars of the Romans*, in the defender’s final pleadings:

But at last the empire was overthrown, and along with all other mortal affairs it had its end. But what had been predicted so long before by wise men, behold, when the Romans had been driven away But behold, . . . behold now the wars of all, of all peoples among themselves. “Neighboring cities, the laws among them burst asunder, take arms; impious Mars rages throughout the globe; as when chariots pour out from the starting pens, they go faster each lap; nor does anyone hold the halter; the chariot is carried along by the horses, and no one guides the reins.”³⁸ And are you laughing here, Picens? Is the world laughing? And do you still laugh when the world’s peoples differ in customs, laws, languages, sacred rites, and thoughts? But if the look of the globe and the faces of all mortal men are saying anything to me, then we have triumphed over you, and all lament the now sundered unity of hearts and sigh for Roman piety, liberality, trustworthiness, magnanimity, peace, security, justice—and for the Roman Empire,

³³ Tacitus, *Historiae* 4. 74. ³⁴ *The Wars of the Romans* 2. 13, p. 347.

³⁵ *The Wars of the Romans* 2. 13, p. 347. ³⁶ Tacitus, *Historiae* 4. 74. ³⁷ *Ibid.*

³⁸ Vergil, *Georgica* 1. 510–14. Gentili was apparently quoting from memory, for the last lines should read “and vainly pulling on the halter, the charioteer is borne along by the horses, and the chariot doesn’t heed the reins”—*et frustra retinacula tendens / fertur equis auriga neque audit currus habenas.*

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from which, in all of its justice, fairness, and goodness, they lament that they have been withdrawn.³⁹

The civilizing effect is not confined to the material advantages and the prosperity resulting from pacification, security, and a certain unification of legal and customary norms. It also finds expression in, paradoxically, a larger amount of *liberty* for those newly subject to Roman rule. The Kingdoms of Macedonia and Illyrium are said by Rome's defender to have been "ordered to live under their own laws and be free."⁴⁰ And the "blessedness (*felicitas*) of those regions" is "that, upon being conquered, they were twice as well off—nay, incomparably better off (if liberty is a thing that cannot be measured)—under the power of their enemy than under the power of their own citizens."⁴¹

These elements of Gentili's approach to evaluating the Roman Empire bear also on the question, posed in the essays of Diego Panizza and David Lupher:⁴² what is the relationship between *The Wars of the Romans* and Alberico Gentili's central treatise on the law of war and of nations, the *De iure belli*? Panizza makes the case that the two works are very closely related as part of a single humanist project, with *The Wars of the Romans* (especially the second book) constituting in some respects a "satellite treatise of historical criticism gravitating towards the core of Gentili's system of jurisprudence" as elaborated in the grand system of *De iure belli*?⁴³ David Lupher suggests that differences between the two works are both considerable and significant.⁴⁴

A feature of both works is that Gentili endeavors in them to give a specifically *legal* answer to the problems of the content, applicability, and validity of norms in intra-imperial and international relations.⁴⁵ A key element in Gentili's defense of the Roman empire in Book 2 of *The Wars of the Romans* is that the Roman empire provided not only civilizing peace but, most importantly, the advantages of a high-quality and durable system of law. The people of Spain, for example, are said by Rome's defender to have been "brought over by our laws to a more cultivated way of life,"⁴⁶ and earlier King Tullus had "transferred" the city of Alba "to the Roman state with much honor and equality before the law (*iuris aequalitas*)."⁴⁷ While the defender of

³⁹ *The Wars of the Romans* 2. 13, p. 355.

⁴⁰ *The Wars of the Romans* 2. 13, p. 337 (our italics).

⁴¹ *Ibid.*

⁴² See their respective contributions in Kingsbury and Straumann (eds.), *The Roman Foundations*. See also our Introduction to that volume.

⁴³ Panizza, "Alberico Gentili's *De armis Romanis*: The Roman Model of the Just Empire," in *The Roman Foundations*, 81.

⁴⁴ Lupher, "The *De armis Romanis* and the Exemplum of Roman Imperialism," in *The Roman Foundations*, 85–100.

⁴⁵ See on this also our Introduction in *The Roman Foundations*, and B. Straumann, "The *Corpus iuris* as a Source of Law between Sovereigns in Gentili's Thought," in *The Roman Foundations*, 101–23.

⁴⁶ *The Wars of the Romans* 2. 13, p. 349.

⁴⁷ *Ibid.* 2. 3, p. 169.

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Book 2 takes pride that the Romans had as a matter of policy left many particular laws and customs of the conquered populations untouched,⁴⁸ the unifying role of Roman law is praised both in a Christian and in a pagan register. God is said to have given Rome the “scepter of the world” so that “the customs, the reverence, the languages, the minds, and the sacred rites of diverse peoples” could be brought under “one set of laws.”⁴⁹ Similarly, citing the Greek pagan Claudian’s panegyric of Stilicho, Rome, the “parent of arms and law,” is said to have “offered the cradle of the beginnings of law.”⁵⁰

It is this, the diffusion of the Roman law, that provides both justification for Roman imperialism in *The Wars of the Romans* and a fundamental connection of that work with Gentili’s treatise *De iure belli*.⁵¹ In the last chapter of the pro-Roman second book of *The Wars of the Romans*, Rome’s defender conjures up the most important remnant of Roman rule—the Roman law:

That is the law code of our state, which . . . persists to the present day even now that the empire has been extinguished and penetrates into all parts of the world, even those parts to which Roman arms did not reach.⁵² Picenus, you possess what the world longs for, you possess what the world delights in—the world which, though deprived of that blessed good luck of our empire, nevertheless tenaciously hangs onto and thirstily gulps down Roman laws, with which it renews for itself the sweet memory of its ancient happiness under Roman rule and alleviates the sadness of these times by this little bit of pleasure that has been mixed in.⁵³

The Roman law, then, is the pivotal legacy of Roman imperialism. In the *De iure belli*, Gentili gives some reasons why this is so—not simply because the *Corpus iuris* provides rules suitable for the complexities of life in urban settings and for cross-border trade, but also, and more essentially for Gentili, because the Roman law is also a source for the operational norms of the law of nations and the law of nature. And this in turn means that it is a source for norms that hold, not only between the private citizens of any given polity, but even between sovereign states. Although Gentili first states that “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,”⁵⁴ he

⁴⁸ See e.g. *The Wars of the Romans* 2. 13, p. 337: “And the city-states of Sicily we received into our friendship and protection in such a way that, after they were subjugated in war, they lived under the same law code as they had before.”

⁴⁹ *The Wars of the Romans* 2. 13, p. 349. Gentili here cites an account by Prudentius of what allegedly are the martyr Lawrence’s words.

⁵⁰ *The Wars of the Romans* 2. 13, p. 351. The citation is from Claudian, *De consulatu Stilichonis* 3. 136–7.

⁵¹ For more on this, see Straumann, “The *Corpus iuris* as a Source of Law,” 101–23.

⁵² Cf. Gentili’s *De iure belli libri tres* (Hanau, 1612), I. 3, p. 26 in vol. 16, pt. 1 of *The Classics of International Law* series, ed. James Brown Scott (Oxford, 1933).

⁵³ *The Wars of the Romans* 2. 13, p. 351.

⁵⁴ *De iure belli* I. 1, p. 3: *Iustinianus quoque noster, qui leges tulit suis, pari ratione egressus non est rempublicam, quam legibus illis voluit adornare*. Translations are taken from vol. 16, pt. 1 of *The Classics of International Law* series, ed. Scott, and are occasionally modified.

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then goes on to make a powerful argument in favor of using the *Corpus iuris* as a source of legal norms between sovereigns. This argument connects Gentili's interest in the justice of the ancient Roman empire in *The Wars of the Romans* with his concerns about the basis for, and content of, the law of war and peace in *De iure belli*:

[T]he law which is written in those books of Justinian is not merely that of the state [*civitas*], but also that of the nations [*gentes*] and of nature; and with this last it is all so in accord, that if the empire were destroyed, the law itself, although long buried, would yet rise again and diffuse itself among all the peoples [*gentes*] of mankind. This law therefore holds for sovereigns [*principes*] also, although it was established by Justinian for private individuals.⁵⁵

This establishes a parallel that is also a fundamental unity of law: the rules that hold for and between sovereigns are the very rules that held for private individuals before the establishment of political power (that is, in a natural state), and for private individuals in established commonwealths, to the extent that these natural rules have not been modified by arrangements of the civil law. The parallel between individuals and states conceived by Gentili is in fact much more rigid than the one later devised by Hobbes, while Hugo Grotius' view was to be strikingly similar to Gentili's. Justifying his use of private Roman law in an international context, Grotius argued that it "is true that Ulpian was referring . . . to private law; but the same principle is equally applicable to the present discussion concerning the territories and laws of peoples, since peoples in relation to the whole of mankind occupy the position of private individuals."⁵⁶ In *De iure belli*, the epistemic criterion Gentili uses in order to determine whether any established legal norm is actually part of the law of nature and of nations (*ius naturae et gentium*) is the following: Whenever a norm cannot be shown to be specific to any state, it should be included in the set of norms belonging to the *ius naturae et gentium*, the norms, that is, which are an expression of natural justice and thus hold for and between sovereigns as well. Gentili in *De iure belli* then goes on to give examples of Roman law principles that presumably are principles of natural law and thus applicable to sovereigns:

⁵⁵ Ibid. 26: *Ius etiam, illis perscriptum libris Iustiniani, non civitatis est tantum, sed & gentium, & naturae. & aptatum sic est ad naturam universum, ut imperio extincto, & ipsum ius diu sepultum surrexerit tamen, & in omnes se effuderit gentes humanas. Ergo & Principibus stat: etsi est privatis conditum a Iustiniano.* See also Gentili, *Hispanicae advocacionis libri duo* (Amsterdam, 1661), ch. 25, pp. 114–15: "Add that between princes and also—and this is our case—between a prince and the subject of another nation it is the practice that the civil law should not apply but rather the law of nations alone."

⁵⁶ Grotius, *De iure praedae* 12, fol. 105 (= *Mare liberum* 5, p. 36). Hugo Grotius, *De iure praedae commentarius: A Colotype Reproduction of the Original Manuscript of 1604*, ed. J. B. Scott (The Classics of International Law, 22, vol. 2; Oxford, 1950). For the translation we have used Hugo Grotius, *De Iure Praedae: Commentary on the Law of Prize and Booty*, trans. G. L. Williams, with W. H. Zeydel, ed. J. B. Scott (The Classics of International Law, 22, vol. 1; Oxford, 1950). Hugo Grotius, *Mare liberum, The Freedom of the Seas*, trans. R. van Deman Magoffin, ed. and intro. J. B. Scott (New York, 1916).

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But if anything of this sort is not shown to be peculiar to a given state, to remove it from these discussions of public matters would be more than ridiculous, more than silly. Again, are not the following principles from the books of Justinian applicable to sovereigns:⁵⁷ to live honourably; not to wrong another; to give every man his due; to protect one's children; to defend oneself against injury; to recognize kinship with all men; to maintain commercial relations; along with other similar and cognate matters *which make up almost the whole of those books?* These belong to the law of nations and to the laws of war.⁵⁸

The universality of the *Corpus iuris* is thus explained by, and its validity based on, the idea that it is an expression of natural law.⁵⁹ As some of the passages cited above indicate, Gentili does not distinguish sharply between the law of nature (*ius naturae*) and the law of nations (*ius gentium*). Anticipating in that regard Thomas Hobbes and Samuel Pufendorf, Gentili holds that the law of nations does not derive its validity merely from human agreement and, ultimately, human will, but that it is rather an expression of natural law, deriving its validity from natural reason (*ratio naturalis*) in the way articulated by the Roman jurist Gaius.⁶⁰ Similarly, in *The Wars of the Romans*, no systematic distinction is drawn between natural law and the law of nations, and both are integrated with core arguments based on natural justice in the defense of Roman imperialism mounted in the second book. The “original source of the law of nations,” Gentili says here in an utterly Stoic vein, is “that of human fellowship.”⁶¹ This Stoic explanation of the source of the *ius gentium* and for its binding force has, apart from Gaius, other important Roman precursors, most notably Cicero, and Gentili's ideas on the topic seem to build directly on this Roman tradition.⁶²

The fact that Gentili does not draw a systematic distinction between the law of nations and the law of nature and declares the Roman law of the *Corpus iuris* to be, at least to a large extent, declaratory of the rules of the law of nations, could have provided a foundation for a kind of positivism in the law of nations, but Gentili did not pursue such an approach. To the contrary, in his arguments about issues of international justice, the last word remains

⁵⁷ This is a reference to *Institutes* I. I. 1–3; *Digest* II. I. 10.

⁵⁸ *De iure belli* I. I, pp. 27 f. Our italics.

⁵⁹ See also e.g. *De iure belli* I. I, pp. 27–8: “[T]he edicts of the praetors are new and follow nature and natural justice more closely than the old laws. Justinian, as he often declares, not only adapted his laws to the simplicity of nature, but also restored the old laws to harmony with nature, from which they had strayed.”

⁶⁰ See *Institutes* I. 2. 1 = *Digest* I. I. 9; *Digest* 4I. I. 1–3. Gaius himself of course built on a Stoic tradition.

⁶¹ *The Wars of the Romans* 2. 2, p. 146f: *Primum iuris gentium caput everterint: quod humanae est societatis, et conjunctionis?*

⁶² See e.g. Cic. *De officiis* I. 50, where Cicero deduces “natural principles” from the “human community and society” (*communitas et societas humana*) which is taken to be a “natural society”; Grotius was later to use this idea, ultimately based on the Stoic doctrine of *oikeiosis*, in the Prolegomena to his *De iure belli ac pacis*; see *prol.* 8: “This maintenance of the social order (*societatis custodia*), which we have roughly sketched, and which is consonant with human reason, is the source of law (*fons iuris*) properly so called.” For a discussion of the view that Gentili's legal theory was influenced by Lutheran legal theory, see Straumann, “The *Corpus iuris* as a Source of Law,” 116–18.

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with natural reason. It is not sufficient that a rule is observed in practice and is one that cannot “be shown to be peculiar to a given state.” Gentili does not make clear whether he adheres to a voluntarist view of the basis of the obligation that is owed to the law of nature, or to a rationalist one; are the laws of nature binding because they are commands of God, or is any obligation to the authority of God derived from the law of nature? A remark in *The Wars of the Romans* leans rather toward a rationalist stance. In this remark Gentili of course does not deny that genealogically, the law of nature has its origin in God, but the source of its *validity* (as opposed to its origin) seems to lie in natural reason: “Thus God wished to bring us all together and to place this necessity upon human affairs: that one person’s profit might be bound up with that of his neighbor; and the entire world is thus constituted; for men would not otherwise pay attention to what profits his neighbor—and yet it was not so much God who wished this as it is by virtue of the reason of our shared humanity that we might be well-wishers and benefactors of all.”⁶³ The *Corpus iuris* is taken to be valid for relations between sovereigns only to the extent that it is *declaratory* of natural law. The significance of the *Corpus iuris* is that it is an expression of natural reason. For international relations, it is not a source of law that could in any straightforward way be built into a positivist theory of law.⁶⁴ The relationship between natural law and custom (*consuetudo*) is conceived analogously: “[t]hat which is true by nature acquires force also through custom.”⁶⁵

If the prominent role of natural justice and of the law of nature as the basis of normativity places Gentili and *The Wars of the Romans* in a fairly orthodox tradition of natural law, Gentili’s views on the role of self-interest, necessity, and preemptive defense as expressed in the second book of *The Wars of the Romans* make him an important outlier from traditional just-war theory. Self-interest, preemptive defense, and necessity as criteria for just wars bring into Gentili’s legal thought some elements of *ragion di stato*. What is the significance of Gentili’s engagement with these ideas? We have elsewhere expressed doubts that it is of great value to treat Gentili’s use of these concepts mainly as placing him in what Richard Tuck and others have called a “humanist” tradition of international political and legal thought,⁶⁶ as

⁶³ *The Wars of the Romans* 2, 8, p. 231. The position is close to Grotius’ and Hobbes’.

⁶⁴ See our Introduction in *The Roman Foundations*; and Straumann, “The *Corpus iuris* as a Source of Law,” 101–23. For a different view, see Jeremy Waldron, “*Ius Gentium*: A Defense of Gentili’s Equation of the Law of Nations and the Law of Nature,” in *The Roman Foundations*, 283–96.

⁶⁵ *The Wars of the Romans* 2, 2, p. 137.

⁶⁶ For more on this, see our Introduction in *The Roman Foundations* and the literature referred to there; and the nuanced contribution by Noel Malcolm, “Alberico Gentili and the Ottomans,” in *The Roman Foundations*, 127–45, which first appeared in Alberico Gentili, *La salvaguardia dei beni culturali nel diritto internazionale* (Milan, 2008), 63–89. See also B. Kingsbury and B. Straumann, “State of Nature versus Commercial Sociability as the Basis of International Law: Reflections on the Roman Foundations and Current Interpretations of the International Political and Legal Thought of Grotius, Hobbes and Pufendorf,” in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 33–51.

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opposed to a “scholastic” tradition of authors who rely on the Christian Fathers and on medieval philosophers and canon lawyers.⁶⁷ To give one example, Gentili, when developing his view on necessity in *The Wars of the Romans*, quotes two celebrated maxims: “That which is not allowable according to the law necessity makes allowable. Necessity has no law, but it itself makes law.”⁶⁸ These are quotations, not from classical authors favored by “humanists,” but from canon law sources—the first maxim is taken from the *Liber Extra* of Gregory IX, and the second from Gratian’s *Decretum*.⁶⁹

While Gentili thus cannot be situated in any simple way in a “humanist” camp, his views, especially on preemptive warfare and the bilateral justice of war, were original and strained the framework of traditional just-war doctrine.

Gentili’s right of preemption, although premised on a very permissive interpretation of self-defense, is not simply the normative outcome of a state of nature conceived as a mere Hobbesian condition of war of all against all and with a *ius in omnia et omnes*, devoid of any mutual duties and wanting any grounds of obligation except for prudential ones. Preemptive warfare is constrained by the principle of self-defense; the Roman defender in Book 2 treats it as a principle of natural justice, and, defending Rome’s destruction of Corinth, berates Picens thus for not acknowledging it:

But are you, Picens, unaware—such a great teacher of law as you wish to appear—that it is permitted to look out for one’s own state and security? Are you unaware that it is permitted to make away with all things which, while not perhaps actually to be feared, offer even some slight hint of danger? It is even fitting to look ahead into the distant future and not to wait until danger beats on one’s doors, one’s bedchamber, and one’s very bedposts.⁷⁰

Addressing one of the major Roman cases, Gentili suggests that the ultimate concern of the Romans in destroying Corinth is said to lie with Greek liberty, not Roman self-defense, although in Gentili’s thought both seem to qualify as just causes for war independently: “For the Romans’ concern was that condition and liberty of Greece, whose founders they themselves were.”⁷¹

Preemptive warfare construed as self-defense is in Gentili’s view a normative concept and constrained by (modest) objective qualifications, as explained in the *De iure belli*: “a just cause of fear is required; suspicion is not enough.”⁷² That preemption is meant not to provide a mere license, but is

⁶⁷ See Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 9 ff., 51.

⁶⁸ *The Wars of the Romans* 2. 2, p. 151. See on the concept of necessity in international realist thought Jonathan Haslam, *No Virtue like Necessity: Realist Thought in International Relations since Machiavelli* (New Haven: Yale University Press, 2002).

⁶⁹ *Liber Extra* [Decretals of Gregory IX] 5. 41. 4; *Decretum Gratiani* C.1 q.1 d.p.c.39.

⁷⁰ *The Wars of the Romans* 2. 9, p. 253.

⁷¹ *Ibid.* 255. ⁷² *De iure belli* 1. 14, p. 99; *Iusta causa metus requiritur: suspicio non est satis*.

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instead to be governed by objective criteria applicable to all, is reinforced by Gentili's statement in *De iure belli* that Perseus and Mithridates had cause to invoke it *against* the Romans, siding here with the prosecutor of Book 1 of *The Wars of the Romans* rather than with the Roman defender.⁷³ While the latter work, polemical in character, almost never—in its second book—admits any injustices and moral lapses committed by the Romans, the former at times argues for the very normative principles advocated by the Roman in the second book, turning them against the Roman empire.

While preemptive warfare is thus conceived as a special case of self-defense—expansive though the criteria may be—there are indications in *The Wars of the Romans* that mere unconstrained imperial self-interest could amount to a justifying principle. Such a prudential principle, devoid of any moral constraint of natural law, would situate that work quite obviously in a prudential, Machiavellian tradition of *ragion di stato*. The closest Gentili—or rather the Roman of Book 2—comes to acknowledging such a principle is when he asks Picensus: “Have you not learned from your teachers that war for glory and empire is just by the law of nations? And that the empire of the Romans was thus just because it grew in that way?”⁷⁴ However, Rome's defender then adds what amounts to a qualification, namely that “[y]ou would also have learned that a war directed at just and upright domination is just,” and comments that the territory in question, Sicily, needed to be “freed from so many monsters and disasters” and should be rejoined “to its ancient head.”⁷⁵ Reading on, it becomes clear that none of these arguments is crucial to Rome's case, which formally rests on self-defense by Rome on behalf of its ally, the Mamertines, against Carthage—a just war according to traditional criteria. Defending allies is an extension of the general justification for Rome's expansion put forward by the defender when he cites Augustine's *City of God*: “It constitutes a just defense of the Romans for so many wars undertaken and waged that it was the necessity of protecting their safety and liberty, not greed for acquiring human glory, that forced them to resist enemies who attacked them violently.”⁷⁶

That Gentili's relatively rich natural legal order is not exclusively based on prudential norms of utility but depends on a more substantive moral vision is further attested by his arguments for subjective natural rights,⁷⁷ including a natural right to punish. Gentili's treatment of punishment as a just cause for

⁷³ See *De iure belli* 1. 14, p. 103. See on this Lupher, “The *De armis Romanis* and the Exemplum of Roman Imperialism,” in *The Roman Foundations*, 9.

⁷⁴ *The Wars of the Romans* 2. 8, p. 229.

⁷⁵ *Ibid.*, p. 231.

⁷⁶ *The Wars of the Romans* 2. 2, p. 163, citing Augustine, *De civitate Dei* 3. 10. On the use of Augustine and the Roman model of empire in the 16th-c. debate on the justice of the Spanish empire, see David Lupher, *Romans in a New World: Classical Models in Sixteenth-Century Spanish America* (Ann Arbor: University of Michigan Press, 2003).

⁷⁷ For a strong formulation of a subjective natural right, see *The Wars of the Romans* 2. 6, p. 210: *ius suum naturæ*.

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war—present in *De iure belli* and further affirmed in *The Wars of the Romans*—necessarily presupposes an objective natural-law framework of norms against which the claims of punishment can be measured and justified. The argument for the right to punish is not merely a self-interested prudential argument such as self-defense, nor does it depend on the same grounds as self-defense. But the right to punish presupposes an offence against natural law, a violation of duties under some natural legal order—something unthinkable in a state of nature conceived along Hobbesian lines, where there are no moral duties whatsoever, just prudential grounds of obligation, and where there is consequently no natural right to punish either. Such a right implies a more substantive natural legal order, and Gentili in this regard belongs to a tradition stretching ahead to Grotius and Pufendorf, who, not surprisingly, also acknowledge a right to punish in the state of nature.⁷⁸

The Wars of the Romans can thus be seen as an attempt to justify a legal order, introduced by Roman imperialism into a situation in which only an under-specified body of natural law applied. Rather than lending support to the empires of Gentili's own day, *The Wars of the Romans* focuses on the Roman empire of classical antiquity, its justification, and its legal legacy. The rules and norms developed by the Romans were apt, in Gentili's analysis, to guide and justify some imperial conduct, but also to constrain early modern empires and emerging sovereign states. Indeed, Gentili is critical of the Spanish and Ottoman empires of the late sixteenth century, and far from enthusiastic about the Holy Roman Empire. While he does not deny a certain continuity between the latter and the ancient Roman empire, his argument in *The Wars of the Romans* clearly does not rest on an analogy between the two. Rather, the Holy Roman Empire of his own day appears in his thought as but one polity among many, all of which are susceptible to being judged according to the principles of law established in the ancient and enduring Roman legal order.

Benedict Kingsbury
Benjamin Straumann

⁷⁸ See on this our "State of Nature versus Commercial Sociability"; and A. Blane and B. Kingsbury, "Punishment and the *ius post bellum*", in *The Roman Foundations*, 241–65.