

Law and War in Late Medieval Italy: the *Jus Commune* on War and its
Application in Florence, c. 1150-1450

by

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Abstract

This study, on law and war in late medieval Italy, has two primary aims. One is to review the legal tradition on war as it developed in the medieval *jus commune*, or common law, from approximately 1150-1300, and then to consider how that tradition evolved from roughly 1300-1450. In general the latter period still represents a *lacuna* in scholarship on the legal theory of war, and can be addressed as a distinct period because the fourteenth century was a time when theory moved in important new directions. It will be suggested in turn that those new directions were related to changing politics and institutions in Italy. The second aim continues and reflects the first, as it seeks to better understand how legal arguments about war and peace were employed in practice, using Florence as an example. The study finds that these legal arguments found their most important role in diplomacy. Florentine diplomatic records, as well as legal opinions (or *consilia*) on inter-city disputes, will help to examine the complex nature of that role. In general it will be seen that the law,

including the *jus commune*, was a strategic tool and an important regulatory mechanism for relations between political actors in late medieval Italy, though one that also had significant limitations.

The first chapter introduces the material and themes. The second treats the just war tradition and laws on war through 1300. The third chapter examines legal theory on war, particularly in Roman law, from roughly 1300 to the early fifteenth century. The fourth explores how just war arguments were deployed in Florentine political discourse between 1230 and 1430. The fifth chapter examines a range of legal issues related to war, as found in diplomatic instructions and *consilia* which played a role in Florentine wartime diplomacy from 1392-1402. The sixth chapter is the conclusion.

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Abbreviations

Cap	Capitoli
C.	<i>Codex Justinianus</i> . In <i>Corpus Juris Civilis</i> . Ed. T. Mommsen, <i>et al.</i> Vol. 2. Berlin: Weidmann, 1892-95. Repr. 1954.
C.	<i>Causa in Pars Secunda</i> of the <i>Decretum Gratiani</i> . In <i>Corpus Juris Canonici</i> . Ed. A. Friedberg. Vol. 1. Leipzig: B. Tauchnitz, 1879. Repr. Graz: Akademische Druck-u. Verlagsanstalt, 1959.
D.	<i>Digesta Justiniani</i> . In <i>Corpus Juris Civilis</i> . Ed. T. Mommsen, <i>et al.</i> Vol. 1. Berlin: Weidmann, 1892-95. Repr. 1954.
HFP	Leonardo Bruni. <i>History of the Florentine People</i> . Vol. 3. Ed. and trans. James Hankins. Cambridge, Mass.: Harvard University Press, 2007.
DBLC	Dieci di Balìa, Carteggi, Missive, Legazioni e Commissarie
Minerbetti	<i>Cronica volgare di anonimo fiorentino dall'anno 1385 al 1409, già attribuita a Piero di Giovanni Minerbetti</i> . Ed. Elina Bellondi. In <i>Rerum Italicarum Scriptores</i> , xxvii, pt. 2. Città di Castello: Lapi, 1915 and Bologna: Zanichelli, 1917-18; repr. Turin: Bottega d'Erasmus, 1966-69.
Morelli	Giovanni Morelli. <i>Ricordi</i> . In <i>Mercanti scrittori</i> . Ed. V. Branca, 101-339. Milan: Rusconi, 1986.
SCMLC	Signori, Carteggi, Missive, Legazioni e Commissarie
SCMC	Signori, Carteggi, Missive, I Cancelleria
Sext.	<i>Liber Sextus Decretalium Bonifacii VIII</i> . In <i>Corpus Juris Canonici</i> . Ed. A. Friedberg. Vol. 2. Leipzig: B. Tauchnitz, 1879. Repr. Graz: Akademische Druck-u. Verlagsanstalt, 1959.
X.	<i>Decretales Gregorii IX</i> . In <i>Corpus Juris Canonici</i> . Ed. A. Friedberg. Vol. 2. Leipzig: B. Tauchnitz, 1879. Repr. Graz: Akademische Druck-u. Verlagsanstalt, 1959.

Chapter 1

Introduction

This study examines the development of the theory of war in the *jus commune*, or common law, of the late Middle Ages, and considers how such legal theory was put into practice by the government of Florence in the same period. In particular, the study examines the law on war in the fourteenth century in detail, and places Florentine wartime diplomacy in the context of its legal disputes and negotiations, in the period 1388-1402. This latter investigation takes its lead from the outstanding work of Lauro Martines on the involvement of lawyers in Renaissance Florentine government and diplomacy, *Lawyers and Statecraft in Renaissance Florence* (1968).¹ Unsurpassed in forty years, Martines's book brilliantly explores the roles that lawyers played in shaping domestic law and policy in Florence and in negotiating foreign treaties and disputes. This thesis takes a somewhat different course, considering the development of the law itself and its role in Florentine foreign relations. To this end, it brings commentaries on the *jus commune* into sharper focus, and examines a series of legal opinions (*consilia*) on disputes that arose during Florence's conflict with Giangaleazzo Visconti of Milan. The aim is to shed some new light on what were processual and highly deliberative relations between the Italian cities in the period.

The first half of the study concerns the legal theory of war in the *jus commune* – which comprised medieval canon, Roman and feudal law – and is intended to provide a foundation for the second half. It is also hoped that the first half can stand as an

¹ Lauro Martines, *Lawyers and Statecraft in Renaissance Florence* (Princeton, 1968).

interpretation of the theory of war in the late Middle Ages. There has been a good deal of scholarship on medieval “just war” theory in canon law and theology, beginning with Augustine and continuing to around 1300.² But scholars for the most part have passed over the development of just or licit war theory, and legal theory on war generally, from 1300 until the contributions of the Spanish scholastics in the 1500s.³ The omission is surprising, because the period saw the production, predominantly in Italy, of numerous legal commentaries and *consilia* (or jurists’ opinions on particular cases) which touched on the justification and conduct of war.⁴ In particular, these commentaries on Roman law, though influenced by prior canon law, had a lower threshold for the justification of war, and maintained a somewhat greater focus on issues related to conduct. This development was natural, given the paucity of guidelines for war in Roman law, and the fact that Romanist (or civilian) jurists in Italy remained deeply enmeshed in the government and politics of their various cities. As a first aim, the study will thus examine some of these developments in legal theory, to give a fuller picture of the learned law on war in the late Middle Ages.

² Notable studies include Frederick Russell, *The Just War in the Middle Ages* (Cambridge, 1975); Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris, 1983); Robert Regout, *La doctrine de la guerre juste de Saint Augustin à nos jours* (Paris, 1935); Alfred Vanderpol, *La doctrine scolastique du droit de guerre* (Paris, 1919); Roland Bainton, *Christian Attitudes toward War and Peace* (Nashville, Tenn., 1960); and James T. Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740* (Princeton, 1975).

³ Haggenmacher, *Grotius et la doctrine de la guerre juste*, is one excellent exception. On the contributions of the Spanish writers, in particular to theories of property rights and war in the New World, James Muldoon, *Popes, Lawyers, and Infidels: The Church and the Non-Christian World, 1250-1550* (Philadelphia, 1979), and Anthony Pagden, *Spanish Imperialism and the Political Imagination: Studies in European and Spanish-American Social and Political Theory, 1513-1830* (Yale, 1998).

⁴ Particularly after 1300, copious commentaries were produced on Roman law. There was also a significant increase in the number of *consilia* written, which is one reflection of the deep engagement of jurists in their contemporary society. On *consilia*, see Mario Ascheri, “Il *consilium* dei giuristi medievali,” in *Consilium. Teorie e pratiche del consigliare nella cultura medievale*, ed. Carla Casagrande et al. (Florence, 2004), pp. 243-58; idem, *I consilia dei giuristi medievali* (Siena, 1982), and G. Rossi, *Consilium sapientis iudiciale: studi e ricerche per la storia del processo romano-canonico* (Milan, 1958). Kenneth Pennington, “The *Consilia* of Baldus de Ubaldis,” *Tijdschrift voor Rechtsgeschiedenis - Revue Histoire du Droit*, 56 (1988), pp. 85-92, on the *consilia* of Baldus, the most prodigious author of *consilia* in the Middle Ages.

To give some background, the first chapter reviews the just war tradition in canon law to the end of the thirteenth century. There is general agreement among scholars concerning the content of just war theory, but various emphasis has been given to particular elements of it. The influential though older work of Robert Regout tended to see the just war tradition in church law and theology as unchanging, and admitted the aspect of punishment which was at its heart.⁵ The authoritative work of Frederick Russell, *The Just War in the Middle Ages* (1975), has shown the complexity of the development of just war in canon law and theology, and has fruitfully explored connections between just war, crusade and the suppression of heretics.⁶ The broadest outlines of the tradition are as follows. Augustine, the essential founder of the tradition, wrote that just wars avenged injuries suffered, where injuries were things taken or done unjustly to the other (innocent) side.⁷ He added that wars should not be waged with cruel and sinful intentions, but with charity and a desire to correct. The final criterion for war was “just authority,” though jurists were not always clear or in agreement on how it should be defined.⁸ Just cause, right intention and proper authority provided the basic criteria for the just war in medieval canon law and theology. The Christian “just war,” which was developed to validate Christian involvement in warfare in late antiquity, allowed the church in the high Middle Ages to clarify its relationship to violence and warfare, while attempting to hold secular wars within an ethical framework.

⁵ Regout, *La doctrine de la guerre juste*, 61ff.

⁶ Russell, *The Just War in the Middle Ages*; the introduction, pp. 1-15, summarizes some of these findings.

⁷ The definition in fact echoed Cicero, and perhaps other Roman sources. On Cicero and Augustine, see chapter two, p. 23.

⁸ The question of proper authority will be treated in chapters two and three. According to canon law the church could not shed blood, but it could call for military action, including war, and later crusade. The question of which secular authorities could wage offensive war in particular was somewhat more complicated.

The analysis of just war theory that follows in chapter one reviews these developments, but two points will remain prominent. One, echoing Regout, Russell, and others, is that the just cause remained very broad in theory. It was tied to goods lost or other injuries suffered, but what qualified as injuries suffered was not specified, and the idea of war as punishment for moral violations (which the church assumed the power to define), remained a part of the tradition through the Middle Ages and into the early modern period.⁹ A related point is that war could be justified as a violation of rights, which were usually rights in property and territory.¹⁰ This was in fact amplified early in the Christian tradition by Augustine, who held that a denial of (the right to) free passage created a just cause for war.¹¹ Just war as a response to violated rights was familiar in medieval practice: as the eminent English historian William Stubbs once wrote, “the kings of the Middle Ages went to war for rights, not for interests, still less for ideas.”¹² In Florence as well, the defense of rights will be seen to play a key role in public justifications from at least the thirteenth century.¹³

The second chapter focuses on developments to the theory of war in the fourteenth century. New ideas did emerge in the period on the justification, conduct and resolution of war, particularly in Roman law. However, fourteenth-century Roman law was influenced by

⁹ Russell, *The Just War*, makes this point for the Middle Ages, identifying its roots in Augustine, pp. 18-26. James T. Johnson, *Ideology, Reason and the Limitation of War*, pp. 81ff, emphasizes that war as punishment for moral violations continued into the early modern period, particularly during the wars of religion, when secular rulers assumed the authority to conduct what Johnson argues were holy wars.

¹⁰ “Rights” generally means any legal entitlement. Even Cicero saw war as a quasi-judicial remedy for the taking, misuse or violation of things the Romans lawfully possessed or were entitled to.

¹¹ Most just causes for war pertained to property and person, but Augustine implied that free passage was a universal positive right whose violation could lead to just war. On free passage in Augustine, see chapter two, pp. 25-6. By the Renaissance and the age of European expansion, commerce could also be defended as a right guaranteed by the law of nations; see the conclusion.

¹² Quoted in H. E. J. Cowdrey, “The Genesis of the Crusades: the Springs of Western Ideas of Holy War,” in *The Holy War*, ed. T. Murphy (Columbus, OH, 1976), p. 9. This is true if applied to the *public* justification for war.

¹³ What constituted a just cause in Florentine diplomacy and public rhetoric was also broad, but a number of injuries and violations were usually given in public justifications.

some thirteenth-century canon law which subjected war to new, and newly organized, analyses. The most influential canonist for later civilian views was Innocent IV, through his *Apparatus* on the *Decretals* of Gregory IX, a work finished around 1245. The complexity of the cases presented in the *Decretals* led Innocent IV to define more carefully the relationship of the church, and that of laymen, to violence.¹⁴ Innocent thus outlined a hierarchy of five kinds of licit war, with a classification that gathered together material from Roman and feudal law.¹⁵ Drawing on Roman and feudal law was not unusual, but Innocent borrowed from them with particular skill and creativity, enabling him to offer a more thorough discussion of war than had his predecessors. Innocent's treatment of war, and the shift it represented, will be seen as significant for later discussions of war in Roman law.

Canon law provided a stimulus to new explorations of war and peace, but the problem of independent political authority was something of a stumbling block to expanded discussion in Roman law, particularly in Italy. In the standard codification of Roman law, the emperor Justinian's *Corpus juris civilis*, the independence of medieval European kings or individual cities from the empire was not contemplated, and among medieval Roman jurists there was also uncertainty over the status of independent political entities in Europe.¹⁶ By the early thirteenth century, however, nationalistic canonists in Spain and England, and also Pope Innocent III, began to make apparent reference to European monarchs as effective sovereigns in temporal affairs.¹⁷ Yet even with these developments in canon law, and the

¹⁴ See chapter two, pp. 38-43. Russell discusses Innocent IV and Hostiensis's contributions in close detail; see *The Just War*, pp. 128-79, particularly pp. 172-77.

¹⁵ There is significant material on the influence of Roman law on canon law in the period, but see the remarks of Stephan Kuttner, "Some considerations on the role of secular law and institutions in the history of canon law," in *Studies in the History of Medieval Canon Law*, VI (Aldershot, 1990), and generally Manlio Bellomo, *The Common Legal Past of Europe: 1000-1800* (Washington, D.C., 1995).

¹⁶ See chapter two, pp. 33-34, and *passim*.

¹⁷ Pope Innocent III's bull, *Per venerabilem*, stated that the king of France did not recognize a superior authority in temporal affairs, while in England, for example, the canonist Alanus Anglicus accorded unnamed

fragmented view of hierarchy in feudal law, the Italian civilians who produced the great preponderance of glosses and commentary on Roman law typically accepted the emperor as their formal overlord.¹⁸ It was a legal blind spot at odds with practice, since the Italian cities fought amongst themselves freely and a sizable number of them were effectively sovereign in the thirteenth century. Yet the period did see the beginning of broader discussions of war in Roman law: the jurist Accursius (c. 1182-1263), for example, noted types of just war and discussed property lost, at least *de facto*, in wars in Italy.¹⁹

The second chapter argues that the critical innovation of the civilian Bartolus of Sassoferrato (c. 1313-1357), on the effective independence of the Italian cities, helped to motivate new treatments of war in fourteenth-century Roman law. Bartolus argued that some cities were *de facto* sovereigns in their own territory, just as the emperor was (*de jure*) in his. Here was the legal admission that a number of cities had full power over their territory, made in a period when a number of cities were developing into significant territorial entities. A key corollary to Bartolus's assertion, which has not received the same attention, is also important. Bartolus emphasized the point, made earlier by Innocent IV, that in the absence of effective recourse to a superior authority, one could avenge injuries which had been suffered, on one's own authority. Such was the situation in Italy, he wrote, where the emperor was ineffective as the superior authority and a number of cities had rightfully taken their causes into their own hands. Bartolus's views with respect to the freedom of the cities and war were significant, and after him the right of independent cities

"secular princes" of Europe the right to make war and even (as a very rare opinion) gave that power to the Italian cities. On the question of sovereignty, Walter Ullmann, "The development of the medieval idea of sovereignty," *Engl. Hist. Review* lxiv (1949), pp. 19-43, is a concise introduction.

¹⁸ Venice was often considered one exception, and the Kingdom of Sicily was another. Early Romanists had written of the right of the city (*civitas*) as a corporation to make municipal laws for itself; see Carlyle, *A History of Mediaeval Political Theory in the West*, vol. 5 (Edinburgh, 1950), p. 83, with the opinion of Irnerius, but this was not full independence and sovereignty.

¹⁹ See chapter two, pp. 52-3, 56.

to wage offensive and defensive war on their own authority became acceptable among civilians.²⁰

Indeed, Bartolus's contributions appear to have had an influence on subsequent civilian commentary. In Bartolus and some civilians who followed him, a certain "realism" with respect to war appeared to emerge more clearly.²¹ Again, classical Roman law tended in this direction, lacking as it did criteria to evaluate the justice of a war, and assuming that foreign peoples would sometimes be at war with Rome.²² Medieval Roman law naturally developed in a practical direction as well, but the acceptance of licit self-help in the absence of an effective superior was significant. In Bartolus's student, Angelus de Ubaldis (c.1330-1400), and another jurist, Raffaele Fulgosius (1367-1427), the problem of judging between two sides in the absence of superior authority became explicit: both jurists expressed doubts over how to determine the just side in a conflict.²³ The solution in Angelus was to assume that both sides were just since the objective justice was doubtful, while Fulgosius suggested that the victor would simply be assumed just.²⁴

New views of war emerged in a few other jurists following Bartolus, particularly Giovanni da Legnano (c.1320-1383) and Paolo di Castro (d. 1441). Giovanni, a doctor of canon and Roman law, was influenced by astrology and Aristotelian science, and judged that

²⁰ City governments in the twelfth and thirteenth centuries sometimes angled, in legal language, to increase the scope of their freedoms and privileges. As Philip Jones has noted, cities might even claim *merum et mixtum imperium*, or full judicial sovereignty. By contrast, Roman law lagged behind. Philip Jones, *The Italian City-State: From Commune to Signoria* (Oxford, 1997), pp. 349-51.

²¹ "Realism" sounds a bit anachronistic since it calls to mind realism in modern international relations. But these jurists did understand that there was no effective judge of disputes among the Italian cities, and some did not demand any justification for war other than proper authority. However, emphasis on the necessity of survival or the imperatives of self-interest among political actors, common to modern realism, was lacking.

²² In Justinian's *Corpus juris civilis*, the classical jurist Pomponius even treated foreigners with whom Rome had no treaties effectively as enemies liable to be despoiled; see ch. 2, p. 54.

²³ The possibility of bilateral justice did not receive much attention in canon law, though the canonists Rolandus and Stephen of Tournai considered it from the perspective of deceit; see p. 35, n. 117. For Angelus on bilateral justice, and Raffaele Fulgosius, pp. 83-6.

²⁴ There was also support in feudal law for the position that, given a doubtful cause, war was still licit; see below, pp. 62-4.

disorders which arose in the world were natural and often inevitable.²⁵ His analysis freely mixed just war, astrology and biological metaphors to help explain and justify disorders and violence. More importantly, Paolo di Castro, like Bartolus, wrote that when there was no effective superior jurisdiction self-help was licit.²⁶ He explained further that before magistrates existed to create (civil) laws, individuals were left in the disposition of the law of nations, which gave each individual the right to make law for himself and judge his own causes. For Paolo, the law of nations prevailed in a “state of nature” in which each one was sovereign, and to which each returned in the absence of effective civil authority. Paolo’s comments were striking, distantly suggesting the “state of nature” later described by Thomas Hobbes (1588-1679).²⁷ Paolo is also significant in another respect. He enunciated a theory of “just” war with classical echoes, likely those of Cicero or Aristotle, and permitting wars for conquest. Indeed Paolo’s opinions probably represent the farthest point reached in contemporary law from traditional just war theory. Of course, traditional, orthodox just war theory persisted just as strongly in the period 1300-1500, and would for a long time. Yet these new legal views on war had behind them an awareness of the problems of war and politics in Italy, and looked forward to some early modern appraisals of the relations between states.²⁸

The second chapter also treats *jus commune* contributions to the theory of treaties of peace and alliance in the fourteenth century, and opinions pertaining to the conduct of war.²⁹

Opinion in this area also built upon ideas expressed earlier, but many of the fourteenth-

²⁵ On Giovanni da Legnano, pp. 87-9.

²⁶ On Paolo di Castro, pp. 89-93.

²⁷ Paolo did not describe this state as one of permanent war, nor treated it to a sociological analysis on the perils of civil disorder, nor used it as the foundation for a theory of government. But the individual’s rights (and those of a political entity) in the absence of higher or effective civil authority may look forward to some early modern ideas.

²⁸ For brief reviews of Pietrino Belli, Alberico Gentili and Hugo Grotius on war, see the conclusion.

²⁹ For these developments, pp. 96-118.

century contributions were new, or newly applied to the affairs of the Italian cities.³⁰

Bartolus's views were again important for these developments. Innocent IV had written in the thirteenth century that confederations required the validation of a superior authority to be licit, in much the same way that licit war required the authority of a superior. Bartolus countered, very consistently, that confederations among free cities did not require a superior authority. He also noted that cities should be involved in peacemaking amongst themselves, a point clear in practice but not treated in prior legal theory. In succeeding generations comments by students of Bartolus, like Baldus de Ubaldis (c.1327-1400) and his brother Angelus, comments of Giovanni da Legnano and particularly the *Tractatus de confederatione, pace, et conventionibus principum* of Martinus Garatus (d. 1453), gathered and added material on the rights and duties that should be observed in war and peace. Some of the key opinions of these jurists on conduct-related issues will be discussed, not least because they were cited and argued in *consilia* written by Angelus de Ubaldis for Florence, which will be examined in chapter four.

New contributions to legal theory on war were spurred on largely by contemporary Italian politics. Before introducing that context, however, it is worth mentioning a few other factors suggested by scholars as influences on the development of theory. One is that an incipient humanist culture affected, to some extent, attitudes in juristic literature. As noted, Paolo di Castro and Fulgosius both relied on classical citations to support new positions, and some Italian jurists from the mid-fourteenth century were exposed to early humanist culture.³¹ The point has been made perceptively by Richard Tuck that new, and more

³⁰ For example, opinions on the ransom of captives built on thirteenth, if not twelfth, century opinions. See pp. 54-5, for early discussions of *postliminium* in the jurists Irnerius and Placentinus.

³¹ On the humanist contacts of one jurist, Lapo da Castiglionchio the elder, see the essays in *Antica possessione con belli costumi: due giornate di studio su Lapo da Castiglionchio il Vecchio*, ed. F. Sznura (Florence, 2005),

permissive, views on war in the Renaissance stemmed from classical culture and were quite important for the development of early modern theories of war and rights.³² While it is certainly true that humanism influenced later jurists like Alberico Gentili (1552-1608), whom Tuck examines and whom I will touch on in the conclusion, the innovations of the fourteenth century were based on medieval law.³³ Tuck's arguments concerning changes to the theory of war are powerful, and it seems true that new legal views on war influenced early modern approaches to political theory and international relations.³⁴ It appears to me, however, that the basis for those new, even early modern, views, dates to the medieval period, and can be situated more directly within the medieval *jus commune*.

It has also been argued, less plausibly, that developments to the theory of war were strongly influenced by secular chivalric customs. On this view, advanced by James T. Johnson, religious sources contributed the *jus ad bellum* (or justification-related) content of just war theory, while secular sources – based largely on chivalric codes of warfare – supplied the *jus in bello* (or conduct-related) content.³⁵ But in fact codes of conduct for war among the knightly elite did not much influence the theory of just or licit war in the *jus*

particularly R. Fubini, "Lapo da Castiglione tra Niccolò Acciaiuoli e Petrarca. Lineamenti introduttivi a una biografia," pp. 11-29. Though friends with Petrarch, humanism does not seem to have influenced Lapo's legal work. Nor does it seem to have influenced Paolo di Castro unduly. In Fulgosius, while it would be quite early and appears to be unique, there may be some influence.

³² Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford, 2000), ch. 1.

³³ Although even Petrarch and Boccaccio studied law early on, professional jurists tended to maintain a distance from humanism before the 16th century and the rise of the *mos gallicus*. The method of teaching in law classrooms can be characterized as scholastic, and legal commentaries and *consilia* did not usually evince signs of the influence of humanism. Humanism did develop partly out of an urban notarial culture in Italy, however, which grew up in the shadow of the law schools and entailed a lesser legal training. On aspects of humanism and the notarial culture, see Ronald Witt, 'In the footsteps of the ancients: the origins of humanism from Lovato to Bruni' (Leiden, 2000).

³⁴ See Tuck, *The Rights of War and Peace*, especially the introduction and conclusion. Hobbes and Grotius are the focus of his analysis, and he draws the analysis up through Kant.

³⁵ James T. Johnson, *Ideology, Reason and the Limitation of War*, pp. 27-33.

commune.³⁶ The picture is also rather more complex: the *jus ad bellum* tradition as developed by the church had roots in secular Roman norms, while proper conduct was of course underlined by Augustine and later canon law.³⁷ When canon and Roman lawyers turned to address conduct-related, or *jus in bello*, questions, they mainly worked with and adapted existing canon and Roman law, and imported rules from feudal law.³⁸ Nor of course can feudal law and chivalric practice be assimilated. As Matthew Strickland and N.A.R. Wright have pointed out, notable 14th century treatises on war, like the *De bello, represaliis et de duello* (1360) of Giovanni da Legnano (itself a repertory of Roman, canon and feudal law), tried in part to regulate the customs of the *gentes armorum*, and attempted to strengthen the power of civil government over their practices.³⁹ The jurists did not, however, succeed, and some of the battlefield practices of soldiers remained a part of military custom into the early modern period.⁴⁰

Another consideration is the impact of the Hundred Years War on juristic commentary and *consilia* on war. Certainly the Hundred Years War transformed warfare on the continent and brought with it pessimism about the unity of Europe and the possibility of lasting peace. But Bartolus's key contributions on the independence of cities in Italy – essentially contemporary with the early years of the Hundred Years War – grew out of

³⁶ For a good discussion of this, see N. A. R. Wright, "The Tree of Battles of Honore Bouvet and the Laws of War," in *War, Literature and Politics in the Late Middle Ages*, ed. C. T. Allmand (Liverpool, 1976), pp. 12-31.

³⁷ Augustine's *jus ad bellum* views reflected Cicero's where just cause was concerned. The medieval church also developed prohibitions on harming non-combatants in war (e.g., pilgrims, farmers), on using certain weapons (crossbows), on fighting on certain days (the Sabbath, feast days), and of course maintained a focus on obedience and fighting with a spirit of charity, on which see Russell, pp. 22-3. It also upheld the validity of oaths given to an enemy and prohibited lies and traps, at least between leaders.

³⁸ Maurice Keen, *The Laws of War in the Late Middle Ages* (London, 1965), p. 22.

³⁹ See Matthew Strickland, *War and Chivalry: the conduct and perception of war in England and Normandy, 1066-1217* (Cambridge, 1996), pp. 31-4; Wright, "The Tree of Battles of Honore Bouvet and the Laws of War," pp. 26-31.

⁴⁰ E.g., ransom and spoils, which practices changed slowly; see Philippe Contamine, "The growth of state control. Practices of war, 1300-1800: ransom and booty," in *War and Competition Between States*, ed. P. Contamine (Oxford, 2000), 163-193. Although ransom practice was accepted in the *jus commune*, it was not accepted univocally; see p. 114.

peninsular political observations; transalpine wars were not important for those legal innovations. However, truces in the Hundred Years War did send into Italy scores of unemployed soldiers. While mercenaries had been active in the peninsula for a long time before 1360, the second half of the fourteenth century saw an increase in mercenary companies, both domestic and foreign, which contributed to territorial tensions, particularly in Tuscany and the Romagna, and particularly between Florence, Milan, Venice and the Papal States.⁴¹ The territorial ambitions of these leading powers intensified the already complex diplomatic relations of the period, which in turn encouraged the creation of new law to address the conduct of war and peace. To the extent that the Hundred Years War contributed to these peninsular conflicts, it can be said to have had an impact on legal developments.

Of course it was Italian peninsular politics itself which drove the increased conflicts of the fourteenth century, and provide the basic background for new legal theory on war. This context, and the role of law in Italian foreign relations – including that of the *jus commune* – is the focus of the second half of the study. Here, too, a word of introduction should be made concerning the rise of the Italian cities in the high Middle Ages, and their political dynamics in the fourteenth century. In the eleventh and twelfth centuries, local nobles and bishops often played an important role in the governance of the Italian cities, and the emperor interfered often and to some extent successfully in Italian affairs until the fourteenth century.⁴² In the twelfth century, however, largely independent, citizen-led governments began to emerge in a number of northern cities, when merchant classes took

⁴¹ For an overview of the development of mercenary warfare in Italy in the fourteenth century, William Caferro, *Mercenary Companies and the Decline of Siena* (Baltimore, 1998), pp. 1-14.

⁴² Philip Jones, *The Italian City-State: From Commune to Signoria*, offers a comprehensive overview of the political and economic dynamics of the twelfth and thirteenth centuries; and here see pp. 333-43.

advantage of lapses in customary imperial, feudal and episcopal dominion. Rivalries between the independent cities in the thirteenth century were often local, and wealthier communes like Florence spent considerable resources to take control of and expand their *contado*, or surrounding countryside, which provided taxes and provisions.⁴³ The fourteenth century saw a consolidation of power among the leading cities and the transformation of most communal governments into signories. At the same time, the leading northern powers – again preeminently Florence, Milan, the Papal States and Venice – developed broad territorial ambitions, including fairly large swaths of northern Italy. But the expense of war and the relatively equal material strength of the cities made territorial gain difficult, and led to careful and highly calibrated foreign relations. As always in Italy, territory would be gained more easily by treaty, sale or other agreement than by military conquest.

In this atmosphere, the law could, and did, play a key role in inter-city relations.⁴⁴ Treaties of alliance and peace, commercial agreements and documents memorializing liberties, privileges and duties, provided a basic foundation on which inter-city relations were built. In the fourteenth century, as the territorial powers of northern Italy grew and came increasingly into conflict, agreements, including treaties of peace and alliance, tended to involve more parties, and became longer and more detailed.⁴⁵ Cities, and particularly

⁴³ For a more challenging interpretation of the political dynamics between Florence and its countryside, focusing on the Trecento, see Samuel Cohn, *Creating the Florentine State: Peasants and Rebellion, 1348-1434* (Cambridge, 1999).

⁴⁴ The learned law had already played a role in the commercial growth of the cities and their internal organization in the twelfth century. The rise of the cities was driven by commerce, and particularly Roman law, with its detailed treatments of contracts, property and inheritance, offered new mechanisms for the accumulation and preservation of wealth. The preeminent complexity of Roman law was of service in a society with significant merchant interests, and its growth in high and late medieval Italy coincided with the development of a notarial culture which produced an unprecedented amount of sophisticated wills, gifts and other legal documents for private individuals. Philip Jones, *The Italian City-State*, makes brief observations on Roman law and the organization of government, pp. 370-74, and older economic historians, like Armando Saporì, *Le Marchand italien au Moyen Age* (Paris, 1952), have made comments on law and commerce.

⁴⁵ One can compare Florentine treaties from 1200-1300 to those from 1300-1400: published selections are found in Cesare Guasti, *I Capitoli del comune di Firenze: inventario e regesto*, 2 vols. (Florence, 1866-1892).

well-organized, powerful cities like Florence, authored a large number of agreements, as much as possible in their own favor, and demanded their observance. In negotiating, and particularly in disputing over these in the course of diplomacy, the *jus commune* could be a useful tool. As the subject of law school instruction across Italy, the *jus commune* furnished lawyers with a common fund of legal concepts and criteria on subjects like the restitution of property or validity of various contracts, among many others.⁴⁶ Certainly in the frequent disputes that arose from legal agreements, or in fact for any cause of dispute, the *jus commune* could have an active role to play. In particular, this “learned law” did sometimes play a role in arbitration proceedings.⁴⁷ Although probably not frequently relied on, expert legal opinions (*consilia*) rooted in the *jus commune* might be submitted by the parties, or solicited by the arbitrator from an outside jurist to decide the case.

Florence, like other cities in the period, used the law skillfully to advance and protect its interests, in war and peacetime. As Lauro Martines has shown, Florence relied on its cadre of trained lawyers in diplomacy, to argue eloquently for Florentine policies, as well as to hammer out the details of treaties and argue or give counsel on Florence’s legal position in various disputes.⁴⁸ Martines has made excellent observations on the key role lawyers played in governing Florence’s subject territories as well.⁴⁹ He has a strong view of the role

While a generalization, Duecento treaties were often local, featured personal pledges of service, and were less complex than Trecento, and particularly later Trecento, treaties.

⁴⁶ On law school instruction, the literature is large, but see James Brundage, *The medieval origins of the legal profession: canonists, civilians and courts* (Chicago, 2008); also idem, “Teaching Canon Law,” and Andre Gouron, “Some Aspects of the Medieval Teaching of Roman Law,” in *Learning institutionalized: teaching in the medieval university*, ed. J. Van Engen (Notre Dame, 2000), and the large bibliography. Beyond normal subjects like property and contract law, the *jus commune* took customary medieval practices like reprisals within its legal framework.

⁴⁷ Here disputing parties would voluntarily agree to submit their dispute to arbitration and decide upon an arbiter or arbitrator (or a panel of them) to inquire into the issues at hand and decide the case. On the theory of arbitration, see ch. 3, pp. 115-18; on arbitration in practice, see ch. 5; and p. 176 for some bibliography.

⁴⁸ Martines, *Lawyers and Statecraft*, pp. 311-84.

⁴⁹ *Ibid.*, pp. 220-45. Martines has used the variety of functions lawyers fulfilled to highlight the complex bureaucracy of Florence even in the fourteenth century, by which time the city can be considered a territorial

law played in Florentine territorial administration and foreign relations; even with respect to the latter, he finds that cities often took their obligations to each other seriously and followed legal forms carefully.⁵⁰ This study generally follows that lead and also finds that the law had some efficacy, shaping and constraining the actions of cities. The focus here, however, is on the law more than lawyers, and the substance of legal theory as applied in one of Florence's great conflicts with Milan. The aim is to allow a closer view of the scope but also the real limits of the law in resolving inter-city disputes.

As a first look at the law on war in context, chapter four will examine some of the uses to which just war theory was put in Florence. It will be seen that even in the thirteenth century, Florentine public speeches justified the city's belligerent responses with reference to just war theory along Augustinian lines. Elements of the just war tradition were invoked as well in Florentine diplomatic letters written by its humanist chancellors, including Coluccio Salutati (1331-1406) and Leonardo Bruni (c. 1370-1444), indicating a long continuity in the way that Florence approached the public justification of its wars. In fact, even in his more rhetorical works, like the noted *Laudatio florentine urbis* (c. 1403-1404), Bruni could draw on an elaborate just war discourse (and his legal training) to describe the aims of Florentine foreign policy.⁵¹ Such a reading can temper the judgment of scholars like Mikael Hornqvist, who see in Bruni's rhetorical works an open imperialism rather than a

state. He is careful however to separate Renaissance "states" from the modern version(s), since the Church formed a "second order" within the state, and territorial control (legal, fiscal, administrative), while it existed, was not nearly as complete as in modern European states. See pp. 405-76. Literature on the Renaissance state is also large, but see the essays in *Florentine Tuscany: Structures and Practices of Power*, ed. W. Connell and A. Zorzi (Cambridge, 2000), and those in *The Origins of the State in Italy, 1300-1600*, ed. J. Kirshner (Chicago, 1996).

⁵⁰ Martines, *ibid.*, pp. 374-82.

⁵¹ On the *Laudatio*, see below pp. 151-5.

more careful presentation of Florence's interventions abroad.⁵² However, just war arguments did not find as significant a place in internal council debates in Florence, where the logic of communal interest and danger, cost and benefit, usually prevailed.

Indeed, despite the just war rhetoric, Florence's foreign policy was expansionist at key moments in the fourteenth century, and particularly in the latter half. Florence's expansionism in the 1380s, and Milan's as well, set the stage for the prolonged conflict between the two rising territorial powers between 1388-1402.⁵³ The fifth chapter of the thesis will re-examine this conflict, particularly from the perspective of Florence's diplomatic disputes in the period from 1392-1402. The intention is to reconsider the role of the law in Florentine wartime diplomacy, and the process by which policies were contested and negotiated in the course of diplomacy. War may have been a usual expedient in the period, but there was usually a willingness to review disputes at length within a diplomatic framework, and sometimes to turn to "extrajudicial" procedures like arbitration to resolve them. Solutions might be temporary, and each side certainly sought its own advantage, but such procedural diplomatic negotiations and quasi-legal judgments, in all their complexity, added channels of communication in inter-city relations.

From an examination of diplomatic sources, it is clear that Florence considered its relations with its neighbors through a lens of rights and obligations laid out in agreements.

⁵² Mikael Hornqvist, "The Two Myths of Civic Humanism," in *Renaissance Civic Humanism: Reappraisals and Reflections*, ed. J. Hankins (Cambridge, 2000), pp. 105-42.

⁵³ Florence had re-established control of surrounding towns, including Pistoia and Volterra, in the 1350s and 60s, and in the same period looked on as Pope Clement VI successfully regained possession of the Papal States, which bordered significantly on Florentine Tuscany. On the Papal States in the period, Peter Partner, *The Lands of St Peter: The Papal State in the Middle Ages and the Early Renaissance* (London, 1972), is a standard guide. Disputes with the Papacy eventually led to the "War of the Eight Saints" between 1375-78. On the war, Gene Brucker, *Florentine Politics and Society, 1348-1378* (Princeton, 1962), pp. 297-335. After the war, in 1384, Florence purchased Arezzo for 40,000 florins, and angered old rival Siena by laying claim to towns and castles uncomfortably close to it. At the same time, Florence looked on, again with anxiety, as Milan pushed into eastern Lombardy under its new ruler Giangaleazzo Visconti.

Relations between cities were often predicated on personal relationships, but fulfilling written promises and agreements was the surest way to measure those relationships. Even small violations of treaty conditions would likely draw a response. To enemies like Milan and Siena, Florence might complain of a violated sphere of influence that had been agreed upon by treaty, or the violation of commercial rights.⁵⁴ Disputes of course also went beyond the scope of treaties.⁵⁵ The usual response to charges of misconduct, as in this case, was to declare innocence, but to indicate a willingness to resolve the issue through a diplomatic process. Of course there were real limits to the usefulness of the law in diplomacy, and diplomacy itself: disputes, and the contrary ambitions which drove them, often became so intractable that law and persuasion could have no great place in resolving them. Yet the law deserves study as a constraint upon foreign policy, and as a key foundation for understanding relations between the cities, and other political actors, of the period.

Certainly in the early years of its conflict with Giangaleazzo Visconti, Florence did evince a willingness to resolve disputes through diplomatic channels, but nevertheless pressed its claims with skill, using its top lawyers to do so. Florence also called upon the services of renowned foreign jurists, whose skills and reputation might add credence to its causes. In the Milan conflict, Florence secured advice from the noted jurist Angelus de Ubaldis, who taught in Florence in 1388 and then at Rome, Bologna and Perugia in the 1390s, before returning to teach at Florence at least in 1398 and 1399.⁵⁶ His legal opinions for some of Florence's wartime disputes can be dated between 1392 and 1398.⁵⁷ In his

⁵⁴ Cases in which these are alleged are treated in chapters four and five.

⁵⁵ In one case in 1394, Milan attempted to build a dam that would threaten Mantua, and faced insistent protests from Mantua, Florence and their other allies, who eventually prevailed; see below, pp. 182-5.

⁵⁶ On Angelus's career, A. Gloria, *Monumenti della Università di Padova, 1222-1318* (Bologna, 1972), pp. 178-80.

⁵⁷ During the 1390s, when Angelus produced some *consilia* for Florentine disputes, Angelus's famous brother, Baldus, was already teaching at Pavia. See Joseph Canning, *The Political Thought of Baldus de Ubaldis*

consilia, Angelus subjected the legal questions before him to the rigors of the *jus commune*, and produced opinions which (with one exception) strongly supported Florence's positions. It is generally unclear whether the *consilia* were submitted to an arbitrator in formal dispute proceedings on Florence's behalf, or directly to a foreign disputant.⁵⁸

Angelus's *consilia* speak to the nature of Florentine diplomacy and the role of law within it. In chapter four, five *consilia* written by Angelus and pertaining to Florence's war with Milan will be examined in their political context. A sixth case, on a dispute between Pisa and Lucca during the same conflict, is included as well. Each case offers insight into disputes Florence was involved with, and into Florence's often careful approach to its allies and enemies. In the opinions, Angelus had no occasion to evaluate the overall justice of Florence's conflict (though his general opinion on bilateral justice was mentioned earlier). Rather, he dealt with questions concerning prisoners of war, adherents and supporters, reprisals against merchants and the duties of allies to provide material support for each

(Cambridge, 1987), pp. 1-6, for Baldus's career. Angelus addressed one *consilium*, on a dispute with Milan in 1398, directly to Baldus; see below, pp. 216. As far as Angelus's connections to Florence, he was familiar with the old Florentine Cavalcanti family by 1385 (Gloria, p. 179), and seemed to maintain connections to the city during his travels in the early 1390s.

⁵⁸ One *consilium* (no. 257; see p. 162 below), however, appears to be a *consilium sapientis* written on behalf of a Florentine court. It was a Milanese spy case tried in Florence. Unfortunately, I have not yet been able to find full record of arbitration proceedings involving Angelus, Florence and foreign disputants, so cannot say with assurance in what manner the *consilia* were submitted. An arbitration should include a *compromissum* and *sententia*, instruments which committed and then gave a judgment to the parties in arbitration. However, there is a documented arbitration for Angelus and Milan. He wrote a *consilium* for a dispute between Montferrat and Savoy in which Giangaleazzo Visconti was named as the arbitrator; in that case, it appears that Angelus's *consilium* was solicited by Visconti. The practice of a judge (here the arbitrator) requesting a *consilium sapientis* from a jurist was common, and the opinion was usually binding on the court. For the *consilium*, see Angelus, *Consilia* (Frankfurt, 1575), fol. 263ra-265ra. For reference to the case, D. M. de Mesquita, *Giangaleazzo Visconti, Duke of Milan (1351-1402): A Study in the Political Career of an Italian Despot* (Cambridge, 1941), p. 212, notes that Giangaleazzo stepped in as arbitrator to settle a land dispute between Montferrat and Savoy in the summer of 1397, in order ultimately to protect his own territory. Angelus's *consilium* opens by stating, "[Montferrat and Savoy submitted this] before the blessed and illustrious lord Duke of Milan, Count of Virtue, etc., as arbiter and arbitrator, proceeding through himself and his commissioners or auditors, concerning law and fact, and in fixing a sentence by his absolute power." Angelus then goes on to address the issues and decide the case. In the *consilia* reviewed in chapter 5, there is no indication that Angelus acted as an arbitrator or on behalf of one, as there is here. For at least two of the Florentine *consilia*, Angelus was resident in Florence (in 1398), and would not likely be accepted to decide the case; rather he would be writing *pro parte* for his client.

other. In taking up these questions, he had to arrive at compelling legal interpretations, based on the *jus commune*, which might sway the other side or an arbitrator. His interpretations may not have always won the day, but some of the opinions were compelling enough to be circulated and used by contemporary jurists. Some evidence of this is seen in the fact that Angelus's *consilia* were cited in the *Tractatus de confederatione, pace, et conventionibus principum* of Martinus Garatus, a legal guide on peace, alliance and similar topics, written less than a half century later. Along with indicating that there was some reception of his ideas, Garatus's inclusion of the *consilia* in his treatise probably reflects Angelus's reputation as a jurist for inter-city disputes.⁵⁹ For the questions Angelus treated, the background legal theory in chapter three should help to allow a closer look at the opinions themselves.

The most rigorous of the procedures found in diplomacy for dispute resolution was again arbitration, a subject which deserves more study in the age of the territorial states as well as that of the communes. But it seems that a willingness to submit disputes to arbitration was not unusual. This is not to say, even with the submission of *consilia* and the other trappings of legal procedure, that dispute resolution on the inter-city level was impartial or particularly long-lasting, or that appeals to forms of dispute resolution were always made in good faith; but again that the law, and as sophisticated a tool as the *jus commune*, had a role to play in containing open conflict. Beyond arbitration itself, greater attention to the legal and processual nature of diplomacy in the period appears to be warranted, to better understand the relations between the political powers in late medieval

⁵⁹ Garatus in fact cites four different *consilia* of Angelus on the subject of confederation and adherents; see Martinus Garatus, *Tractatus de confederatione, pace et conventionibus principum*, ed. A. Wijffels, in *Peace Treaties and International Law in European History*, ed. R. Lesaffer (Cambridge, 2004), pp. 433-5, qu. 52, fn. 132, 133, 136 and 137. *Consilium* 257, cited by Garatus (fn. 132), will be examined in chapter five. No other jurist has four *consilia* cited in the treatise.

Italy. More narrowly here, such a focus will allow for a re-reading of Florentine foreign policy in the period of 1392-1402. It will be argued in chapter five that Florentine policy was more careful and conservative, and less disorganized and fearful, than has sometimes been observed.⁶⁰

⁶⁰ Particularly by Gene Brucker, *The Civic World of Early Renaissance Florence*, pp. 102-86.

Chapter 2

Laws of War and the Just War tradition to 1300

In the twelfth century, canon lawyers began to draw together what would later become known as the medieval “just war” tradition. The Church had long been concerned by endemic violence that pulled at the social fabric of medieval Europe, and some of its first coordinated efforts to stem the frequency of conflict relied on active intervention. The most notable examples were the Peace and Truce of God movements, begun in the tenth century, in which the Church preached against violence and oversaw rituals of reconciliation between laymen.⁶¹ Although the effects of the movements were limited, they demonstrated the Church’s goals of protecting its property and members, and acting as supreme moral guide in Europe, supported by an asserted right to define, judge and punish illicit violence. With the growth, and organization, of canon law in the late eleventh and twelfth centuries, and the inclusion of questions pertaining to war within it, just war discussions could evolve as part of a growing commentary literature. Canon lawyers thus asked, and construed answers to such questions, as which wars were moral and lawful to fight, which were illicit, under which circumstances, and for whom. The expansion of canon law instruction across Europe in the high middle ages, and the creation of new papal law which stimulated it, allowed for

⁶¹ For these movements, see T. Head and R. Landes, ed., *The Peace of God: Social Violence and Religious Response in France around the Year 1000* (Ithaca, 1992), particularly H.-W. Goetz, “Protection of the Church, Defense of the Law, and Reform: On the Purposes and Character of the Peace of God,” pp. 259-79; and Thomas Head, “The Development of the Peace of God in Aquitaine (970-1005),” *Speculum* 74: 3 (July 1999), pp. 656-686; H. E. J. Cowdrey, “From the Peace of God to the First Crusade,” in *The Crusades and Latin Monasticism, 11th-12th Centuries* (Aldershot, 1999), II, pp. 51-61, and idem, “The Peace and the Truce of God in the Eleventh Century,” *Past and Present* 46 (1970), pp. 42-67.

more complex treatments of the legal theory of war. These reached a high point in medieval canon law in the thirteenth century.

In fact, medieval canonists who treated war built directly on the justifications for Christian involvement in warfare developed in the late fourth and early fifth centuries by Saint Augustine. Early Christian writers had not been strong in their support for Christian participation in war, with Church Fathers including Origen and Tertullian favoring no Christian involvement at all.⁶² But after Christianity became the official religion of the Roman empire, ecclesiastics like Ambrose and Augustine felt a pressure to accommodate Christian precepts to Roman military requirements, and justify to Christian soldiers their service in the Roman army, engaged as it was in constant warfare on the frontiers. Thus Augustine's mentor Ambrose accepted the necessity of military service in defense of one's country, and saw threats to Christianity as threats to the Roman empire and vice versa.⁶³ As a bishop in northern Africa, Augustine also faced challenges from heretical groups which he accused of violence and provocation.⁶⁴ Facing the question of Christians engaged in actual warfare, Augustine thus responded in part to his contemporary situation when he gave them a larger scope of action. He developed Ambrose's line of thought by introducing language and concepts that were new, and his remarks would soon represent the most significant step in a post-Constantinian shift of orthodox Christian opinion on the question of Christian involvement in warfare. Augustine's scattered comments on war did not form anything like a coherent and unified theory, but they were consistent enough, and his doctrinal authority

⁶² Louis Swift, "Early Christian Views on Violence, War, and Peace," in *War and Peace in the Ancient World*, ed. Kurt A. Raaflaub (Malden, MA, 2007), pp. 279-96.

⁶³ *Ibid.*, pp. 287-88; James T. Johnson, *The Quest for Peace: Three Moral Traditions in Western Cultural History* (Princeton, 1987), pp. 53-4. Also *idem*, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740* (Princeton, 1975).

⁶⁴ In particular, a faction of Donatists called Circumcellions. For Augustine's response to this sect, see his Letter 88, in Augustine, *Political Writings*, ed. E. M. Adkins and R. J. Dodaro (Cambridge, 2000), pp. 147-52.

was sufficient to make him, through Gratian's *Decretum*, the essential guide to the subject for the medieval Church.

Augustine's contribution to just war theory had both Roman legal and Christian moral components, though he was not concerned to make a distinction between them. On the legal plane, Augustine wrote that just wars "were typically" defined as those which "avenge or punish injuries" (*ulciscuntur iniurias*).⁶⁵ Almost certainly influenced by Roman legal sources, and echoing Cicero, he defined injuries as the failure of one people to restore or make amends for something they took from or did unjustly to another, which would include the failure to punish one's own citizens for faults they committed against another nation.⁶⁶ It is implied by Augustine, and later made clear by medieval jurists under very different political conditions, that war was conceived as a quasi-judicial punishment with the offended nation acting in its own cause. However, there was no further explanation of "injuries" in Augustine, and so little limitation on what an injury could be.⁶⁷ Augustine also viewed a war of immediate defense, to repel an attack, as naturally legitimate. Like the idea that wars avenged or punished injuries, the defense of one's "homeland," or *patria*, was a common concept in Roman law and culture, and it persisted in the legal thought of the middle ages.⁶⁸

⁶⁵ Augustine, *Quaestiones in Heptateuchum*, vi, 10, in *Corpus scriptorum ecclesiasticorum latinorum*, ed. J. Zycha (Prague, 1895), vol. 28, sec. 3, pt. 3, p. 428. Cf. Cicero, *De Republica*, ed. P. Krarup (Milan, 1964), p. 129: 'Illa iniusta bella sunt, quae sunt sine causa suscepta. Nam extra ulciscendi aut propulsandorum hostium causam bellum geri nullum potest.' Cicero's definition was preserved in Isidore of Seville's *Etymologiae*, bk. 18, 1, 2-3.

⁶⁶ *Quaestiones in Heptateuchum*, p. 428., 'Iusta autem bella ea definiri solent quae ulciscuntur iniurias, si quae gens vel civitas quae bello petenda est, vel vindicare neglexerit quod a suis inprobe factum est, vel reddere quod per iniurias ablatum est.'

⁶⁷ That just wars 'avenge injuries' (*ulciscuntur iniurias*) became a fixture in medieval law, beginning with Gratian. The term 'injuries' usually had a broad, undefined significance, which could include a violation of rights and obligations. In Roman law, *iniurias* could be anything done illegally which caused damage; see generally D.9.2.5 in *Corpus juris civilis*, 3 vols., ed. T. Mommsen, *et al.* (Berlin, 1928).

⁶⁸ On the defense of the *patria* and its meanings, Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322* (Princeton, 1964), pp. 435-52; and Ernst H. Kantorowicz, "Pro patria mori in

Augustine's contributions to Christian moral theory concerning war were particularly significant for subsequent canon law.⁶⁹ Facing Biblical precepts like "turn the other cheek" (Matt. 5:39), Augustine shifted his attention from the external act of fighting to the inward disposition of the soldier. In doing so he came to the view that the internal attitudes of patience and mercy could allow soldiers to fight without sinning.⁷⁰ Although punitive, war could be an almost paternal act, and his approach to it was broadly analogous to that on heretics, where the same inward virtue protected the Christian from sin as he coerced the offender to return to the fold.⁷¹ Correspondingly, Augustine admonished belligerents to avoid a love of violence, cruelty and the desire for conquest in war – such evil intentions were "culpable," according to Augustine, but it remained unclear if those would affect the validity of the war.⁷² Like Ambrose, Augustine urged soldiers to fulfill their military duty to their homeland, and did not counsel any form of physical restraint toward the enemy until the conclusion of a war. Nor did he attempt to distinguish innocent from guilty, or noncombatant from combatant in the course of a conflict.⁷³ His various comments were

Medieval Political Thought" *American Historical Review*, 56 (1951). For the idea in a somewhat later period, Norman Housely, "Pro deo et patria mori: Sanctified Patriotism in Europe, 1400-1600," in *War and Competition between States*, ed. P. Contamine (Oxford, 2000), pp. 221-48.

⁶⁹ For what follows, see Frederick Russell, *The Just War in the Middle Ages* (Cambridge, 1975), pp. 16-39; R. H. Hartigan, "Saint Augustine on War and Killing," *Journal of the History of Ideas*, 27:2 (1966), pp. 195-204; H. Deane, *The Political and Social Ideas of St. Augustine* (New York, 1966), pp. 154ff.; and Robert Regout, *La doctrine de la guerre juste de Saint Augustin a nos jours* (Paris, 1935), pp. 39-44. For a recent view that tries to rehabilitate the integrity of Augustine's writings on war, see John M. Mattox, *Saint Augustine and the Theory of the Just War* (London, 2006). Mattox attempts to mold Augustine's various comments into a theory that sometimes goes beyond what the texts will support, e.g., on proportionality and discrimination, pp. 60-64.

⁷⁰ Russell, *The Just War*, p. 17. As Russell notes, Gratian picked up on these ideas in his *Decretum*: C.23 q.1 c. 2; C.23 q.5 c.8; C.23 q.4 c.44.

⁷¹ Mattox, *Saint Augustine*, pp. 65-73; Russell, pp. 23-6.

⁷² Augustine, *Contra Faustum Manichaeum*, xxii, 74, in *Patrologia latina*, ed. J.-P. Migne (Paris, 1844-65), vol. 42, col. 447: 'Nocendi cupiditas, ulciscendi crudelitas, inpacatus atque inplacabilis animus, feritas rebellandi, libido dominandi, et si qua similia, haec sunt, quae in bellis iure culpantur.'

⁷³ Hartigan, "Saint Augustine," pp. 201-4. Hartigan finds Augustine "unconcerned with the fate of the innocent" (p. 203). In the case of moral enemies, Augustine offered no way of discerning innocent from guilty, presuming them all morally culpable.

thoroughly insufficient to deal with the issues of conduct in war, but they reflect his primary interest in justifying Christian involvement.⁷⁴

With his emphasis on the inward disposition, and a renewed focus on the wars of the Hebrew Bible, Augustine's view of war could be more expansive than that of his predecessors. Most significantly, he affirmed that wars against the enemies of God were just and necessary, adding to the category any wars "ordered" by God.⁷⁵ He added elsewhere that it was not permitted to question such wars, which were fought to strike fear into men or suppress their arrogance.⁷⁶ In another example from his *Quaestiones in Heptateuchum*, the Israelites waged an offensive war against the Amorites because the latter had refused to allow the Israelites free passage through their land. The war was just, but the reason was not simply divine fiat. By refusing free passage, the Amorites had essentially refused a right that was available by a common "law of human society" (*jure humanae societatis*) and thus could be opposed by war.⁷⁷ Augustine did not explain this "law of human society," but it would seem that he upheld free passage through another's land as a

⁷⁴ Clerics, however, were prohibited from participating in wars. Augustine restricted physical fighting to soldiers (Russell, *The Just War*, p. 22), which became the Church's position. For individuals facing violence from an attacker, Christian or non-Christian, the situation was somewhat different. Augustine held that they were able to defend themselves according to human law, but according to the higher Christian law they should turn the other cheek: Hartigan, pp. 196-8; Russell, p. 18.

⁷⁵ *Quaestiones in Heptateuchum*, p. 428: '...sed etiam hoc genus belli sine dubitatione iustum est, quod deus imperat, apud quem non est iniquitas et novit quid cuique fieri debeat. In quo bello dux exercitus vel ipse populus non tam auctor belli quam minister iudicandus est.'

⁷⁶ *Contra Faustum*, col. 448: 'Bellum autem quod gerendum Deo auctore suscipitur, recte suscipi, dubitare fas non est, vel ad terrendam, vel ad obterendam, vel ad subjugandam mortalium superbiam...'

⁷⁷ *Quaestiones in Heptateuchum*, p. 352: 'Hic certe Israhel possedit civitates Amorrhaeorum quas bello superavit, quia non eas anathemavit; nam si anathemasset, possidere illi non liceret hic inde ad usus suos aliquid praedae usurparet. Notandum est sane quemadmodum iusta bella gerebantur. Innoxius enim transitus negabatur, qui iure humanae societatis aequissimo patere debebat. Sed iam ut deus sua promissa compleret, adiuvit hic Israhelitas...'

right accorded by the law of nations (*jus gentium*).⁷⁸ It was an example that jurists would take up even much later, as part of a justification of war.⁷⁹

Augustine made no distinction in his comments between divinely, morally and legally just wars. But his discussion of war in the *Quaestiones in Heptateuchum* is remarkable for justifying the wars of the Hebrew Bible partly with reference to a contemporary Roman legal framework. His formal legal definition of just war, drawn probably from Roman law, was introduced in a passage commenting on the wars of Joshua.⁸⁰ And in his discussion of the Amorites, Augustine appeared to appeal to a legal discourse in mentioning a common “law of human society.” Rather than qualifying biblical wars, it seems that Augustine tried to make them more comprehensible, and to some extent more acceptable, to contemporary audiences. Indeed, though Augustine urged that only necessary wars be undertaken, he believed wars could be waged to punish the moral faults of another people.⁸¹ He did not thus distinguish between an offensive and defensive war, and gave no full sense of the rights or liabilities of either side, either in going to war or conducting it. It has to be admitted, however, that these issues were beyond Augustine’s expertise and interest. His significance lies in standing at the head of a long, and here inchoate, tradition of the Christian just war; in his own age he aimed to valorize Christian military service by introducing the idea of fighting with the proper spirit, and reinforced the idea that for Christians there could be morally just and necessary wars.

⁷⁸ In Roman law, a rustic servitude called *servitus viae* gave the holder a right of passage through his neighbor’s land, while the use of public roads (*publicae viae*) in the Empire was protected by right. But this was a part of civil law and not the *jus gentium*, so that this rule appears to be Augustine’s own. On this kind of servitude, Adolph Berger, *Encyclopedic Dictionary of Roman Law*, in *Transactions of the American Philosophical Society*, N.S., 43:2 (1953), s.v. “via,” p. 763, and D.8.3.1.

⁷⁹ See the conclusion. And on Gratian’s use of the example of the Amorites, see below p. 28, n. 89. Decretists repeated the point in their glosses on the Decretum at C.23 q. 2 c.3.

⁸⁰ *Quaestiones in Heptateuchum*, p. 428.

⁸¹ P. Brown, “St. Augustine’s Attitudes to Religious Coercion,” *Journal of Roman Studies*, 54 (1964), pp. 107-116; Russell, pp. 25-6.

It was Gratian, an otherwise unknown Bolognese monk of the twelfth century, who next treated war in the Christian context extensively. In the 1140's Gratian drew together and organized the most comprehensive set of Church canons to that time in his *Decretum*, which quickly became the leading collection of canon law. In his long Causa 23, Gratian set out a number of texts, most prominently those of Augustine, to discuss the role of Christians in warfare and the conditions under which wars might be justly waged. Borrowing directly from Augustine, Gratian held that warfare itself was not a sin; only cruelty and an implacable fighting spirit, a desire to harm and a will to conquer, were culpable.⁸² Likewise Gratian emphasized the inward attitude of the belligerent, particularly his patience, and compared war again to paternal love, which corrected with benevolence and benign asperity.⁸³ For the soldier, the highest duty was obedience to his commanders; as scripture held, a soldier should be content with his wages, and should not fight for the sake of spoils.⁸⁴ Following the Augustinian line, Gratian took the return of society to peace as the object of war, and required that wars be fought from necessity.⁸⁵

On the question of what constituted a just war, Gratian offered the definitions of Isidore of Seville and Augustine before giving his own. In the second *quaestio* of Causa 23, he cited a passage from Isidore of Seville's *Etymologies*, that "just wars were waged on edict to repel enemy attacks or to recover goods."⁸⁶ After citing Augustine's definition,

⁸² Gratian, *Decretum Gratiani*, in *Corpus Juris Canonici*, vol. 1, ed. A. Friedberg (Leipzig, 1879), C.23 q.1 c.4-5

⁸³ *Ibid.*, C.23 q.1 c. 2

⁸⁴ C.23 q.1 c.5. Gratian also wrote that the sins of an unjust leader (i.e., an unjust war) would not stain the soldiers who fought justly and like Christians (C.23 q.1 c.4).

⁸⁵ C.23 q.8 c.15

⁸⁶ C.23 q.2 c.1, from Isidore of Seville, *Etymologies*, bk. 18, 1, 2-3: 'Iustum bellum est, quod ex praedicto ingeritur de rebus repetitis aut propulsandorum hostium causa.'

Gratian then gave his own version: a just war was waged on edict and avenged injuries.”⁸⁷

That just wars were waged on a public edict – implying in Roman law a duly constituted public authority – was a key element of the definition for medieval commentators.⁸⁸ Gratian himself was not focused on exactly which secular authorities had the capacity to declare war, and other commentators would grapple with the issue more extensively, in a period when the legal authority of a major or minor nobleman, or a city, to formally declare war was contestable and uncertain. Nor did Gratian further describe “injuries,” but again the term had both a moral and legal connotation. Like Augustine, Gratian envisioned war as avenging injuries to the goods, persons or rights of an offended people, waged either immediately and in self-defense or after a period in which the offending people had failed to rectify their transgression.⁸⁹ On a moral level, those who committed such crimes were sinful and punishing them could be a licit means of correction.⁹⁰

For Gratian, writing after the first crusade and aware that clerics sometimes participated directly in conflicts, the question of the Church’s role in war was of the first importance. Gratian generally forbade clerics from direct involvement in war, and they

⁸⁷ *Ibid.*, C.23 q.2 d. p. c.2: ‘Cum ergo iustum bellum sit, quod ex edicto geritur, vel quod iniuriae ulciscuntur.’ The *vel* is taken by Russell to mean *and*, rather than *or* (pp. 63-4, n. 29). This is sensible and has the backing of Lewis and Short. Otherwise Gratian’s definition would seem classical, and lose any claim for inclusion in just war theory.

⁸⁸ Augustine, *Contra Faustum*, cols. 447-8, had also written that God or any legitimate authority could order war: ‘...sive Deo sive aliquo legitimo imperio iubente, gerenda ipsa bella suscipiuntur...’, and that a ruler (likely the Emperor is intended) had the authority to wage war: ‘...ut suscipiendi belli auctoritas atque consilium penes Principem sit.’ Interestingly, when Gratian quoted this passage at C.23 q.1 c.4, he changed *principem* to the plural, *principes*, indicating that a number of authorities might be able to declare war, but without further comment.

⁸⁹ Gratian included Augustine’s commentary on the Amorites, in which denial of free passage gave rise to a just war, at C.23 q.2 c.3: ‘Notandum sane est, quemadmodum iusta bella gerebantur a filiis Israel contra Amorreos. Innoxius enim transitus negabatur, qui iure humanae societatis equissimo patere debebat.’

⁹⁰ Hartigan, “Saint Augustine on War and Killing,” p. 199, makes this point for Augustine, whose views on the moral guilt of the enemy Gratian inherited.

were not allowed to shed blood, but the Church could have a role in initiating war.⁹¹

According to Gratian, it could persuade or exhort the secular authorities to war (using *persuadere* and *exhortari*), but he also indicated that the Church could order war on its own authority (*sua auctoritate*).⁹² Elsewhere, too, Gratian explicitly held that for the defense of the faith the Pope could summon anyone, apparently directly, to protect against infidels.⁹³ In general, Gratian clearly expected lay authorities to come to the defense of the Church when necessary (and he attached penalties to the failure to do so), though he did not try to assert the Church's authority over secular rulers in military affairs in general or limit their sphere of action.⁹⁴

Although Gratian offered no explicit theory of crusade that would reserve to the Pope control over the initiation and direction of a holy war, his treatment of heretics and infidels indicated that religious war was an acceptable form of punishing and correcting them. One of Gratian's central aims in Causa 23, in fact, was to reinforce the Church's authority to correct and punish its intransigent enemies.⁹⁵ In a more organized and concentrated manner than Augustine, Gratian's treatment of heretics and infidels in this

⁹¹ C.23 q.8 c.30, on the prohibition against shedding blood; they also, and famously, could not order blood to be shed, which was a technicality. The Church did as much by calling for defense and war. Russell, pp. 78-9, 186-94, reminds us that the line on clerical participation in war – particularly for regalian bishops who had the rights of secular rulers – was less than clear.

⁹² C.23 q. 8 d.p.c. 6; C.23 q.8 d.p.c 18: 'Sacerdotes, etsi propria manu arma arripere non debeant, tamen vel his, quibus huiusmodi officia commissa sunt, persuadere, vel quibuslibet, ut ea arripiant, sua auctoritate valeant inperare.' On the coercive powers of the Church according to Gratian, see Stanley Chodorow, *Christian Political Theory and Church Politics in the Mid-Twelfth Century: The Ecclesiology of Gratian's Decretum* (Berkeley, 1972), pp. 223ff., and p. 240 for discussion of this citation.

⁹³ C.23 q. 8 d.p.c 28: 'Licet etiam cum B. Leone quoslibet ad sui defensionem contra adversarios sanctae fidei viriliter adhortari, atque ad vim infidelium procul quosque citare.' Leo IV's original pronouncement took place amidst the alarm caused by the Arab raids on the Italian coast near Rome around 846 to 849.

⁹⁴ Secular authorities faced serious penalty for failure to defend the Church when necessary, e.g. C.23 q.5 c.25: 'Preterea, sicut principibus et potestatibus fidem et reuerentiam exhiberi cogimur, ita secularium dignitatum amministratoribus defendendarum ecclesiarum necessitas incumbit. Quod si facere contempserint, a communione sunt repellendi.' A broader attempt to limit the military powers of secular rulers, and subordinate them to the Church, would have been unrealistic.

⁹⁵ See also C.24, on the penalties for heretics and excommunicates; and on that title and its genesis, Anders Winroth, *The Making of Gratian's Decretum* (Cambridge, 2000), pp. 34-66.

section focused on coercion and force as a means of correction.⁹⁶ Like Augustine, he cited the conflict of the Israelites against the people of Ai as an example of divinely commanded war, and maintained that the Church had God's authority to punish the wicked on earth.⁹⁷ Such malefactors, particularly the rebellious, schismatics and heretics, were a threat to the faithful and themselves, and religious authorities – the bishops and ultimately the pope – were responsible for their discipline and return to orthodoxy.⁹⁸

Concerning the *jus in bello*, or conduct in war, Gratian did not comment extensively, but he did include brief texts in four important areas: faith given in war, the status of non-combatants, third-party aid and the distribution of spoils. All of the opinions would become standard points of reference and be widely accepted in the medieval *jus commune*. For the first, when faith was promised to an enemy (e.g., a promised safe passage, truce or indeed peace), it had to be upheld. Absent any specific promises, the ambushes, stratagems and ruses that were frequently used during warfare were all legally acceptable, and Gratian quoted the Hebrew Bible in support.⁹⁹ On the status of non-combatants, Gratian repeated the Church's position from the Peace of God movement that clerics, monks, preachers and their converts, merchants, women and the unarmed poor were ordinarily protected from violence on pain of penance or excommunication.¹⁰⁰ This was hardly ever, if at all, legally enforced, but with Gratian the notion became a part of the canon law tradition.

⁹⁶ C.23 q. 4 cc. 36-50. E.g., C. 23 q.4 c. 49, 'Gratianus? Breuiter monstratum est, quod boni laudabiliter persecuntur malos, et mali dampnabiliter persecuntur bonos;' c. 50, 'Si ea de quibus uehementer Deus offenditur, insequi uel ulcisci differimus, ad irascendum utique diuinitatis pacienciam prouocamus;' c. 51, 'Ea uindicta, non prohibetur, que ualet ad correctionem, que etiam ad misericordiam pertinet, nec inpedit illud propositum, quo quisque paratus est ab eo, quem correctum esse uult, plura perferre.'

⁹⁷ C.23 q.2 c.2; and C.23 q.4 cc. 36-50

⁹⁸ E.g., C.23 q.4 c. 38 ('That heretics may be pulled back to the faith unwillingly'); C.23 q.4 c.39 ('That heretics profitably endure what the faithful inflict upon them'); C.23 q.4 cc.40-43, ('That the Church and Christians pursue heretics rightfully'); C.23 q.5 c.46 ('Whoever dies fighting infidels merits heaven')

⁹⁹ C.23 q.2 c.2

¹⁰⁰ C.24 q.3 cc.22-5.

Gratian also validated the aid given to associates or friends under attack, stating that those who did not help to repel an attack, but could have, were at fault as much as the actual attackers.¹⁰¹ The example given was of personal aid, and Gratian did not apply it to third-party aid in war, though by a simple extension of the principle later jurists would justify third-party aid explicitly, as a moral duty whose negligence would give rise to some level of culpability.¹⁰² Finally, on the question of spoils, Gratian adduced a passage influenced by Roman law which held that spoils gained in war should go to the prince, who could in turn distribute them to soldiers according to merit.¹⁰³ As *jus in bello* discussions these were slim beginnings in canon law, but Gratian's opinions would become standard positions in the learned law, as it expanded its focus on conduct in the fourteenth and fifteenth centuries.¹⁰⁴

Canonists after Gratian followed his interpretation of the just war while frequently trying to clarify (not always successfully) or expand the analysis. Additions and variations were formulated by the Decretists, the commentators on Gratian's *Decretum*, whose substantial output dated from the publication of the *Decretum*, around 1140, until the early thirteenth century, and the Decretalists, who commented most importantly on Pope Gregory IX's collection of *Decretals*, published in 1234. Like the growth of legal commentaries in general, these discussions of war and violence responded to a perceived need to amplify Gratian's ideas, particularly as canon law instruction spread quickly in the twelfth century and as the Church took a more aggressive role in the enforcement of Christian orthodoxy.

¹⁰¹ C.23 q.3 c.7: 'Qui enim non repellit a socio iniuriam, si potest, tam est in uicio quam ille, qui facit.'

¹⁰² E.g., the Renaissance civilian, Alberico Gentili (1552-1608), held this view, with some qualifications, in his *De Iure Belli Libri Tres*, trans. John Rolfe (Oxford, 1933), pp. 74-78. The important point is that principles of private law were transferable, and were transferred, to international public law.

¹⁰³ C.23 q.5 c.25.

¹⁰⁴ A few *jus in bello* ideas preceded Gratian's *Decretum*; in one instance, Gratian omitted a prohibition on certain types of weapons – viz. slings and arrows used against Christians – issued by the second Lateran Council. See Canon 29 in H. J. Schroeder, *Disciplinary Decrees of the General Councils: Text, Translation and Commentary* (St. Louis, 1937), pp. 213. Gregory IX's *Decretals* reintroduced the prohibition at X.5.15.

The Decretists and Decretalists continued to refine the relationship of the Church to violence and war; the Decretalists in particular would go beyond their Decretist predecessors to identify various levels of licit public violence and their appropriate limits.

Rufinus, a Bolognese canonist who wrote one of the early commentaries on the *Decretum* sometime before 1159, treated war, its proper authority and effects, at some length in his *Summa Decretorum*.¹⁰⁵ The basic keys to the just war were again proper authority, just cause and right intention. Rufinus admitted that it was not sinful for laymen to go to war in order to defend themselves against injuries or to inflict (just) punishment, as long as war was waged by legitimate public authorities.¹⁰⁶ As for all jurists, “injuries” remained general. Rufinus repeated the Augustinian idea that wars had to be fought in the proper spirit, and then made explicit a point that was assumed in Augustine and Gratian, that the enemy should deserve the war.¹⁰⁷ If in doubt, the adversary was to be presumed guilty and deserving of retribution.¹⁰⁸ Here again there was no clear distinction between a subjective moral *culpa* and an objective legal *injuria* that would give rise to war, and again no difference delineated between offensive and defensive war. It was not clear either that the guilty side had any rights, even of defense, and certainly had no measure of the just

¹⁰⁵ Rufinus, *Summa Decretorum*, ed. Heinrich Singer (repr. Paderborn, 1963).

¹⁰⁶ Rufinus, *Summa Decretorum*, to C.23 q.1, p. 404: ‘Laicis itaque ex iusta causa – vel pro vindicta inferenda vel pro iniuria propulsanda – militare non est peccatum, dummodo publice potestates bello gerendo presideant, indicto mandato sive permissa licentia a principibus, penes quos suscipiendi belli auctoritas et consilium permanet.’ As had become traditional, the Church could enjoin war but not participate in it actively, p. 404: ‘Clerici vero militare non possunt i. e. arma movere, sed in certis casibus aliis, ut moveant, iniungere...’

¹⁰⁷ *Ibid.*, p. 405: ‘Iustum bellum dicitur propter indicentem, propter belligerantem, et propter eum, qui bello pulsatur. Propter indicentem: ut ille, qui vi bellum indicit vel permittit, huius rei indulgende ordinariam habeat potestatem; propter belligerantem: ut ille, qui bellum gerit, et bono zelo hoc faciat et talis persona sit quam bellare non dedeceat; propter eum, qui bello fatigatur: ut scil. mereatur bello lacerari vel, si non meretur, iustis tamen presumptionibus mereri putetur.’

¹⁰⁸ *Ibid.*, ‘...ut scil. mereatur bello lacerari vel, si non meretur, iustis tamen presumptionibus mereri putetur.’

cause, which could only operate unilaterally.¹⁰⁹ Rufinus also affirmed that in a just war the victor could justly take the power and place of the defeated side.¹¹⁰

The question of authority necessary to undertake war received more notice in Rufinus than Gratian. Rufinus wrote that the only public authorities who could declare war were *principes*, an ambiguous term that translates “princes,” but in Roman law denoted exclusively the Roman Emperor.¹¹¹ In medieval Europe, however, it might refer to any European king, and possibly include princes or other nobles. The ambiguity in meaning was related to a key question in medieval Roman and canon law, namely, whether the kings (dukes, or other nobles) of Europe, although formally part of the Roman Empire, were in any sense legally independent of it, and able, for instance, to declare war on their own authority.¹¹² The juridical problem had little or no reference to political reality during most of the middle ages, but the question was a powerful remnant of classical Roman legal thought, revived by the Carolingian empire and emphasized again after the recovery of the

¹⁰⁹ Some jurists clearly held that even the natural right of self-defense could be limited, arguing that the unjust side defended itself unjustly against violence. The canonist Huguccio made this point: ‘Quid si sit iustum bellum ex utraque parte? Respondeo non potest iustum nisi tantum ex altera parte. Si enim iste impugnat iuste, adversarius iniuste defendit, et si ille iuste defendit, iste iniuste impugnat,’ cited in Russell, p. 92. The Romanist Accursius also appeared to hold this view, at least with regard to personal self-defense: Accursius, *Corpus iuris civilis Iustiniani* (=Glossa Ordinaria) to D.1.1.3, s.v. *ut vim* (Lyon 1627; repr. Osnabruck 1965, I col. 16): ‘*ut vim* (atque iniuriam propulsemus): scilicet iniuste illatam ab aliquo privato...item non illatam a privato iuste.’ Of course figuring out which side had the just and unjust cause was the contentious problem, which eventually led to some new views.

¹¹⁰ Rufinus, *Summa*, to D.1 c.9, p. 10.

¹¹¹ Above, n. 106: ‘dummodo publice potestates bello gerendo presideant, indicto mandato sive permissa licentia a principibus, penes quos suscipiendi belli auctoritas et consilium permanet.’ Russell, p. 88, holds that the *Summa Parisiensis* is the first to enunciate the principle that the prince has the proper authority for waging war, but it is here in Rufinus and stretches back to Augustine (see above, n. 88).

¹¹² The question has generated a large amount of modern commentary. A few classic treatments are Otto Gierke, *Political Theories of the Middle Ages*, trans. F. W. Maitland (Cambridge, 1900), pp. 350-390; Francesco Ercole, *Da Bartolo all’ Althusio* (Florence, 1932), pp. 70-104, 157-217; Francesco Calasso, *I glossatori e la teoria della sovranità* (Milan, 1951), and Gaines Post, *Studies in Medieval Legal Thought*, pp. 434-93.

Corpus juris civilis in the eleventh century, which conceived of the Emperor as the lord of the world (*dominus mundi*) and Europe as subject to him.¹¹³

The question created more anxieties for conservative Romanists than canonists, but it remained deep in the wellspring of medieval thought. Like Rufinus, many canonists left the question of who had legitimate authority to declare war rather unclear.¹¹⁴ However Rufinus added three criteria to his definition of legitimate public authority which offered some clue as to his intention concerning *princeps*. Such authority had to be instituted (circularly) by someone with the public authority to do so, “like the Emperor or his prefect and ones similar,” the person had to be a layman, and had to govern laymen.¹¹⁵ With his first criterion, and without specifying “ones similar” more clearly, Rufinus suggested that there were a number of legitimate public authorities who could declare war. In general many canonists wrote of princes in the plural, and they were realistic enough to accept some level of hostilities among nations, feudal nobles, and even cities. However, exactly which and to what extent political actors could engage in hostilities autonomously was an enduring question in the medieval *jus commune*.

Another early gloss on Gratian, by a Bolognese master named Rolandus, also considered the just cause with respect to the legitimate authority of one side, and the fault of

¹¹³ On the Emperor as *dominus mundi* and its significance in medieval law, Kenneth Pennington, *The Prince and the Law, 1200-1600* (Berkeley, 1993), pp. 8-37, and the extensive bibliography; and in European culture, James Muldoon, *Empire and Order* (New York, 1999), pp. 87-100.

¹¹⁴ The canonist Huguccio offers an example of the doubt the question created. He wrote that only the Roman Emperor seemed to have the authority to declare war; but reading Gratian, it seemed any prince could have that power: ‘Iustum esse dico, hic queritur, quid sit ille qui bellum posset indicare? Respondeo cum Iohannes imperator romanus possit concedere leges et edita. Videtur quod solus possit bellum indicare. Sed superius danda est quod auctoritas penes *principes* est [C.23 q.1 c.4]. Unde videtur quod quilibet princeps hoc possit.’ Quoted in Russell, p. 101. Gratian had changed *principem* to the plural (above, n. 88), giving cause for reflection. Huguccio’s comments are still in manuscript, which I have not had a chance to consult.

¹¹⁵ Rufinus, *Summa Decretorum*, to C.23 q.1, p. 404: ‘Et quidem institutio legitima circa tria versatur, videlicet circa instituentem, ut qui instituit publicam instituendi habeat auctoritatem, ut imperator et prefectus et his similes; circa institutum: ut persona sit idonea, que secularis potestatis cingulo est decoranda, puta non regularis clericus sed strenuus laicus; circa eos, super quos constituitur: ut potestas secularis laicis dominetur, non clericorum militie preponatur.’

the other side.¹¹⁶ Rolandus did not explicitly include as just causes immediate defense or the recovery of goods, which was a kind of gap in the analysis, but interestingly he took the war of the Israelites against the Amorites as a war of self-defense, thereby broadening the scope of defense.¹¹⁷ In Rolandus, and at Bologna around the middle of the twelfth century, the analysis of war also emphasized elements like war as just deserts. On the other hand, in a French gloss from the same period, the *Summa Parisiensis*, Gratian was adhered to more firmly.¹¹⁸ In this latter work the criteria for the just war were Gratian's, namely, that war should be waged on an edict and for the recovery of goods lost or to punish injuries sustained.¹¹⁹ The author also followed Gratian closely in areas which would find wide agreement among canonists in this period: he affirmed that wars had to be fought in the proper spirit, and evil doers (including heretics) could be compelled to reform.¹²⁰

The *Parisiensis*, like Rufinus, named the *princeps* a legitimate authority able to wage war, but was unusual in allowing that a city could wage war. The *Parisiensis* held that if a city (*civitas*) "had cause," it could fight against another city, occupy and garrison it.¹²¹ This was outside the scope of classical Roman law, which did not conceive of individual cities, and certainly not ones under the empire, as having the power to wage war. Even if *princeps* was not taken to mean the emperor alone, canonists in this period did not argue that a city

¹¹⁶ Rolandus, *Summa magistri rolandi*, to C.23 q.2, ed. F. Thaner (Aalen 1962), p. 88. Rolandus is no longer identified as Pope Alexander III; see J. T. Noonan, 'Who was Rolandus?', in *Law, Church, and Society*, ed. K. Pennington (Philadelphia, 1977), pp. 21-48, and R. Weigand, 'Magister Rolandus und Papst Alexander III.,' *AKKR* 149 (1980), pp. 3-44. Rolandus was influential at Bologna around the middle of the twelfth century.

¹¹⁷ Rolandus, *Summa*, p. 88. Rolandus included the example in a discussion of the possibility of war being just on both sides, though not in the modern sense. If a prince was deceived as to the culpability of the adversary, both sides could be just; conversely, both could be unjust. It was an academic question that found some favor at Bologna, as witnessed by Stephen of Tournai's longer discussion of the same issue. Russell, pp. 89-92, suggests that Stephen of Tournai was the first to suggest these possibilities; the *Summa* of Rolandus would also be a close contemporary.

¹¹⁸ *Summa Parisiensis*, ed. T. McLaughlin (Toronto, 1952).

¹¹⁹ *Summa Parisiensis*, to C.23 q.2, p. 211.

¹²⁰ *Ibid.*, to C.23 q.3-5, p. 211-13.

¹²¹ *Ibid.*, to D.1, p. 2.

could licitly declare war on its own.¹²² One canonist who did support the *Summa Parisiensis* to some extent was the noted Huguccio, who diluted his approval by writing that cities could licitly wage war if they had first been granted that authority by the emperor (*princeps*).¹²³ The *Parisiensis* also noted another category of licit public violence short of formal war, which was directed against pirates and bands of robbers.¹²⁴ This referred to a principle of Roman law that these groups – in general brigands (*latrunculi*) – were a kind of common criminal, and thus did not wage war licitly and could not enjoy licit material gains from it.¹²⁵ The attempt to identify and set within a legal framework various kinds of public violence was an important project, and one which thirteenth-century Decretalists would undertake to a greater extent than their decretist predecessors.

In the first part of the thirteenth century the theory of just war received a more systematic treatment. Building on distinctions made by the Spanish canonist Laurentius Hispanus, the important *Summa de casibus* of Raymond de Peñafort, written probably in the 1230s, organized the criteria of the just war under five main headings: *persona* (person), *auctoritas* (authority), *res* (thing), *causa* (cause) and *animus* (mind or intention).¹²⁶ In order to wage a just war all the five conditions had to be fulfilled: the person waging war had to be

¹²² Before the fourteenth century, few jurists in commentaries on Roman law or canon law wrote that cities could licitly declare war, though in the fourteenth century this would change; see below, chapter three.

¹²³ Russell, pp. 101-2. Huguccio taught at Bologna during the period c.1180-1210; he almost certainly had in mind the northern Italian cities and the Emperor as the legitimizing authority for war. On Huguccio's career and the speculative identification of him with the Pisan grammarian Huguccio, W.P. Müller, 'Huguccio of Pisa: Canonist, Bishop, and Grammarian?', *Viator* 22 (1991), pp. 121-52, and R. Weigand, *Die bedingte Eheschliessung im kanonischen Recht I* (Munich, 1963), pp. 203-18.

¹²⁴ *Summa Parisiensis*, to C.23 q.2, p. 211.

¹²⁵ D.49.15.24.

¹²⁶ Raymond of Peñafort, *Summa de Paenitentia*, ed. X. Ochoa and A. Diez (Roma, 1976), Lib. II, tit. 5, sec. 17, cols. 485-86: 'Ut autem plene liqueat de bello, nota quod quinque exiguntur ad hoc ut bellum sit iustum, scilicet: persona, res, causa, animus et auctoritas. Persona, ut sit saecularis cui licitum est fundere sanguinem; non autem ecclesiastica cui est prohibitum, nisi in necessitate inevitabili. Res, ut sit pro rebus repetendis, vel pro defensione patriae. Causa, si propter necessitatem pugnetur, ut per pugnam pax acquiratur. Animus, ut non fiat propter odium vel ultionem vel cupiditatem, sed propter caritatem, iustitiam et oboedientiam. Auctoritas, ut sit auctoritate ecclesiae, praesertim cum pugnatur pro fide, vel auctoritate principis. Si aliquod istorum defuerit, bellum dicetur iniustum.'

a layman, and it was to be waged on the authority of a prince; the thing or object of the war had to be the recovery of things taken or the defense of the homeland; the cause had to be immediate necessity; and the intention had to be virtuous rather than wicked. With Laurentius Hispanus and Peñafort the authority of a prince was preserved and more attention was paid to the traditional causes of war, defense and property lost. While canonists before Peñafort may not have imagined a limit to the right of spoils in a just war, Peñafort affirmed that anything taken from the enemy in a just war became the victor's, but added that what was taken should be "according to conscience" in recompense for damages suffered.¹²⁷ The contributions of Laurentius Hispanus and Peñafort reflected a broader trend among thirteenth-century canonists toward more detailed descriptions of just war.

The thirteenth century saw, on the canonistic side, the most important developments for the theory of war. This was made possible by the publication of the *Decretales*, which Pope Gregory IX commissioned and then made the official body of canon law in 1234. The new collection of law gave broader scope to discussions of violence and war, especially with the inclusion of a decretal of Innocent III under the title *De restitutione spoliarum*.¹²⁸ The case under discussion there pertained to the illicit possession of property and the power of the rightful owner (the Church) to retake possession, with or without a judicial order, and by force if necessary. It was a situation that often gave rise to hostilities among individuals, families and nobles in the middle ages, and was perhaps the most common cause for legal appeal amid or after hostilities. As the Church was frequently deprived of property illicitly,

¹²⁷ Peñafort, *Summa*, col. 485: 'In primo casu scilicet, cum habet iustum bellum, et non exercet illud nisi contra nocentes, et non habet intentionem corruptam, quidquid capit ab hostibus suum est, nec tenetur restituere;' and sec. 19, col. 488: '... miles habens iustum bellum contra alium militem licite facit suum quicquid capit ab hoste vel vallatoribus eius sive subditis eius sive aliis quousque iuxta conscientiam suam sit sibi satisfactum de omni dampno dato et labore et operis...'

¹²⁸ Gregory IX, *Decretales*, to X.2.13.12, in *Corpus Juris Canonici*, vol. 2, ed. A. Friedberg (Leipzig, 1879).

the canonists turned to Gratian and Roman law to defend its right to use force. In turn they were led to consider questions of war in greater detail.

Among the greatest commentators on the new decretals was Sinibaldo de' Fieschi, who himself became Pope Innocent IV in 1243, and whose *Apparatus in quinque libros decretalium* was cited by nearly all subsequent canonists. In his comments on *De restitutione spoliarum* Innocent IV carefully weighed the rights of war and violence. On the question of authority, he held that only a prince who did not have a superior (*princeps non superiorem habet*) was able to declare a full war.¹²⁹ This was an important contribution to theory because it gave a somewhat clearer definition to the term *princeps*, and probably took its cue from relatively recent papal law.¹³⁰ In particular, it appeared to draw on the papal bull *Per venerabilem*, issued in 1202 by Innocent III, which acknowledged that the king of France recognized no superior authority in temporal affairs.¹³¹ As the thirteenth century progressed, jurists from Spain, France and England, especially, tended to assert at least the *de facto* independence of their kingdoms from the Emperor by writing that their monarchs recognized no superior, and were sovereigns in their own kingdoms who established all laws and declared war.¹³² Innocent IV's formula of a prince *qui superiorem non habet* thus echoed these recent developments in legal and political theory, and probably referred to these independent monarchs.

¹²⁹ Innocent IV, *Apparatus in quinque libros decretalium*, to X. 2.13.12 (Frankfurt 1570, fol. 231vb): 'Bellum autem secundum quod proprie dicitur solus princeps qui superiorem non habet indicere potest.' On Innocent IV's analysis of war, cf. Russell, pp. 145-47, 172-76; Regout, *La Doctrine de la Guerre Juste*, pp. 69-72; and Peter Haggemacher, *Grotius et la doctrine de la guerre juste* (Paris, 1983), pp. 259-62, 280-83.

¹³⁰ In fact, Roman law could be a source as well, since a *populus liber* was one that was not subject to the authority of another; see D.49.14.7.1: "Liber autem populus est is, qui nullius alterius populi potestati est subiectus."

¹³¹ X.4.17.13 (*Qui filii sint legitimi*), referring to the king of France who "ipse superiorem in temporalibus minime recognoscat."

¹³² See above, p. 33, n. 112, for some bibliography on the question of sovereignty. A good introduction is Walter Ullmann, "The development of the medieval idea of sovereignty," pp. 19-43.

Beyond this addition concerning princely authority, Innocent IV laid out in his comments on *De restitutione spoliarum* a hierarchy of licit public violence which went beyond the traditional Decretist analysis of just war, and also influenced later discussions on issues like reprisals and the enforcement of jurisdiction. On the highest level, Innocent recognized the full public war waged by a prince who had no superior. Innocent only mentioned this war in passing, but it corresponded to the public war declared in Roman law by the Emperor (now in Innocent other sovereigns were possible candidates). Somewhat strikingly, in this example Innocent did not add the familiar criteria of just cause or just intention from canon law, but enunciated the classical criteria of proper authority and public declaration.¹³³ In classical Roman law captured soldiers also became slaves who forfeited their civil rights, regaining them on release or escape according to the Roman law or right of *postliminium*.¹³⁴ Innocent did not follow Roman law here, noting that slaves could not be taken in war.¹³⁵

Although Innocent IV did not invoke the just war criteria, it is best to assume that he understood just cause and intention to be present in this kind of war, which allowed him to focus on identifying various kinds of licit war and violence. On the next level, Innocent held that a subordinate could appeal to his own superior in order to wage a war that he could not wage on his own authority.¹³⁶ Presumably this had reference to the feudal practice of applying to an overlord (not necessarily the highest sovereign) in order to make war. Innocent allowed recourse to this mode of war to recover goods taken or rights violated,

¹³³ Roman law made no reference to just cause in war; see below, pp. 50ff.

¹³⁴ D.49.15, and on the right of *postliminium*, see below, pp. 53-4.

¹³⁵ Innocent IV, *Commentaria*, fol. 231vb: 'nec in his casibus capti fient servi.'

¹³⁶ *Ibid.*, fol. 231va, n. 8, 'Item ubicumque per alium rem suam et ius suum prosecui non potest licitum est auctoritate superioris arma movere et bellum indicere ad recuperandum sua...tamen si principem super se habet eius auctoritate hoc faciat et non aliter.'

which did not differ from the view of war recently outlined by Raymond of Peñafort and stretching back to Cicero. Besides the appeal to a superior to go to war, there was also self-defense against immediate (*incontinenti*) violence, which was available to all without the authority of a superior.¹³⁷ A fourth kind of licit public violence was termed an “exercise of jurisdiction,” where a lord or nobleman was able to pursue rebellious or lawless subjects, and all those who helped them.¹³⁸ Innocent termed this hostilities or a mere battle (*praelium*). In none of these cases of limited war could those captured be enslaved, and only in the case of a war waged as an exercise of jurisdiction could additional property be taken as punishment beyond what had been taken originally.¹³⁹

Finally, Innocent made reference to reprisals, in which a victim sought a judicial order licensing the recovery of goods or rights violated by a foreign subject.¹⁴⁰ In the case of reprisals the victim’s own judge could authorize the victim to retake, by force if necessary, what he had been deprived of, if justice was denied by the foreign judge or officials.¹⁴¹ Innocent importantly added that if there was no judge before whom the victim could attain justice, then the victim was able to recuperate his lost goods on his own

¹³⁷ *Ibid.*, fol. 231va, n. 8, ‘Respondemus omnibus esse licitum movere bellum pro defensione sua et rerum suarum. nec dicitur proprie bellum sed defensio, et quando quis est eiectus incontinenti antequam ad aliena negocia divertat licitum est sibi impugnare...igitur et cum hoc a jure fit concessum nec est auctoritas principis necessaria.’ Innocent seemed to refer to individuals, and he drew on the civilian analysis of personal self-defense, but it would apply just as much to political entities.

¹³⁸ *Ibid.*, ‘Item quilibet praelatus si habet jurisdictionem temporalem contra subditos inobedientes licite moveret arma...dummodo iurisdictione indicendi bellum habet vel in casibus supradictis et etiam si non habeat ius indicendi bellum dummodo iurisdictione...quia his casibus non proprie dicitur fieri bellum sed melius executio iurisdictionis vel iustitia.’ Here Innocent was considering a prelate with regalian rights, or temporal jurisdiction, and incidentally was giving himself power to prosecute enemies in what he considered papal territory. But the comments would also apply to secular figures with temporal jurisdiction. The exercise of jurisdiction appeared to always deny a just cause to rebellions, assuming the title to power was valid.

¹³⁹ *Ibid.*, fol. 232ra, n.9, ‘si autem non est indictum bellum contra aliquem sed aliquo praedictorum modorum procedebat puta ratione sue iurisdictionis volebat aliquem punire vel res eius devastare...in hoc casu videtur quod possit capere res vel personas auxiliorum eius.’

¹⁴⁰ *Ibid.*, ‘si non est de sua jurisdictione sed alterius debet coram suo iudice de eo iusticiam petere.’ The victim was supposed to apply to a foreign judge first, and if he was denied justice, apply to his own for justice.

¹⁴¹ On reprisals, see p. 76 below, and chapter five, pp. 171-6.

authority – a point that the jurist Bartolus of Sassoferrato would later reinforce.¹⁴² Reprisals were a self-help remedy usually pertaining to commerce, which found favor with governments and endured for centuries in Europe; but in the late middle ages the practice was first inserted into the legal framework of the *jus commune*. Innocent’s effort to legitimize categories of limited war, like reprisals and the exercise of jurisdiction, represented a step in the medieval jurists’ attempt to bring war within a quasi-judicial framework.¹⁴³ For all of these wars Innocent reminded that the violence had to be moderate and not excessive, a reference to the standard of self-defense in Roman law in which the defender had to reply with a “moderation of blameless force.”¹⁴⁴ With his complex treatment, Innocent, probably more than any other canonist, pushed the legal discussion of war in new directions, and ones more intent on the legitimate scope of various kinds of hostilities.

Innocent’s reference to the Roman war also highlighted the double nature of relying on Roman law in a medieval analysis of war. On one hand, the conception of war in Roman law featured the slavery of captives and lacked the just war criteria: it only really shared the notion of a highest public authority.¹⁴⁵ In consequence, it had to be adapted both by civilians and canonists to fit the assumptions of the morally just war of medieval law, but it could never fit beside it with much ease. On the other hand, concepts from Roman private law greatly enriched the canonistic analysis of war – as it enriched many other areas of

¹⁴² *Ibid.*, ‘si vero non habet iudicem coram quo posset suam iusticiam obtinere, tunc sibi licet sua auctoritate recuperare sua.’ Reprisals would be treated more fully in the Italian context by Bartolus (below, p. 76).

¹⁴³ Russell, pp. 175-6, emphasizes this point, describing with customary acumen the importance of Innocent and Hostiensis.

¹⁴⁴ C.8.4.1 and see below, pp. 56-61, on the medieval civilian commentary, some of which influenced Innocent’s understanding of defense. Raymond of Peñafort also considered defense according the Roman principles of immediacy and moderation; *Summa*, cols. 486-88.

¹⁴⁵ Arguably Cicero’s formulation of just cause, which was important for Augustine, and through him the canonist tradition, was part of Roman law, but was not collected in the *Corpus juris civilis*.

canon law – and allowed for greater precision in identifying different types of licit violence, their proper authority and scope. In Innocent’s analysis, the reference to Roman war raised questions about its relation to just war theory; but his use of Roman law in discussing the standard of moderation in self-defense, as well as familiar tenets from the Roman analysis of despoiled property, allowed him to treat the decretal before him in a comprehensive way. There was certainly in Innocent the influence not only of Roman law but also feudal law, and even municipal law insofar as it legitimized practices like reprisals. Innocent was very willing to use all the tools available to him to describe just and licit wars, and advanced the discussion somewhat beyond the broad assertions of moral culpability and right intention.

In fact the Roman analysis of despoiled property was key to Innocent’s argument. The case Innocent discussed pertained to the use of violence by churchmen to eject Templars from a bishop’s property, and it gave Innocent the opportunity to argue that rightful possession was never lost by the bishop and that a right to expel by force was valid even for ecclesiastics. Someone who takes property openly or clandestinely, or by force, possesses it naturally but does not thereby acquire a civil title to it, Innocent pointed out, with reference to Digest 41.2.¹⁴⁶ Further, he noted, even if the Templars had taken up possession while ignorant of the owner, if they did not return it after being warned by the owner, force could be used licitly to eject them.¹⁴⁷ It was justifying the defensive actions of these ecclesiastics that led Innocent to consider self-defense generally and then the other categories of licit public violence. Roman law served as a bulwark behind the whole

¹⁴⁶ Innocent IV, *Commentaria*, fol. 231rb: ‘secus si per seipsum possideret, quia tunc non amitteret possessionem, nisi expulsus esset, vel revertens non esset admissus vel suspicaretur se posse repelli...sed licet ulterius possessionem quam per me possideo me ignorante clam possideas possides naturaliter, et ego civiliter...’

¹⁴⁷ *Ibid.*, ‘Alii tamen dicunt et forte melius, quod etiam si ignoranter accepissent possessionem, episcopi tamen si moniti non reddidissent licite eis vis fieret, quia incipiunt esse vitiosi.’

analysis, used in constructing the categories and guiding the comments.¹⁴⁸ In this Innocent is representative of the Decretalists, insofar as they delved more deeply into Roman law to add new analysis to their commentaries.

Another interpretation, by Innocent IV's great contemporary Hostiensis, rivaled Innocent's treatment in its detail and was as versed in Roman law, but appeared to strike a more conservative tone. Hostiensis's discussion, contained in his important *Summa* of around 1253, and in his revised *Lectura* on the *Decretals* finished around 1270, upheld the just war tradition and reflected traditional moral qualms about the frequency and injustice of inter-Christian violence.¹⁴⁹ Hostiensis set up his own complex schema of wars but only a few could be just.¹⁵⁰ The first was again the "Roman war," but here it was limited to war against infidels, which were called just.¹⁵¹ Another just war was the "judicial war," waged on the authority of a judge who was punishing the contumacy of one party.¹⁵² In theory this would seem to include reprisals, since Hostiensis did not demand that the judge should have jurisdiction over all the subjects and the case he pronounced upon. The other two licit or just wars were similar, and essentially allowed only for the defense of associates, self and possessions, and Hostiensis stressed that the license of a judge should always be sought

¹⁴⁸ Innocent cited Roman law throughout his analysis on war. Examples include C.8.4.1, cited on self-defense; D.28.7.8, on a prince's authority for waging war; C.3.1, concerning the authority of a superior; D.6.1, concerning the powers of jurisdiction; C.2.16, on the necessity of appeal to a judge; C.1.9.14, supporting one's right to recuperate something on their own, if a judge was lacking; see fols. 231va-232ra. Canonists like Innocent (as well as civilians) often used their Roman law citations as creative analogies to support new and sometimes incongruous arguments; e.g., C.1.9.14 in Roman law pertains to judicial protections for Jews implicated in crime, so that lawless vengeance would not be taken against them, and not to recuperating goods in the absence of a judge.

¹⁴⁹ On Hostiensis, see Kenneth Pennington, "Henricus de Segusio (Hostiensis)," in *Popes, Canonists and Texts* (Aldershot, 1993), XVI. Hostiensis did not approve of many contemporary wars, which according to him were voluntary wars undertaken without proper authority. Hostiensis, *Summa Aurea*, to X.1.34 (= *De treuga et pace*) (Venice 1537, fol. 59ra): 'Quid ergo de comitibus nostris qua tota die sine autoritate principis arma sumunt et sumi faciunt et vasallos proprios exheredant; non dubito quin ad restitutionem teneantur.'

¹⁵⁰ On Hostiensis's conception of war, cf. Regout, pp. 72-75; Russell, pp. 129-30, 141-43, and Haggemacher, pp. 110-111, 261-262.

¹⁵¹ Hostiensis, *Summa Aurea*, to X.1.34 (= *De treuga et pace*) (Venice 1537, fol. 59ra).

¹⁵² *Ibid.*, 'Quartum quod faciunt fideles autoritate iuris et hoc potere dici licitum.'

first.¹⁵³ Like Innocent IV, Hostiensis noted that this defensive war should be made with a moderate amount of blameless force (*cum moderamine inculpatae tutelae*), the standard for licit self-defense.

In fact, Hostiensis's treatment of war bore some similarities to Innocent's, and he was willing to grapple with issues like obedience to a feudal overlord in war and the execution of jurisdiction. Hostiensis wrote that if war was not made on the edict of a prince but was otherwise just – which meant for the defense of goods or the restoration of one's rights – then either the war was an execution of jurisdiction, in territory over which the party moving war had legal control, or it was not.¹⁵⁴ If the lord's subjects had become contumacious rebels, then the lord, and anyone he licensed, could seize them and their property as an exercise of jurisdiction.¹⁵⁵ Rather than call this kind of war a *praelium*, as Innocent had done, Hostiensis termed it a *guerra*. Otherwise a war against non-subjects, made without the authority of a prince, could be undertaken for the defense of goods or rights. However, consistent with his opinion that the warrant of a judge should be sought, Hostiensis noted that wars were to be presumed unjust unless the moving party was able to prove otherwise.¹⁵⁶ He did not specify the court or authority to whom the case would go, but elsewhere noted that the pope had supreme authority to judge such secular affairs.¹⁵⁷

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*, 'utrum is, qui tale bellum agit iurisdictionem habeat super illos, quibus guerram facit, et si contumaces ei sint et rebelles, potest statuere et concedere quod liceat unicuique res ipsorum invadere, capere, et suas facere, et detinere quousque.'

¹⁵⁶ *Ibid.*, fol. 136ra, n. 2: 'Si igitur constet, quod aliquis bellum movit, tenetur ad restitutionem, sed hoc intelligendum, quando iniuste movit, quod semper prima facie praesumitur... sed ideo iunxit iniuste, quia si is, qui movit bellum vult probare quod iuste ipsum movit in nullo tenetur, imo facit sua omnia occupata.' In all cases the unjust side had to make restitution for whatever they gained in war.

¹⁵⁷ *In primum [-sextum] decretalium commentaria*, to X.2.13.12, nn. 24-5, I fol. 53ra. In fact Innocent III had asserted the right of the papacy to intervene in secular affairs by *ratione peccati*; see ch. 3, pp. 102-4. A number of writers who despaired over the lack of an effective judge or court to prevent wars between European rulers believed that the pope or the emperor should fill that role; Michael Wilks, *The Problem of Sovereignty in the Later Middle Ages* (Cambridge, 1963), pp. 102-110. The idea that the pope should be the highest judge in

One important branch of just war theory developed by canonists was the theory of holy war or crusade. Although it is generally outside the scope of this study, it merits a brief comment, as an important dimension of the canonistic tradition on war.¹⁵⁸ The first crusade was undertaken over forty years before the writing of the *Decretum*, but Gratian's self-appointed task was compiling and harmonizing existing canons rather than constructing new theories, so he himself did not theorize the legality of holy wars in the east. He did lay the foundation, however, for a theory of offensive war against heretics and infidels by asserting the authority of the Church to defend against, punish and correct them. Decretists following Gratian in the twelfth century sided with the idea that heretics could be forcibly led back to orthodoxy, and some believed that infidels, like heretics, could be despoiled of their property wherever they were.¹⁵⁹ This touched the question which would most exercise Decretalists on the subject in the succeeding generation, and amounted to a way of asking whether holy wars were always licit, and whether infidels had the right to hold any lands in the east or west.

Europe for disputes among sovereigns continued into the sixteenth and seventeenth century; even Leibniz entertained the idea. See G. Soldi-Rondinini, "Il diritto di guerra in Italia nel secolo XV," *Nuova Rivista Storica*, 48 (1964), pp. 303ff; P. Gilli, "Guerre, paix, alliance, duel: le disciplinement de la violence dans les traités juridiques sur la guerre, en Italie, au XVe siècle," in *Guerre, pouvoir et noblesse au Moyen Age: Mélanges en l'honneur de Philippe Contamine*, ed. Paviot and Verger (Paris, 2000), pp. 323-41.

¹⁵⁸ The literature on the development of crusade theory and ideals, in canon law, theology and papal letters and decrees, is large. A helpful introduction is Norman Daniel, "The Legal and Political Theory of the Crusade," in *The Impact of the Crusades on Europe*, vol. 6 of *A History of the Crusades*, ed. Kenneth Setton (Madison, 1969-89), pp. 3-38; some notable studies are Carl Erdmann, *Die Entstehung des Kreuzzugsgedankens* (Stuttgart, 1935); B. Z. Kedar, *Crusade and Mission: European Approaches Toward the Muslims* (Princeton, 1988); James Brundage, *Medieval Canon Law and the Crusader* (Madison, 1969); *idem*, "The hierarchy of violence in twelfth- and thirteenth-century canonists," *IHR* 17: 2 (1995), pp. 670-92; *idem*, "Anselm, Ivo of Chartres and the ideology of the First Crusade," in *Les Mutations socio-culturelles au tournant des XIe-XIIe siècles. Etudes anselmiennes (IVe section)* (Paris, 1984), pp. 175-87; M. Villey, *La Croisade: essai sur la formation d'une théorie juridique* (Caen, 1942); Pierre Alphantery and A. Dupront, *La Chrétienté et l'idée de croisade*, 2 vols. (Paris, 1954-59).

¹⁵⁹ James Muldoon, *Popes, Lawyers and Infidels* (Philadelphia, 1979), p. 16. Muldoon claims Alanus Anglicus was the first to hold that infidels had lost all dominion, jurisdiction and apparently property to Christians. For what follows see generally Muldoon, pp. 1-28, who guided this discussion.

As with other issues related to war, the most influential canonistic analyses came from the pens of Innocent IV and Hostiensis. Innocent was the most important voice supporting the position that infidels could rightly hold and govern their own lands, and rejected the idea that infidels *qua* infidels were liable to war.¹⁶⁰ By implication infidels were entitled to wage a just war for the immediate defense of their legitimate lands. But Innocent was in agreement with all other Christian writers that the Holy Land in and around Jerusalem was the property of the Church and Christians generally, and any Christians could make war to recover it. The argument depended on an explanation of why the Church had dominion over the Holy Land, and Innocent supposed that it had been consecrated Christian by the life and death of Christ, and had also been passed to the Church by the Roman emperor through the Donation of Constantine.¹⁶¹ Nor were infidels left completely free and unmolested in their own lands, because Christians had a right to send missionaries among them in order to convert them. The pope, further, as the ultimate arbiter of the moral order on earth, had a right to punish infidels anywhere for perversions of the laws of nature (which could include any number of improper or “barbaric” social customs), and could depose infidel rulers for persecuting any Christians in their lands.¹⁶² Innocent reserved to the pope alone the power to use force against infidels and order crusades, a far-reaching power of intervention that amounted to a kind of legal jurisdiction over infidels.¹⁶³ He lastly argued

¹⁶⁰ *Ibid.*, pp. 8-9; Innocent IV, *Commentaria*, to X.3.34.8, n. 3 (fol. 430r), ‘Item per electionem poterunt habere principes, sicut habuerunt Saul, et multos alios...dominia, possessiones, et iurisdictiones licite sine peccato possunt esse apud infideles, haec enim non tantum per fideles, sed pro omni rationabili creatura facta sunt.’

¹⁶¹ *Ibid.*, pp. 6-7.

¹⁶² *Ibid.*, pp. 10-11, and Innocent IV, *ibid.*, n.4: ‘omnes autem tam fideles quam infideles oves sunt Christi per creationem, licet non sint de ovili ecclesiae, et sic per praedicta apparet, quod Papa super omnes habet iurisdictionem et potestatem de iure, licet non de facto, unde per hanc potestatem, quam habet Papa, credo quod si gentilis, qui non habet legem, nisi naturae, si contra legem naturae facit, potest licite puniri per Papam arg. Genes. 19 ubi habes, quod Sodomitae quae contra legem naturae peccabant puniti sunt a Deo.’

¹⁶³ *Ibid.*

that infidels had no right to reclaim lands that they held formerly and had lost, and naturally could not missionize among Christians as Christians could among infidels.¹⁶⁴

Innocent's approach to infidels shared a few characteristics with his approach to war generally, where independent sovereigns did exist and had at least some powers to make war. Hostiensis was the outstanding exemplar of the conservative line, though somewhat less so than on first glance. For Hostiensis, infidels could have no just dominion, jurisdiction or government over any lands.¹⁶⁵ Infidels were sinners and the pope had the categorical right to depose their rulers and take their lands. Hostiensis then mitigated his position somewhat, writing that infidels who acknowledged Christian overlordship should be allowed to keep their lands.¹⁶⁶ And missionizing should be the first and main method of conversion and not violence or crusade, though these various means were exclusively the pope's prerogative. Although debate on the possibility of territorial sovereignty for infidels continued on into the early modern period, canonists usually kept to the terms of the medieval debate as set by Innocent and Hostiensis.¹⁶⁷ Leaving behind the question of whether infidels could in general hold lands or not, the Holy Land was certainly Christian, and war for it was essentially a just war for the recovery of property to which they had just title. Of course the discussions on war in and directly after Innocent also represented the

¹⁶⁴ *Ibid.*, p. 12.

¹⁶⁵ *Ibid.*, p. 16.

¹⁶⁶ *Ibid.*, p. 17. Hostiensis said further that although the pope could deprive infidels of their lands, including those in which they had jurisdiction over Christians, he should not unless there was a great cause for doing so. Hostiensis, *In primum [-sextum] decretalium librum commentaria*, to X.3.34.8, n.21 (Venice 1581; repr. Torino 1965, II fol. 428va): 'Imo et si male tractent christianos potest eos privare possessionem iurisdictionem et dominium, quod super eos habent. Sed hoc non nisi ex magna causa...'

¹⁶⁷ In the sixteenth and seventeenth centuries, however, writers added arguments to the legal and moral discussion concerning European relations with the non-Christian world. Some justified the conquest of the new world in Aristotelian terms, as the natural right of the strong over the weak, while others applied a more utilitarian theory, which held that land not in use (in this case unused by natives of North America) could be appropriated by those who could use it (in this case the English); on these issues, Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford, 2000), pp. 16-77, 166ff.; cf. Muldoon, *Popes, Lawyers and Infidels*, pp. 105-58.

fullest expression of the Church's claim to authority over crusading activity, and a claim – which came down intact to the early modern period – to ultimate control over the non-Christian world.

Beyond the canonists, though heavily influenced by their approach, theologians like Thomas Aquinas also commented importantly on war in the second half of the thirteenth century. Indeed Aquinas's formulation of the just war in the *Summa Theologiae* (c. 1266-1273) is the medieval approach that has come down most readily to modern students of the just war tradition.¹⁶⁸ But his definition was fashioned from traditional elements of canon law. It included the familiar principles that war should be fought on the authority of a sovereign, with a just cause and right intention.¹⁶⁹ Concerning the sovereign, Aquinas wrote of princes in the plural, holding that to such highest authorities pertained the care of the commonweal (*reipublicae*).¹⁷⁰ This reflected a trace of Aquinas's political Aristotelianism, since as in Aristotle the assumption was of a plurality of political communities which aimed to preserve themselves and in which the temporal ends of men were actualized. Aquinas allowed that defense of the common good and commonweal sometimes required making war against internal and external enemies.¹⁷¹ The idea of protecting the commonweal was essentially no different than the stress Roman lawyers placed on the defense of the *patria*

¹⁶⁸ Aquinas, *Summa Theologiae*, IIa-IIae, q. 40, art. 1.

¹⁶⁹ Aquinas quoted Augustine for each criterion. The just cause was the familiar one: “iusta bella solent definiri quae ulciscuntur iniurias, si gens vel civitas plectenda est quae vel vindicare neglexerit quod a suis improbe factum est, vel reddere quod per iniuriam ablatum est.”

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*, “...ita etiam gladio bellico ad eos [principes] pertinet rempublicam tueri ab exterioribus hostibus.” Aquinas later mentioned the common good: “Sed quandoque est aliter agendum propter commune bonum, et etiam illorum cum quibus pugnatur.” On the significance of the idea of the common good, see generally M. S. Kempshall, *The Common Good in Late Medieval Political Thought* (Oxford, 1999), and on one extreme exponent of the common good in Florence, Charles T. Davis, “An early Florentine Political Theorist, Fra Remigio de’ Girolami,” in *Dante’s Italy and Other Essays* (Philadelphia, 1984), pp. 198-223.

(assuming there could be multiple *patriae*), but now the idea could be strengthened from another source.

The canon law on war, between the time of Gratian and the fourteenth century, did not separate itself from the criteria of just cause, proper authority and intention, but did develop to address more specifically different levels of licit violence, their proper rights and limits. First, in the Decretists' glosses and commentaries on Gratian's *Decretum* the analysis of war tended to fit a general picture. War was to be waged in immediate defense, for the recovery of goods lost, injuries suffered or rights violated, and generally intended to punish the offender for his transgression. The notion of "injury" remained quite unspecific (though legal in origin), and gave a broad scope to offensive war. In the shadow of the idea of punishment and correction, was also the notion that an enemy could deserve war for a moral fault: the fault, if severe enough, might itself be an injury (as with a "perversion" of natural law, or indeed intransigent disobedience to Church law). In the case of an offensive war to redress an injury and punish the offender, the requirements of justice temporarily overrode those of peace, though both would be restored at the conclusion of the war. War was only just on one side, and some called into question the right of the unjust side to defend themselves. The question of authority was also problematic, with some canonists wishing to reserve war to the emperor (or the authority of the pope) as much as possible; though the view that multiple independent powers could declare war certainly grew in the thirteenth century.

With the publication of Gregory IX's *Decretales*, which invited refined commentary, the analysis of war could become more complex. Innocent IV assigned the proper authority for a full public war to a prince who had no superior. There was somewhat less emphasis in

the Decretalists on the idea that war should punish the transgressor or that moral faults should be punished by war (at least within Europe). Instead, they outlined more specific and limited kinds of war, and showed an early willingness to handle the issues in a more practical way. This movement away from a focus on the essential moral justifications for war and towards treatment of particular rights and obligations in various hostile contexts was influenced by Roman and feudal law, which naturally dealt with issues like obedience to one's lord in war and the rights of a property owner facing the despoliation of property. But with Innocent IV and Hostiensis, the canonists reached their deepest point of engagement with issues related to war. In the fourteenth century, Roman lawyers would move the analysis forward with greater interest.

Quite different from canon law, there was in the Roman law available to the medieval jurists very little sense of the morally just war. The *Corpus juris civilis* of Justinian accepted wars as natural phenomena which sometimes occurred among different societies, and attached no necessary moral value to them. The law assumed that wars openly declared by the Emperor and made on his express authority were licit, and did not seek to explain the aims of his wars or their causes. A famous passage at the beginning of Justinian's *Digest* (D.1.1.5) did address the origin of war, observing that wars were first introduced into human society by the law of nations (or peoples: *jus gentium*), which also introduced the division of society into various peoples or tribes, and ushered in the rise of governments, property rights, commerce and similar foundational social developments.¹⁷²

War thus appeared as a natural development of society and inseparable from it. Further, the

¹⁷² D.1.1.5, in *Corpus juris civilis*, 3 vols., ed. T. Mommsen, et al. (Berlin, 1928): 'Ex hoc iure gentium introducta bella, discretæ gentes, regna condita, dominia distincta, agris termini positi, aedificia collocata, commercium, emptiones venditiones, locationes conductiones, obligationes institutæ: exceptis quibusdam quæ iure civili introductæ sunt.'

law of nations was usually identified by medieval civilians as “secondary” natural law, or that part of natural law which pertained to humans and governed their conduct as a species.¹⁷³ Descending in this way from nature, and proximately from the law of nations, war appeared as a sanctioned aspect of human relations. A passage of Justinian’s *Institutes* suggested that at least part of the law of nations developed simply from the developing needs of human society, but that passage did not alter the medieval jurists’ reading of the *jus gentium*.¹⁷⁴

The medieval reading of the origin of war in Roman law could be seen to accord to some extent with Christian doctrine, concerned as it was with God’s justice. Even the foundational Augustinian view, that government and war were necessary and just on account of the sins of mankind, could be made to harmonize with the legal reading of war as from the law of nations and natural law. A definition of natural law given by Franciscus Accursius (c. 1182-1263), author of the standard medieval gloss on the *Corpus juris civilis*, was broadly representative of how civilians equated the law of nations with that part of natural law pertaining to humans, and deriving ultimately from God. Accursius discerned four distinct kinds of natural law. First was Mosaic law, followed by the “instincts” of nature (or what was common to all animals, “like procreation and the raising of young”), then the law of nations (specific to humans), and finally praetorian law.¹⁷⁵ Accursius simply

¹⁷³ A slightly earlier passage of the *Digest* defined the law of nations as that law which was common to men alone, while natural law was common to all animals, which nature itself taught them: D.1.1.1.4: ‘Ius gentium est, quo gentes humanae utuntur. Quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit.’ Natural law was defined at D.1.1.1.3: ‘Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est.’

¹⁷⁴ Inst. 1.2, in *Corpus juris civilis*: ‘Ius autem gentium omni humano generi commune est. nam usu exigente et humanis necessitatibus gentes humanae quaedam sibi constituerunt.’ Indeed, there is more than an element of positive law in the passage, with a sense that humans might elect to establish laws or customs.

¹⁷⁵ Franciscus Accursius, *Corpus iuris civilis Iustinianei cum commentariis Accursii* (=Glossa Ordinaria), to D.1.1.1.3, v. *quod natura* (Lyon 1627; repr. Osnabruck 1965, I col. 15).

gave an assurance, which became typical among medieval jurists, that the law of nations could not introduce into society a wicked principle or institution, so that the origin of war was just.¹⁷⁶ By implication illicit wars came accidentally, from the faults of men alone, and were punished by just wars.¹⁷⁷ More classically, however, and apparently without further concern, Accursius named the wars of the Roman emperors as licit, as well as those fought to repel injuries.¹⁷⁸

For the civilians, holding to a Roman law in which the emperor was the sole legitimate political authority, the question of whether war beyond the Empire and that of truly independent political entities in Europe was licit, was often answered equivocally or in the negative. But the civilians were eventually more responsive to the realities of contemporary practice, and grappled both with the theoretical question of war among European powers and the practical issues pertaining to it. For his part, Accursius followed Roman law (D.1.1.3) in allowing a right of self-defense against attack, which was available to all individuals by the law of nations.¹⁷⁹ Accursius then exhorted: “‘fight for the fatherland [*patria*],’ as Cato said,” as an example of the devotion subjects or citizens owed, with the suggestion that fighting for one’s *patria*, at least in defense, might be a duty under

¹⁷⁶ Accursius, *Glossa Ordinaria*, to D.1.1.5, v. *ex hoc iure* (ed. cit., I col. 17), ‘Ergo ius gentium iniquum est, cum iniquum inducat. Sed dic, quod dicit de bello licito...’

¹⁷⁷ In fact, medieval civilians struggled with the idea of how unjust wars could have come from the law of nations. Giasone del Maino (1435-1519), summarized some of the disagreements earlier jurists had on it, in his comments on D.1.1.5. Jurists often argued that unjust wars came “occasionally” or “consecutively” from the law of nations; see Giasone del Maino, *In primam [-secundam] Digesti veteris commentaria*, to D.1.1.5 (Venice 1579, fol. 8ra).

¹⁷⁸ “...ut indicto a populo Romano vel Imperatore...item dicit de bello indicto ad iniuriam propulsandum...’ It was problematic from a just war perspective to assert that the wars of the emperor were *ipso facto* just, but Accursius did not explain the example further.

¹⁷⁹ D.1.1.3: ‘Ut vim atque iniuriam propulsemus: nam iure hoc evenit, ut quod quisque ob tutelam corporis sui fecerit, iure fecisse existimetur, et cum inter nos cognationem quandam natura constituit, consequens est hominem homini insidiari nefas esse.’

the law of nations.¹⁸⁰ Though Accursius did not define *patria* here, elsewhere he acknowledged that there were kings “not subject to the emperor.”¹⁸¹ However, even if there were some independent kingdoms within Europe, the status of Italian cities in relation to the empire remained unclear. On this key problem, Accursius seemed to think that (at least most) cities could not wage public war, though might engage in some level of hostilities, including strict self-defense.¹⁸²

The material in the *Corpus juris civilis* relating to war pertained almost exclusively to military law, and that largely addressed the duties and rights of soldiers. Their essential duty was of course service and obedience, and Digest 49.16 was largely concerned with punishments for deserters and other infractions of military discipline. The most important of the rights discussed was that of *postliminium*, which generally concerned property lost in war and soldiers taken prisoner.¹⁸³ As to property, Roman law held that at least territory which had been taken by an enemy and later recovered by the Romans should return to the former owner.¹⁸⁴ For soldiers, the law decreed that a captured Roman soldier lost his civil rights, including the ability to make a will, and his marriage was dissolved. The Romans accepted that their soldiers became slaves of the enemy by being taken captive, and applied

¹⁸⁰ *Ibid.*, to D.1.1.2, v. *et patria* (ed. cit., I col. 16). On the political significance of this phrase, see Post, *Studies*, pp. 435-52. The phrase was taken from the *Disticha* of pseudo-Cato, a common school text in medieval Italy. On the use of the text, see Robert Black, *Humanism and education in medieval and Renaissance Italy* (Oxford, 2001).

¹⁸¹ *Ibid.*, to D.49.15.24, v. *vel praedones* (ed. cit., V col. 1669): ‘idem dico de eis qui non sunt liberi, sed subsunt regibus non subditis Romano imperio.’

¹⁸² Accursius did not spell out exactly what level of hostilities were appropriate to the Italian cities. He felt that their wars were those of bandits in which there was no classical right of *postliminium*, but did not declare that all their hostilities were illegal. See below, p. 53.

¹⁸³ For a close reading of classical *postliminium*, see Giulio Silano, “*Postliminium*: Reflections in Margin to Justinian's Digest 49.15,” in *Limina: Thresholds and Borders; proceedings of a St. Michael's College symposium* (28 Feb. - 1 Mar. 2003), ed. J. Goering, F. Guardiani, and G. Silano (Ottawa: Legas, 2005), pp. 85-105.

¹⁸⁴ D.49.15.20.1: “Verum est expulsis hostibus ex agris quos ceperint dominia eorum ad priores dominos redire nec aut publicari aut praedae loco cedere: publicatur enim ille ager qui ex hostibus captus sit.” Horses were also subject to the right of *postliminium*, while arms were not able “to be surrendered with honor” and so were not subject to recovery. See D.49.15.2.1-2.

the same rule to those soldiers they captured, so that captives lost their legal powers. If a soldier was released or managed to escape to his own defenses or friendly territory, he was restored to the rights he formerly enjoyed by means of the *jus postliminii*.¹⁸⁵ A Roman soldier would thus regain legal power over his estate and children; one exception, however, was marriage, which remained dissolved unless it was renewed voluntarily.¹⁸⁶ As well, the right of *postliminium* existed both in times of war and peace. The jurist Pomponius warned that anything which passed into Roman hands from a nation which was not bound to Rome by friendship or treaty would be lost to Rome, implying a state rather closer to war among people with whom Rome had no relations.¹⁸⁷

Medieval civilian jurists also commented on the Roman law of *postliminium*. The jurist Irnerius, one of the forces behind the revival of Roman law in the middle ages, and active at Bologna in the later eleventh and early twelfth centuries, discussed *postliminium* succinctly in his *Summa Codicis*.¹⁸⁸ Like a number of early civilians, his comments on war were confined to the issue of *postliminium*, and more particularly to the practice of ransom, to which the jurist devoted most of his discussion. Irnerius warned that whoever redeemed a soldier from captivity did not thus have legal power over him, but could accept a pledge until the freed captive repaid him.¹⁸⁹ Presumably he supported the idea that the captive should uphold his promises to all parties. Irnerius clearly accepted contemporary ransom practice, but did not apparently consider that captured soldiers truly became slaves.¹⁹⁰

¹⁸⁵ D.49.15.5.1

¹⁸⁶ See D.49.15.14.1 on the renewal of marriage by consent.

¹⁸⁷ D.49.15.5.2.

¹⁸⁸ Irnerius, *Summa Codicis*, ed. Fitting (Berlin, 1894).

¹⁸⁹ Irnerius, *Summa Codicis*, to C.8.46 (=C.8.50 in *Corpus juris civilis*, ed. Mommsen *et al.*) (ed. cit., p. 304): “Qui vero aliquem ab hostibus redemit, in sua potestate eum non habet, set in pignoris causam eum quoad pecunia solvatur retinere potest, nisi qualicumque iudicio id remissum sit.”

¹⁹⁰ Cf. the jurist Baldus, who much later did not agree that ransom promises should be kept; below, p. 114.

The jurist Placentinus (d. 1192), another pioneer in Roman law after Irnerius, also discussed the Roman law of *postliminium* in his *Summa*. He took a classical stance in holding that *postliminium* was valid in war and peace, asserting that it would avail when a soldier returned from captivity to a neutral or non-enemy territory.¹⁹¹ In sticking to his text Placentinus preserved the view of foreign relations found in Pomponius, who believed that the people and goods of nations Rome was not allied to were always liable to capture.¹⁹² He also emphasized a question that required some creativity to answer in Roman law: how to explain the change in legal status of a captive and returned captive. The classical jurist Ulpian had opined that the captive who returned should be considered never to have left; on the other hand, a captive who never returned was considered to have died from the moment he was taken captive.¹⁹³ These were convenient legal fictions in Roman law, and Placentinus endorsed them as such.¹⁹⁴

In the thirteenth century, in the standard gloss to Roman law, Accursius added comments on much of *Digest* 49.15, where *postliminium* is found. Accursius identified two groups of people against whom *postliminium*, and ostensibly slavery, held good: permanent enemies (apparently referring to non-European nations with a history of hostilities), and those with whom Europe had no relations or contact.¹⁹⁵ Concerning the right of *postliminium* among European nations, Accursius seemed to hold that it was not valid, in

¹⁹¹ Placentinus, *Placentini Summa Codicis*, to C.8.50 (Lyon 1536; repr. Turin 1962, p. 414), ‘...sed etiam non bello captus, postea reversus, ut ab his qui hostes non sunt, sed cum quibus nec hospitium nec foedus nobis est.’

¹⁹² D.49.15.5.2

¹⁹³ D.49.15.16 and D.49.15.18

¹⁹⁴ *Placentini Summa Codicis* (ed. cit., p. 414): ‘Reversus ergo ab hostibus libertatem et civitatem recuperat...[i]ure enim postliminium semper in civitate fuisse videtur...econtra ab hostibus captus si quis fuerit et decesserit, per aequissimam tamen fictionem legis Corneliae, liber decessisse creditur. Quippe ea hora qua captus est, expirasse presumitur.’

¹⁹⁵ Accursius, *Glossa Ordinaria*, to D.49.15.24, s.v. ‘hostes,’ (ed. cit., V col. 1669): ‘Quinque sunt genera gentium. 1. Primum hostes, de quibus hic dicit: in quibus scilicet postlim. locum habet. 2. Item alii, cum quibus non habemus usum, et in his idem.’

particular among free peoples and sovereigns who were not subject to the emperor.¹⁹⁶

Accursius also discussed Italian cities subject to the emperor: these had no rights of *postliminium* because as subjects, and not sovereigns, their wars were illegal and merely the conflicts of bandits (*latrunculi*).¹⁹⁷ Accursius acknowledged, at least, that property could be lost *de facto* in war between the Italian cities. In one example, he supposed that his own horse or servant had been captured, and then recovered by someone else in Bolognese territory. He noted that normally the goods would become the property of whomever recuperated them, since there was no right of *postliminium* by which they would return to the original owner.¹⁹⁸

If there was no material in Roman law pertaining directly to the justification of war, or indeed discussion of different levels of licit public hostilities and their proper authorities, there were important references to personal self-defense, and discussions of the defense of property. The concepts laid out in these discussions could be extended to apply to political entities, and sometimes were, in what became a fruitful movement of concepts from Roman private law to early international public law.¹⁹⁹ Roman law held that self-defense was available to all by the law of nations.²⁰⁰ In the *Digest*, the title D.9.2.45.4 reinforced

¹⁹⁶ Accursius, *ibid.*, ‘Tertium populi liberi, qui nec nobis nec alicui sunt subditi sive sint nobis foederati, cum prius erant forte hostes, sive non, et in his non est opus postliminii...idem dico de eis qui non sunt liberi, sed subsunt regibus non subditis Romano imperio.’ Accursius did however add a caveat, ‘si modo cum eis amicitiam habuimus,’ which somewhat clouded the meaning. It was not entirely clear that Accursius was referring to European polities, as the caveat may well indicate political entities outside of Europe.

¹⁹⁷ *Ibid.*, ‘Quintum sunt latrunculi, de quibus hic dicit...sub quibus possunt comprehendendi si civitas de nostris contra civitatem aliam de nostris: vel si eiusdem civitatis cives inter se: ut Faventia vel Aretium, vel si castrum cum castro de nostris, vel aliquis tyrannus caperet.’

¹⁹⁸ Accursius, to D.49.15.28, s.v. ‘*si quid*,’ col. 1670: ‘seruum meum vel equum hostes ceperunt. Tandem cum Bononiensis essent in exercitu, recuperavit eum aliquis. Dicitur quod non reddetur mihi Francisco iure postliminii.’ He then added a condition under which it would return to the original owner, but not by the right of *postliminium*.

¹⁹⁹ For example, see the conclusion, pp. 236-42, for the influence of medieval self-defense on *jus ad bellum* theories in the early modern period.

²⁰⁰ D.1.1.3: ‘Ut vim atque iniuriam propulsemus: nam iure hoc evenit, ut quod quisque ob tutelam corporis sui fecerit, iure fecisse existimetur, et cum inter nos cognationem quandam natura constituit, consequens est

D.1.1.3, holding that “all laws and rights permit defense against violence with violence,” while D.9.2.5 added that whoever killed an attacker wielding a weapon was not held to have killed illegally. Yet there was no sustained discussion of self-defense found in Justinian’s *Corpus juris civilis*. There were rather these framework comments that medieval civilians built upon to develop a detailed theory of their own. The pertinent ideas evolved in comments on *Code* 8.4, concerning the interdict *Unde vi*, where the use of a “moderate amount of blameless force” was judged to be legally permissible in repelling an attacker.

The medieval civilians considered personal self-defense generally at *Code* 8.4, developing criteria to define licit defense more exactly than Roman law had done. They first raised the question of exactly what constituted a “moderate amount of force” to repel an attacker. Among early jurists, Placentinus noted that a moderate amount of force meant that arms should not be used to expel an attacker if possible.²⁰¹ In Placentinus a legal standard of self-defense was just beginning to emerge: he drew upon *Digest* 43.16 (*De vi et vi armata*) to mention another criterion, that defense had to take place immediately (*incontinenti*) and not after an interval – which was to say, before the defender had turned his mind to other things.²⁰² The brief comments by Placentinus were likely influenced by contemporary debates, and even if they were not specific enough to be applicable to cases, they indicated the line of questioning jurists would pursue in the following generations.

The jurist Azo (fl. 1150-1230), who wrote an influential *Summa* around 1200, emphasized similar rights of personal self-defense.²⁰³ Repulsion of an attacker again had to

hominem homini insidiari nefas esse.” The Roman jurist Florentinus wrote that whatever was done for the safety of one’s body in this case was rightful. It was not a stretch to say – as the jurist Bartolus and others later did – that the corporate body politic could defend itself in the same way as an individual.

²⁰¹ Placentinus, *Placentini Summa Codicis*, to C.8.4 (ed. cit., p. 374): “Ut si sine armis possit expellere, arma non debeat adhibere, non debeat vulnerare.”

²⁰² *Ibid.*

²⁰³ Azo Portius, *Summa Azonis* (Lyon 1533).

be *incontinenti*, or immediate, taking place before the defender turned his mind to other business. Azo modified Placentinus by asserting that arms could be used in defense *only* if used by the attacker (where arms could include rocks), and considered whether a weak man could strike a strong man first, or if he had to wait to be struck before retaliating.²⁰⁴ Because the first blow could be the last, Azo wrote, a defender had to wait only until the would-be attacker sought or threatened to attack with arms before he defended himself or his property.²⁰⁵ In Azo the example of the “weak” defender, which would become common in later arguments, resulted in a right to strike first when threatened.

Odofredus, a Bolognese jurist who died before 1265, also decided in favor of the defender. He argued that more than an equality of arms, an equality of persons (in other words, strength) had to be observed.²⁰⁶ As a result, a weak man was licensed to use arms to repel a stronger though unarmed man.²⁰⁷ Odofredus agreed with Azo that a “threat of force” was sufficient to strike first, but noted that it was necessary to know the exact circumstances of the case, to judge whether injury was inflicted in defense or revenge. On the question of immediate defense, he raised the issue of licit pursuit, but answered in the negative: if the defender pursued the attacker after the latter was repelled, it was assumed to have been done with a mind to revenge and not defense.²⁰⁸

²⁰⁴ Azo, *Summa*, to C.8.4 (ed. cit., fol. 306vb), “...si enim vim inferat sine armis propulsare vim debeo sine armis. Si autem vim inferat cum armis possum eundem armis repellere... Arma autem sunt omnia tela: hoc est fustes et lapides...” and fol. 307ra, “Illud quidam dixerunt simplicitate nimia servandum ut possessor debeat pati primo, se percuti quam ipse percutiat.”

²⁰⁵ *Ibid.*, “Sed certe forte nunquam percuteret postea. Satis est ergo quod alius petit possessorem invadere armis, vel armis terreat ipsum, ut sic possessor contra eum utatur armis.”

²⁰⁶ Odofredus, *Lecture super codice*, to C.8.4.1, n.2 (Lyon 1550; repr. Bologna 1968-9, II fol. 140va): “Et certe potest dici hoc casu quod propter inequalitatem personarum licebit tibi armis resistere.”

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*, ‘...his cursis, ego intimoratus cepi fugere et exivi extra fundum; tu prosecutus est me extra fundum, et extra fundum percutis me. hoc casu non facis ad defensionem, imo ad vindictam, et ideo puniris...’

In the later thirteenth century the jurist Jacobus de Ravanis (or Jacques d'Revigny) (d. 1296), furnished a more permissive interpretation of self-defense on the questions of striking first and pursuit. He agreed with his predecessors on a few issues that were apparently becoming received opinion: a weak man was able to defend himself with arms against an unarmed but stronger man, and a defender did not have to wait to be struck; rather, "the threat of arms" was sufficient to strike first.²⁰⁹ However, the "threat of arms" was expanded in Jacobus to include the reputation of the would-be attacker. If the attacker had a reputation for violence and promised to attack, or was a soldier who unsheathed his sword, it was licit to strike first.²¹⁰ On the issue of flight, Jacobus went beyond Odofredus, writing that the defender was not required to flee even if he could, provided that flight would be dishonorable (as it would be for a soldier, he added). Even further, the defender could licitly pursue and attack the assailant, if the attacker might return to attack again. Jacobus used as an example Saracen raids, where attacks came in waves alternating with retreats; notably, the bold analysis relied on an analogy between personal self-defense and broader military defense.²¹¹

The fuller analysis of self-defense found in Jacobus represented a steady expansion of the subject in juristic commentary from at least Placentinus onward, motivated certainly by doubts and questions that arose in law classrooms and to some extent courtrooms. Certainly also, Jacobus's offer of broad defensive protections to would-be victims of personal violence was granted with a view to limiting the frequent violence of late medieval society. But by admitting that it might be dishonorable (almost certainly for noblemen) to flee an attack, he reintroduced the idea of honor that was at the heart of revenge violence.

²⁰⁹ Jacobus de Ravanis, *Lectura super codice*, to C.8.4.1 (Lyon 1519; repr. Bologna 1967, fol. 367vb).

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

That jurists could countenance the dictates of honor and permit defenders a full scope of action against attackers is not very surprising; when applied to states, however, it reinforced the notion that they could respond very robustly to a full range of alleged *injuriae*.²¹²

The discussion of defense at C.8.4 in fact originally concerned the defense of property. Medieval civilians found it necessary again to go beyond the Roman text in order to offer strong powers of defense to owners threatened with expulsion. *Code* 8.4 granted to lawful property owners (by which was meant land and domicile) the right to use a moderate amount of force to eject attackers immediately, which was the same standard that applied to personal defense.²¹³ In Roman law, if the owner did not act immediately in defense of property, he could still have legal recourse to the interdict *unde vi*, a summary order granted by a judge to recover possession. But the unlawful possessor could also go for an interdict *unde vi* if he was forcefully re-expelled by the rightful owner or possessor.²¹⁴ The thrust of the law was to limit self-help and induce victims to seek an interdict. Medieval jurists, on the other hand, responding to the realities of a contemporary society in which forcible ejection from property and self-help recovery were common, and in which legal orders for restoration could be ineffectual, often gave fuller scope for self-help remedies. They did not specifically allow a greater use of force than was permitted in Roman law, but the jurists did extend the meaning of *incontinenti* to include a greater period of time, in a legal maneuver probably meant to accommodate contemporary practice.

Placentinus was an early voice for broadening the definition of *incontinenti* to accommodate self-help. He wrote that an expelled owner could wait to gather his friends

²¹² The civilian Alberico Gentili, *De Iure Belli*, trans. Rolfe, pp. 61-66, echoed these broad defensive protections in writing that nations did not have to wait to be struck to go to war; the fear of being struck could be sufficient to strike first. See the conclusion on Gentili's account, pp. 236-9.

²¹³ See also the discussion in Roman law at D.43.16, *De vi et vi armata*.

²¹⁴ D.43.16.14.

together in order to expel the despoiler from his property, without specifying a period of time for it.²¹⁵ Jacobus de Ravanis, writing over a century later, concurred, noting that someone expelled from his rightful property could gather his friends for a year (and even after) and return to recapture his property by force, without needing an interdict.²¹⁶ But because Roman law did not contemplate anything like a year for recuperation, the jurists had to present novel reasoning to extend the meaning of *incontinenti*. Placentinus and Jacobus found their analogy in the Roman law on adultery, where a husband who caught his wife and lover *in flagrante delicto* could kill the lover first, before capturing and killing his wife some hours later if she had escaped.²¹⁷ Pushing a few hours to a year was a leap, but *mutatis mutandis* it seemed reasonable enough in Jacobus's legal view.

Such an interpretation, of course, bordered on licensing private war. While it may have been realistic as a self-help remedy in a period when forcible ejection and private war were common, the legal interpretation was not universally accepted among civilians. Odofredus, for one, came out strongly against such an interpretation of *incontinenti*, asking: “why will it not be licit for me up to the month, or to the year, to expel you from possession of my estate, because perhaps...I can only do so because I have called together my friends”?²¹⁸ He answered with an awareness of the possibility of escalating violence: “this

²¹⁵ Placentinus, *Placentini Summa Codicis*, to C.8.4 (ed. cit., p. 374): “Non assumpto alio negotio, id est, non reservet nec differat post dies, sed instet: amicos, vicinos, consanguineos rogitet, anxie desudet: ut congregato coetu eum, qui se expulit expellat...”

²¹⁶ Jacobus de Ravanis, *Lectura super codice*, to C.8.4 (ed. cit., fol. 367va): ‘sed questio intelligitur incontinenti intelligimus antequam divertatur ad alium actum. Verbi gratia possideo castrum expellis me non possum te expellere solus congrego amicos meos per annum, ex quo prosequutus sum diligenter, non deponens animum possidendi, possum te expellere etiam post annum.’

²¹⁷ Jacobus de Ravanis, *Ibid.*; and Placentinus, *Ibid.*, citing D.48.5.24.

²¹⁸ Odofredus, *Lectura super codice*, to C.8.4.1 (ed. cit., II fol. 141ra): ‘Sed quare non licebit mihi usque ad mensem, vel usque ad annum te expellere de possessione fundi mei; quia forte tunc non potui te deicere, sed modo possum quia convocavi amicos meos...’

is not licit for me, because from it a great tumult may occur and many evils could arise.’²¹⁹

As was often the case with questions of medieval violence, the jurists found themselves forced to choose between permitting self-help remedies that might threaten the social order, and demanding restraint that could leave victims without defense. The overarching problem was the availability of a reliable court system in a given area, and the actual enforceability of court decisions.

Finally, feudal law also added a number of directives to the discussion on war. Like Roman law it saw no inherent moral peril in hostilities, and focused not on justification but the specific rights and obligations of vassals to their lords. There was, however, an important section – though pertaining again to the obligations of vassals – which canonists and Romanists cited frequently in discussions of justification. The section was *Domino guerram* from Title 28 of the *Libri feudorum*, the medieval collection of feudal law. There it was argued that a vassal was obligated to help his lord in a war that was known to be just, and also one whose justice was doubtful.²²⁰ If the war was known to be unjust (*irrationabiliter*), then the vassal was bound to aid his lord in defense but not offense – if he did not wish.²²¹ This was significant, and struck against canon law not only by permitting participation in a certainly unjust war, but by holding that defense was always a right and actually a duty. According to two jurists, Oberto and Gerardo, the vassal should not lose his fief if he refused to help his lord in an unjust (offensive) war. But “others” said that a vassal

²¹⁹ *Ibid.*: ‘hoc mihi non licet, quia ex hoc posset multus tumultus accidere, et multa mala possent oriri.’

²²⁰ *Libri feudorum*, to bk. II, tit. 28, in *Corpus juris civilis Romani*, 5 vols., ed. D. Gothofredi (Naples 1828-30, V p. 528): ‘Domino guerram facienti alicui, si sciatur, quod juste, aut cum dubitatur, vasallus eum adjuvare tenetur.’

²²¹ *Ibid.*, ‘Sed cum palam est, quod irrationabiliter eam facit, adjuvet eum ad eius defensionem: ad offendendum vero alium non adjuvet, si vult.’

ought always to help his lord, without distinction.²²² There was, however, one caveat, that a vassal was in no way bound to help an excommunicated or banned lord, being in that case freed from all bonds.²²³ The optional character of helping a lord in an unjust war, or the duty to help without regard for the war's justice, of course ran counter to canon law, but exerted an influence over jurists, and would continue to do so in the fourteenth century, when determining the justice of a given war was acknowledged by some Roman jurists to be very difficult.

Another important section of feudal law was naturally more in keeping with the canonists' desire to place limitations on warfare. This was the feudal obligation for vassals to bring their conflicts before a king, judge or peers.²²⁴ Thus the *Lex corradi* was also a frequent citation in discussions of war, used by canonists and Romanists to remind vassals of their duty to seek legal and not armed recourse. If one party had any benefits from the king or had been invested by the king, the case was accordingly to be tried before him.²²⁵ And if two equals both asserted that a fief was theirs, whether they agreed on who invested them with it or did not, the case was to be decided by a judge or arbiter.²²⁶ Innocent IV and particularly Hostiensis had made similar demands for recourse to a judge. Although the Church sometimes claimed jurisdiction over matters pertaining to war, writers like Innocent and Hostiensis certainly saw that secular, feudal jurisdiction was the usual means by which

²²² *Ibid.*, 'Sed si eum adjuvare noluerit, non tamen feudum amittet, secundum Obertum de Orto, et Gerardum (Capagistum). Alii vero sine distinctione dicunt semper debere eum adjuvare.'

²²³ *Ibid.*, 'Sed Obertus et Gerardus utuntur eo argumento, quod quemadmodum dominum excommunicatum, vel a rege bannitum non est obligatus vasallus ad adjuvandum vel servitium ei praestandum, imo solutus est interim sacramento fidelitatis, nisi ab ecclesia, vel a rege fuerit restitutus.'

²²⁴ *Ibid.*, tit. 34, p. 531.

²²⁵ *Ibid.*, 'quia si inter duos quicumque fuerint, de beneficio regali controversia fuerit, quorum uterque a rege se dicit investitum fuisse, tunc causa coram eo decidatur...'

²²⁶ *Ibid.*, 'Si autem inter pares duos de aliquo beneficio controversia sit, quorum uterque suum feudum proprium esse dicat: sive asserant eundem investitorem, sive diversos: coram iudice vel arbitro finiatur.'

smaller, local wars should be prevented. The idea of an appeal to a higher superior was itself originally an acknowledgment of feudal principles of law.

The view of warfare, its justification, obligations and consequences, was certainly different in Roman and feudal law than canon law. While Roman law had no real sense of a morally just war, feudal law rested on a system of obligations between overlord and vassal which tended to overrule strong considerations about the justice of a cause. Although very different in their orientation, they both influenced the canon law on war, and were influenced by it in turn. Canon law adopted ideas, for example, on moderate self-defense, despoliation of property, and recourse to a superior to adjudicate disputes, which enriched the analysis of war. A rich fund of ideas primarily from Roman, but also feudal, law helped jurists like Innocent IV and Hostiensis to describe war in greater detail, which they did by identifying different kinds of hostilities and defining their proper scope, as part of a process by which jurists attempted to bring war into the legal framework of the *jus commune*.²²⁷

Though the three laws influenced and borrowed elements from each other profitably, they could not merge into a single, seamless tradition within the *jus commune*. Elements from each would always fit incongruously beside the others. This was particularly true for Roman law, which had to adopt assumptions about just war that were foreign to it, and which was further impeded by its own assumption on the universal authority of the emperor. However, Roman law would find exceptionally creative commentators in the fourteenth century, and in a period when innovative commentary on war declined in canon law, civilians were stimulated by a number of legal issues in the contentious and expanding city-states of Italy. War was one of the important issues that Romanists faced, and they were in

²²⁷ E.g., Hostiensis, *In primum [-sextum] decretalium commentaria*, to X.2.24.29, nn. 2-3 (= *De iureiurando*) (Venice 1581; repr. Torino 1965, I fol. 136ra), on feudal obligations in war, where a vassal does not have to aid his lord in an unjust war.

fact called on to give legal opinions on particular cases. The Roman lawyers saw no need to replace the theories of just war from canon law, but some civilians took up new attitudes – or at least made explicit their assumptions – on the justification of war, and worked out more detailed analyses on issues like truce, alliance, confederation and ransom.

Chapter 3

War and peace in the fourteenth-century *jus commune*

In the fourteenth century the impetus to develop the legal theory of war, and in some cases to take it in new directions, came primarily from Roman law and civilian jurists. In the thirteenth century, in the work of Innocent IV and Hostiensis, there was already to be found a broader scope to discuss various kinds of violence, but canonists in the fourteenth century did not have reason to move further from the foundations of the Augustinian tradition. It was the Roman lawyers (though some had degrees in both laws) who took up questions related to war with greater interest, not least because they played a central role in the legal and institutional organization of the Italian cities, and remained intensely engaged in urban society. Noted civilians travelled the judicial circuit as judges and lesser magistrates, helped reform city statutes and offered legal opinions to city governments on questions ranging from conflicts of jurisdiction to taxation.²²⁸ Trained lawyers also took part in city government and served as ambassadors, in which role they participated in foreign disputes, including questions of war and peace.

It was thus not surprising that these civilian lawyers, attuned to the needs of contemporary Italian society, would be able to adapt the theory of war to independent cities,

²²⁸ Martines, *Lawyers and Statecraft*, is still the best survey of the deep involvement of trained lawyers in city affairs, and he focuses, from a Florentine perspective, on such important topics as the lawyers' guild, their educational background, role in creating and reforming legislation at home and in subject territories, their role in Florentine relations with the Church, and in diplomacy. And see now *The Politics of Law in Late Medieval and Renaissance Italy*, ed. L. Armstrong and J. Kirshner (Toronto, 2011), essays commemorating the fortieth anniversary of the publication of *Lawyers and Statecraft*. For excellent insight, through a detailed analysis of a jurist's work on Florentine finance, into the function of jurists as upholders of class privileges and merchant interests, see Lawrin Armstrong, *Usury and Public Debt in Early Renaissance Florence: Lorenzo Ridolfi on the Monte Comune* (Toronto, 2003).

particularly those of northern Italy. A number of Italian cities of course had been effectively independent for a long time, but medieval Roman law had been ambivalent about that freedom at best. It will be a primary argument of this chapter that the legal contributions of the jurist Bartolus of Sassoferrato, asserting the political independence of a number of Italian cities, had natural and important consequences for the theory of war, and derived in part from observations on the lack of an overarching authority in Italy. Bartolus recognized that in many cases it made little sense to maintain that cities were subject to the empire in any but the most formal way, and that as *de facto* sovereign polities those cities were free to make war. The just war criterion of intention was essentially dismissed by Bartolus, and the legal view that war was often a necessary form of self-help became more explicit in the work Bartolus and some contemporaries.

In keeping with his view on free cities, Bartolus also modified tradition by arguing that cities were free to make peace and federate among themselves. In fact Bartolus and jurists following him penned a number of opinions on questions related to peace, truce and alliance which were applicable to, and generally arose from, the Italian context. As on war, juristic thought on peace and alliance produced by the Roman lawyers often took its lead from canon law, but new questions arose from practice in the fourteenth century which stimulated new responses. In this regard, *consilia*, or legal opinions written for actual cases, could play a role, and some of them developed new theory on questions of war and peace which in turn influenced the commentary literature. As well, the rising territorial city-states of the fourteenth century, including Florence, Venice and Milan, were aided by the formation of new law that could be applied to their increasingly interwoven relations. With

the *jus commune* and its evolving law on war and peace, jurists took possession of a shared lexicon with which to debate the competing claims of their cities.

Discussions on war among Roman lawyers were often concentrated in commentaries at D.1.1.5 by the fourteenth century. Indeed, this important section, concerning the origin of society, war and property, remained an important *locus* and saw discussion move in some new directions. The Romanist Cino of Pistoia (1270-1336/7), for instance, articulated a notion of human social development which featured elements of the Christian and Ciceronian traditions. One of Cino's descriptions for the origin of society derived from the Augustinian account which held that after man's fall, his wicked nature required the restraint of laws and government. Cino wrote: "when races, on account of the unpunished license of their crimes, subjected their liberty to justice, it was necessary that man was put over man, for whom laws were given."²²⁹ The idea of subjecting one's liberty (or having it subjected) to just government on account of man's "crimes" accorded with a traditionally accepted medieval view of government.

Cino also borrowed part of his account of the origin of society from Cicero. Cino stayed close to his source in writing that, "anciently men lived in forests; finally, after the people increased they began to make coverings, houses and buildings; and thus by the gathering of people towns were made, camps, cities and villages, according to Tully."²³⁰ For Cicero the origin of civil society and government was natural, consequent simply upon man's sociability, changing needs and the use of reason. Of course, the view of society at D.1.1.5 also accorded more easily with Cicero's description, in which there was no sense of

²²⁹ Cino of Pistoia, *In Digesti veteris libros commentaria*, to D.1.1.5 (Frankfurt 1578, fol. 4rb): "vel quod cum gentes propter impunitam licentiam scelerum libertatem suam subiecerunt iustitiae: necesse fuit, quod homini praelatus esset homo, per quem iura redderentur."

²³⁰ *Ibid.*, "Nam homines antiquitus habitabant in sylvis, demum crescentibus populis coeperunt facere tegmina, domos, et aedificia: et sic collatione gentium facta sunt oppida, castra, civitates et villae, secundum Tullium."

a moral “fall” or a human nature requiring restraint on account of sin. The two traditions could be and were blended, though never perfectly; and Cino’s inclusion of both is a reminder that their content importantly differs. Indeed, the origin of civil society and of war could be understood in a classical and more Christian light, as a purely natural phenomenon and a result of man’s fallen state.²³¹ And what might be called a more classical understanding of D.1.1.5 would be more marked in the later commentaries of Paolo di Castro and Raffaele Fulgosius, where it might support a more permissive outlook on war.²³²

Cino also enumerated four kinds of just or “licit” war, among which was that waged in the absence of a judge.²³³ Including this kind of war harked back at least to Innocent IV, who had written that in the absence of a judge one could recuperate goods on one’s own authority. In Romanists like Cino, the idea had a fuller meaning: Cino referred not simply to reprisals but the right to wage offensive war in the absence of a superior. He noted the opinion that with the empire vacant, some jurists held that “all those who are of the empire” could wage war on their own authority.²³⁴ Cino himself concluded that war was possible with the empire vacant, but only in strict self-defense.²³⁵ As a northern Italian, Cino had in

²³¹ Cary Nederman, “Nature, Sin and the Origins of Society: The Ciceronian Tradition in Medieval Political Thought,” *Journal of the History of Ideas*, 49:1 (1988), pp. 3-26, points out that this dichotomy between the social (classical) and anti-social (Christian) accounts of the origin of society were present from the twelfth century onwards. Nederman subtly argues that Cicero offered a weaker version of natural sociability than Aristotle that was more compatible with Christian accounts of the fall.

²³² See below, pp. 86-94.

²³³ Cino, *op. cit.*, fol. 4va. Cino gave four “licit” wars: “Aliud est licitum, et hoc specialiter in tribus, vel quatuor casibus. Primus, quando fit ad propulsionem illatae iniuria in continenti, et cum moderamine...Secundo, quando fit autoritate legis scriptae...Tertio, quando fit in hostes populi Romani, vel econtra...Quarto, quando fit in defectum iudicis.” Cino’s wars, not unusually, obscure divisions between licit public wars and licit personal violence. His first example was of personal self-defense, though it became an accepted analogy for public defense. The second makes reference to C.3.27.1 in Roman law, which held that anyone had a license to detain or kill someone who lays waste to fields or lays traps or obstacles along roads. This was also personal violence, but the point was that written law could define licit war. The third of course was the Roman public war, declared on proper authority.

²³⁴ Cino, *op. cit.*, fol. 4va, “Et per hoc dicunt quidam, quod qui sunt de imperio, vacante eo, possunt ad invicem debellare, quia non est superioris copia et recursus.”

²³⁵ *Ibid.*, “Breviter tamen dicendum est, quod in defectum superioris, ad defensionem personae vel rerum, potest bellum fieri, non ad acquisitionem, et in istis licitis bellis intelligitur lex ista.”

mind the Italian cities, which were usually considered to be *de jure* a part of the Holy Roman Empire. Earlier, the *Summa Parisiensis* also held that cities could wage war, and Huguccio held that with the Emperor's authority the Italian cities could wage war, but now Romanists began to contemplate more generally whether Italian cities could legally wage offensive war on their own authority.

The question was also treated by Albericus de Rosate (c.1290-1360) in his commentary on D.1.1.5. Albericus took parts of Cino's analysis verbatim, and repeated both the Augustinian and Ciceronian explanations that Cino gave for the origin of society. He also gave Cino's four kinds of licit or just war. Concerning the war which was licit in the absence of a judge, Albericus reminded students that this "judge" was the emperor.²³⁶ Again it was the Italian context that mattered. Albericus asked whether "as canonists said" the Church succeeded to the place of the emperor when the seat of the empire was vacant. But he vigorously denied the familiar claim, writing that the Empire and Church did not depend on each other and one could not succeed to the other. As a consequence, with the empire vacant, "arms were able to be taken up without license."²³⁷ There was no assertion here, as there often was among canonists, that the Pope was the arbitrator of last resort in cases of dispute. Like Cino, Albericus was opening a legal path for the independent Italian cities to justify their recourse to both offensive and defensive war. It was here that the jurist Bartolus, in the next generation, would make the most important contributions.

Bartolus of Sassoferrato (1313-1357) is notable in medieval political thought for his legal justification of the *de facto* independence of Italian cities from the Holy Roman

²³⁶ Albericus de Rosate, *Commentaria super Digesto veteri*, to D.1.1.5, nn. 6-7 (Lyon 1545, fol. 14va).

²³⁷ *Ibid.*, n. 7: "Sed canoniste dicunt quod vacante imperio succedit ecclesia romana ut extra de foro competente...quid si fas est, non puto verum, cum nec imperium ab ecclesia nec econverso dependeat, sed simul ortum habuerunt...[p]uto quod vacante imperio assumi possint arma sine eius licentia."

Empire. His contribution in this respect has been studied, but merits brief review because it is intimately connected with the cities' right to wage war, and to make treaties, peaces and truces, on their own authority.²³⁸ A few jurists prior to Bartolus had observed that certain cities did not recognize a superior in the Emperor, but they did not openly affirm such non-recognition legally and certainly did not create a theory to legitimize it.²³⁹ Bartolus on the other hand decided to elaborate on why cities could make valid laws and govern themselves autonomously. His argument focused importantly on their law-making power.²⁴⁰ Citing Roman law, he argued that customary law could be made by the consent of the people alone, and did not require the approval of a superior. He then argued that express consent, which resulted in statutory law, did not differ essentially from the tacit consent that established customary law, so that cities could make laws for themselves without the emperor's ultimate approval. The consequence was that a city which did not recognize a superior in fact (as was fitting of a republic, Bartolus wrote), was a *civitas sibi princeps*, or a city which was an emperor to itself, exercising in its dominions the same power that the emperor exercised in his. It was a powerful argument for the sovereignty of the cities, and while Bartolus held accordingly that it was *de facto* and not *de jure* sovereignty and that the cities were still

²³⁸ Among prominent studies treating Bartolus's contributions, C.N.S. Woolf, *Bartolus of Sassoferrato, his position in the history of medieval political thought* (Cambridge, 1911); Francesco Ercole, *Da Bartolo all'Althusio. Saggi sulla storia del pensiero pubblicistico del Rinascimento italiano* (Florence, 1932); Francesco Calasso, *I glossatori e la teoria della sovranità*, 3rd ed. (Milan, 1957); S. Mochi Honori, *Fonti canonistiche dell'idea moderna dello stato* (Milan, 1951); Gaines Post, *Studies in medieval political thought: public law and the state, 1100-1322* (Princeton, 1964); Walter Ullmann, *Principles of Government and Politics in the Middle Ages* (London, 1955), pp. 279-87; idem, 'De Bartoli Sententia: Consilium repraesentat mentem populi,' *Bartolo da Sassoferrato, Studi e Documenti per il VI Centenario* (Milan, 1962), vol. 2, pp. 707-33; Joseph Canning, *The Political Thought of Baldus de Ubaldis* (Cambridge, 1987), which also treats Bartolus to some extent; and Magnus Ryan, "Bartolus of Sassoferrato and Free Cities," *Transactions of the Royal Historical Society*, 6th ser., vol. 10 (2000), pp. 65-89.

²³⁹ Canning, *The Political Thought of Baldus de Ubaldis*, p. 94, cites Petrus de Bellapertica, Jacobus de Ravannis, Oldradus da Ponte and Cino.

²⁴⁰ The basis of his theory in the law-making power of the cities was argued by Ullmann, 'Sententia Bartoli,' and in *The Principles of Government and Politics*, pp. 283-4; in Canning, *The Political Thought*, pp. 94-7, and is followed here.

subject to the spiritual authority of the Church, it left them with the power to make laws and war.

Bartolus was also willing to discuss which Italian cities had become free *de facto* or *de jure* to make laws and govern themselves, and he commented on the cities' legal relationship to the empire and each other. He handled the question by trying to identify the different kinds of independence from the empire that various Italian cities possessed in his contemporary society. The starting point of the discussion was the broader assumption, common to jurists, that not only Italy but all of Europe was part of the Roman empire and still subject to it *de jure*. Bartolus did argue for European unity based on the connection between the Church and empire, but the real result was to offer a view of the kinds of political independence that existed in Europe, particularly among the Italian cities of the fourteenth century. He revealed more about the status of various Italian cities than he found success in bringing such a range of differences into an imagined legal and cultural unity.

He argued first that because all the kingdoms and peoples of Europe obeyed the Church, they were part of the Roman people and citizens of Rome, though they might assert that jurisdiction and dominion (or full ownership) of their territory had been conceded to them.²⁴¹ This was of course the supposed unity that could contain such differences in Europe, but in Italy Bartolus acknowledged that the relationships of the cities to the Roman empire, the emperor and his laws, were complex. The cities of Tuscany and Lombardy, Bartolus noted, lived according to the laws of the people of Rome (*populus Romanus*) and

²⁴¹ Bartolus of Sassoferrato, *Commentaria*, to D.49.15.9, n. 6 (Turin 1589, IV fol. 275rb): "Et idem dico de istis aliis Regibus et principibus qui negant se esse subditos Regi Romanorum, ut Rex Franciae, et Angliae, et similes. Si enim fatentur ipsum esse dominum universalem, licet ab illo universali dominio se subtrahant, ex privilegio, vel ex praescriptione, vel consimili, non desinunt esse cives Romani, per ea quae dicta sunt. Et secundum hoc quasi omnes gentes, quae obediunt sanctae matri ecclesiae, sunt de populo Romano."

admitted that the emperor was lord of all things, even if they fully governed themselves.²⁴²

The Venetians on the other hand did not obey the emperor at all nor lived by Roman laws, but they had been granted a revocable privilege by the emperor to do so.²⁴³ Still others claimed that they had their liberty from the empire by irrevocable contract, like the lands held by the Church in Italy, which were supposedly transferred through the Donation of Constantine.²⁴⁴ Bartolus's examples all gave the same result: these cities and territories did not recognize a superior in fact. As well, with respect to each other, some cities were subject to other cities. As the jurist noted, cities subject to another could not be called a free people, and residents of those places were called citizens of the city to which they were subject.²⁴⁵

Bartolus however allowed one circumstance in which this imagined totality of the Roman people and citizens of Europe would fall apart. That case was war, and it first suggested how deeply the question of political independence was related, for him, to the power to make war. Bartolus held that the kings and other independent polities of Europe, including the free cities of Italy – like Florence – had the power to wage public wars against each other, in which the belligerents became official enemies (*hostes*), and had the right of *postliminium*.²⁴⁶ In these wars captives legally became slaves, which Roman law had

²⁴² *Ibid.*, fol. 275ra, n. 3: “Quaedam sunt, quae non obediunt Romano Imperio in totum, sed in aliquibus obediunt, ut quia vivunt secundum legem populi Romani, et Imperatorem Romanorum esse dominum omnium fatentur, ut sunt civitates Tusciae, Lombardiae, et similes, et istae sunt de populo Romano.”

²⁴³ *Ibid.*, n. 4: “Quidam sunt populi, qui nullo modo obediunt Principi, nec istis legibus vivunt, et hoc dicunt se facere ex privilegio Imperatoris, et isti similiter sunt de populo Romano, ut faciunt Veneti.”

²⁴⁴ *Ibid.*, “Quidam sunt populi, qui non obediunt Principi, tunc asserunt se habere libertatem ab ipso ex contractu aliquo, ut provinciae, quae tenentur ab ecclesia Romana, quae fuerunt donari ab Imperatore Constantino ecclesiae Romanae posito pro constanti quod donatio tenuerit, quodque revocari non possit, adhuc dico istos de populo Romano esse.”

²⁴⁵ *Ibid.*, to D.49.15.7, fol. 274ra, n. 1: “Nota quod ista castra, quae sunt in comitatu alicuius civitatis non possunt dici proprie liber populus, et homines de illis castris dicuntur cives illius civitatis.”

²⁴⁶ *Ibid.*, fol. 275rb, n. 7: “Praedicta vera [that they were part of the Roman people], nisi bellum publicum esset indictum contra aliquos ex istis. Tunc enim efficerentur hostes propter indictionem belli, ut infra dicam.”

validated for wars between the Romans and any foreign people.²⁴⁷ In the case of war, the unity of European peoples under a common Roman identity was suspended at best, and in effect dissolved. As far as the point touched upon the free cities, it reinforced Bartolus's argument on *civitas sibi princeps*, which indicated the rights the cities possessed even against the emperor. Although the point did not reflect European practice in war, it was striking: for the purpose of war, independent European kingdoms and free cities were related to each other, and to the empire, only as much as the Romans were to any other foreign territory.

Bartolus incidentally did not confine himself to the relationship of Italian cities and western Europeans to the Holy Roman Empire, but tried to describe the relations of all people to the Empire, in a more disinterested way than Innocent IV or Hostiensis had. Beyond the *cives Romani* were Greeks, who believed that the eastern Roman emperor was the lord of the world (*dominus totius mundi*) rather than the western Roman emperor; likewise the Mongols (*Tartari*) held that the Great Khan was the lord of the world.²⁴⁸ Bartolus thought that Saracens and Jews each claimed the same for their temporal lord. There were people federated with the western empire, like the Greeks, while the empire had peace pacts with the Mongols. There were others, like the Indians, with whom the west had no contact and so were not either at peace or war, and those like the Saracens and Turks against whom war had been declared, whether permanently or not Bartolus did not

²⁴⁷ See above, pp. 53-4.

²⁴⁸ *Ibid.*, n. 8: "Secundo dixi, quod alii populi sunt extranei et sunt populi extranei proprie, qui non fatentur Imperatorem Romanum esse dominum universalem, ut Graeci, qui non credunt Imper. Rom. esse dominum universalem, sed dicunt Imper. Constantinop. esse dominum totius mundi. Item Tartari, qui dicunt Grantcham, esse dominum universalem. Et Sarraceni, qui dicunt dominum eorum esse dominum totius mundi. Idem in Iudeis. Verum inter istos est differentia. Nam quidam ex istis sunt nobis foederati, ut erant Graeci nobis foederati contra Turcos. Quidam sunt, cum quibus habemus pacem, ut Tartari nam mercatores nostri vadunt ad illos et illi ad nostros. Quidam cum quibus non habemus pacem nec guerram, nec aliquid facere, ut cum illis de India. Quidam sunt, cum quibus habemus guerram indictam, ut cum Sarracenis et hodie cum Turcis: sed modicum ad nos de illis, qui foris sunt."

comment. Clearly there were competing claims to world sovereignty. Bartolus followed for a moment the long legal tradition that held the Roman emperor to be the *dominus mundi*, by suggesting that it might be heretical to deny it.²⁴⁹ But he also noted that there were foreign people who were “properly” foreign.²⁵⁰ Bartolus assumed with classical Roman law that entities beyond the empire (at least *de facto*, like ones within it) could be free, federated or hostile, and make war and peace.

Bartolus’s real focus of course was contemporary Italy, and he consistently defended the war-making powers of the free Italian cities on the grounds of the independence he had articulated.²⁵¹ When he took up the question of war in his *Tractatus represaliarum*, Bartolus indicated the important connection between political independence and war, implying that it was possible in Italy because of the emperor’s inability to intervene effectively in Italian politics or settle disputes as their highest judge.²⁵² He did not deny the rights that the emperor had in Italy, but indicated the weakness of his position. This was the other side of the *civitas sibi princeps* argument: on questions of war, Bartolus highlighted not the cities’ power to make law but the “lack of access to the judgment of a superior” (*non potest haberi copia superioris*) for disputes, which left cities free *de facto* to defend their own rights and

²⁴⁹ *Ibid.*, fol. 275rb, n. 6, “Et forte si quis diceret dominum Imper. non esse dominum, et monarcham totius orbis, esset haereticus: quia diceret contra determinationem ecclesiae, contra text. S. Evangelii, dum dicit, Exiit edictum a Cesare Augusto ut describeretur universos orbis, ut habes Luc 2, c. Ita etiam recognovit Christus Imperatorem, ut dominum.”

²⁵⁰ *Ibid.*, n. 7: “Secundo dixi, quod alii populi sunt extranei et sunt populi extranei proprie...”

²⁵¹ Another precursor to Bartolus’s views was Oldradus da Ponte, a jurist active in the early Trecento. Oldradus argued in a *consilium* that princes who did not recognize a superior were free to declare war against each other, citing Innocent IV; but he did not apply his views to cities. He made explicit the point that according to the *jus fori*, or public courts, war could be declared on proper authority alone, but according to the *jus poli*, or law of heaven, just cause and intention was also required. See Oldradus da Ponte, *Consilia*, no. 70 (Lyon 1550, fol. 25ra).

²⁵² Bruno Paradisi, “International Law and Social Structure in the Middle Ages,” in *Civitas Maxima: Studi di Storia del diritto internazionale* (Florence, 1974), pp. 657-81, makes some perceptive comments on this problem of lack of access to authority, which he traces as a legal problem to the early feudal period when individuals and families could claim political autonomy.

property, and even to wage retributive, offensive war. The introduction to the *Tractatus represaliarum* gives a description of the position in which Italy found itself:

The cause for reprisals was neither frequent nor daily in that time during which the Roman empire thrived in its proper state: recourse was had to it [the empire], just as to the highest monarch, and so the doctors of laws and ancient interpreters of the law did not discuss this matter. But afterwards our sins merited that the Roman empire should lie prostrate for a long time, and kings and princes and also cities, particularly in Italy, did not recognize a lord in temporal things, at least *de facto*, wherefore recourse to a superior for [redressing] injuries could not be had...²⁵³

Bartolus was here discussing reprisals, which were usually commercial retaliations for a failure to do justice; however, reprisals were considered a species of limited war and shared with public war the same principles.²⁵⁴ For Bartolus, the act of disobedience, or non-recognition of a superior, seemed to assume the prior condition that the empire had been for a long time “prostrate” or ineffective as an area of legal or political control.

Bartolus reinforced the principle of self-help for Italian cities elsewhere in the same treatise, offering an example of why access to a superior was not available:

²⁵³ Bartolus, *Tractatus represaliarum*, in *Commentaria* (Venice 1590-1602, X fol. 119vb): “Represaliarum materia, nec frequens, nec quotidiana erat tempore, quo in statu debito Romanum vigeat Imperium: ad ipsum enim tanquam ad summum Monarcham habebatur regressus, et ideo hanc materiam legum Doctores, et antiqui iuris interpretes minime pertractaverunt. Postea vero peccata nostra meruerunt, quod Romanum Imperium prostratum iaceret per tempora multa, et Reges et Principes, ac etiam civitates maxime in Italia, saltem de facto in temporalibus dominum non agnoscerent, propter quod de iniustitiis ad superiorem non poterant haberi regressus...”

²⁵⁴ On reprisals, see the older but essential treatments of A. del Vecchio and E. Casanova, *La rappresaglie nei comuni medievali e specialmente in Firenze, saggio storico* (Bologna, 1894), Dina Bizzarri, *Studi di storia del diritto italiano* (Turin, 1937), pp. 3-44, Giovanni Cassandro, *Le rappresaglie e il fallimento a Venezia nei secoli XIII-XVI. Con documenti inediti* (Turin, 1938), Guido Bonolis, *Questioni di diritto internazionale in alcuni consigli inediti di Baldo degli Ubaldi. Testo e commento* (Pisa, 1908), pp. 96-104; and more recently Lauro Martines, *Lawyers and Statecraft in Renaissance Florence* (Princeton, 1968), pp. 359-82 and *passim*; and Antonella Astorri, *La mercanzia a Firenze nella prima metà del Trecento: il potere dei grandi mercanti* (Firenze, 1998), pp. 186-95. Usually pertaining more to the detention of goods and persons, reprisals were still considered a species of war, and indeed were a quasi-legal remedy for the failure to do justice. They deserve a separate and updated historical and legal treatment.

[I]t is asked, how it should be understood that access to a superior cannot be had? Response: whenever access cannot be had, neither by law nor in fact, because there is none, then it is clear...[or] whenever access can be had by law, but not in fact. Example: the emperor is presently in Germany, and by law he is the superior, nevertheless in fact these parts are not in obedience to him. Or, in the March [of Ancona] he [the emperor] is the rector for the holy mother Church, but in fact nothing is, on account of the occupation of tyrants, so that it seems access to a superior cannot be had.²⁵⁵

Not all cities were free *de facto* on account of the emperor's absence. Some continued to recognize the emperor formally, and of course others recognized another city as their superior. But in the milieu of mid-fourteenth century Italy, where a number of prominent and autonomous cities competed for territory, Bartolus's expanded view of self-governance was an important position to take in law.²⁵⁶

Bartolus also suggested a wider idea of licit authority for war in the *Tractatus represaliarum*. He wrote:

And war is licit from the aforesaid causes, which also is proved, since it is by the law of nations that it seems to be done justly when someone does it for the sake of the protection of his body. [As] I understand the body, either we may speak of one individual, or of one mixed body. Whence a city is able to wage war for the protection of one citizen, just as one particular [person] is able to wage war

²⁵⁵ Bartolus, *Tractatus represaliarum*, fol. 121ra, n. 12: "...queritur, quomodo intelligatur, quod superioris copia haberi non possit? Respon. quandoque non potest haberi copia superioris de iure, nec de facto, qua non est, et tunc est clarum...[q]uandoque potest haberi copia de iure, sed non de facto. Exemplum, Imperator est modo in Alemania, et de iure est superior, tamen de facto in partibus istis ei non paretur. Vel pone, in Marchia est rector pro sancta matre ecclesia, tamen de facto nil potest propter occupationem tyrannorum, scilicet quod videtur superioris copia non haberi." Bartolus continued with a comment on tyrants: "Quandoque tamen non potest haberi copia de facto, nec de iure. Exemplum: aliquis tyrannus occupavit multas terras de facto, nam de iure non est dominus, et puto recurrendum ad ea quae no. Inno. in c. nihil. extra, de elec.; videlicet, quod aut tyrannus ille sua autoritate occupavit et tunc non habetur pro superiore, et non valeret quod ab eo fieret...[a]ut fuit electus ab habentibus potestatem facere per vim vel metum, et tunc aut hoc non est notorium, sed pro vero domino se gerit, et sic reputatur communiter et tunc habetur pro superiore...[a]ut est publice notum quod est tyrannus, non dominus et tunc habetur pro superiore..." The same principles that disqualified the tyrant from being a legitimate authority also ruled him out as a valid superior. On Bartolus's theory of tyranny, and an edition of his treatise *De tyranno*, see Diego Quagliani, *Politica e diritto nel Trecento italiano: il De tyranno di Bartolo da Sassoferrato (1314-1357): con l'edizione critica dei trattati De Guelphis et Gebellinis, De regimine civitatis e De tyranno* (Florence, 1983).

²⁵⁶ Canning, *op. cit.*, pp. 113-15, gives Baldus's treatment of non-recognition. It included the same *de facto* consequences for the absence of effective imperial rule in Italy.

against all for the protection of his person and his things, where access to a superior is not able to be had, or another remedy cannot be had, as with the said laws...[a]nd I think the aforesaid things are in accord with the law of nations and civil truth.²⁵⁷

A few important points come out of the comments. First, Bartolus alluded to an idea that was generally accepted among jurists, that a polity was a corporate body – often considered a *persona ficta* – and was treated as a single person in law.²⁵⁸ And here Bartolus made it clear that self-defense for cities was well supported by the analogy between the individual and a legitimate corporation. In both cases self-defense was based on a right guaranteed under the law of nations, which was often considered by jurists to be “secondary” natural law.²⁵⁹ Bartolus also relied on corporation theory to hold that a city could collectively defend the rights and interests of any individual citizen by war if necessary, which here formed the legal foundation for his theory of reprisals.

Secondly, any individual deprived of access to a superior and without another remedy was able on his own authority to wage war against all to protect his goods or person. The point had a Hobbesian ring and the suggestion of a state of nature in which everyone was left to his own devices. Indeed it was a condition of self-help, but for Bartolus the idea assumed a temporary lack of access to civil authority. The right to self-defense in such a

²⁵⁷ *Tractatus represaliarum*, fol. 120ra, n. 5: “Et bellum licitum est ex causis praedictis, quod etiam probatur, quia de iure gentium est, quod id quis ob tutelam sui corporis fecerit, videtur fecisse iuste...corpus intelligo sive loquamur de uno individuo, sive de uno corpore mixto. Unde ob tutela unius civis, potest civitas indicere bellum, sicut unus particularis potest indicere bellum contra omnes ob tutelam personae suae, et suarum rerum, ubi superioris copia vel aliud remedium haberi non potest, ut dictis iuribus et ff. quod vi aut clam., l. si alius, sec. bellissime [D.43.24.7.3] et quod not. in d. l. nullus, C. de iudi. [C.1.9.14] et quae in frau. cred., l. ait praetor, sec. si debitum [D.42.8.10.16], et praedicta puto iuri gentium et veritati civili consonare.”

²⁵⁸ See Canning, “The corporation in the political thought of the Italian jurists of the thirteenth and fourteenth centuries,” *History of Political Thought*, I (1980), pp. 9-32, and bibliography cited. The foundational work is still Otto Gierke, *Political Theories of the Middle Age*, trans. F. Maitland (Cambridge, 1900). As on many issues Innocent IV was an important early pioneer of the argument.

²⁵⁹ E.g., by Odofredus, *Lectura super Digesto veteri*, to D.1.1.1 (Lyon 1550; repr. Bologna 1967-8, I fol. 6vb); Albericus de Rosate, *Commentaria super Digesto veteri*, to D.1.1.5 (Lyon 1545, fol. 14vb). See also, ch. 1, pp. 52-3; 56ff., on the civilian theory of self-defense.

situation – to the extent of declaring war against all to protect oneself and one’s goods – was based on the *jus gentium*. More basically, the idea depended on a creative application of classical Roman law that was characteristic and often necessary for the medieval jurists. Bartolus took as one of his texts the Roman dictum D.43.24.7.3, which had it that a property owner could, with a legal exception granted by a judge, demolish a building that had been erected on his property by his neighbor without notice or consent.²⁶⁰ There was a clause however that allowed, with “great and necessary cause,” a building to be destroyed without an action granted by the judge.²⁶¹ Bartolus took up the clause to determine what would constitute such a cause, and found that when authoritative judgment was unavailable, self-help was a permissible remedy.²⁶²

All three of the citations given by Bartolus above were commonly grouped together to make the same point, that if the judgment of a superior could not be had, self-help was licit. Angelus de Ubaldis (c.1330-1400), a prominent student of Bartolus and brother of the famed jurist Baldus de Ubaldis, also noted this in his comments on D.43.24.7.3, holding that when the authority of a judge could not be had, or enormous loss resulted in delay, the building could be destroyed.²⁶³ He pointed out the same in the case of the fugitive debtor,

²⁶⁰ D.43.24.7.3: “Bellissime apud Iulianum quaeritur, an haec exceptio noceat in hoc interdicto ‘quod non tu vi aut clam feceris?’ ut puta utor adversus te interdicto quod vi aut clam, an possis obicere mihi eandem exceptionem: ‘quod non tu vi aut clam fecisti?’ Et ait Iulianus aequissimum esse hanc exceptionem dare: nam si tu, inquit, aedificaveris vi aut clam, ego idem demolitus fuero vi aut clam et utaris adversus me interdicto, hanc exceptionem profuturam. Quod non aliter procedere debet, nisi ex magna et satis necessaria causa: alioquin haec omnia officio iudicis celebrari oportet.” On this provision in classical Roman law, David Johnson, *Roman Law in Context* (Cambridge, 1999), pp. 74-5.

²⁶¹ *Viz.*, “Quod non aliter procedere debet, nisi ex magna et satis necessaria causa: alioquin haec omnia officio iudicis celebrari oportet.”

²⁶² Bartolus, *Commentaria*, vol. 4, to D.43.24.7.3, fol. 192va: “Quaero, quae est ista causa, de qua loquitur texus? Respondeo si copia iudicis non potest haberi, permittitur quod sua autoritate hoc faciat...[u]nde in istis civitatibus, quae non recognoscunt superiorem, si una civitas occupat per vim bona de civitate alterius, illa civitas potest per vim recuperare, quia iudicis non est copia.”

²⁶³ Angelus de Ubaldis, *Commentaria in digestum novum*, to D.43.24.7.2, n. 2 (Lyon 1561, fol. 86ra): “Est autem iusta causa si ille qui demolitus est opus iudicis copiam non habebat, vel enorme damnum sentiebat in mora modici temporis opere non destructio...”

who could be captured on one's own authority if the authority of a judge was unavailable and there was danger in waiting for his decision.²⁶⁴ The real innovation of course was in applying the principle not to buildings or debtors, but to cities and kingdoms as a way to justify reprisals and war. Since access to a superior could not be had in Italy, as Bartolus said, the remedy was allowed, and again it was the legal analogy between the individual and the state – an analogy that in some cases was quite fluid – that allowed the principle to apply to both.

It is worth bearing in mind that some of the concepts in Bartolus's treatise on reprisals were first raised by Innocent IV and Hostiensis. Innocent had included reprisals in his scheme of just wars, and also claimed that lacking recourse to a superior, goods could be recuperated on one's own authority.²⁶⁵ Hostiensis had discussed Innocent's categories of war with similar ease. But Innocent and Hostiensis, concerned as they were to defend the interests of the Church, did not connect reprisals in a more theoretical or comprehensive way to the problem of the emperor's authority or the rights of the cities, and did not detail as Bartolus did how reprisals should be carried out in practice. Bartolus, who had served as a judge in northern Italy, did so not in order to set cities loose upon each other, but rather to set reprisals within a legal framework that would regulate the practice and ensure that it had a strong procedural foundation.²⁶⁶ Innocent and Hostiensis were, however, able to provide important framework discussions of issues of war and peace. Again, the canon law whose

²⁶⁴ *Ibid.*, n. 3: "Not. bene quia glossa intelligit illum [section] dicentem quod debitorem fugitivum quis potest capere autoritate propria, quum iudicis copia haberi non potest. Secus si possit, et in expectatione iudicis non est periculum enorme..."

²⁶⁵ See above, p. 40-1.

²⁶⁶ For biographical details on Bartolus, see Woolf, *op. cit.*, pp. 1-20. Aside from the introduction to the *Tractatus represaliarum*, which includes the interesting exposition on the theory of reprisals, Bartolus's treatise concerns how and in what cases reprisals can be granted, and the procedure involved. In places like late medieval Florence the practice did have a strongly procedural character and they were often granted by capable, discerning judges. On reprisals in Florence, A. del Vecchio and E. Casanova, *op. cit.*, pp. 97-246.

creativity depended on Roman law in the twelfth and thirteenth centuries, in turn enriched the Roman law of the fourteenth century, during the latter's period of rich development.²⁶⁷

The innovations of Innocent IV and Hostiensis on the analysis of war had greater creative influence on succeeding Romanists, but were not developed much further by canonists of the fourteenth century. The outstanding canonist of the period, Giovanni d'Andrea (c.1275-1348), was also aware of the problem of licit authority, and his analysis of war followed Innocent and Hostiensis. On self-defense, Giovanni noted that it was licit for individuals to defend their own goods and person, if it was done immediately and with moderation.²⁶⁸ He also noted that it was licit for an individual to recuperate goods or rights on the authority of a superior, or without one if there was none.²⁶⁹ More generally, he held that princes not subject to others and free to make law could wage war on their own authority.²⁷⁰ Though he seemed to maintain a division between personal recuperation of property, and public war declared by a prince, his analysis essentially echoed that of Bartolus as well. Giovanni, however, was exercised more by the relation of the pope to the emperor on the issue of war. Roman law assumed that the emperor's wars were *ipso facto* just, but d'Andrea emphasized that the emperor could not war against the Church, which *ex officio* he was held to protect.²⁷¹ According to d'Andrea all the faithful were obliged to oppose a wicked and unjust prince, including the emperor. He betrayed in general a

²⁶⁷ E.g., Stephan Kuttner, "Some considerations on the role of secular law and institutions in the history of canon law," in *Studies in the History of Canon Law* (Aldershot, 1990), no. VI, and James Muldoon, "Medieval Canon Law and the Formation of International Law," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung*, 81 (1995), pp. 64-82, though they do not discuss reprisals.

²⁶⁸ Giovanni d'Andrea, *Novella super decretalibus*, to X.2.13.12 (Venice 1504-5, fol. 56vb).

²⁶⁹ *Ibid.*, "...ubicumque etiam quis non potest rem suam per alium recuperare vel ius suum prosequi, licitum est ei auctoritate superioris arma movere et bellum indicere ad sua recuperanda...vel etiam sine auctoritate superioris si ipsum non habeat."

²⁷⁰ *Ibid.*, fol. 57ra: "Inde est quod princeps sine auctoritate hominis cui non subest: et sine auctoritate juris quo non astringitur movet bellum."

²⁷¹ *Ibid.*, fol. 57rb: "Imperator enim ex officio est advocatus ecclesie: unde non debet eam impugnare: sed potius a malignorum oppressionibus liberare: ergo si ipsam impugnet magis peccat quam alius...unde ei potere dici privilegium indicendo bellum mereris amittere..."

traditional concern to punish the wicked, but also to limit violence among Christians, which remained characteristic of canon law.

For the civilians more than canonists, expanding the scope of licit authority for war to include certain cities was a useful addition to theory, and more in tune with an Italy in which the cities were often at war. But civilians not only reinterpreted licit authority, they also reexamined the traditional criteria of right intention and just cause. Bartolus also appears to be the first who explicitly rejected any consideration for the right intention or “proper spirit” of the belligerents. In discussing reprisals he invoked the categories of just war given by Aquinas and quoted Augustine on the criterion of right intention, only to dismiss intention from civil law:

Whence Augustine, in *Contra Faustum*: ‘The desire to harm, cruelty of vengeance, implacable mind, savageness of fighting, the lust to conquer...these are culpable in wars,’ and thus although there is superior authority and just cause, nevertheless an unjust spirit makes reprisals illicit in the forum of conscience. Thomas Aquinas thinks these things in the *secunda secundae*, quaest. 40, c.1. In the civil forum, however, there is no concern for such mind, since there is no care for cogitation...among the aforesaid theologians nevertheless it ought to hold its place.²⁷²

Certainly the canon law before Innocent IV almost always included the “proper spirit” as part of the just war criteria, and the idea remained key to just war theory. But Bartolus dismissed the criterion from practical consideration. Bartolus’s word was not absolutely final on the issue of intention: jurists more influenced by canon law (usually doctors of both laws), would still include the full canonist criteria, and cities like Florence would certainly

²⁷² Bartolus, *Tractatus represaliarum*, fol. 120ra: “Unde August. in li. contra Faustum; nocendi cupiditas, ulciscendi crudelitas, implacatus et implacabilis animus, feritas debellandi, libido dominandi, et si qua sunt similia haec sunt, quae in bellis culpantur; et sic licet esset autoritas superiorum et iusta causa, tamen animus iniquus faceret represalias illicitas in foro conscientiae. Haec sentit sanctus Thomas in secunda secundae quaestio 40, c. 1. In foro autem civili de tali animo non curatur, quia de cogitatione non curatur...in praedictis tamen est standum Theologis.”

claim only right intentions for wars in which they became involved.²⁷³ But Bartolus's opinion represented part of what was a changing approach to war in the fourteenth century.

On the question of the just cause, the early canonists consistently maintained that the justice of a war was strictly unilateral, and it was usually doubtful that the unjust side had any rights. A few canonists at Bologna had argued that one side could falsely believe itself just if misled by bad information.²⁷⁴ In the fourteenth century, however, some civilians went further, concluding that the objective justice of either side might be uncertain to all observers, in which case the war could proceed on proper authority. One of the first civilians to raise the problem of "bilateral justice" was Angelus de Ubaldis, the noted student of Bartolus. Angelus penned a *quaestio* entitled *Renovata Guerra*, concerning a war between Verona and Padua, around 1386.²⁷⁵ It was not an actual legal opinion (or *consilium*), submitted by either side, but an academic exercise, the product of a disputation at the law school of Padua while Angelus held the chair of civil law there.²⁷⁶ The *quaestio* raised issues concerning proper authority, just cause and the law on captives and spoils, which deserve brief mention here.

Angelus first asked whether the lords of Verona and Padua had the proper authority to go to war, and found that they did. Although both lords recognized the emperor as a superior, they held the imperial vicariate in the lands they governed; thus Angelus justified their war by arguing that they exercised *merum et mixtum imperium*, or full sovereignty, in

²⁷³ See pp. 93-4, below on traditionalism in later approaches; and chs. 4-5 on how Florence justified its wars.

²⁷⁴ E.g., the canonist Stephen of Tournai; above, p. 35, n. 117.

²⁷⁵ Angelus de Ubaldis, *Renovata Guerra*, in *Quaestiones Doctissimae* (Turin 1580, fols. 22va-24vb). On this *quaestio* and the idea of bilateral justice, cf. Haggemacher, *op. cit.*, p. 117.

²⁷⁶ On Angelus's career, Andrea Gloria, *Monumenti dell' Università di Padova, 1318-1405*, vol. 1 (Bologna, 1888), pp. 178-80.

their own lands.²⁷⁷ In addition, Angelus wrote, they could go to war in defense of themselves and their goods, and also their rights, which was permitted by natural law.²⁷⁸ Thus the sides were not constrained to wage wars only in strict, immediate defense.²⁷⁹ In a war restoring goods or some right, Angelus assured his audience that spoils could be taken and men could be justly detained.²⁸⁰ For Angelus this was an accommodation to contemporary practice: the lords of Padua and Verona were not quite sovereign like the emperor, and soldiers could not become slaves in their wars, yet spoils and prisoners were allowed.

An important question then arose: for whom was the war just? Claiming first that war was only just on one side, Angelus wrote: “nevertheless who has the just or unjust side is doubtful since each asserts that he was insulted first, and for the defense of his right made the said war; in which case on account of the doubt we are able to call the war just on both sides.”²⁸¹ He went on to equate the just cause with proper authority, which both lords had, and saw no further reason to question the overall justice of the conflict.²⁸² Angelus’s approach highlighted the problem of discerning the just side, and his admission about the uncertainty of the just cause is not surprising. When jurists were brought to consider particular factual cases, they usually avoided the question of overall justice, presumed

²⁷⁷ Angelus, *Renovata Guerra*, fol. 22vb-23ra: “...tale bellum possit indicare, tamen quia quilibet dominorum dictorum in terris et territoriis suis habent merum et mixtum imperium et omnimodam iurisdictionem sui imperii suaeque iurisdictionis suique territorii, licitum est contra alium bellum indicare, et arma sumere, et non solum contra ipsum dominum invadentem contra eos homines fideles vasallos et alios quoscumque iuvantes.”

²⁷⁸ *Ibid.*, fol. 23ra: “...incidit qui se et sua iura sua bellando defendit cum hoc fit permissum etiam iure naturae.” Angelus refers the right here directly to natural law, without the usual explanation that it is valid under the law of nations or “secondary” natural law.

²⁷⁹ This was also indicated by the title of the *quaestio*, *Renovata Guerra*, which signified a war waged after an interval.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*, “...tamen quis habeat iustam vel iniustam dubitatur eo quod quilibet asserit se prius insultatum, et se pro defensione sui iuris facere dictam guerram, quo casu propter dubium ex utroque latere dicere possumus guerram iustam.”

²⁸² *Ibid.*, “sed salve quod verum est mota guerra sine iusta causa, secus si causa fit, quia tunc auctoritate publica moveatur, ut superius dictum est.”

bilateral justice due to uncertainty, or reduced just war to the criterion of proper authority. Angelus is notable as one of the first civilians, if not the first, to point to the uncertainty over the just side. He is also a jurist who was frequently called upon in the period to address questions arising from disputes between cities, and a primary exemplar of the involvement of jurists in these kinds of questions.²⁸³

Another novel explanation of the problem of the just side was given by Angelus's younger contemporary Raffaele Fulgosius (1367-1427), whose more extreme view may have been influenced by classical sources. Fulgosius addressed the difficulty of discerning the just side: "I respond that because it was uncertain which part moved war justly, nor was there a judge as a common superior to both, by whom it could be decided in civil law, by the best reasoning the people established that war would be the judge of the thing," and quoted the Roman poet Lucan in support.²⁸⁴ Fulgosius was writing his commentary in the late Trecento or early Quattrocento, at a time when humanist culture was beginning to gain critical momentum in centers like Florence, and had already seen development at Padua, where Fulgosius was educated.²⁸⁵ Jurists in the period were not deeply affected by humanist culture, but Fulgosius's reference to Lucan was not simply a classicizing trace. Rather, Fulgosius was attempting, in his discussion of war at D.1.1.5, to understand the Roman law accurately within its historical context, an understanding which accorded with a main project

²⁸³ Angelus's *consilia* which were produced for such disputes will be a focus of chapter five.

²⁸⁴ Raffaele Fulgosius, *In primam Pandectarum partem commentariorum*, to D.1.1.5 (Lyon 1544, fol. 8ra): "Respondeo quod quia incertum erat utra pars iuste bellum moveret, nec erat iudex communis utrique superior, per quem id possit certum civiliter effici, optima ratione constituerunt gentes, ut eius rei iudex bellum foret: hoc est, ut quod in bello, vel per bellum caperetur, partis capientis fieret; quasi sibi adiudicatum a iudice fuisset...iuxta illud Lucani: utendum est iudice bello...ut idem Lucanus testatur: victrix causa deis placuit, cum prius dixisset."

²⁸⁵ On Fulgosius at Padua, see Gloria, *Monumenti*, bks. 1-2, nn. 189, 811, 1118.

of Renaissance humanism. In fact he used the freedom of Africa from Rome as an example of authority sufficient for making war.²⁸⁶ He then added:

Therefore nothing else is to be asked, except whether it was a just war, namely a public war, and against whom and by whom it was declared: that he [who did] had been able to declare it. This is because a free people (*populus liber*) or free king [is able to], as follows in the gloss here...the decretum speaks also on licit or just war: that is public and declared by him who was able to do it.²⁸⁷

For Fulgosius also, just cause became an uncertainty and proper authority was the sole criterion for licit war, which he observed from Roman law.²⁸⁸ As far as who had the proper authority in his contemporary Europe, Fulgosius mentioned the kings of Aragon, Castile and France, and a *populus liber*, indicating free cities.

After the middle of the fourteenth century, a few jurists gave voice to new, and for law unorthodox, views on the nature of war and its causes. One prominent jurist credited with writing the first full legal treatise on the laws of war, Giovanni da Legnano, offered a rather idiosyncratic account of war. Giovanni (c.1320-1383), a professor of law at Bologna, wrote his *Tractatus de bello, de represaliis et de duello* around 1361, which was in places a wholesale borrowing from Bartolus, particularly his *Tractatus represaliarum*.²⁸⁹ He nevertheless added new material on the causes of war and gathered comments on war from feudal law, and his treatise in general indicates a growing interest on the part of learned

²⁸⁶ *Ibid.*, n. 2.

²⁸⁷ *Ibid.*, n. 2: "Nihil ergo aliud querendum est, nisi an bellum iustum erat, id est publicum et ei, et ab eo indictum esset, qui potuisset indicare: hoc est quia populus liber, aut rex liber: ut hic sequitur in glosa...allegans per ipsam gloss decreti loquitur etiam in bello licito, seu iusto: hoc est publico et ab eo indicto qui potuisset indicare." Fulgosius was reading the *Decretum* in a classical way, but it should be remembered that that reading was left open by Gratian, who allowed the possibility that proper authority alone might be sufficient for licit or "just" war. See above, p. 28, n. 87.

²⁸⁸ Cf. Haggenmacher, *op. cit.*, pp. 203-4; also Richard Tuck, *The Rights of War and Peace*, p. 32.

²⁸⁹ Giovanni da Legnano, *Tractatus de bello, de represaliis et de duello*, ed. T.E. Holland and trans. J. Brierly (Washington, D.C., 1917). G.W. Coopland, *The Tree of Battles of Honoré Bonet* (Liverpool, 1949), shows the dependence of this work on that of Giovanni, and (some of) the dependence of Giovanni on Bartolus.

jurists in questions related to war. Giovanni wrote, as others did, that wars had their origin in divine law, since the wars of the Israelites were often willed by God.²⁹⁰ He then detailed a more naturalistic concept to explain how divine law operated ‘scientifically,’ borrowing from contemporary medical discourse the theory of the humors and applying it to help account for healthy versus unhealthy societies.²⁹¹ On his view, disorder arose naturally in the world, from a certain rebelliousness among men (which might be associated with struggles for political power), and was connected with vice and a more general excess. In such cases, war might be called for to restore the proper social balance.²⁹² But depending on the causes, war sometimes led to the utter extinction of societies, through civil war or just war at the hands of foreign adversaries.²⁹³

The use of humoral theory was unusual in law, and Giovanni also added an astrological component to the analysis. He held that the alignment of the stars and planets influenced events on earth and sometimes caused wars; at base, the enmities of men were

²⁹⁰ Giovanni, *op. cit.*, pp. 224-5.

²⁹¹ Nicolai Rubinstein, “Municipal Progress and Decline in the Italy of the Communes,” in *Fritz Saxl, Memorial Essays*, ed. D. Gordon (London, 1957), pp. 43-60, discusses how astrological and humoral theory influenced the cyclical interpretation of history found in fourteenth century Italian historiography. Such ideas were common long before Machiavelli employed them to discuss balance and imbalance within the state, in Trecento writers like Marsilius of Padua. On which, Antony Black, “Harmony and Strife in Political Thought, 1300-1500,” in *Church, State and Community: Historical and Comparative Perspectives* (Aldershot, 2003), XV, pp. 355-363. On Machiavelli’s use of astrology, Anthony Parel, *The Machiavellian Cosmos* (New Haven, C.T., 1992).

²⁹² Giovanni da Legnano, *op. cit.*, p. 225 (Brierly’s translation): “[F]or as the natural philosophers say, man is a small world, and as government goes on in the small world, so it does in the universal whole, if the analogy be traced, as the Philosopher says in the *Physics*, book viii; and in the natural ordering of the body it is clear that, when there is no excess of humours, there is no rebellion...[s]o exactly in the great world. For sometimes, in a territory and region of the world, there is no excess of rebellious persons, and then there is no conflict, or rather the guiding hand of Nature tends uniformly to its conservation. Sometimes there is excess of rebellious persons, tending to the destruction of government and its conservation, and then sometimes Nature corrects it of itself, by monitions, exhortations, and other soothing processes, and so there is no need for war...[s]ometimes the disease has advanced so far that a poisonous medicament is needed, extirpating the matter of the disease entirely, and such a medicament is a war to eradicate and exterminate the bad.”

²⁹³ *Ibid.*, p. 226, on the “eradicator medicament” that sometimes leads to “utter extinction.”

natural and often determined by nature or fate.²⁹⁴ Giovanni noticed that humans often hated one another simply because their natures were in opposition: by a natural inclination (“even circumscribing the dictates of the intellect”), they strove to destroy what opposed them.²⁹⁵ The jurist saw this as the first, natural law origin of war. But by the law of nations – the natural law unique to man – human reason regulated that inclination according to justice, giving rise to just wars.²⁹⁶ This origin of just war under the law of nations was not novel, but both Giovanni’s reliance on humoral theory and astrology were new. Outside of law, however, neither a reliance on astrology nor a naturalistic view of things were unusual in the middle ages.²⁹⁷ Their expression in legal discourse suggests that war was becoming more acceptable to jurists as a naturalistic phenomenon, a view in some cases influenced by classical sources. And the bulk of Giovanni’s treatise, which collected opinions on such issues as when a vassal was able to petition his lord for expenses incurred in war, indicated an increasingly practical approach toward war in law.²⁹⁸

²⁹⁴ *Ibid.*, p. 229 (Brierly’s translation): “That this is true may be shown thus: natural first principles have implanted in every created natural entity a natural inclination to exclude everything opposed to its natural disposition. This is clear if we look at particular natural entities, simple and mixed; for resistance to fire is implanted in water, and resistance to water in fire...[t]hus, in a rational creature Nature has implanted an inclination, even circumscribing the dictates of the intellect, to hunt whatever is repugnant to itself.” And on the influence of the heavens: “And because in the whole celestial frame itself there are parts which have virtues of diverse influence, as the variety of spheres, the diversity of wandering and fixed stars, on which...every created and corruptible thing effectively depends, therefore a certain contrariety and diversity of natures, an opposition arising here below, is dependent on that above.” Giovanni was deeply impressed by traditional natural philosophy, as found in works like Aristotle’s *Physics* and *De Coelo*, which he quoted frequently, p. 227ff.

²⁹⁵ *Ibid.*, p. 228-30. The Latin on p. 90: “etiam circumscripto intellectuali dictamine...”

²⁹⁶ *Ibid.*, 230; Latin, p. 91.

²⁹⁷ The basic study remains Lynn Thorndike, *A History of Magic and Experimental Science*, vol. 2 (New York, 1923), and pp. 874-947 for the influential astrologer and Paduan Pietro d’Abano, a contemporary of Giovanni; and G. Federici Vescovini, “Peter of Abano and astrology” in *Astrology, Science and Society: Historical Essays*, ed. P. Curry (Woodbridge, 1987), pp. 19-39.

²⁹⁸ Giovanni da Legnano, *op. cit.*, e.g., pp. 254-59. The conditions surrounding the composition of the work reflect something of Giovanni’s involvement in the communal politics of his day: he likely wrote the treatise when Bologna, where he taught and lived, was under siege by Milanese forces 1360-1. It was dedicated to Cardinal Albornoz, to whom the city had formally submitted and who was defending it. Giovanni, in addition to teaching at Bologna, was a frequent legate for the city, particularly to the pope. See *ibid.*, pp. xii-xvi.

The jurist Paolo di Castro (d. 1441) developed Bartolus's problem of legitimate authority probably to its greatest extent, and like Fulgosius used classical sources to support a broad conception of licit war. A prominent civilian who taught in Padua, Bologna, Siena and Florence in the first half of the Quattrocento, Paolo was sometimes called upon to justify the powers that Venice exercised over its subject territories. His *consilia* amply demonstrate, as Aldo Mazzacane has remarked, the prerogatives that Venice reserved for itself in respect to its subject territories, particularly in cases involving a conflict of laws and jurisdiction, and the powers of magistrates.²⁹⁹ Less directly, a few of Paolo's comments on war might seem to offer a justification for Venice's *terraferma* expansion in general, much of which was undertaken in the jurist's period.

Writing on the problem of legitimate authority, Paolo echoed Bartolus in holding that an individual, having been wronged, could war against another when recourse to a superior was unavailable. In this case, Paolo made clear that it was licit for the individual to "pronounce law for himself." Paolo was more explicit than Bartolus, and his description suggested a state of nature:

For also before there were magistrates anyone was able to pronounce law for himself by the law of nations; after the creation of magistrates however it was prohibited for anyone to pronounce law for himself...[i]f therefore a magistrate is lacking we remain in the disposition of the law of nations.³⁰⁰

²⁹⁹ Aldo Mazzacane, "Lo stato e il dominio nei giuristi veneti durante il 'secolo di terraferma,'" *Storia della cultura veneta*, 3:1 (Vicenza, 1980), pp. 577-650. Paolo was active in Florence in 1401, sometimes during the period 1413-24, and reformed its 1415 statutes; Martines, *Lawyers and Statecraft*, p. 500.

³⁰⁰ Paolo di Castro, *In primam partem Digesti veteris*, to D.1.1.5 (Venice 1582, fol. 4va): "Nam etiam de iuregentium antequam essent magistratus quilibet sibi ipsi poterat ius dicere, post creationem vero magistratum inhibitum est cuique sibi ipsi posse dicere...si ergo deficit magistratus, remanemus in dispositione iurisgentium."

Paolo also described a condition in which it was licit to each person to “give law to oneself” in one of his *consilia* on war. There he wrote that wars were introduced by natural law and the law of nations, and that in the state of nature the right of war was available to all:

Before laws were made, when there was no judicial order, which then was unknown, anyone could follow his own law. But [afterward, there were judgments] either by a royal hand, if there was recourse to a king...or if there was no recourse, war was taken up on one’s own authority. Indeed that seemed licit by all divine law, namely natural law and the law of nations.³⁰¹

Afterwards civil laws were enacted and magistrates set up to protect those laws, by which public discipline was established. The jurist added:

[It is] otherwise if the authority of a magistrate is absent, because it is too little that laws were created, where there is no one who looks after those laws. [In that case] we return to our primeval rights (*jura*), by which it is licit for us by every right (*jure*) to follow our own law (*jus*), by our own authority (*propria autoritate*).³⁰²

This is closer to the foundation of a state-of-nature picture that is found later in Hobbes or Locke, and though an idea of perpetual war or the tendency toward conflict is lacking, there is not far to go to understand the potential for it, or the implication that the effective rule of magistrates is necessary to maintain civil society.³⁰³ It seems clear at least that each

³⁰¹ Paolo di Castro, *Consilia*, vol. 1, no. 400 (Frankfurt 1582, fol. 207rb): “Priusquam iura fierent, nullo ordine iudiciario, qui tunc erat incognitus, consequatur quis ius suum. Sed autem regia manu, si regis aderat copia, ut ff. do orig. iur., leg. 2, circa prin.; vel si non aderat, autoritate propria suscepto bello. Quod quidem omni iure licitum videbatur divino, scilicet naturali atque gentium.”

³⁰² *Ibid.*, n. 2: “Caeterum si deficit copia magistratus, quia parum est iura fuisse condita, ex quo non est qui tueatur ipsa...[a]d iura primaeva redimus, quibus omni iure nobis liceat, autoritate propria ius nostrum consequi.”

³⁰³ Of course Hobbes’ detailed description of a “state of nature” and its political consequences goes far beyond that of Paolo di Castro. But Paolo makes a prescient point about rights in the absence of civil authority. As well, it is not impossible that Hobbes knew Paolo’s opinions if he read or heard lecture the professor of civil law at Oxford, Alberico Gentili, who taught until 1605 when Hobbes was in residence, and who cited Paolo’s opinions in his *De jure belli*. Richard Tuck has pointed out that Hobbes may have been familiar with Gentili’s work and may have heard him lecture: Tuck, *The Rights of War and Peace: Political Thought and the*

individual becomes a sovereign unto himself in such a state and thus judges and acts in his own cause. The “right” to do so appears as a natural right. In fact the first issue under consideration in the *consilium* brought out the import of Paolo’s theoretical point, because it asked whether a certain lord had *de facto* access to a jurisdictional superior or whether he could act on his own authority to recover possessions. The understanding of war that emerged from civilian jurists like Paolo di Castro, and Bartolus, was thus rather realistic, pointedly aware as it was of the necessity of self-help among cities and lords.

Paolo also had a permissive idea of just war. He gave as causes for war the right to recover goods lost (taken by stealth or force) which were unable to be recovered otherwise, and the negligence of a ruler to do justice, both of which were within the accepted framework. But he added a third reason probably derived from classical sources. This was the war of conquest, if not for the sole reason of glory (though Paolo seemed to accept war for glory), then at least with the purpose of ruling the conquered well:

Also I think that although by divine law it is not licit to fight for the sake of subjugating men who waged war...nevertheless by the law of nations one free people not recognizing a superior is able [to fight] against another free people if it makes for a good end, with the result that they may rule those people well and otherwise govern [them]; wars which the Roman people waged for this sole end – for the glory of the empire – were not licit, nor was their monarchy and rule over them; and nevertheless the contrary is true since Christ approved [this] when he said “render what is Caesar’s unto Caesar.”³⁰⁴

International Order from Grotius to Kant (Oxford, 2000), p. 17. Hobbes may also have known Paolo from other readings in Roman law.

³⁰⁴ Paolo di Castro, *In primam partem Digesti veteris*, to D.1.1.5 (Venice 1582, fol. 6ra): “Puto etiam quod licet de iure divino non licet bellare pro subiugando bellatos...de iure tamen gentium unus populus liber non recognoscens superiorem possit contra alium liberum si facit ad bonum finem ut illos bene regat et gubernat aliter; bella qui exercuit populus romanus ad hunc solum finem pro gloria imperii non fuissent licita nec ipsorum principatur et monarchia, et tamen contrarium est verum quia Christus aprobavit dum dixit reddite que sunt Cesaris Cesari, et cetera.”

Thus Paolo offered a vision of war that departed from Christian just war theory but was not inconsistent with more classical views. Though Paolo did not name a source to support his position, there were important precedents, including Aristotle and Cicero, that likely informed it. Cicero held that wars could be fought for glory, provided peace and self-protection were also an aim, and Aristotle argued that some men were naturally slaves and better off ruled by others.³⁰⁵ Ultimately Paolo appeared to believe that wars fought for glory were licit. Paolo's view on just war, presumably applicable within Europe, seems to represent the farthest point reached in civil law from the traditional view of canon law.

In a few ways, along with Bartolus and Giovanni da Legnano, Paolo was probably the most interesting legal thinker on war in his period, and he investigated the foundations of the theory of war more thoroughly than some of his fellow jurists. He took up Giovanni da Legnano, for instance, to clarify why human wars could be just, distinct from those of beasts and derived from the *ius gentium*. Giovanni had said that by means of reason we overcome our natural inclination to strife, and Paolo pressed the basis of the idea, noting that war was irrational when waged without reason and coming from our sensual nature alone. The sensual instinct itself was not a problem as an origin for action, but it had to be ruled by free will and reason, with reason leading the will to the proper end.³⁰⁶ Paolo may have believed that wars for glory or empire could be rational ends, but did not elaborate on it. He also sought to show why self-defense should be considered as derived from natural law by

³⁰⁵ Cicero, *De officiis*, trans. W. Miller (Cambridge, M.A., 1913), I, 12, 38: "when a war is fought out for supremacy and alien glory is the object of war, it must still not fail to start from the same motives which I said a moment ago were the only righteous grounds for going to war." Those grounds were apparently to redress injuries or upon a formal declaration: *De officiis*, I, 11, 34-6. Aristotle, *Politics*, trans. H. Rackham (Cambridge, M.A., 1932), I, 13, 1260a12; slavery is defended generally in I, 4-8.

³⁰⁶ Paolo di Castro, *op. cit.*, to D.1.1.5, fol. 5rb: "Haec autem depravatio non potest esse in animalibus brutis in quibus non adest voluntas nec intellectus sed solum sensualitas...sed in hominibus sic, in quibus adest voluntas, intellectus et ratio si voluntas non ducitur a ratione quae est propria hominis, sed a sensualitate, damnatur sensualitas in homine quae in animalibus brutis non damnatur, et sic bellum iniustum proveniens ex sensualitate in homine non dicatur provenire ex iure naturali..."

connecting it with charity, since a love of one's neighbor, commanded by divine law, "included the love of oneself."³⁰⁷ It was this searching approach in Paolo's thought on war, which could draw out the implications of earlier ideas of Bartolus and Giovanni da Legnano, that makes him an important contributor.

However, even with the innovations of Bartolus, Giovanni da Legnano or Paolo di Castro, most civilians did not move so far from traditional assumptions about just war, or at least they paid lip service to them. Indeed it was more a case that law moved forward to enlarge its scope and accommodate new ideas without openly repudiating earlier foundations. As well, many jurists summarized the earlier discussions on war and quoted them with approval without contributing much new material. The famous Baldus de Ubaldis (c.1327-1400), asked a common question at D.1.1.5, on how war could have arisen from the law of nations (*ius gentium*). And he followed a pattern by answering that just wars arose dispositively from the law of nations, while unjust or illicit wars arose consecutively.³⁰⁸ Just wars arose necessarily and on account of the law of nations, while unjust wars seemed to be merely the *de facto* responses of the unjust side. As jurists usually noted, the law of nations could not introduce into society an evil or unjust institution, and Baldus upheld the position. Baldus also followed many jurists in approving reprisals, but did not discuss anything like a right to war against all.³⁰⁹ Yet Baldus did raise a new

³⁰⁷ *Ibid.*, "...cum dilectio proximi includat dilectionem sui. Et sic ut charitas est in diligendo proximum, ita in diligendo seipsum."

³⁰⁸ Baldus de Ubaldis, *Prima [-secunda] Baldi super Digesto veteri commentaria*, to D.1.1.5, n. 11 (Lyon 1535, fol. 10vb), "His premissis venio ad apparatus. Dicit hic quod bella sunt de iure gentium; contra, bellum est illicitum...[s]olutio haec lex intelligitur de bello licito et non illicito et nota quod cum bellum fit contrariorum necesse est quod una pars foveat iusticiam, quia contrariorum extremorum unum est equum aliud iniquum...vel dic quod bella licita processerunt a iure gentium dispositive sed illicita consecutorie, quia omnia bella processerunt a nominibus possessivis meum et tuum." In the last line he seemed to think that wars arose from the institution of private property, which also was established at D.1.1.5.

³⁰⁹ *Ibid.*, "Si igitur est licitum bellum ergo et represalie; immo iustiores sunt represalie, quia ex quo ingreditur captus in territorium statuentium contra eorum voluntatem et statutum delinquit, et ideo merito capi potest

question in asking whether war was licit to avenge a debt that was not repaid, and answered that failing other remedies, war could indeed be licit.³¹⁰ In this way, though without adding very new insights or overruling some of the just war criteria, Baldus addressed questions that clarified the scope of licit war.

Later Quattrocento jurists, like Giasone del Maino (1435-1519), returned to familiar territory at D.1.1.5, asking how unjust wars came from the law of nations.³¹¹ Giasone also took up traditional questions on whether slaves could be taken in wars waged by those who did not have a superior. Wars waged by those who did not recognize a superior were valid, but among Romans (Europeans) there was no right of taking slaves.³¹² Quoting Innocent, Giasone also held that wars waged by inferiors (with permission of an overlord) were licit, but of course there also no slaves could be taken.³¹³ The questions on slaves were fairly academic, but help to remind that there was significant continuity in the answers jurists rendered on war. At the same time, reflecting the more recent emphasis of Bartolus, Giasone argued that war was licit when access to a judge could not be had.³¹⁴ In general, Giasone's comments on war were orthodox, though they were also thorough and made reference to an impressive array of earlier jurists.

The most innovative civilian changes to the traditional just war criteria came in the later fourteenth and early fifteenth centuries, though of course the older just war theory was

debent tamen prius omnia civilia remedia tentari quam represalie concedantur, nam de natura sui prohibite sunt...

³¹⁰ *Ibid.*, "Duodecimo queritur nunquid propter debitum pecuniarium non solutum possit indici bellum, ut si civitas dum alteri civitati centum millia et non vult soluere; nec est imperatore vel alius qui de hoc possit efficaciter ius dicere, et videtur quod sic, quia quod civiliter fieri non potest licet facere de facto pro iure suo consequendo..."

³¹¹ Giasone del Maino, *In primam [-secundam] Digesti veteris commentaria*, to D.1.1.5, n. 23 (Venice 1579, fol. 8ra).

³¹² *Ibid.*, n. 24b.

³¹³ *Ibid.*, n. 30: "Nota tamen, quod licet permittatur inferioribus bellum indicere, ut no. Inno...tamen nunquam capti in tali bello, etiam licito, efficiuntur servi capientium..."

³¹⁴ *Ibid.*, n. 32.

by no means effaced and traditional criteria were mentioned by later civilians.³¹⁵ The laws on war in the *jus commune*, however, evolved as jurists grappled with the particular complexities of the Italian political context, with its numerous conflicts and intense interrelations. It is thus not the case, for instance, that Bartolus would have ruled the old criterion of right intention out of civil court cynically. Rather, the difficulty of judging on the basis of such a criterion called for more realistic solutions. Likewise, with the emperor nearly powerless to settle disputes between Italian cities conclusively as its highest judge, there was reason to admit that cities could be free to judge their own causes. In this respect the views of Fulgosius and Paolo di Castro were outspoken. Fulgosius seemed to aim for a more classical understanding of licit war, while Paolo was writing in the period of Venice's territorial expansion (as well as that of Florence), when the object of "ruling others well" would have seemed to some observers morally praiseworthy, and practically necessary. Taken together, the views do represent a theory of war which was fitted to the needs of the expanding city-states of late medieval and Renaissance Italy, particularly the most powerful among them.

In the fourteenth century, the *jus commune* was moved in new directions not only by new material on the theory of war, but also saw the addition of a constellation of opinions pertaining to peace, truce and confederation.³¹⁶ The key contributor among civilian jurists to

³¹⁵ E.g., Pierino Belli, *De re militari et bello tractatus*, trans. H.C. Nutting (New York, 1964), p. 59, recites just war criteria, including intention. Belli's conception of licit war departed significantly from the canon law tradition, however; see the conclusion, p. 235.

³¹⁶ A useful place to find discussions of these subjects is later treatises which gather the earlier citations. The first, and perhaps most useful, is that of the jurist Martinus Garatus (or Laudensis) (d. 1453), *Tractatus de confederatione, pace, et conventionibus principum*. The treatise is found in *Tractatus universi juris*, ed. Ziletti (Venice 1584-6, XVI fols. 302rb-303rb), and followed by that of Johannes Lupi, *Tractatus dialogicus de confederatione principum* (*op. cit.*, XVI fols. 303rb-308rb), which relies on the Bible as its authority. On Garatus's career and work, Ingrid Baumgärtner, *Martinus Garatus Laudensis: ein italienischer Rechtsgelehrter des 15. Jahrhunderts* (Cologne and Vienna, 1986), and on the treatise, G. Soldi-Rondini, "Il diritto di guerra in Italia nel secolo XV," pp. 275-306. Garatus's *Tractatus de confederatione* is introduced and edited by Alain

this relatively new area of theory was again Bartolus, but eminent jurists like Baldus de Ubaldis and his brother Angelus also played a significant role. These jurists often built their views, as on questions of war, on opinions of thirteenth-century canonists. Now, however, following Bartolus's opinion that some cities were free *de facto* and able to make war and peace, the principles of peace (like those of war) could be developed more easily and applied to the Italian cities. Juristic contributions to the theory of peace or alliance, in fact, were as significant as those to the theory of war: in practice, questions stemming from the obligations to pay ransom, the scope of a safe passage or the duties of members of an alliance, arose frequently in diplomacy and became the subject of numerous disputes. The juristic responses that those questions generated, in the form of case-based legal opinions known as *consilia*, reflect again the learned jurists' increasing involvement in disputes between cities in the period. The opinions from those *consilia*, like the sizable commentary literature in the *jus commune*, contributed to the development of a body of law on peace and confederation which, like that on war, could later be applied to sovereign states in Europe and form a first set of common doctrines of international law.

Peace itself was a topic that did not necessarily depend on any recent political or legal innovations to be discussed. All writers, following Augustine, accepted that the goal of war was a just peace, though exactly what a just peace entailed was more difficult to spell out. Jurists agreed that the unjust side could not take spoils in war, though in practice the victors naturally claimed justice and often preserved their gains. The jurists however

Wijffels, "Martinus Garatus on Treaties," in *Peace Treaties and International Law in European History*, ed. R. Lesaffer (Cambridge, 2004), pp. 184-97; 413-47, which helpfully includes a number of long quotations from the authorities cited. Wijffels' introduction tends to accept that the treatise is a somewhat disjointed collection of legal *dicta*, though there is greater internal correspondence between the issues than he has given the treatise credit for. Martinus gives sixty-three short statements (*questiones*) of legal principles on the agreements of princes and cities, and takes the majority of points from Bartolus, Baldus and Angelus, among civilians.

disagreed about what could be taken in war or peace by the just side. The canonist Hostiensis noted the range of opinion: some held that in a just war anything could be captured, while others wrote that only what was part of the war – presumably what was in dispute – could be captured.³¹⁷ The uncertainty partly reflected a tension between the problem of the unjust side, which was sometimes judged to have no rights, and the traditional principles of just war, which held that war could only be fought in defense, to recover some limited thing or some right that had been denied. It was a tension that remained in place in the late middle ages, though by the fourteenth century canonists and Romanists laid little emphasis on the idea that the unjust side was sinful or morally culpable. Certainly the exhortation to recover only what was lost intended also to curtail expansionist or cruel campaigns, regardless of how justly they were begun.³¹⁸

The jurists did seek to make peaces as lasting as possible, and considered aspects of justice in peacemaking. The standard form of peacemaking between cities relied on negotiators (in the Italian cities usually lawyers and notaries) who drew up peace treaties. Afterwards the document would be ratified by the contracting parties.³¹⁹ Often an oath from the negotiators and principal monarch or state itself solemnized the agreement and conferred upon it a sacral character. The general moral and legal principle was that peace agreements were considered inviolable, following the common juridical dictum that “agreements must

³¹⁷ Hostiensis, *In primum [-sextum] decretalium librum commentaria*, to X.2.13.12, n. 26 (= *De restitutione spoliarum*) (Venice 1581; repr. Turin 1965, I fol. 53rb).

³¹⁸ However, obedience from vassals and subjects was quite important, and one area where standards of equity might be altered. One example would be Innocent IV’s opinion, noted earlier, that in wars that were an exercise of jurisdiction, the just side could devastate or take any property from rebellious subjects; Innocent IV, *Apparatus in quinque libros decretalium*, to X. 2.13.12, n. 9 (Frankfurt 1570, fol. 232ra).

³¹⁹ Karl-Heinz Ziegler, “The Influence of Medieval Roman Law on Peace Treaties,” in *Peace Treaties and International Law*, p. 149.

be observed” (*pacta sunt servanda*), a point that was based on natural law.³²⁰ Thus the civilian Cino of Pistoia was clear that even the emperor had to keep faith and maintain pacts he made with barons or cities.³²¹ Cino observed that natural law upheld contracts, and noted from Gratian’s *Decretum* that faith had to be observed even with enemies.³²² Another proof of the point was taken from *Code* 5.16.26, where the gifts (*donationes*) of the emperor were “contracts having the force of law.”³²³ Bartolus and Baldus, and the jurists generally, followed these opinions.³²⁴ The jurists also shared the opinion that peace agreements between sovereigns (cities or rulers *non recognoscens superiorem*), like other contracts, could only be infringed for just cause.³²⁵ Some then asked whether agreements also bound

³²⁰ It was explicitly upheld by canon law at X.1.35.1: “Universi dixerunt, pax servetur, pacta custodiantur.” On *pacta sunt servanda*, Randall Lesaffer, “The Medieval Canon Law of Contract and Early Modern Treaty Law,” *Journal of the History of International Law* 2 (2000), pp. 178-98. Contracts reputedly arose under the law of nations (*jus gentium*), commonly called secondary natural law; see, e.g., Odofredus, *Lectura super Digesto veteri*, to D.1.1.1 (Lyon 1550; repr. Bologna 1967-8, I fol. 6vb); Albericus de Rosate, *Commentaria super Digesto veteri*, to D.1.1.5 (Lyon 1545, fol. 14vb).

³²¹ Cino, *Cyni Pistoriensis In Codicem...commentaria*, to C.1.14.4 (Frankfurt 1578; repr. Turin 1964, I fol. 26ra): “Ultimo sciendum, quod Guido de Suza. formavit hic questionem, utrum si Imperator ineat aliqua pacta cum aliqua civitate vel Barone, teneatur ea observare, tam ipse quam eius successor? Videtur quod non...[e]contra videtur quod sic: nam grave est fidem fallere...et naturalia iura suadent pacta servari, et fides etiam hostibus est servanda...nihil magis debetur homini quam pacta servare.” Cino noted that some believed that pacts were not to be observed if fraud was present, *ibid*: “Alii distinguunt: an erat ibi iustitia ex altera parte: an erat ibi iniustitia et dolus, ut primo casu valeat pactum et compositio, secundo non,” which indicated the depth of (some of) the jurists’ commitment to the principle of *pacta sunt servanda*, particularly when solemnized by an oath. Cino seemed to think pacts could be broken due to fraud, and he interestingly endorsed a right of resistance against unjust and violent lords, “[E]t potest esse ex parte subditorum iustitia resistendo, si ex parte domini fit iniusta et notoria violentia.” For Cino on the emperor and his contracts, A. J. and R. W. Carlyle, *A History of Medieval Political Theory in the West*, vol. 6, 2nd ed. (London, 1950), pp. 14-17. On the relation of the emperor to the law generally, see Kenneth Pennington, *The Prince and the Law*, chs. 1-4. The emperor was not thought to be subject to positive law since he himself made positive law, but though he could derogate natural law (including the law of nations) in particular instances, he was subject to it.

³²² Cino, *ibid*. (quoted above): “...et naturalia iura suadent pacta servari, et fides etiam hostibus est servanda...” cf. C.23 q.2 c.2, on observing faith with enemies.

³²³ C.5.16.26: “Donationes, quas divinus imperator in piissimam reginam suam coniugem vel illa in serenissimum maritum contulerit, ilico valere sancimus et plenissimam habere firmitatem, utpote imperialibus contractibus legis vicem obtinentibus minimemque opitulatione quadam extrinsecus egentibus.” Cf. Cino, *op. cit.*, to C.5.16.26, fol. 317ra.

³²⁴ Carlyle, v. 6, pp. 19-23, 153-6.

³²⁵ Pennington, *The Prince and the Law*, pp. 207-13, reasonably takes Baldus to mean that sufficient cause to infringe a contract or take away property meant not the mere will of the sovereign but a just reason. Just causes to infringe might include serious breaches of the agreement by one side or fraud in making it.

successors if made publicly, as part of the office of the ruler, though opinion varied.³²⁶ As to the nature of peace agreements, Baldus, in his commentary on the Peace of Constance, noted accepted opinion that peace treaties were agreements in good faith.³²⁷

Good faith was a difficult though important term to define, and medieval jurists provided three criteria for it in their comments on contract law.³²⁸ Their opinions also shed some light on what a just cause for infringing a treaty might be. The first criterion for acting in good faith was that each party should keep their word and fulfill the contract. The second was that neither party should devise an unfair contract or otherwise defraud the other in doing so. Thus, even if there was no intentional fraud but there was *dolus ex re ipsa*, or unfairness arising from the agreement itself, there was a violation of good faith.³²⁹ The third was that the parties should perform the tacit or understood obligations in the agreement that any good or honest person would recognize. Both civil and canon law admitted the validity of these tacit obligations.³³⁰ These criteria did not necessarily make things much clearer, or at least did not create applicable rules, but of course the lack of clarity is partly inherent in the concept.

Fulfilling the contract, the first criterion, was slightly complicated with respect to the theory of contract law. This was because treaties were a kind of contract – called an innominate contract in Roman law – which was binding on performance. These were

³²⁶ Guido of Suzzara and Cino believed that they did; see above, fn. 321. Carlyle, v. 6, pp. 155-6, cites the opinion of Giasone del Maino that rulers by election, like the pope or emperor, did not have to observe the agreements of predecessors, while ones by hereditary succession did. Revolutionary changes in municipal government in Italy certainly could bring arguments that the new government was not held by old treaties.

³²⁷ Martinus Garatus, *Tractatus de confederatione*, p. 427, qu. 36, citing Baldus, *De Pace Constantiae*, s.v. “si quis vero,” n. 100. Good faith and equity accorded with natural reason introduced by the law of nations.

³²⁸ See James Gordley, “Good faith in Contract Law in the Medieval *Ius commune*,” in *Good Faith in European Contract Law*, ed. R. Zimmerman and S. Whittaker (Cambridge, 2000), pp. 93-117; p. 94, summarizing the distinctions.

³²⁹ Gordley, “Good Faith in Contract Law,” p. 101-2. The example given is failing the just price by half, automatically giving a *dolus ex re ipsa*. It is one reminder that unlimited consensualism did not exist in the medieval period.

³³⁰ *Ibid.*, pp. 103-6.

unenforceable under civil law and simply created a “natural” obligation under the law of nations.³³¹ Canon law, by contrast, did often find that all agreements were enforceable in ecclesiastical courts.³³² As far as treaty-making was concerned, this put a special emphasis on the oath, and reflected the special role that the Church could play when intervening in disputes concerning broken peaces. However, the civil law on contract drew closer to canon law with a contribution of Baldus. Baldus held that a *causa*, or just reason for agreeing or promising something, was sufficient to give the innominate contract a *vestimentum*, which made it enforceable.³³³ The good faith standard and Baldus’s *causa* strengthened the idea that justice in peacemaking should be observed, just as the agreement itself should be. While the theory of obligations presented some difficulties for peace treaties, the more difficult problem of course was still their practical enforceability.

Another aspect of justice that jurists considered in peacemaking concerned the rights of private citizens. It was held generally that treaties made by sovereigns could not prejudice private rights unless doing so served the public utility or common good.³³⁴ This was an extension of the idea, accepted among jurists, that the prince could not take away the

³³¹ Lesaffer, “The Medieval Canon Law of Contract,” pp. 179-85; Gordley, *ibid.*, pp. 97-8; also Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford, 1992), pp. 69-111.

³³² Lesaffer, *ibid.*, p. 184, observes that Johannes Teutonicus guided opinion on this point, and pp. 190ff., on the importance of the oath in actual treaty-making into the early modern period. Giving an oath was of course a deeply traditional way of making an agreement.

³³³ Having a *causa* assumed that the parties understood what they were doing and were contracting rightly; Gordley, “Good Faith in Contract Law,” pp. 112-3.

³³⁴ Martinus Garatus, *Tractatus de confederatione*, p. 412, qu. 1. Garatus cites, and Wijffels quotes, Giovanni d’Andrea, on X.2.24.18, fn. 1: “[Assensu populi] quasi dicat, ex quo fit praeiudicium populo, non debet fieri sine suo assensu, ar. de offic. Archid. ad hoc sec. fi. et est arg. secundum Host. quod principes per se non [possunt] componere de damnis populo datis ratione guerrae...;” cf. Hostiensis on X.2.24.18. Baldus later concurred: Baldus, *Super primo, secundo, et tertio Codicis*, to C.2.2.2 (Lyon 1539, fol. 97vb). Angelus de Ubaldis related the common opinion that the prince could remit the rights of individuals when making peace: Angelus, *In I. atque II. Digesti veteris partem commentaria*, to D.2.14.5 (Venice 1580, fol. 56vb), “Item scias, quod tales duces faciendo pacem possunt remittere iniurias, et damna data subditis eorum, ita quod in perpetuum non possunt conqueri, neque civiliter neque criminaliter, sic fecit civitas Perusina, cum pacem contraxit cum ecclesia, et e converso est pax iusta causa, propter quam dominus habens guerram potest remittere iniurias subditis, et damna illata.” On the idea that the public good could trump private rights, Gaines Post, *Studies in Medieval Legal Thought*, p. 290, and pp. 241-309 on justifying public action with reference to the public utility and “reason of state.”

property of private citizens without just cause.³³⁵ The jurist Angelus de Ubaldis felt that peace itself was a just cause for remitting the rights of private citizens, and of course in practice whatever was done in a peace agreement might defensibly be said to promote the public utility or common good.³³⁶ On the other hand, jurists also argued that kingdoms were inalienable, and not only kingdoms but whatever grant of territory might gravely injure the dignity of the realm was invalid – principles that would apply equally to the territories of the Italian cities.³³⁷ As well, a principle derived from feudal law held that a lord could not alienate a fief without his vassal's permission.³³⁸ There thus also remained a certain tension in the *jus commune* between the exigencies and concessions necessary for peace, and the duty to preserve the realm or territory of the city (or kingdom, duchy, etc.) and protect the private rights of its citizens in respect of injuries suffered during war.

The question of who could interpose themselves between disputing parties for the sake of bringing peace was also discussed. Particularly for canonists the standard answer was the pope, who as the spiritual (and as some argued the ultimate temporal) leader of Christians had responsibility for their welfare, and the authority to try to bring warring

³³⁵ Pennington, *The Prince and the Law*, pp. 113-4, 203-4, 210-13; on pp. 218-9, a *consilium* of Angelus is cited, arguing that private property cannot be taken away without cause. It is important to note that these *dicta* were debated and applied frequently in practice. Also on property rights, see the important work of Ugo Nicolini, *La proprietà, il principe e l'espropriazione per pubblica utilità: studi sulla dottrina giuridica intermedia* (Milan, 1940).

³³⁶ Quoting Angelus, *In I. atque II. Digesti veteris*, fol. 56vb: "et econverso est pax iusta causa, propter quam dominus habens guerram potest remittere iniurias subditis, et damna illata."

³³⁷ On inalienability, P. Riesenbergh, *The Inalienability of Sovereignty in Medieval Political Thought* (New York, 1956); E. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton, 1957), pp. 346-58; Gaines Post, *Studies in Medieval Legal Thought*, pp. 415-33, and Post, pp. 416-24 on the duty (*ius*) to prevent injury to the dignity or majesty (*maiestas*) of the realm. X.2.24.33 speaks to the issue: "Si positus in dignitate alienat bona dignitatis, non valet alienatio; et ipsemet revocare debet, non obstante iuramento de non revocando; maxime, si prius iurat non alienare."

³³⁸ It was recorded for example in canon law by Hostiensis, *In primum [-sextum] decretalium librum commentaria*, to X.1.33.13 (Venice 1581; repr. Torino 1965, I fol. 98rb): "...[e]t est expressum quod dominus in alium feudum non transferat sine vasalli voluntate, ut in lib. feu. de feudo non alie. sine consensu...", citing feudal law in support.

parties to peace.³³⁹ The Church had in fact taken up a serious peacemaking role with the Peace and Truce of God movements beginning in the tenth century, and the papacy itself also remained active in peace negotiations between warring monarchs and nobles in Europe.³⁴⁰ Canonists affirmed that this was the pope's role in the Decretals at X.2.1.13, where the pope was able to intervene in secular affairs by *ratione peccati*, or on account of sin, which the pope had power to judge.³⁴¹ In particular, X.2.1.13 discussed ecclesiastical authority to inquire into and judge "broken peaces" among laymen.³⁴² The decrees of Clement V (Clementine constitutions) also stated that it pertained to the pope to make peace among Christians, and to pacify discord and scandal.³⁴³

The pope could be an effective mediator in disputes, but in the thought of Bartolus the cities and their *podestà* could be active mediators as well. It is another indication of the

³³⁹ On the role of the papacy in disputes, J. Gaudemet, "Le Rôle de la Papauté dans le règlement des conflits entre états aux xiii et xiv siècles," *Recueils de la Société Jean Bodin* xv (1961), pp. 79-106; F. L. Ganshof, *The Middle Ages: A History of International Relations* (New York, 1970), pp. 136-7, 315-16, and *passim*. The broadest justification for papal intervention was the claim to (even indirect) supremacy over the temporal sphere, a large topic which cannot be treated here, but see W. Ullmann, *The Principles of Government and Politics in the Middle Ages*, 3rd ed. (London, 1974); J. A. Watt, *The Theory of Papal Monarchy in the Thirteenth Century* (London, 1965); M. J. Wilks, *The Problem of Sovereignty in the Later Middle Ages* (Cambridge, 1963), pp. 233-454. See also above, p. 45, fn. 157.

³⁴⁰ See p. 1, on the Peace and Truce of God. F. L. Ganshof, *op. cit.*, pp. 283-323, notes arbitrations and mediations in which the papacy was involved; J. R. Sweeney, "Innocent III, Hungary and the Bulgarian Coronation," *Church History* 42:3 (1973), pp. 320-34, treats Innocent's diplomacy and arbitration between Hungary and Bulgaria. Innocent III was the key figure in asserting the papacy's powers to intervene in secular disputes, and he intervened actively, perhaps most notably between England and France: Carlyle, *op. cit.*, vol. 5, pp. 165-71, among others, describes the events and issues.

³⁴¹ It was Innocent III's decretal *Per venerabilem* which established the surest powers to intervene, though the exact nature of those powers has been disputed among scholars. Brian Tierney, "'Tria Quippe Distinguit Iudicia...' A Note on Innocent's Decretal *Per Venerabilem*," *Speculum* 37: 1 (1962), pp. 48-59, gives a summary of the dispute and submits a careful reading of the decretal; James Powell, ed., *Innocent III: Vicar of Christ or Lord of the World?* (Washington, D.C., 1994), collects articles and chapters representing a good range of opinion on Innocent's vision of papal authority.

³⁴² Innocent III also wrote X.2.1.13 (*Novit ille*): "Iudex ecclesiasticus potest per viam denunciationis evangelicae seu iudicialis procedere contra quemlibet peccatorem, etiam laicum, maxime ratione periurii vel pacis fractae." It gives a good sense of his expansive vision of intervention, including the power to judge oaths: "Numquid apud nos debet esse pondus et pondus, mensura et mensura, quorum utrumque est abominabile apud Deum? Postremo quum inter reges ipsos reformata fuerint pacis foedera, et utrinque praestito proprio iuramento firmata, quae tamen usque ad tempus praetaxatum servata non fuerint, numquid non poterimus de iuramenti religione cognoscere, quod ad iudicium ecclesiae non est dubium pertinere, ut rupta pacis foedera refoermentur?"

³⁴³ Clem. 2.9.1.

consistency and importance of Bartolus's thought on the subject of cities that this was so. Bartolus argued that the *praeses provinciarum* or *potestates* ought to compel cities to come to peace, and with *praeses* he had in mind the government officials representing prominent territorial units, including the city-states of Italy.³⁴⁴ In a comment on *Code* 7.33.12, Bartolus followed a tradition going back to Accursius, noting that the Italian city as a territorial unit was equivalent to a province in Roman law.³⁴⁵ The *potestates* Bartolus referred to were, in his own time, the professional corps of itinerant judges, or *podestà*, who served terms as judicial magistrates in the Italian cities.³⁴⁶ Thus in all cases secular representatives of the cities – rectors, governors or judges from the judicial corps – had a role to play in peacemaking.

Jurists also considered the difference between peace and truce, and the question of who could conclude them was also raised in this connection. A peace was the cessation of all hostilities, the remittance or settlement by treaty of injuries, claims and damages, and the return to officially amicable relations (usually proclaimed as *amicitia*). A truce on the other hand was merely a temporary cessation of hostilities and pause in the war.³⁴⁷ Jurists recognized that truces were valid and served an important role in practice; the Quattrocento jurist Martinus Garatus even felt (as some did for any kind of faith given) that if a truce was

³⁴⁴ Garatus, *Tractatus de confederatione*, p. 418, qu. 12, citing Bartolus, to D.1.18.13: "...et ideo dic, quod interdum quaeritur de pace fienda inter unam civitatem et aliam, et hoc casu preses sive potestas debet se interponere ut fiat..." Canning, *The Political Thought of Baldus*, pp. 125-7, notes this understanding of *praeses provinciae* in Baldus. Baldus thought that some cities, like Florence, Perugia and Siena, occupied the position of *praeses provinciae*, and exercised *merum imperium* in their territories.

³⁴⁵ Bartolus, *Commentaria*, to C.7.33.12 (Turin 1589, I fol. 71rb), "No. gl. super verbo, id est in una provincia, in provinciis vero, quae adhuc reguntur hodie per presidem, habet locum hec lex. In locis vero in quibus civitas habet sua regimina, habet locum, quod dicit hic no. gl." Canning, p. 125, notes that the tradition extended back to Accursius.

³⁴⁶ On the development of the office of the *podestà*, Lauro Martines, *Power and Imagination: City-States in Renaissance Italy* (Baltimore, 1979), pp. 41-7, pp. 107ff. *Podestà* often exercised broader governmental power in the period 1220-1270, but by the Trecento were usually confined to judicial functions.

³⁴⁷ Commentaries on X.1.34 (= *De Treuga et Pace*) are the most convenient *locus* for this discussion; e.g., Francesco Zabarella, *Super primo [-quinto] decretalium subtilissima commentaria* (Venice 1602, I fol. 322rb-va).

broken on one side, it should not be broken on the other.³⁴⁸ Additionally, jurists like Bartolus and Raffaele Fulgosius began to consider whether, beyond the cities themselves, mercenary captains could also conclude peaces or at least truces for their employers. This was perhaps not surprising, given the growing prevalence of mercenaries in later fourteenth-century Italian warfare; but despite these changing realities, jurists commonly denied mercenaries that kind of executive authority, which would reduce the cities' already limited control over the conduct of war. However, some allowed that, as necessity demanded, mercenaries could conclude at least *inducias*, or short truces.³⁴⁹ Apart from mercenaries, jurists did recognize that the lawyers and notaries who negotiated and drew up treaties could act as legal procurators for the principal signatories by mandate, which status would be noted in the treaty.³⁵⁰

Jurists also examined the nature of alliances and leagues (*confederationes*), and the norms that should govern them. Most often, leagues were based on detailed written agreements concluded between cities to provide for collective defense in case of attack,

³⁴⁸ Garatus, *op. cit.*, p. 420, qu. 26: "In treugis est speciale, quod licet tu frangis fidem mihi, tamen non debeo tibi frangere, donec durat tempus treugae, secundum Anto. de But. in c. pervenit, de iureiur." Garatus cited the opinion of Antonio de Butrio to X.2.24.3, which was based on Gratian's dictum that faith should be kept with an enemy. Butrio reasoned further that faith was not conditional on the other side, using marriage as an analogy: "...dic quod vota coniugum diriguntur in deum, nec unum prestatur ad implementum alterius respective, ideo nec resolvuntur vel conditionantur ad implementum alterius, ut si aliqua conditio inserta in iuramento et acceptata per aliam partem non servatur." Though not mentioned by Garatus, Angelus de Ubaldis wrote that faith should be kept even with rebels; Angelus, *In I. atque II. Digesti veteris partem commentaria*, to D.2.14.5 (Venice 1580, fol. 56vb): "Et attende, quia ducentes bellum nomine proprio debent observare fidem etiam rebellibus."

³⁴⁹ Raffaele Fulgosius, *In primam Pandectarum partem commentariorum*, to D.2.14.5 (Lyon 1544, fol. 88vb-89ra), summarized some preceding opinion. Jurists agreed that mercenaries lacked the authority to make peace, but truce was more uncertain. Fulgosius followed Bartolus in holding that they could conclude *inducias* (short truces, e.g., for the sake of burying the dead). Cf. D.49.15.19 for *indutiae* in Roman law. Baldus and Angelus countered that mercenary captains could not even conclude those. Cf. Angelus, *op. cit.*, to D.2.14.5: "...capitaneos guerram appellamus, nam cum eorum mandatum se extendat ad guerram, non faciunt treugam vel inducias nec contrahunt amicitiam propter mandatum domini, quia habens mandatum ad litigandum, non paciscitur..." and Baldus, *Lectura super I. et II. parte Digesti veteris*, to D.2.14.5 (Venice 1493-95, fol. 128ra). The question exercised the jurists' classical imagination, as Baldus turned to Jugurtha and Fulgosius to the Greeks and Trojans, to explain their positions.

³⁵⁰ Garatus, *op. cit.*, p. 438, qu. 59, citing in fact the earlier *Speculum iudiciale* of Gulielmus Durandus (c.1290).

though there were also offensive alliances. In the thirteenth century alliances were often local and of a more limited scope, even for cities like Florence.³⁵¹ But with the competitive rise of the major territorial powers in the fourteenth century, confederations often tied together a number of the northern cities, sometimes from one coast to the other.³⁵² The alliance system of Italian politics became essential in the fifteenth century to check the ambitions of the largest territorial players.³⁵³ That the jurists were slow to investigate confederations, however, was due largely to the lingering question of whether the cities were politically independent. In the thirteenth century, Innocent IV had held that any *collegium* or corporation – and alliances or confederations were kinds of *collegia* – needed the authority of the prince to be valid, including explicitly the alliances of barons and cities.³⁵⁴ Again it was Bartolus who marked a clear transition with his insight on free cities. Bartolus reviewed Innocent's position on *collegia* before noting that certain cities in Tuscany at least

³⁵¹ See P. Santini, *Documenti dell'Antica Costituzione del Comune di Firenze*, 2 vols. (Florence, 1895), for peace treaties concluded by Florence before the second half of the thirteenth century.

³⁵² For the rise of the Florentine territorial state, the works of Gene Brucker, *Florentine Politics and Society* (Princeton, 1962), and *idem*, *The Civic World of Early Renaissance Florence* (Princeton, 1977); and Marvin Becker, *Florence in Transition*, 2 vols. (Baltimore, 1967), are still important. On the role of lawyers in the Florentine city-state, Lauro Martines, *Lawyers and Statecraft*, is still the best guide. However, Martines does not consider treaties and treaty law *per se*. More recently see the essays in *Florentine Tuscany: Structures and Practices of Power*, ed. W. Connell and A. Zorzi (Cambridge, 2000), and those in *The Origins of the State in Italy, 1300-1600*, ed. J. Kirshner (Chicago, 1996).

³⁵³ On Quattrocento diplomacy and the importance of the alliance system, see the articles collected in Vincent Ilardi, *Studies in Italian Renaissance Diplomatic History* (London, 1986); and particularly from a Florentine perspective, N. Rubinstein, "Das politische System Italiens in der zweiten Hälfte des 15. Jahrhunderts," in *Bündnissysteme und Außenpolitik im späteren Mittelalter*, ed. Moraw (Berlin, 1988); and Riccardo Fubini, "Appunti sui rapporti diplomatici fra il dominio sforzesco e Firenze medicea," in *Gli Sforza a Milano e in Lombardia e i loro rapporti con gli stati italiani ed europei (1450-1535)*, Atti del Convegno Internazionale, Milan, 1982, pp. 291-334.

³⁵⁴ Innocent IV, *op. cit.*, to 5.31.13, fol. 526va. On Innocent IV's theory of *collegia*, also known as his corporation theory, Manuel Rodriguez, "Innocent IV and the Element of Fiction in Juristic Personalities," *The Jurist* 22: 3 (1962), pp. 287-318; Joseph Canning, "The Corporation in the Political Thought of the Italian Jurists of the Thirteenth and Fourteenth Centuries," *History of Political Thought* I (1980), pp. 9-32; Pierre Quantin-Michaud, *Universitas. Expressions du mouvement communautaire dans le moyen-âge* (Paris, 1970); Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism* (Leiden, 1998), pp. 89-108; and Gierke, *op. cit.*, the classic treatment.

were free *de facto*, and so able to federate with each other on their own authority.³⁵⁵ The point bears further witness to the consistency of his thought on free cities, which again invited some further juridical development.

Both Bartolus and Baldus, like Innocent, used corporation theory to describe their legal conception of confederations. The basic premise was that, by means of confederation, cities or other free political actors would be joined into one body, as Baldus wrote.³⁵⁶ The question then was how far the jurists wanted to take this legal metaphor. Bartolus, for his part, considered one logical conclusion. He asked whether political entities could be joined together by confederation to such an extent that someone exiled from one jurisdiction could be exiled from that of all members, and a crime committed in one could be punished in all the rest.³⁵⁷ He held that it could be done; but perhaps in part to maintain territorial jurisdiction, he advised that it could be done only by a “special statute” established by a member city. Bartolus took a practical approach to the question, but even the suggestion of

³⁵⁵ Garatus, *De confederatione*, pp. 421-2, qu. 20, quoting Bartolus on D.47.22.4, fn. 70: “Item iste lige que fiunt inter civitates et inter principes et barones non valent, ita tenet Inno. in c. dilecta. extra de excus. prelato. nec ob. l. non dubito. infra. de cap. ubi dicitur quod civitates invicem federantur et colligantur quia istud est verum quando civitates alie non amice vel libere federantur populo romano habenti imperium. sed plures civitates vel plures barones qui essent sub uno rege dominio vel principe non possunt invicem facere illam federationem. Ista enim sunt sodalicia et collegia prohibita. ut supra l. i. Ex istis colligitur quod civitates Tuscie que non recognoscunt de facto in temporalibus superiorem possunt invicem simul federari tanquam libere, sed plura castra vel ville que essent sub una civitate vel uno domino hoc non potest. ut dictum est.”

³⁵⁶ Garatus, *op. cit.*, p. 416, qu. 7, citing Baldus on C.7.53.8, fn. 34: “Sed quaero, quid de civitatibus. confoederatis, nam natura federis haec est, persequi hostes alterius, ut proprios, ut ff. de cap. l. non dubito [D.49.15.7], nam confaederatio non est aliud, quam facere quasi ex duobus corporibus unum corpus, ad invicem se protegendum contra hostes, et inimicos cuiuslibet ex collegatis, nec est novum quod de duab. civitatib. et duab. provinciis fiat unum corpus...”

³⁵⁷ Bartolus, *Commentaria* (Turin 1589, IV fol. 274ra): “Ultimo nota, quod dicunt quidam, quod hic est casus, quod si aliquae civitates foederatae sunt, quod exbannitus in una fit exbannitus in alia: quod non placet et usus non approbat. Sed quaero, quod velit dicere hic tex. quod ex civitatibus foederatis, rei apud nos fiunt? Aut enim illi de civitatibus foederatis delinquant in territorio nostro, et non est mirum, quia ratione delicti fortiantur forum nostrum undecumque sint. Aut non delinquant apud nos [in territorio nostro], et videtur quod apud nos non possunt puniri: quia non est aliqua causa, propter quam hic fortiantur forum...[q]ualiter ergo dicemus? Dico, quod ex speciali statuto civitatis hoc potest fieri, ut delinquentes de foederatis civitatibus possunt apud nos puniri...”

such extensive cooperation was striking, and looked forward to some extent to more modern extradition agreements.

Baldus wrote in one place that a confederation could do no more or less than what the pacts of the confederates stated, yet he remained influenced by a corporatist view of confederations.³⁵⁸ He suggested elsewhere that the greater part (the *maior pars*, or principal or most powerful member(s)) of the confederation should govern its decisions and compel lesser members to act.³⁵⁹ The idea referred to an aspect of corporation theory by which the *maior pars* might act for and effectively represent the will of the corporate body.³⁶⁰ In contrast, Baldus's brother Angelus commented that if war was begun by one confederate without cause, the other members did not have to give aid; in fact, no colleague should be held to give aid in another colleague's war unless the members consented.³⁶¹ Though they had different approaches, both Angelus and Baldus were partially right on how confederations worked in practice. An alliance treaty might specify that aid was not required from confederates in various circumstances; on the other hand, the most powerful

³⁵⁸ Garatus, *op. cit.*, p. 416, qu. 7, fn. 34, citing Baldus on C.7.53.18: "sed tu dic, quod confaederatio non operat plus, vel minus, quam dictent pacta confaederatorum, quicquid dicat Bar. in sec. ratione non obstat l. non dubito."

³⁵⁹ Garatus, *op. cit.*, p. 431, qu. 44, citing Baldus on the *Peace of Constance*, s.v. 'ego,' fn. 118: "Quod enim maior pars facit, tota universitas fecisse videtur...quod illud quod facit maior pars collegiatorum, seu confederatorum, minori parte contradicente, ratum quo ad omnes debet haberi, quia omnes collegati rediguntur ad instar unius corporis."

³⁶⁰ The role of the more powerful part (*maior, sanior, valentior pars*) in leading or governing the corporation was an important aspect of corporation theory and political theory generally; see, e.g., Tierney, *Foundations of the Conciliar Theory*, pp. 100-8. The idea was not only important for canonist conciliar theory, but is found for example in the political theorist Marsilius of Padua, as the means by which the "human legislator," the corporative *persona* of a city government, willed and acted; see Arthur Monahan, *Consent, Coercion and Limit: The Medieval Origins of Parliamentary Democracy* (Leiden, 1987), pp. 209-29.

³⁶¹ Angelus, *Commentaria*, to D.45.1.132 (Lyon 1561, III fol. 141rb): "Hoc etiam est valde notandum, si fit ligam inter duas communitates aut dominus et vicissim permittunt se defendere et guarentigiare ut moris est, nam si unus incipit sine causa guerram non tenebuntur colligati dare subsidium in tali guerra. Casus est hic, ad evitandum tamen scandalum moris est in pactis lige apponere: quod nullus teneatur alteri dare subsidium in guerra nove qua inchoaretur per colligatum sine consensu colligatorum."

members of a league had more control over initiating and concluding wars, and often pulled the other members with them.

If confederations could be described as legal corporations, however, they were in practice weak ones, and both Baldus and Angelus seemed to recognize this. Their sense of a league as a corporate body was somewhat fluid, since Baldus also called confederations *societates*, and Angelus would later insist in a *consilium* that leagues were merely *societates*.³⁶² In Roman law *societates* were business partnerships that dissolved on the withdrawal of any member.³⁶³ Although it might be called a corporation, a *societas* did not create a legal *persona* separable from its members. In fact, it was rather a contract creating rights and duties of members to each other; unlike the medieval corporation (*collegium* or *universitas*), no one could represent the totality of the *societas*.³⁶⁴ Insofar as the confederation was viewed as a *societas*, it was also, like the peace treaty, governed by good faith. Thus a suit by one of the members would allege a breach of faith, for instance one party's fraudulent conduct, or damages incurred by the petitioner while pursuing the common purpose of the *societas*.³⁶⁵ Ultimately it was the *societas* that seemed a closer analogy for the confederation. Baldus's view on confederations appeared more corporatist than that of his brother Angelus, but it is a good illustration of the familiar point, that jurists could and did assimilate various legal concepts from Roman, canon and feudal law to inscribe in the *jus commune* medieval practices and institutions that had no direct precedents.

³⁶² Garatus, *op. cit.*, p. 427, qu. 36, citing Baldus on the *Peace of Constance*, s.v. 'Si quis vero,' fn. 100: "Hic dicitur quod si aliqua civitas de dicta societate Lombardie non servat statuta pacis, ceterae civitates de societate compellant illam ad observandum;" and Angelus, *Consilia*, no. 391 (Frankfurt 1575, fols. 281rb-283rb), on which see ch. 5, pp. 212-15.

³⁶³ See Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford, 1996), p. 455.

³⁶⁴ *Ibid.*, p. 454-5; Vincenzo Arangio-Ruiz, *La società in diritto romano* (Naples, 1950), pp. 63-70, 93-116.

³⁶⁵ Zimmermann, *op. cit.*, pp. 460-4.

This does not mean that confederations existed in such an unsettled domain of law that arguments about them were fruitless. The point seems to hold true for most of the developing jurisprudential theory on peace, truce and confederations. There were fluid ideas about practices that were treated in the late medieval *jus commune* for the first time or applied to the Italian cities for the first time; but there was agreement on some basic principles, like observing treaties in good faith or preferring the public good to private rights in peace agreements. Indeed, the *jus commune* played a role by developing shared definitions in the commentary literature which could be drawn on in diplomacy, and which in fact was influenced by actual practice. Moreover, both peace agreements and confederations were memorialized in detailed treaties containing acts to be performed (and abstained from), with penalties for non-compliance. Perhaps most importantly, there were many political reasons, some of which will be treated in chapter four, why treaties were observed and why legal obligations were important considerations in the foreign policy of any city.

The duties of confederates were outlined in treaties themselves, though the *jus commune* contemplated some general responsibilities. A seemingly established principle was that the fulfillment of such treaties was based on the (presumably reasonable) ability of the actors to meet their obligations.³⁶⁶ One question that arose concerned multiple alliances: if a side had allied with more than one party, which alliance had to be observed first? The canonist Giovanni d'Andrea wrote that faith made to the first party had priority over the

³⁶⁶ Garatus, *op. cit.*, p. 413, qu. 4, makes this point: "Si plures Principes fecerunt invicem colligationem de defendendo unu[m] alterum sub certa pena, non incurrunt penam, si faciunt, quod possunt pro adiuvando offensum." It was an important point, which came up in *consilium* by Angelus; see pp. 212-15 below.

second, and the second over the third.³⁶⁷ The opinion was also maintained in a *consilium* by Ludovico Pontano, where the question arose over separate confederations made with the kings of England and France, and the conclusion seemed an uncontroversial point.³⁶⁸ Another question was whether an enemy of one confederate was the enemy of all confederates. Baldus, giving further evidence of his corporation theory, held that confederates shared the same will, so that the enemy of one was the enemy of all.³⁶⁹ This was fine as a theoretical discussion, but in practice alliances often approved different material responsibilities for different members. As Baldus himself had noted (whether agreeing or not), it was much more accurate to say that confederates were held only to what they agreed.

Jurists also had a few opinions about adherents, who were similar but distinguishable from confederates. Adherents were followers of one city or lord in a conflict, and came under the protection of their principal. They were also liable to attack by enemies of their protector, but they were not confederates who signed treaties in their own name, and did not necessarily have material obligations under an alliance. How their “adherence” was to be declared or publicly known was less clear, but they were nominated, at the latest, in peace treaties. In canon law, adherents were those who were “under the same will” as their principal, just as confederates shared the same will according to Baldus.³⁷⁰ Innocent IV upheld the duty of the principal to its adherents, writing that the pope would not want to

³⁶⁷ Garatus, *op. cit.*, p. 438, qu. 60, citing Giovanni d’Andrea on X.3.35.3, fn. 154: “...promittendo quod homo suus ligius erit decetero, et ei fidelitatem servabit, et ipsum contra homines omnes adiuuabit: quam promissionem facit iurando, et osculando, et hoc potest facere secundo, salva tamen fidelitate primi, et tertio, salva fidelitate primi, et secundi. primum est licitum iuramentum, etiam secundum servandum est...”

³⁶⁸ Ludovico Pontano, *Consilia*, no. 47 (Venice 1581, fol. 25ra-va).

³⁶⁹ Garatus, *op. cit.*, p. 438, qu. 26, citing Baldus on C.3.28.28, fn. 83: “Item probatur inimicitia, si quis contrahit parentelam, vel facit confederationem cum inimico nam coniuncti et confederati praesumuntur eiusdem intentionis.”

³⁷⁰ Sext. 2.14.2.

conclude a peace without seeing his adherents also safe and secure.³⁷¹ This did not do much to identify them either, but in one *consilium* Angelus wrote that adherents were known through their intention and works, supplying criteria that helped argue his particular case.³⁷² Angelus also held that peace made among principals extended to adherents, while Baldus wrote that violated peaces were understood to be violated with respect to all its adherents.³⁷³ Opinions on adherents, like those on confederates, were developing in the late fourteenth century *jus commune*, in part because it was a topic over which controversies arose in practice. Their significance would still appear to be minor, except that they could become sensitive political issues; in fact, two *consilia* on adherents will be examined below in chapter four.³⁷⁴

Although the *jus commune* was not overly concerned with the law of captives and ransom, it did contain comments on it, and the subject came up in diplomacy. In practice, captives of a noble background or high rank were often ransomed for profit by their captors.³⁷⁵ The *jus commune* both accommodated and criticized this practice. In classical Roman law, captives legally became the slaves of their captors and had the right of *postliminium* if they escaped or were freed, but the most influential glossator, Accursius,

³⁷¹ Garatus, *op. cit.*, p. 422, qu. 21, citing Innocent IV on Sext. 2.14.2: “(Adhaerentes) no. fidelitatem ecclesie romane, quia numquam voluit habere pacem nec pacis tractatum, nisi prius exprimeret et premitteret de pace sibi adherentium et de perpetua securitate eorum.”

³⁷² Angelus de Ubaldis, *Consilia*, no. 257 (Frankfurt 1575, fols. 175rb-177vb). He came up with the criteria in a *consilium* where that problem was raised; the *consilium* will be examined in ch. 5, pp. 161-67.

³⁷³ Garatus, *op. cit.*, p. 427, qu. 35: “Si paciscenti non potest esse pax sine adherentibus, verba pacis extenduntur ad adherentes,” and citing Angelus on D.6.1.43: “No. idem esse iudicium de adherentibus quod de principalibus, et sic est argumentum quod pax facta [...] cum principali intelligatur facta cum adherentibus...,” also p. 433, qu. 51: “Quando Princeps diffidatur, omnes eius complices intelliguntur diffidati,” citing Baldus, *repetitio* on C.3.34.2.

³⁷⁴ See below, pp. 161-67, 216-19.

³⁷⁵ Keen, *op. cit.*, pp. 20-25, 212-3. Venice bought for a set price the captives who were mercenary captains or rebels; see Mallet, *op. cit.*, p. 143. The French crown also upheld its right to take spies or rebels who were captives in private hands, and had a right to buy high-profile captives for a large sum (sometimes 10,000 francs); see Contamine, *op. cit.*, pp. 170-2.

held that slavery was generally invalid within Europe.³⁷⁶ In particular, Accursius called the wars of the Italian cities amongst themselves or against the empire the illicit violence of robbers or brigands (*latrunculi*).³⁷⁷ By contrast, Bartolus's influential opinion on the subject underscored a wider scope of action for the cities. Bartolus held that there was a right of *postliminium* in wars between the emperor and his *de jure* subjects in Italy, in which captives could become slaves.³⁷⁸ It was an important theoretical point, because it gave the wars of the cities against the empire a public and licit character, rather than one of illicit rebellion. Bartolus's opinion on the slavery of captives in the emperor's wars was quoted by subsequent jurists, and with approval by some.³⁷⁹

Bartolus held differently for wars within Italy, where the role of ransom practice became more apparent. Both in wars between Italian cities which were under some lord, and free cities which were not, he noted that *postliminium* was not observed with respect to persons, so that captives did not become slaves.³⁸⁰ Bartolus though did accept ransom practice, and compared it to a certain aspect of homage or fidelity, similar to that between a vassal and lord.³⁸¹ And many discussions of captivity and ransom did connect them back, at least by analogy, to slavery. Angelus observed that monetary penalties were licitly imposed

³⁷⁶ See above, pp. 53-5.

³⁷⁷ See above, p. 56.

³⁷⁸ Bartolus, *Commentaria*, to D.49.15.9 (Turin 1589, IV fol. 275rb): "Et immo puto, quod civitates Italiae, contra quas Imperator indixit bellum, ut contra civitatem Florentiae et similes, sint vere hostes imperii, et capti efficiuntur servi." In wars with those outside the European world (wars with non-Romans), jurists often did think *postliminium* should hold and enslavement exist; see the treatise of Pierino Belli, *De re militari*, p. 85, referencing earlier opinion.

³⁷⁹ E.g., Belli, *op. cit.*, p. 95, citing Bartolus; Giasone del Maino, *op. cit.*, to D.1.1.5, fol. 8ra, n. 24, agreeing with the position and citing Fulgosius as well.

³⁸⁰ Bartolus, *ibid.*, "...quando est contentio inter aliquas civitates, quae sunt sub uno domino, tunc inter eas non est locus iuri captivitatis et postliminii...[q]uandoque est contentio inter duas civitates quae superiorem non recognoscunt, ut inter civitatem Florentiae et civitatem Pisanum...quantum ad personas hominum non observamus iura captivitatis et postliminii...;" in this case, Bartolus thought that by the law of nations in antique times *postliminium* held, but the law of nations had been modified by modern customs and the customs observed among Christians.

³⁸¹ *Ibid.*; Baldus also noted the opinion: *Baldus Super VII, VIII, et IX, Codicis*, to C.8.47.7, n. 3 (Lyon 1539, fol. 181rb).

on captives, but that there was only a natural, and no civil, obligation for the captor to uphold a promise to pay ransom. This was because, just as between master and slave, no civil obligation could arise between captor and captive.³⁸² However, if the captor was a *latrunculus*, Angelus, like the other jurists, agreed that capture was illicit and no obligation to him arose.³⁸³

Baldus used the category of *latrunculi* to launch a more pointed critique of contemporary customs of war. He noted that mercenary companies which devastated countrysides should be considered *latrunculi*, and their captures judged illicit.³⁸⁴ He went on to condemn all promises of ransom (and otherwise) made to mercenaries by captives even though, as he admitted, the practice was observed.³⁸⁵ Baldus also went beyond the question of mercenaries, indicating that anyone who did not wish to return to a captor was not bound to do so: insofar as captors were enemies of a republic, faith was not to be observed to them.³⁸⁶ Baldus's comments constituted a strong critique, militating against the customs of knightly combat by trying to invalidate promises made among private soldiers.

³⁸² Angelus, *In I. atque II. Digesti veteris partem commentaria*, to D.3.5.21 (Venice 1580, fol. 98va): "Et vides, quod antiquo tempore digestorum captis ab hostibus imponebantur taleae, et illa impositio erat iusta et obligat servos naturaliter tamen: quia civilis non cadit neque cadebit in servos: ideo autem erat permissa, quia captivus promittebat pecuniam, ut eriperetur in libertatem. Unde sicut servus promittendo pecuniam, ut fiat liber, tenetur, ita ut captivus hostium tenetur." Cf. Fulgosius, *ed. cit.*, to D.3.5.18.5, fol. 164ra-b. The situation was made complex by the fact that the promise to pay ransom was made in captivity but fulfilled by one who was free. The jurists contemplated an *actio mandati* to give the promises civil validity.

³⁸³ Angelus, *ibid.*, "Si quis autem captus esset a latrunculis, quia servus non est, tunc promittendo pecuniam neque civiliter neque naturaliter in effectum tenetur..."

³⁸⁴ Baldus, *Baldus Syper VII, VIII, et IX, Codicis*, to C.8.47.7, n. 4 (Lyon 1539, fol. 181rb): "...si captivantes sunt de numero sodalium qui mundum destruunt, et territoriam invadendo ponendo eam sub incen. et rui. et homicidiis ac etiam homines captivando iniuste, enim et illicite homines captivati per eos, licet relaxentur."

³⁸⁵ Baldus, *ibid.*, "Sed si non essent captivantes de numero sodalium: quia sunt stipendiarum alicuius regis facientis aliquam guerram qui in actu guerre publico et patenti capiunt gentes armorum inimicas, et deinde eas ad fidem relaxant: tunc potest dubitari, quia captivantes captivos amore amittunt...[c]ontraria est verum: quia non tenetur captus reverti etiam si iurasset hoc tenet gl. in d. l. nam et servus, et expressius in alleg. cle. pastoralis. Imo dictum iuramentum de redeundo est reprobatum...non enim est licita captivatio, cum tales dicantur latrunculi."

³⁸⁶ *Ibid.*, "Quero an isti qui relaxantur ad fidem, si vocati nolunt reverti, possint ad revertendum iure tituli compelli aut saltem soluere interesse, et in quantum captivans esset hostis reipublicae non est dubium quod ei non est servanda fides et in observantia fidei est dolus bonus."

His critique generally reflected the dim view taken of mercenaries in the fourteenth century *jus commune*, which usually aimed to curtail their authority and the validity of their customs in favor of the authority and law of the cities.³⁸⁷ Practice, however, would lag far behind Baldus's views: while Venice in the period sometimes did take control of prisoners of war, private captivity and ransom continued and thrived into a much later period.³⁸⁸

Finally, the theory of arbitration calls for some treatment, since the practice was relied on to settle disputes among the Italian cities. Like peace agreements, arbitration aimed to bring conflicts, including open hostilities, to a conclusion, but did so through a mutually agreed-upon arbiter or arbitrator (or a group of them) who rendered judgment.³⁸⁹ Arbitration was an established procedure in Roman law and was later adapted and brought into the medieval *jus commune*.³⁹⁰ In the later medieval *jus commune*, disputants would mutually agree to and sign a *compromissum*, an instrument which committed their case to an arbiter or arbitrator and committed them to follow the decision he reached, with penalties agreed to for non-compliance.³⁹¹ The difference between an arbiter and arbitrator was important in theory, though less so in the practice of late medieval Italy, where the

³⁸⁷ Cf. the positions on whether mercenaries could conclude peace, or longer truces. Garatus, *op. cit.*, p. 433, qu. 49, also backed Baldus on ransom, citing him on D.2.14.31. Garatus wrote simply: "Hosti publica fides est servanda, licet privata fides non sit servanda," which had broad implications.

³⁸⁸ M. Mallett and J. Hale, *The military organization of a Renaissance state: Venice, c. 1400 to 1617* (Cambridge, 1984), pp. 143ff, discusses prisoners and ransom in Venice; Venice did take prisoners of war, which was not unheard of even in the medieval period, but as the authors note ransom practices continued to flourish.

³⁸⁹ For arbitration in law, Thomas Kuehn, "Arbitration and law in Renaissance Florence," *Renaissance and Reformation*, n. s., 11: 4 (1987), pp. 289-319, the detailed treatment of Luciano Martone, *Arbiter-Arbitrator: Forme di giustizia privata nell'età del diritto comune* (Naples, 1984), and Karl S. Bader, "Arbiter, arbitrator seu amicus compositor," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 77 (Kan. Abt.) (1960), pp. 239-76. The analysis of arbitration is drawn from private law but I think those principles will be applicable in many cases to inter-city disputes. Arbitration among individuals in medieval Italy deserves more attention from legal historians, particularly using a case-based approach like Kuehn's. Arbitration among cities in particular needs attention, though locating the relevant documents can be difficult.

³⁹⁰ On the classical theory and medieval developments, Martone, *op. cit.*, pp. 3-115.

³⁹¹ Martone notes that there was originally another step, the *receptum arbitri*, which was absorbed into the *compromissum*, p. 26.

distinctions often collapsed.³⁹² Formally, the arbiter issued a decision, a *sententia*, only on the narrow issue given to him in the *compromissum* to decide, and the judgment could not be rescinded or appealed except in the case of his malfeasance.³⁹³ As Thomas Kuehn has noted, the arbiter could apply principles of strict law and follow more rigorous civil law procedure.³⁹⁴ The arbiter had no jurisdiction and the enforcement of the *sententia* was the enforcement of a private contract that could be taken to a court.

The arbitrator by contrast had somewhat broader power to look into the matter before him and judged based on equity. As Bartolus wrote in his treatise *De arbitriis*, there was to be no solemnity of law observed in the arbitrator's investigation of the question, since the arbitrator acted as an *amicabilis compositor* who might hope to bring the sides into accord.³⁹⁵ For Bartolus the arbitrator was not absolutely bound to render a *sententia* like the arbiter, but was generally expected to produce such a decision.³⁹⁶ His broader power to investigate the question also resulted in a larger scope of appeal for the disputants. Appeal in this case was based not only on malfeasance, but was also possible if a disputant felt the judgment had been unjust.³⁹⁷ If that were the case, an appeal could be made to the judgment of a good man (*arbitrium boni viri*); Bartolus, for one, demanded that appeal be made within ten days.³⁹⁸ The good man could only void the *sententia*, however, and not modify it.³⁹⁹

³⁹² Kuehn, *op. cit.*, p. 294.

³⁹³ Kuehn, *ibid.*, p. 293.

³⁹⁴ *Ibid.*, including a *libellus* and witnesses, and the agreed-on questions of fact and law were addressed.

³⁹⁵ Bartolus, *Tractatus de arbitriis*, in *Commentaria* (Venice 1590-1602, X fol. 146rb): "Arbitrator est, qui consilio suo tamquam amicabilis compositor litem decedit bona fide, et bono motu nulla solemnitate servata, et absque iudiciorum strepitu."

³⁹⁶ Bartolus, *op. cit.*, fol. 146vb, n. 18. Technically a *laudum* was issued by the arbitrator, but Kuehn notes that *sententia* and *laudum* were used indiscriminately in practice, p. 294.

³⁹⁷ *Ibid.*; cf. Kuehn, p. 294.

³⁹⁸ *Ibid.*, fol. 146va, n. 5; Kuehn, *ibid.*; Martone, pp. 93-100, describes the important formulations of Gulielmus Durandus.

³⁹⁹ Presumably the qualifications for *boni viri* were the same as for arbiters and arbitrators: Bartolus, for example, noted that arbiters and arbitrators should be of good reputation, free, *compos mentis* and older than 25 years; Bartolus, *ibid.*, fol. 146ra, n. 1.

Bartolus also considered a few special circumstances, and looked at the right of appeal more closely. If the case was given to three arbiters, and one died, he denied the right of the others to judge it.⁴⁰⁰ If a third arbiter on the other hand refused to show and perform his duties, the other arbiters could go to a judge to summon him, but similarly could not decide without him.⁴⁰¹ Nor could one arbiter (and presumably arbitrator also) commit his powers to the other two.⁴⁰² As far as appeal, Bartolus felt that disputants could agree in the *compromissum* to forego their right of appeal from an arbitrator's decision, though he noted that opinion varied.⁴⁰³

Of course, an important question in our context is the extent to which principles of arbitration taken from private law were applied in disputes between cities, territories and their rulers. As Bartolus wrote, cities should interpose themselves between disputants for the sake of peace, and Martinus Garatus cited Angelus that when disputes arose over peace treaties they should be directed to the *arbitrium* of a judge in binding form.⁴⁰⁴ Yet it is not clear how closely the *jus commune* procedures of private arbitration were followed in arbitration between cities or lords. Certainly such disputants agreed to submit their conflicts to third parties and were expected to follow decisions, with penalties for non-compliance. In fact, legal *consilia* were at least sometimes submitted in the course of arbitration disputes, which indicates a formal procedure and reflects the influence of the *jus commune*. Much

⁴⁰⁰ *Ibid.*, fol. 146va, n. 9.

⁴⁰¹ *Ibid.*, fol. 146va, n. 10. The others did not have the power to force an equal to perform his duties, Bartolus noted: "Sed an duo ex ipsis poterunt absente tertium cogere, ut veniat cum ipsis? Respondeo quod non, quia in hoc sunt pares, et par in parem non habet imperium...[q]uid ergo fiet? Adibunt iudicem et eum citabunt, et ei praecipient, ut conveniat cum ipsis duobus..."

⁴⁰² *Ibid.*, n. 11. There was an exception if the *compromissum* specified that it could be done.

⁴⁰³ *Ibid.*, n. 20, citing a contrary opinion of Dino di Mugello.

⁴⁰⁴ This is Bartolus on *praeses provinciarum*, in Garatus; and Garatus, *op. cit.*, p. 429, qu. 42: "Quando in concipiendis capitulis pacis est contentio inter Principes quo ad formam ligandi dirimitur hec causa arbitrio iudicis, secundum Ang. in d. l. de die. in prin. ff. qui satis. cog. [D.2.8.8]." Angelus did write a number of *consilia* on disputes between cities, and his opinion here may well reflect his close contact with arbitrations.

more work needs to be done on arbitration in dispute processing between the Italian cities (their *signori*, and other lords) in this period, but it might be expected that practice in fact varied from formal to rather informal. As far as the role that arbitration played in diplomacy and diplomatic strategy, which will be considered in chapter five, enforceability was the key problem; but arbitration could have some efficacy, and at least defer open conflict.

In the fourteenth century, attitudes toward war and the formulations of licit war in juristic literature underwent important changes and clarifications. For Innocent IV, a new analysis of war could usefully identify a few levels of licit violence in medieval society, with a description of the conduct and scope of each different kind of war. Given the great reputation of Innocent's commentary, it also became a kind of clearinghouse for ideas on war, and it is not surprising that Romanists followed Innocent's lead to some extent. The key change to views on war in civilian literature appears to come with the opinions of Bartolus, however. Here the Italian context emerges as important for the development of theory. Bartolus, perhaps considering questions posed by Cino of Pistoia and Albericus de Rosate in particular, set out the idea that at least some Italian cities were *de facto* sovereigns, and essentially independent from the empire. Part of the explanation of why this was so relied on the argument that the emperor was not available as an effective judge in disputes, and this part of the analysis deserves attention. Among followers of Bartolus in this respect, the jurist Paolo di Castro made the assumption most explicit, writing that when there was no effective superior, individuals, and cities, remained in the disposition of the law of nations and could "give law to themselves." In that case, they were effective sovereigns possessing the right to judge the justice of their causes and go to war over them.

Jurists in the fourteenth century, and particularly civilian jurists, also turned to the conduct of war and peace with greater interest. Thus a jurist like Bartolus could attempt to set reprisals within the confines of the *jus commune*, in his *Tractatus represaliarum*, in order to clarify the procedural foundation on which the institution could be made legitimate. Giovanni da Legnano, writing the first legal treatise devoted to war, borrowed from Bartolus on reprisals and assembled a variety of Roman and feudal laws on such issues as the responsibilities of soldiers and vassals to their lords. There was perhaps nothing particularly new in Giovanni's *jus in bello* material, but the fact that war was the subject of a single treatise reflected the jurists' closer involvement with a range of legal issues pertaining to war. On issues of peace and alliance, as well as ransom and mercenaries, jurists added some new opinions. Here Bartolus also appears as the key figure, affirming as he did that cities could make peace and federate freely. At the same time, and as an important background to these developments, jurists became quite involved in foreign relations, helping to negotiate and settle disputes between the Italian cities.

Chapter 4

The Just War in Florentine Political Discourse

The just war tradition was effectively developed in the classrooms of medieval Italian law schools, but it had important applications in the political discourse of the cities. In Florence, internal council debates often echoed with patriotic declarations of faith or arguments based on utility, instead of just war pronouncements. Perhaps not surprisingly, however, traditional just war arguments found a role in diplomacy, where Italian cities framed their causes for war in the terms of the Romano-canonical tradition, as injuries suffered, goods and rights to be recuperated and necessary defense. These arguments are reflected later also, in the diplomatic missives of Florence's chancellors, indicating a long continuity in the way Florence justified its wars to its neighbors, allies and enemies. In the missives and rhetorical works of the chancellors and humanists Coluccio Salutati and Leonardo Bruni, elements of a more classical discourse were introduced to bolster foreign policies and burnish Florence's image.⁴⁰⁵ But it will be noted that traditional arguments on just war continued to play an important role, even in Salutati and Bruni's works, and were a mainstay of diplomacy.

In Florentine political writing, just war theory can be found fairly early, in the collections of model speeches written for *podestà*, the chief judges and, in the thirteenth century, often rectors of cities. A well-known collection, the *Oculus pastoralis*, written in

⁴⁰⁵ Quentin Skinner and others have pointed out that some of these elements, and particularly the ideal of liberty, were taken up already in the late Middle Ages. Salutati and Bruni used *libertas* in a particularly adept way in diplomatic correspondence and public discourse, and they were reaching back, in part, to classical expressions of it. See Skinner, "Machiavelli's *Discorsi* and the pre-humanist origins of republican ideas," in *Machiavelli and Republicanism*, ed. Q. Skinner and M. Viroli (Cambridge, 1990), pp. 126-34.

Florence around the 1220s, is composed of speeches on particular topics on which the *podestà* was to praise or condemn, exhort or warn the citizens in fairly accomplished Latin.⁴⁰⁶ The Latin is not particularly classicizing, but the speeches in the collection pertain to the civic ethics and civic pride that humanism would later embellish upon, as Quentin Skinner has noted.⁴⁰⁷ War is treated in four speeches, in which, depending on the speaking occasion, varying emphasis is placed on the glory of war and the importance of its justice. The collective message is univocal, however, since all praise valor in war but underline the idea that wars must be just and necessary. The first speech on war, *De iuvene cupiente guerram*, holds that righteousness in arms is all-conquering and martial virtue wins undying fame from the poets. Florence naturally has this virtue in abundance: in times of war the Florentines will be ready to win glory and praise through their military skill.⁴⁰⁸ The patriotism of such public speeches, however, is not uncommon for civic discourse, even in this early period.⁴⁰⁹

The following three speeches all emphasize aspects of the just war tradition coming from Augustine and Gratian. The first instructs that only fighting because of necessity, and

⁴⁰⁶ *Speeches from the Oculus pastoralis*, ed. T. Tunberg (Toronto, 1990).

⁴⁰⁷ Quentin Skinner, "Machiavelli's *Discorsi* and the pre-humanist origins of republican ideas," pp. 126-34, makes the point concisely; it is made at length in his *The Foundations of Modern Political Thought*, 2 vols. (Cambridge, 1977). In a similar vein, Ronald Witt, 'In the footsteps of the ancients: the origins of humanism from Lovato to Bruni' (Leiden, 2000), traces the origin of humanism to the rhetorical arts of letter writing and oratory, emphasizing however the importance of a classicizing style.

⁴⁰⁸ *Speeches from the Oculus pastoralis*, p. 60: "Et hoc ideo cupio, quia inter virtutes seculi quibus homines venerantur, armorum probitas prefulgens cunctas exsuperarat et prevalet universis. Ecce illorum quos fama probos predicat armis, post transitum naturalem memoria vivit, nec deperit nomen ipsorum in secula, sicut poetarum manifestant ystorie..."

⁴⁰⁹ E.g., Skinner, "Machiavelli's *Discorsi*," pp. 126ff., discusses the idea of glory in this early civic discourse and the later officially "humanist" manifestations of it. Also J. H. Mundy, "In praise of Italy: the Italian City-Republics," *Speculum* 64 (1989), pp. 815-34; and Charles T. Davis, "An Early Florentine Political Theorist: Fra Remigio Girolami," pp. 198-223, on the republican patriotism of the Florentine friar Remigio Girolami, who contemplated an absolutely unquestioning adherence to one's city. As a Dominican, however, Girolami would have also supported just war theory. Any conflict might be resolved by looking at the problem from the perspective of the soldier, from whom obedience was expected, and the rulers, who had to decide which conflict was just.

never on account of will, is permissible.⁴¹⁰ If there is in war a will to harm “with cruelty, to fight with savageness, a lust for conquest,” then these are punishable, which all referred to Augustine.⁴¹¹ Another speech makes reference to Augustine’s definition of war: “just wars are accustomed to be called those which avenge [or punish] injuries,” and quotes the legal definition that injuries are capable of being redressed by war when the other side fails to do justice.⁴¹² The quotation in fact emphasizes that just wars are those declared either on edict or for justice, which raises again the problem that proper authority might be sufficient for a war to be just.⁴¹³ But in general the speeches hold that war must be undertaken carefully and only with justice and a certain mercy, for the evils of war are great, including “the loss of souls,” loss of goods, fear, devastation and slaughter.⁴¹⁴ As one speech adds, virtue in arms is subordinate to wisdom in counseling it; and war should only be fought, according to established Christian rules, to establish peace.⁴¹⁵

Another collection which includes model speeches, the *Liber de regimine civitatum*, written by Giovanni da Viterbo while he was *podestà* of Florence around 1250, similarly contains material on war.⁴¹⁶ It undertakes generally to advise *podestà* on how they should carry out their office, while giving a few examples of how a *podestà* should publicly justify an armed response to another city. These speeches, though also rooted broadly in the just

⁴¹⁰ *Speeches from the Oculus pastoralis*, p. 62: “Cogitare tamen prius debet deliberatione previa, antequam ad pugnandum armetur, utrum ipsum pugnare necessitas deprimat an voluntas.”

⁴¹¹ *Ibid.*, “Si autem voluntas vel cupiditate vel crudelitate nocendi, sive feritate bellandi et libidine dominandi et crasandi super rebus alienis, hec iuste culpantur et plerumque acriter puniuntur...”

⁴¹² *Ibid.*, pp. 66-67: “...quoniam licitum est unicuique vi repellere propulsantes, et iustum mouere bellum, si ex edicto vel pro iustitia moueatur, beato Augustino testante, qui ait, ‘iusta bella diffiniri solent que ulciscuntur iniurias. Sic gens vel civitas petenda est, que vel vindicare neglexerit quod a suis improbe factum apparet, vel redere quod per iniurias est ablatum.’”

⁴¹³ See above, p. 28, fn. 87. This was the problem Gratian had allowed in.

⁴¹⁴ *Ibid.*, p. 67: “...videlicet animarum perditio, strages corporum, incendium, vastatio et destitutio honorum, diminutio rerum mobilium, fuga incolarum, incarceration captorum...”

⁴¹⁵ *Ibid.*

⁴¹⁶ Giovanni da Viterbo, *Liber de regimine civitatum*, ed. G. Salvemini, in *Scripta Anecdota Glossatorum*, vol. 3 (Bologna, 1901), pp. 217-80.

war tradition, focus on enumerating the injuries and violations of rights that justify Florentine military action, and which would remain standard features of Florentine wartime diplomacy. One speech holds that war can be undertaken “on account of conserving or increasing the honor of the city,” or to recuperate rights after they have been unjustly occupied, detained or molested in some way.⁴¹⁷ War for “conserving or increasing the honor of the city” strikes a consciously civic note which was outside of the just war tradition but closer to the reality of inter-city strife, while the idea of recuperating rights was certainly traditional. The violated rights are not specified, but are likely rights in property; the speech may refer to the city’s corporate rights to territorial possessions, or individual rights of citizens to their goods. But rights conceivably could be broader, and refer to taxes on merchant goods or indeed free passage. As well, and common in practice, rights (and obligations) would be spelled out in commercial treaties, peace agreements or by the terms of a defensive alliance. More explicitly at least, Giovanni, like the jurists, included self-defense against force as a right, which he assumed was extended to the city as well as individuals.⁴¹⁸

Giovanni referred to violated rights throughout the model speeches. In another speech Florentine “rights and possessions” (*iura et possessiones*) had been disturbed by the Romans and Florentines could resist their arrogance (*superbia*) and defend their rights by whatever force was necessary.⁴¹⁹ The rights again seem vague, but Giovanni went on to adduce specific causes for war: the Romans were accused of occupying land unjustly and

⁴¹⁷ *Ibid.*, p. 269: “Cum autem ob honorem civitatis conservandum vel augendum, seu ob recuperanda vel retinenda iura civitatis, que ab aliis occupata detinentur iniuste vel indebite molestantur...”

⁴¹⁸ He quoted Roman law on repelling force with force in support, p. 270: “...quatenus nos et nostra ab iniuriis et molestiis eorumdem illesa conservare possimus, et vim ipsorum a nobis repellere valeamus viriliter et potenter.”

⁴¹⁹ *Ibid.*, p. 270: “...ut a Romanis nos tueri debeamus, qui nos et iura et possessiones nostras indebite contra deum et ius et iustitiam perturbare, molestare et auferre nituntur.”

taking castles.⁴²⁰ The speaker appealed to God to help them defend their rights, and assured the Florentines that if they could restrain the Romans, they would enjoy their rights in peace.⁴²¹ Elsewhere the citizens of Poggibonsi inflicted great injury by detaining Florentine “rights and possessions” and stirring up conspiracies against them; the Florentine republic had to respond with force against the enemy, always mindful of the injuries that were caused to its rights.⁴²² In another speech, the Pistoians had occupied Florentine land, despoiled its citizens of their goods, and come armed into Florentine territory.⁴²³ The rights language in these early speeches often refers to serious violations of movable or immovable property, but again it could refer to the infringement of agreements and other unspecified rights.

Giovanni also counseled, as did speeches in the *Oculus pastoralis*, that war should be avoided whenever possible, as by definition only necessary wars were just. Significant prudence was necessary for it, and he suggested basic procedural rules for gaining popular assent for war. He did not mention the familiar Roman legal principle of *quod omnes tangit*, but did think that convening a general council was necessary.⁴²⁴ In his account the council was to be called by general acclamation or on the authority of the *podestà*, the course of belligerent action agreed upon, and then presented to a group of leading citizens, including

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.*, “Sed cum de iure ad defensionem nostri iuris deum patrem omnipotentem in nostrum auxilium omnimode habere debeamus;” and p. 271: “...quod si hac vice inimicorum propositis resistere potueritis et eorum superbiam refrenare, vobis et successoribus perpetuas quietem laudes et gloriam cum honore magnifico acquiratis et iura vestra optinebitis pacifica et quieta.”

⁴²² *Ibid.*, 272: “Sane cum Podibonizenses in superbia elati et magnitudine cordi audacissime sint et stultissime exaltati versus populum florentinum, iura et possessiones vestra per violentias detinentes et, quod deterius est, coniurationes et societates cum vestris inimicis contrahentes...;” p. 273: “Estote insuper omni ora vigiles et omni tempore parati ad prelium pro nostra republica, nullum recusantes subire laborem,” and “...vos et iura vestra dante domino illesa servabitis et vestros inimicos vobis conculcabit pro velle vestro.”

⁴²³ *Ibid.*, p. 271.

⁴²⁴ See Gaines Post, *op. cit.*, pp. 163-238 on *quod omnes tangit* and its implications for parliamentary government, and John Najemy, “Guild Republicanism in Trecento Florence: The Successes and Ultimate Failure of Corporate Politics,” *American Historical Review* 84:1 (1979), pp. 53-71, for the use of that phrase in Florentine political discourse.

knights, captains, diplomats and jurists for approval.⁴²⁵ He did not apparently mean to describe Florentine procedure in detail, but to emphasize that war was a difficult decision requiring the formal assent of at least the leading citizens. Indeed, the *Oculus pastoralis* and *Liber de regimine civitatum* indicate that a certain balance had to be struck in public discourse on war between eager patriotism, the enumeration of specific injuries and violations of rights that justified war, and the moral (and procedural) foundation on which just war should rest.

The list of injuries and violated rights found in the *Liber de regimine* pointed to the reality of legitimizing war in the Italian cities throughout the late middle ages and Renaissance. In the accepted course of foreign relations, cities made official complaints about specific injuries and perceived violations of rights that could justify war; the final declaration, which proclaimed a formal breach of faith, was a *diffidatio* and was to be made before undertaking bellicose action. In respect to these enumerated injuries and violations, the two collections of speeches serve as fair introductions to the ways in which Florence, in the powerful rhetoric of its humanist chancellors, publicly justified its causes. As will be noted, the public missives of Florentine chancellors Coluccio Salutati and Leonardo Bruni framed Florence's wars against Milan or Lucca in terms as just defense against immediate force, defense or recuperation of goods or rights, or punishment of injuries. In their justifications of Florentine wars, the rhetoric of Salutati and Bruni can certainly be set within a tradition that extended back to the *Liber de regimine civitatum* and the *Oculus pastoralis*. The traditional elements of these early speeches in fact still offered a template for diplomatic letters on war in the later period. The rhetoric grew more complex and the Latin became

⁴²⁵ *Ibid.*, pp. 269-70.

more classicizing, but the form of the public missives and their basis in just war theory remained consistent.⁴²⁶

Before considering some of the wartime correspondence of Salutati and Bruni, it should be noted that in Florentine council debates on foreign policy just war theory did not play a strong role. Arguments concerning which wars should be undertaken were not surprisingly made in a pragmatic language of communal self-interest. Sometimes, however, concerns about the deep moral justice of a war were raised; and it was for those dissenting from a bellicose policy that the moral cause seemed more likely to become an issue or at least a means of argument.⁴²⁷ Thus after Florence annexed Arezzo and its territory in 1384, and turned an acquisitive eye towards its old rival, Siena, dissenting voices like that of Cipriano Alberti called the use of force against Siena “immoral.”⁴²⁸ Alberti wanted good diplomacy to resolve any disputes between the cities, and urged Florence to work for “good government” in Siena. As Gene Brucker has noted, ordinary guildsmen seem to have been less interested in an aggressive foreign policy than wealthy patricians.⁴²⁹ An otherwise unknown armorer named Salvo di Nuto, for example, condemned the use of force against

⁴²⁶ Skinner, particularly in *The Foundations of Modern Political Thought*, pp. 28-84, and “Machiavelli’s *Discorsi*,” observes that civic political discourse of late medieval Italy and so-called “civic humanist” discourse of the fifteenth century form a single, largely continuous, tradition. I just point out that the same holds true for just war theory in the context of diplomacy. Florentine political propaganda in the early *Quattrocento* did develop a somewhat more aggressive attitude toward war and an expanded idea of Florence’s rightful dominion, however. On the imperialist theme in Florentine republican thought, see M. Hornqvist, “The Two Myths of Civic Humanism,” in *Renaissance Civic Humanism: Reappraisals and Reflections*, ed. J. Hankins (Cambridge, 2000), pp. 105-42, and James Hankins, “Rhetoric, history, and ideology: the civic panegyrics of Leonardo Bruni,” pp. 145-7, in the same volume; and pp. 151-56 below.

⁴²⁷ Concern for the moral justice of war in medieval Europe was deeply rooted in the Hebrew Bible, with fears that God avenged unjust wars and punished sins through war. The idea was encapsulated in frequently-cited Biblical phrases, like “vengeance is mine, I shall repay” (*mihi vindicta, ego retribuam*). On the role of providence in Florentine history as reflected in the work of its historiographers, Louis Green, “Historical Interpretation in Fourteenth-Century Florentine Chronicles,” *Journal of the History of Ideas*, 28: 2 (1967), pp. 161-78.

⁴²⁸ Gene Brucker, *The Civic World of Early Renaissance Florence* (Princeton, 1977), p. 106, on Alberti’s dissent, and that of some fellow politicians. Alberti also adduced the expense of the war and its danger as reasons to avoid it.

⁴²⁹ *Ibid.*, p. 107

Siena, urged Florence to do nothing against the will of God and to work for harmony in that city.⁴³⁰ But more elite conservatives could also express concerns about the overall justice of war. In 1388, in response to the Pope's perceived threat to Perugia's independence, Simone Bordoni advised non-interference, saying that Florence should never participate in an unjust war; and when Florence was threatened by Giangaleazzo Visconti in the same year, Biagio Gausconi argued that if Florence did not have a just cause against Milan "it would displease God and men."⁴³¹

By and large however, Florentine politicians had a necessarily pragmatic approach to foreign policy, immersed as Florence was in the complex and constantly changing world of Italian politics. When city councilors rose to urge a course of action, they appealed typically to a language of utility or invoked the good of the commune, rather than citing any broader idea of justice.⁴³² Thus in a meeting on January 13, 1401, during Florence's war with Milan, the powerful lawyer Rinaldo Gianfigliuzzi argued that it was "useful" to keep Florence's Romagnol subjects close to it, while the equally influential Filippo Corsini urged the "utility" of retaining the loyalty of the king of Naples.⁴³³ Anselmo Anselmi, speaking for the *Otto di Guardia*, echoed that whatever was of "greater utility" to the commune was best, as did Tommaso Sacchetti.⁴³⁴ Gianfigliuzzi pointed out in another meeting that it was useful to Florence that factions be maintained in Pistoia, while Maso Albizzi advised on the

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*, p. 123; 130.

⁴³² In most cases, however, no guiding norm for a course of action was articulated.

⁴³³ *Le "Consulte" e "Pratiche" della Repubblica Fiorentina nel Quattrocento (1401)*, ed. E. Conti *et al.* (Florence, 1981), p. 3: "Quod bonum et utile est Communi nostro..."; "Item quod utile est..."; p. 4, for Corsini's council.

⁴³⁴ *Ibid.*, pp. 6-7: "...quo possunt et cum maiori utilitate Communis" (Anselmi); "...provideant prout eis utilius videbitur pro Communi, respectu temporis presentis et futuri et non solum preteriti" (Sacchetti).

same occasion that Florence not take lordship of Pistoia, because it would break existing treaty agreements and would neither be “honorable” nor “useful.”⁴³⁵

Honor was also a reason alleged for action, and particularly war: in 1405 Gianfigliuzzi spoke of continuing a military operation in the Romagna, so that the Commune might retain its honor (though also seek its utility).⁴³⁶ Andrea della Stufa a month later advocated sending troops against Piombino to recuperate the honor of the city, and Francesco Ardinghelli asserted that an honorable vendetta might be made there.⁴³⁷ A few days later Maso degli Albizzi said in council that the Rossi family should receive Florentine military aid, for the honor of the commune, and for its public utility.⁴³⁸ The idea of honor in political reasoning reflected a scale of values drawn from the personal and familial honor which was essential to Italian social life: honor was something to be maintained and fiercely defended, and there is little doubt that it played a role at the political level. But the pragmatic view behind appeals to utility were equally important. In reality the decision to go to war was usually careful and based on a number of considerations, not least of which were chance of victory, desirability of goal, legal obligations, public opinion, and some (at least vague) projection of financial cost. As a matter of foreign affairs the decision was often built through and after diplomatic exchanges, extended council discussions and smaller military actions. Whatever the multiple reasons for going to war, whether in part for

⁴³⁵ *Ibid.*, pp. 237-38, “Quod in facto civitatis Pistorii Communi utile est quod ibi sint secte” (Gianfigliuzzi); “Quod capiatur securitas oportuna de civitate Pistorii non capiendo dominium, ne fiat contra pacta propter inhonestatem, et quia non esset utile” (Albizzi).

⁴³⁶ *Le consulte e Pratiche della Repubblica Fiorentina (1405-1406)*, ed. L. De Angelis *et al.* (Roma, 1996), pp. 89-90: “Confirmando idem quod dictum est, et pro honore et utilitate Communis, si verum.” Brucker, *Florentine Politics and Society, 1343-1378* (Princeton, 1962), p. 75, briefly remarks how eager *Trecento* Florentines were to guard the honor of the commune and defend their rights. This is very apparent from the *Consulte e Pratiche*.

⁴³⁷ *Ibid.*, “Quod in factis Plumbini fiat et cito honor Communis. Et fiat demonstratio, ita quod honor Communis recuperetur” (Della Stufa); “Et si omnia perdita sunt, fiat vindicta honorabilis” (Ardinghelli), from an April 15th meeting.

⁴³⁸ *Ibid.*, p. 96.

strict defense, to fulfill strategic objectives or avenge past wrongs, it was a processual affair significantly mediated by diplomacy and law.

Justifying Florentine causes in terms of specific injuries and violations of rights did come up in council debates, but enumerations of the injuries and violations that might constitute *casus belli* were most apparent in responses to foreign ambassadors. When Venice came to question Florence in February 1406 about its siege of Pisa, Florentine councilors crafted the official response that Florence was simply upholding its rights and only working for peace.⁴³⁹ Niccolo Guasconi said the commune only wanted to maintain its right, while Piero Baroncelli urged the orators to say that Florence was absolutely set on acquiring its rights; Piero Firenzi added that all this would be done for “perpetual peace.”⁴⁴⁰ In this case Florence claimed they had purchased Pisa legally and were only putting down a rebellion, in what was now Florentine territory: as the councilors argued, this was a perfectly just cause for war.⁴⁴¹ The official response by this point was established policy. Earlier, however, in September 1405, just after the Pisans had retaken their citadel from Florentine troops, the angry Florentine councilors spoke of recuperating honor, not legal rights, in recapturing the city.⁴⁴² When the Pisan ambassadors came to Florence almost two weeks later, Florentine councilors urged a unanimous response, but only one mentioned rights.⁴⁴³

⁴³⁹ *Ibid.*, p. 368. E.g., Angelo de Pino, “Quod fiat potentia et fortia, ita quod recuperetur honor Communis,” and the leader of the *reggimento*, Maso degli Albizzi, “Quod attendatur ad recuperandum honor Communis.”

⁴⁴⁰ *Ibid.*, p. 368: “Et quod iustificetur Commune et magnifice respondeatur, ostendendo quod Commune velit suum ius penitus obtinere” (Guasconi); “Quod oratoribus respondeatur iustificando Commune. Et referantur gratie de his que offerunt, ostendendo Commune esse dispositum omnino acquirere iura sua” (Baroncelli); “Et quod respondeatur quod quicquid Commune facit, solummodo facit ad finem pacis perpetue” (Firenzi).

⁴⁴¹ *Ibid.*, p. 369, opinion of Barduccio Cherichini. In Innocent IV and other jurists, this would be war as an “exercise of jurisdiction.”

⁴⁴² *Ibid.*, p. 279, meeting of September 7, 1405.

⁴⁴³ *Ibid.*, p. 298, meeting of September 19, 1405. Piero Baroncelli spoke of rights: “Quod non stetur in practica et disputationibus cum oratoribus sed licentientur et fiat potentia pro honore Communis, ut visis iuribus nostris, moneantur ad ea que sint iusta et utilia pro Communi.” Notably justice, honor, rights and utility were easily invoked all together in political discourse.

Faced with an immediate threat, it is not surprising that public opinion would clamor for a course of action which only afterwards was framed with legal arguments.

Just war arguments certainly found their most important role not in council debates but in diplomacy. Asserting a just cause resulting in a formal breach of faith was the most significant prelude to war in diplomacy, and cities frequently named the legal injuries and violations that could justify their hostile responses. Like those of other cities, Florence's diplomatic letters in times of war reviewed the justice of its causes, and asserted its rights to war and the scope of those rights. Notably the missives produced for Florence by Coluccio Salutati in the first and second wars with Giangaleazzo Visconti of Milan, which have been studied for their brilliant rhetoric and taken to signal a stage in the development of humanistic political thought, are also diplomatic documents which mark steps in a dispute process that escalated to war after formal charges were laid.⁴⁴⁴ It is somewhat unrealistic in fact to try to isolate the political rhetoric in those letters and interpret them apart from the foreign policy objectives which they tried to serve, or (often) to consider them as divorced from justifications of hostile action. The real policy objectives of the rhetoric deserve continued emphasis, while the degree to which such missives, and diplomacy in general, were bound up with law and legal claims on behalf of those policy aims deserves more examination.⁴⁴⁵

⁴⁴⁴ The style and political ideas of Salutati's missives from this period are discussed by Ronald Witt, *Coluccio Salutati and his Public Letters* (Geneva, 1976), and Daniela De Rosa, *Coluccio Salutati: Il cancelliere e il pensatore politico* (Florence, 1980). It was Hans Baron's seminal and controversial *The Crisis of the Early Italian Renaissance*, 2nd ed. (Princeton, 1966), that greatly promoted debate on the idea of civic humanism and its meaning in Renaissance political discourse, using in part Salutati's letters. Baron however assigned to Leonardo Bruni the most important role in developing those ideas. A more recent and clear-eyed analysis of the significance of civic humanism, a term Baron coined, is found in the articles contained in *Renaissance Civic Humanism: Reappraisals and Reflections*, noted above, fn. 426.

⁴⁴⁵ This was one of Baron's oversights in *The Crisis*. Witt, *Coluccio Salutati*, pp. 48-72, remains sensitive to the conditions in which Salutati's letters were written and the policy objectives they served, though does not discuss them as part of a diplomatic dispute process in connection with law and just war.

Salutati, the humanist and chancellor of Florence during part of Florence's great struggle with Giangaleazzo Visconti, from roughly 1390-1402, called upon his considerable rhetorical gifts to connect Florence's republican form of government to its deep love of political liberty, defined generally as independence and self-rule.⁴⁴⁶ In his diplomatic letters from the period he often relied on an opposition between "liberty" and "tyranny" to compare peaceful Florence to warlike Milan, arguing that political liberty was something Florence shared with ancient republics and was willing to defend in contemporary Italy.⁴⁴⁷ The themes were not new in Italian politics by any means, but Salutati treated the dichotomy with a special emphasis.⁴⁴⁸ As Ronald Witt has observed, Salutati's consistent reliance on the theme of liberty was actually born in Florence's conflict with the Papacy in the 1370s, in which Salutati reminded cities in papal territory of their ancient political liberty in order to incite them to revolt against Rome or to maintain their independence from it.⁴⁴⁹ The terms were certainly flexible tools in foreign affairs: Salutati could broadly employ the struggle of "liberty" against "tyranny" to depict a united front in Tuscany against outside intervention,

⁴⁴⁶ *Libertas* or *libertà* was a key term in Florentine civic culture more generally and an important aspect of their political self-image. It was not just a cynical fabrication for certain foreign policy goals, though it was used instrumentally in foreign policy. Nicolai Rubinstein, "Florentina libertas," *Rinascimento*, n.s., 26 (1976), pp. 3-26, and idem, "Florence and the Despots: Some Aspects of Florentine Diplomacy in the Fourteenth Century," *Transactions of the Royal Historical Society*, ser. 5 (1952), pp. 29ff., examines the fuller range of associations *libertas* had in Florence, which did not entail a certain form of government. *Libertas* and its meanings in Renaissance political debate have been discussed frequently, for example its *longue durée* by J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, 1975), and Skinner, *Liberty before Liberalism* (Cambridge, 1985); and again on Florentine connotations by Skinner, *Foundations*, pp. 71-84, De Rosa, *Coluccio Salutati*, pp. 87-133, and Hornqvist, "Two Myths," p. 125ff., which last discusses the connection between the Florentine understanding of *libertas* and their imperialistic foreign policy. It might be noted that Roman law had a complex understanding of political *libertas*. Federated peoples were considered free, but "clients" might be also; D.49.14.7.1: "Liber autem populus est is, qui nullius alterius populi potestati est subiectus: sive is foederatus est item, sive aequo foedere in amicitiam venit sive foedere comprehensum est...[h]oc enim adicitur, ut intellegatur alterum populum superiorem esse, non ut intellegatur alterum non esse liberum: et quemadmodum clientes nostros intellegimus liberos esse..."

⁴⁴⁷ Witt, *Coluccio Salutati and his Public Letters*, p. 48-57. Witt shows how Salutati renovated the Florentine idea of liberty by associating it more explicitly with its republican government and supplying a classical background for it.

⁴⁴⁸ *Ibid.*, pp. 51-6; De Rosa, pp. 101-33.

⁴⁴⁹ *Ibid.*, p. 51.

or at times a united front of all Italy against foreign enemies.⁴⁵⁰ In the Milan conflict, the terms were enlisted to help unify support against Milanese activity in Tuscany and Lombardy, isolate it militarily and diplomatically, justify Florentine intervention in the affairs of other Tuscan cities (like Montepulciano) and furnish in part a just cause for war against Milan. They were also tools that were easily appropriated: Milan simply directed charges of tyranny back at Florence, accusing it of threatening other Tuscan cities while deceitfully calling itself a defender of liberty in the region.⁴⁵¹

Importantly, Salutati's wartime letters as chancellor also made reference to elements of just war theory. One letter of February 21, 1377, addressed to the kings and princes of Italy during Florence's war with the Papacy, provides an example of rhetorical proficiency but also concerns itself with some of the traditional criteria.⁴⁵² Salutati was trying to justify the Florentine cause to a broader community of Italian cities, and asserted that Florence was involved in a war of "moderate defense," had never acted in offense or "moved arms against the lands of the Church" and never "wished domination" of any city or town of the Church.⁴⁵³ These were familiar elements, namely moderation, defense and also right intention, the last going back to Augustine's idea of *libido dominandi*. It was the Papacy, on the other hand, that had violated all norms of war. It was responsible through its mercenaries for a massacre at Faenza in the previous year, the details of which Salutati reviewed at length in order to highlight the injustice of the Papal cause and its cruel

⁴⁵⁰ De Rosa, pp. 91-103.

⁴⁵¹ See, e.g., p. 136 below.

⁴⁵² Published in Witt, *Ibid.*, pp. 100-3.

⁴⁵³ *Ibid.*, p. 101: "Ut enim cognoscat vestra sublimitas quali simus in hoc bella defensionis nostre moderatione versati, nunquam contra terras ecclesie arma movimus, nunquam dominationem nedum civitatum et provinciarum, que nobis quotidie se offerunt, sed nec etiam unius minimi castri quod pertineret ad ecclesiam, voluimus."

prosecution of the war.⁴⁵⁴ In general the letter functioned as a public grievance registered, so Florence hoped, on behalf of Italy, as the mercenaries were painted as savage foreigners (barbarians) whom the Papacy had unleashed upon the *patria*.⁴⁵⁵

The missives *Salutati* produced in the early part of the conflict with Giangaleazzo Visconti were also part of a dispute process in which Florence defended its actions and alleged violations on Milan's side, while Milan similarly built a case for war against Florence through an accumulated list of grievances. Some of those exchanges can be useful to examine as steps to a formal justification for war, in what was a fairly long buildup. As a brief background, the wars between Florence and Milan in the 1390s had their most important roots in Florentine expansion in Tuscany in the 1380s and the rise to power of Giangaleazzo Visconti in Milan in 1385. Tuscan cities like Siena turned to Giangaleazzo as an ally who could protect them from Florence, while Bologna turned to Florence as protection against Giangaleazzo's designs in Lombardy.⁴⁵⁶ The year 1387 proved to be one turning point, in which Milan attacked and subjected Verona, putting all Lombardy on guard, while Florence's (somewhat more diplomatic) struggle with Siena over Montepulciano caused alarm throughout Tuscany.⁴⁵⁷ It seemed that the two ambitious, expanding powers would come into conflict by 1388, though Giangaleazzo was probably more immediately dangerous, since he took Padua on December 18th of that year, to add to his prize of Verona.⁴⁵⁸ In the meantime, Florence stood aside, complaining of his aggression

⁴⁵⁴ *Ibid.*, pp. 102-3. E.g., "Scimus enim (quod non sine horrorem recolimus) maritos ab uxorum laceribus tractos ad victimam et uxores in piis lacrimis super virorum corpora suum effundendo sanguinem moribundas occubuisse."

⁴⁵⁵ *Ibid.*, p. 103.

⁴⁵⁶ See Bueno de Mesquita, *Giangaleazzo Visconti, Duke of Milan: A study in the political career of an Italian despot* (Cambridge, 1941), pp. 69-120; Gene Brucker, *The Civic World of Early Renaissance Florence*, pp. 102-44.

⁴⁵⁷ Mesquita, *Giangaleazzo Visconti*, pp. 89-93.

⁴⁵⁸ Benjamin G. Kohl, *Padua under the Carrara, 1318-1405* (Baltimore, 1998), p. 253.

but having no legal basis to interfere, as his actions did not directly violate any of their agreements or create clear enough injuries to Florence.⁴⁵⁹

Giangaleazzo's hostilities, however, brought relations between Florence and Milan to an anxious level. As much of northern Italy found itself threatened, diplomatic contact between the powers intensified. A conference was convened at Pavia to try to settle the problem in the summer of 1389, with a clear delineation of the respective spheres of influence of Florence and Milan. But Giangaleazzo proved intractable and little was accomplished.⁴⁶⁰ Another conference, hosted by Pietro Gambacorta, the lord of Pisa, was held in September of the same year, but by then the sides were buying time as military arrangements were made. An agreement was finally signed on October 9, 1389 at Pisa, between Milan and Florence, but it was followed the next day by a Florentine pact with Bologna, Pisa, Perugia and Lucca to provide for their mutual defense, showing what little hope was held out to the Pisan pact.⁴⁶¹ Milan likewise had already secretly secured the lordship of Florence's enemy Siena, and pledged whatever forces were necessary against Florence.⁴⁶² In October Giangaleazzo alleged that Florence was plotting to poison him, and again in November he accused the republic of seeking to assassinate him, this time while out hunting.⁴⁶³ The charges, whether pretextual or not, indicated a grievous fault. Giangaleazzo used the first accusation as the basis to expel Florentines from his dominions, while the second accusation similarly built Giangaleazzo's case against Florence and pushed close to war.

⁴⁵⁹ Brucker, *The Civic World*, rightly points this out, p. 129.

⁴⁶⁰ de Mesquita, pp. 102-6; Brucker, pp. 132-6.

⁴⁶¹ de Mesquita, p. 110; the confederation agreement is summarized in C. Guasti, *I Capitoli del comune di Firenze: inventario e regesto*, 2 vols. (Firenze, 1866), ii, pp. 240-43, and found at *Cap*, 12, fols. 259r-267v.

⁴⁶² de Mesquita, p. 109.

⁴⁶³ Witt, *Coluccio Salutati*, p. 104, prints Florence's reply to the Count's accusations.

Through Salutati, Florence vehemently denied Giangaleazzo's assassination charges and assured Milan of its friendship, despite the crumbling state of relations. Salutati's reply for Florence on December 16th noted that Milan had circulated its accusatory letters throughout Italy, demanding a Florentine response lest silence seem an admission of guilt.⁴⁶⁴ In the letter Salutati struck a defiant tone that could only have annoyed Giangaleazzo further. Salutati asked incredulously and with sustained rhetorical skill how the assassins could have known exactly where the Count would be hunting and when, or who could approach him with his retainers, calling the plot into doubt by attacking its feasibility.⁴⁶⁵ He concluded by declaring that the traditional friendship Florence had for Milan remained intact, but warned that the matter should be put to rest, so that cause for further discord did not arise. Statements like, "O simple ears of princes! O how easily princes are persuaded when it concerns their personal safety," were glibly dismissive; but the rebuttal of the charges, carried out through a series of rhetorical questions, was a good example of forensic, or courtroom, rhetoric, and indicated the quasi-legal form of the exchange.⁴⁶⁶

Giangaleazzo tried another angle in a letter to Florence of April 26, 1390, now accusing it of tyranny by threatening its neighbors in Tuscany.⁴⁶⁷ The previous months had seen a buildup to war on both sides, with the raising and movement of troops, but now Giangaleazzo was ready to open hostilities formally. The April 26th letter was sent after

⁴⁶⁴ *Ibid.*, "Sed videntes vos et primas et ultimas litteras vestras transmissis hinc inde copiis per Italiam seminasse, quod quidem potius videtur odii quam benivolentie signum esse, conveniens esse censuimus vobis omnino rescribere ne taciturnitate nostra videremur que tam assertive scribitis consentire."

⁴⁶⁵ *Ibid.*, p. 104-5: "Ergo cuiquam, nisi familiaribus et stipatoribus vestris, aut in occupatione venatica, aut in aucupii versatione possibile foret, corpus vestrum ad cedis efficaciam adoriri. Dicite, quesumus: ecce possint esse, licet occulti, percussores in nemore, locus siquidem notus esse potest? Estne possibile tempus et hora qua venatum exiveritis (quod solum in potestate vestra situm est) aliquibus indiciis presentire? An forte credendum est ipsos posse tam diu delitescere, quod tandem suum propositum exequantur? Deinde quis compertum habere potest quam etiam ex solite silve regionem tunc temporis adeatis?"

⁴⁶⁶ *Ibid.*, p. 104-5.

⁴⁶⁷ *SCMC*, 22, fol. 58v.; Witt, p. 58.

Florence accepted Montepulciano as its subject: Giangaleazzo claimed that this submission violated the Pisan pact and gave a legal basis for war, and his letter itself constituted an official *diffidatio*, or declaration of broken faith. According to the letter, it was Florence (or its Guelph government) that was choosing war over peace and threatened all of Italy with its wars.⁴⁶⁸ Casting itself as the defender of liberty, Milan claimed it was bound to come to the defensive aid of its allies, particularly Siena.

Florence sent a vigorous rejoinder on May 2nd, calling Milan the tyrant while Florence fought for freedom, and rejected the charge that Florence had transgressed its bounds in Tuscany.⁴⁶⁹ On May 25th, Florence produced a letter which represented a full counter-claim, setting out Florence and its allies' case for war against the "viper" of Milan.⁴⁷⁰ The war had by that time been started, but it was important for Florence to represent its claims publicly and to all, as part of an effort to shore up support among other cities. The letter was addressed to all of Italy and sought a sympathetic hearing from any corner. Broadly it held that Giangaleazzo had deceived, violated promises and become tyrannical, while Florence, solely devoted to mercantile endeavors, had sought peace as the only way to preserve liberty.⁴⁷¹ Specifically, Milan had aggressed upon Verona and Padua, the latter of which was an offense to Florence (though Florence had stood aside at Venice's request); duplicitously entered into and then violated the league of Pisa; expelled Florentines

⁴⁶⁸ *Ibid.*, "Maluit enim, non dicimus, magnifica vesta communitas de qua nichil tale opinari possemus, sed paucorum Arciguelforum vestrorum seu rabies seu diffidentia male fundati et tremuli status sui qui florentem illam civitatem sub libertatis spetie tyrannizant, guerram quam pacem eligere, et pacis indignam patriam et Italiam pro magna parte strepitibus bellorum involvere."

⁴⁶⁹ *SCMC*, 22, fols. 59v-60v; Witt, p. 58, n. 59. On p. 61, Witt appears to conflate the May 2nd and 25th letters.

⁴⁷⁰ *Ibid.*, fols. 66v-68r; Witt, p. 59.

⁴⁷¹ *Ibid.*, fol. 66v.; Witt, *ibid.*: "Apertum est illud ingens secretum quo comes ille virtutum si fallere, si violare promissa, si tyrannidem in cunctos appetere virtus est;" and the portrayal of Florence: "Nos popularis civitas soli dedita mercature. Sed quod ipse tamquam rem inimicissimam detestatur libera. Et non solum domi libertatis cultrix sed etiam extra nostros terminos conservatrix. Ut nobis et necessarium et consuetum sit pacem querere, in qua sola possumus libertatis dulcedinem conservare."

and Bolognese from its dominions; unjustly accused Florence of an assassination plot; had armed men in Tuscany supporting Perugia and Siena (the latter against Montepulciano, Florence's ally), and had invaded Cortona and taken castles from Florence through its Tuscan agents.⁴⁷² This was a litany of charges, and no particular element was identified as the sufficient and determining cause. The cumulative effect was certain though. The letter declared, "you see how the Count of Virtue broke faith with us," and begged the other cities to join the cause against him: "we implore you to suppress this monster, crush this arrogance and punish such great perfidy."⁴⁷³ The charges Florence alleged were a mix of pretext and more substantive claims, while the exchanges in general had a procedural character typical of formal diplomatic correspondence.

War was officially opened and would continue until peace was agreed between the major parties in January 1392.⁴⁷⁴ The eventual cessation of hostilities was due more to the financial difficulty of sustaining the war than any real understanding that had been reached, though peace would last officially for four years. In fact neither Florence nor Giangaleazzo had made significant territorial gains in the conflict, and the Count had lost Padua back to the Carrara family. But with peace signed a diplomatic language of friendship was ushered back in. The Count pledged his willingness, above all, to work with Florence on the problem of the free companies. These were the mercenaries who largely fought the war, and whose continued presence at the conclusion of a war was always a threat to the countryside and to smaller towns, a fact that both Florence and Milan agreed upon. In a letter to

⁴⁷² *Ibid.*

⁴⁷³ *Ibid.*, 67v-68r: "Videtis quali fide nobiscum incessecit comes iste virtutum...[q]uamobrem vos et totam Italiam ad opprimendum hoc monstrum ad contundendam tantam superbiam, et talem tantamque perfidiam puniendam altis et claris vocibus imploramus."

⁴⁷⁴ For the terms of the peace, Guasti, *I Capitoli*, ii, p. 400-6; *Cap*, 14, fols. 149r-156r. See also below, pp. 158-161.

Florence on March 27, 1392, the Count certified Florence's *amicitia*, claimed he was of one mind with Florence in all things and promised to observe the peace amicably and fraternally.⁴⁷⁵ Visconti called the free companies a plague that vexed and suppressed Italy, but admitted to keeping a few condottieri in his service, and asked safe passage for one of them to pass into the service of the Pope.⁴⁷⁶ He claimed that the captains in his service had been instructed to cross peacefully through other territories; whatever else was necessary to be done the Count pledged to do.⁴⁷⁷

Disagreements endured after the peace agreement but in 1392 Florence willingly joined in the rhetoric of peace.⁴⁷⁸ The chancery likewise sent a letter to Visconti, like the one on September 6, assuring him of the commune's "true friendship," claiming that Florence was "eager for peace" and could not be pushed into war unless by the "greatest necessity," which of course was a requirement for a just war.⁴⁷⁹ Salutati asserted that Florence did only what promoted concord, increased peace and confirmed it, because Florence was a nation devoted to merchant endeavors which could only thrive under peaceful conditions.⁴⁸⁰ Further, peace gave a universal gift to all: it nurtured the poor, maintained those who had enough and increased the wealth of the rich. Only with peace

⁴⁷⁵ *SCMC*, 23, fols. 11r-v, "Certificantes amicitiam vestram, una vice pro omnibus nos eandem mentem in omnibus et intencionem habere. Ut non solum pronuntiata servemus sed ut amicabiliter et fraterne vobis et comunitati vestre nostra in cunctis enim emergentibus casibus..."

⁴⁷⁶ *Ibid.*, fol. 11r; Biordo Michelotti was the captain in question: "...Biordus autem ut se conferat ad servitia sanctissimi domini nostri pape." Michelotti became the effective lord of Perugia and had been Giangaleazzo's ally in that region, which better reflects the Count's real attitude toward mercenaries, as assets in his foreign policy, in both war and peace. In this case, to Giangaleazzo's dismay, Biordo went on to lend support to Florence before his assassination in 1398.

⁴⁷⁷ *Ibid.*, fol. 11r-v.

⁴⁷⁸ Some of the disagreements will be examined in chapter five.

⁴⁷⁹ *SCMC*, 23, fol. 47v, "Nos autem pacis avidi et in bellum non nisi summa necessitate trudendi..."

⁴⁸⁰ *Ibid.*, "...illaque denique faciamus, que pacis et concordie sint, pacem augeant pacemque pariant et confirmant. Quid enim populis pace desiderabilis esse potest. Et illis presertim populis qualis noster est qui bonis artibus, solaue congregant mercatura."

was any honorable accumulation possible.⁴⁸¹ However hollow these claims may have sounded, they had more than a little truth: financial difficulty had ground the previous war to a halt, and expense was also the reason Florence continued to allege to its allies for avoiding conflict with Milan, even when Padua and Ferrara were eager to restart hostilities.⁴⁸²

Before examining Florentine diplomacy in the second Visconti war more closely, it is well to note that Leonardo Bruni, the outstanding humanist and a successor to Salutati in the chancellorship, was just as adept at justifying Florence's causes with appeals to just cause and just war. Indeed the chancellors were paid in part to do just that – to elaborately justify Florence's causes in elegant Latin, sometimes with appropriate historical illustrations – and Bruni handled his duties in this respect well. His rhetoric was not only brilliant but he possessed a legal acumen that is not evident in Salutati's missives and which aided him in fulfilling his office. In particular, Bruni's role in Florence's ultimately disastrous military campaign against Lucca offers a good example of his expertise in justifying policy.

A number of Bruni's most important missives came soon after he was elected chancellor in 1427, as Florence was embroiled successively in wars against Milan and Lucca.⁴⁸³ The war against Filippo Maria Visconti of Milan (the son of Giangaleazzo) lasted until April 1428. It was concluded by the treaty of Ferrara, and soon followed by a war with Lucca, from 1429-1433.⁴⁸⁴ Not long after the conclusion of the first war, Florence turned to

⁴⁸¹ *Ibid.*, “Unica quidem pax sicuti dei et universalis cause universale donum venit ad cunctos, nutrit indigos sufficientes fovet, et multiplicat opulentos. Hec sola facit ut qui nichil habent honeste possit aliquid cumulare.”

⁴⁸² de Mesquita, p. 167, citing a letter from August 16, 1394.

⁴⁸³ C.C. Bayley, *War and Society in Renaissance Florence: The De militia of Leonardo Bruni* (Toronto, 1962), p. 95. On Bruni's appointment as chancellor, see Lauro Martines, *The Social World of the Florentine Humanists, 1390-1460* (Princeton, 1963), pp. 118-20, and Arthur Field, “Leonardo Bruni, Florentine Traitor? Bruni, the Medici, and an Aretine Conspiracy,” *Renaissance Quarterly* 51:4 (1998), p. 1111.

⁴⁸⁴ Again there were few gains from either war for Florence and a massive outlay to cover mercenary costs. The costs led to a significant innovation in Florentine public finance in 1427, the *catasto*. Anthony Molho,

put down a rebellion, based largely on grievances over taxation, in its subject town Volterra.⁴⁸⁵ With Volterra pacified by early November 1429, the chief Florentine mercenary captain, Niccolo Fortebraccio, crossed into Lucchese territory and started to lay waste to it, which raised alarms across Tuscany and marked the beginning of Florence's protracted and unsuccessful conflict, not only with Lucca but also again with Milan. There were perhaps a few leading causes for the war; one was the belief in Florence that Lucca provided Milan a foothold in Tuscany, since the city had turned to Milan for protection in the earlier Visconti war and sent troops. Seeing that Filippo Maria was still a threat to Florence, Lucca was considered a point of vulnerability and a latent threat, geographically situated far too close to Florence for comfort. Perhaps as importantly, Lucca was a major silk producer in northern Italy whose industry Florence envied, at a time when Florence was attempting to push into that market (which it eventually did).

Florentine councilors, however, were not unanimous in advocating war. Lucca was called an old Guelph ally of Florence in council debates while it was pointed out that Florence had refused a Lucchese offer of aid before Lucca had turned to Milan.⁴⁸⁶ Lucca had also refrained from assisting Volterra during its rebellion against Florence, leading a peace party headed by Niccolo da Uzzano to warn against an unjust war.⁴⁸⁷ But the war party, arguing heavily for the strategic significance of Lucca and its prior support for Milan, carried the day.⁴⁸⁸ The committee that oversaw wartime policy and expenditure, the Ten of War, was set up in December, tacitly acknowledging that a decision to entrench and

Florentine Public Finances in the Early Renaissance, 1400-1433 (Cambridge, MA, 1971), remains an excellent look at the financing of the Milanese and Luccan wars.

⁴⁸⁵ Bayley, *War and Society*, p. 97.

⁴⁸⁶ Giovanni Cavalcanti, *Istorie Fiorentine*, ed. G. de Pinto (Milan, 1944), pp. 163-5, gives a number of arguments raised by each side, for and against the war.

⁴⁸⁷ Cavalcanti, *Istorie Fiorentine*, p. 164.

⁴⁸⁸ The war party also argued that the expansion of Florentine territory was a just enough reason; Cavalcanti, p. 165: "Ma pure, se biasimo ci corresse, gli accrescimenti de' nostri confini ce ne farebbono manifesta scusa."

continue the war had been reached.⁴⁸⁹ Prior to that decisive step, the Lucchese had sent an envoy to find out whether Fortebraccio was still in Florentine service, which if the reply was affirmative, would have provided Lucca with a just cause.⁴⁹⁰ Florence waved off the suspicions, in fact bribing the envoy, while Fortebraccio continued his depredations in Lucchese territory. Lucca was forced in the next year to ally with Genoa and received through that alliance indirect mercenary aid from Milan. The reasons behind the Florentine denials and Milan's covert aid were markedly legal: Fortebraccio's depredations were not part of a declared war (in fact Florence and Lucca were officially allies from the treaty of Ferrara), while Milan had agreed in the same treaty to avoid intervention in Tuscany.

Near the end of 1430, the newly appointed chancellor of Lucca, Cristoforo Turretini, chastised Florence for initiating an unjust war, in a letter which Bruni wrote two responses to, one a private epistle in Latin and the other the *Difesa contro i riprensori del popolo di Firenze nella impresa di Lucca*, an Italian version with similar arguments, intended to justify Florence's policy to a more general audience.⁴⁹¹ Not all of Turretini's letter survives, but his view of Florence and the defense of his city's conduct comes across clearly in the extant portion. Most importantly he argued to Bruni, to whom the letter is addressed, that the terms of the peace treaty of Ferrara, which ended the previous Milanese war, had been broken.

Turretini reminded Bruni that Lucca was named an adherent of Florence by the terms of the

⁴⁸⁹ Bayley, p. 100.

⁴⁹⁰ Cavalcanti, pp. 160-1; Bayley, pp. 98-99.

⁴⁹¹ Part of Turretini's letter is lost but the extant portion is printed in A. Mancini, "Per la storia dell'Umanesimo in Lucca. II. Ser Cristoforo Turretini e Leonardo Bruni," *Bollettino Storico Lucchese* 11 (1939), pp. 26-41. For Bruni's letter in response, *Epistularum libri*, ed. Mehus (Florence, 1741), lib. VI, no. 4; and more recently in Paolo Viti, *Leonardo Bruni e Firenze: Studi sulle lettere pubbliche e private* (Roma, 1992), pp. 94-5, n. 7. Bruni's *Difesa* can be found in *Opere letterarie e politiche di Leonardo Bruni*, ed. P. Viti (Turin, 1996), pp. 757-70, and for a partial English translation, *The Humanism of Leonardo Bruni*, ed. Hankins *et al.* (Binghamton, N.Y., 1987), pp. 146-52. Viti discusses the Latin letter and the *Difesa* in *Leonardo Bruni e Firenze*, pp. 93-111, and Gordon Griffiths discusses them in *The Justification of Florentine Foreign Policy offered by Leonardo Bruni in his Public Letters (1428-1444)* (Rome, 1999), pp. 33-42. However, the elements of law in the exchange should be pointed out.

treaty, from which the Lucchese had every reason to believe they would live in peace.⁴⁹²

Despite this, the Florentines had then demanded back payments in the “unjust” amount of 14,000 florins for the salary of a *condottiere* which Lucca and Florence had jointly hired.⁴⁹³

However Lucca still agreed to pay, which should have ended any obligations.⁴⁹⁴ Not long

after, mercenary troops in Florentine territory massed on the border of Lucca, and it was rumored that war was in the offing and had the consent of Florence.⁴⁹⁵ Florence denied

everything, according to Turretini, and said they were disposed to protect and aid Lucca, even to its very gates.⁴⁹⁶ Those denials and promises continued even as the territory of

Lucca was attacked by Fortebraccio and his men. The implication, as well, is that Bruni had lied and had some personal responsibility for doing so. That may in part have triggered his response, and certainly it was a charge that the Florentine chancellor bristled at.

Unfortunately, due to the incompleteness of letter, the rest of Turretini’s charges have to be inferred from Bruni’s replies.

Bruni’s private letter, dated January 8th, 1431, is thought to be a contemporary composition with the undated *Difesa*.⁴⁹⁷ In it he replies closely to the charges laid against Florence, and himself, by the Lucchese chancellor. Importantly Bruni takes a legalistic stance, one that seeks to justify the Florentine cause rather meticulously “in fact” and “in law.” He opens by asking:

⁴⁹² Mancini, “Ser Cristoforo Turretini,” p. 39: “Fuit denique in tempore reservato idem Lucanus Dominus a regentibus Florentinam rem, qui in coherentem publicatus et auctentice scriptus. Que nominatio, ut novi ego, fuit acceptata gratissime et singulare gratie adscripta. Qua ex re ipse olim Lucanus Dominus singulique eiusdem cives confidentes plurimum, leti vivebant, eternam sese pace habere tenentes.”

⁴⁹³ *Ibid.*, pp. 39-40.

⁴⁹⁴ *Ibid.*, p. 40: “Constituit itaque, sibi pacem, et civitati, confirmare studens, ea milia florenorum persolvere, que ab eo petita, his expresse servatis ut liberationem finemque a communi Florentino tam generalem haberet quam plus peti posset.”

⁴⁹⁵ *Ibid.*, p. 40.

⁴⁹⁶ *Ibid.*, p. 40-1. And their promise of aid: “...addens, etsi ab aliis offensus sit, tutele ac protectioni Lucane Florentinum commune, ut requisitum fuerit, dispositum esse; et tam certissimum referebat confirmabatque ac si in portis esset defensio.”

⁴⁹⁷ Mancini, p. 32; Viti, *Leonardo Bruni e Firenze*, pp. 95-6, gives reasonable textual evidence.

every *quaestio* [an academic or legal question] is about a doubtful thing...but if license is given to men to narrate the matter in their own judgment, and give false things for true, to bring forth unknowns as knowns, and finally to pass sentence, what shall be the authority of that judgment...in which the same person is accuser and judge?⁴⁹⁸

Considering the matter as a legal dispute, Bruni notes that all controversies are either of fact or law; if of fact, they are proved by records, witnesses, evidence and probable arguments, while if they are of law they are questions of right and wrong.⁴⁹⁹ Accordingly he sets out to prove in both modes that the Florentine cause was just.

In response to Turretini's first assertion, that Lucca was named an adherent of Florence in the treaty of Ferrara, and so was immune from Florentine predation, Bruni claims – as a question of law – that Turretini has assumed incorrectly that being an adherent cancels past injuries and establishes an obligation of the nominating party to the nominated.⁵⁰⁰ Bruni does not cite law to explain why this should be so, either in the letter or the *Difesa*, though in the latter work he makes the legal assertion clearer. According to Bruni obligations of peace are set up between the principals of a treaty agreement, not the adherents: by naming Lucca an adherent Florence merely prevented Lucca from allying with or aiding Milan, but it did nothing to cancel past injuries, even open enmities, which may have existed between Florence and Lucca.⁵⁰¹ As another example Bruni takes the lords of

⁴⁹⁸ Viti, *Leonardo Bruni e Firenze*, p. 94: “Quaestio namque omnis de re dubia consuevit esse; terminatio autem certitudinem flagitat. Quod si haec licentia hominibus tribuatur ut et narrent ipsi rem suo arbitrato et falsa pro veris, incognita pro cognitis afferant, deinde ipsimet sententiam ferant, quae auctoritas erit huiusmodi iudicio quod non meritum causae sed libido expresserit, in quo idem accusator et iudex?”

⁴⁹⁹ *Ibid.*; in part the legalistic language is itself rhetorical, but these quasi-legal representations were important, made within a discourse that was a recognized and expected basis of argument.

⁵⁰⁰ *Ibid.*, “Haec igitur prima quaestio iuris est. Quod tu per huiusmodi nominationem remitti priores iniurias et obligationem inter nominantem et nominatum oriri existimas, nos rem inter alios actam nullam huiusmodi vim habere putamus.”

⁵⁰¹ *Difesa*, p. 761-2: “Fessi la pace a Ferrara col duca di Milano, et inter cetera fu proviso che le parti dovessino fare nominatione di quelli che dar voleano per adherenti loro, la qual nominatione avesse questo effetto, che l'altra parte di quelli così nominati impacciare non si potesse. Hora tal contracto obbliga solo le parti che contrahevano la pace insieme tra loro, ma intra il nominante et il nominato neuna obbligatione partorisce...Che

Petramala and Azzo da Montegraneli, rebels against Florence but named acceptably as adherents in the treaty. In the case of Lucca, as well, Bruni declares that the aid Lucca insidiously gave to Milan in the previous war, while being a confederate of Florence, constituted an egregious and standing injury, which the recent treaty did nothing to change.⁵⁰² This injury constitutes a just cause. From a legal perspective, Bruni's argument was both crafty and bold: the *jus commune* does not seem to establish a definite obligation between principal and adherent, but after all Innocent IV had written that a principal would want his adherents secure (at least from other enemies), and Baldus felt that adherents shared the same will as the principal.⁵⁰³ On a practical level, at least, Bruni was fairly honest: the main argument for besieging Lucca given in Florentine council meetings is consonant here – Lucca was a proven defection risk, and so a strategic weakness for Florence.

Secondly, Bruni addresses the charge that the war is unjust because it was not publicly declared but waged covertly, partly through the attacks of Fortebraccio. This Bruni notes in the letter, is a matter of fact: a Lucchese ambassador had indeed carried the public declaration of war back to Lucca.⁵⁰⁴ In the *Difesa* a more ample reasoning is given concerning Fortebraccio's involvement and the declaration. Bruni assures Turretini that when the Florentine government learned of Fortebraccio's attacks, they were astonished and

forza ha adunque la nominatione? Ha questa forza, che li separa al tutto dal duca di Milano, sì che impacciare non se ne possa; ma la qualità del nominato in niente si muta. Per qual cosa se amico era della comunità questo cotal nominato, amico si rimane, se nimico o ribello era, inimico et ribello si rimane.”

⁵⁰² *Ibid.*, p. 761, e.g., “La quale confederatione et lega durante, sopravvenne la guerra et la oppressione del presente duca di Milano, dove l'animo del Signor di Lucca si dimostrò più empio et inimico che mai; ché non solo abbandonò il popolo Fiorentino confederato suo, ma etiandio al nimico di esso popolo mandò i suoi aiuti insieme con la persona del propio figliuolo.”

⁵⁰³ See ch. 3, pp. 111-12.

⁵⁰⁴ Viti, *Leonardo Bruni e Firenze*, p. 94-5: “Tu non denunciatum fuisse bellum praedicas, nos per Philippum, qui et vivit et testimonium perhibebit, denunciatum fuisse affirmamus.”

sent letters to him to desist, and sent copies of those letters to Lucca.⁵⁰⁵ Soon afterwards, however, people in Florentine territory, of their own will, had gone on the offensive – a move not directed by the government but nevertheless just on account of the injuries Florence had received from Lucca.⁵⁰⁶ In fact the government had to accede to the just demands of the people because, as Bruni says, the Florentine people are sovereign and have the right to declare war.⁵⁰⁷ Accordingly, Lucca's ambassador had made Florence's will known to his government (the *diffidatio*, or here *sfidamento*), which constituted a public declaration.⁵⁰⁸

Bruni then refutes a final argument, which Turretini must have leveled elsewhere in his letter, that Florence should not have continued the war after Lucca deposed its ruler, Paolo Guinigi.⁵⁰⁹ Bruni in fact agrees that the people of Lucca were not responsible for past injuries against Florence, but their own continued prosecution of the war after Guinigi had been deposed, and their willingness to accept the rule of tyrants, indicts them as a continued threat to Florence.⁵¹⁰ Again the reasoning is not inconsistent with Florence's private justification of the war as a strategic issue; and Bruni claims that the Lucchese have again, in signing an agreement with Genoa, submitted themselves not only to Genoa but its old ally

⁵⁰⁵ *Difesa*, p. 764, "Et per far chiaro ognomo, che contra sua volontà [the will of the Florentine government] era proceduto, la copia delle lettere scritte a Niccolò et della risposta sua fe' dare a messere Urbano."

⁵⁰⁶ *Ibid.*, p. 764-5. Bruni also notes the idea of a vendetta, which has the legal echo of "ulciscuntur injurias," p. 765: "Nella quali parole non solamente lo sfidamento apparisce manifesto, ma etiamdio si dimostra non tanto per vendetta delle ingiurie da lui ricevute..."

⁵⁰⁷ *Ibid.*, p. 765: "Non è offitio del magistrato far le imprese della guerra, ma raffrenarle: il popolo è signor del tutto, et con buona ragione et con giusto sdegno si mosse."

⁵⁰⁸ *Ibid.*, p. 765.

⁵⁰⁹ *Ibid.*, p. 768: "Resta hora quella parte, nella quale doppo la ruina di quel Signore il popolo di Lucca, secondo il dir tuo, ricoverò la libertà; nel quale popolo non essendo difecto alcuno né ingiurie antecedenti, neuna honestà rimaner dici al popolo fiorentino d'averli fatto contra."

⁵¹⁰ *Ibid.*, pp. 768-70.

Milan.⁵¹¹ Thus injuries committed by Guinigi are simply being perpetuated by the people under the shadow of Milanese tyranny, and war can be rightfully continued.⁵¹²

The elaborate answer to Turretini in the *Difesa* reflects the full breadth of his charges, and the need Florence felt to respond fully, as a way of making a counter-case before a skeptical public audience. As a separate defense written outside of normal diplomatic correspondence and in Italian, the *Difesa* was indeed meant for a broad public hearing, and suggests the difficult position Florence found itself in at the end of 1430. In fact the letter and the *Difesa* were written about a month after Florentine forces had been routed outside Lucca by a Genoese force led by Niccolo Piccinino.⁵¹³ Milan was by then clearly on Lucca's side, having supplied the *condottiere* for employment by Genoa, and Genoa's alliance with Lucca had been signed in September of that year. Siena had also sought aid from Milan, fearing Florence's hostility. Florence needed allies in the conflict and sought Venice above all, as the state whose involvement could draw Filippo Maria's attention away from Tuscany to eastern Lombardy.

Florence, in fact, appealed to Venice quite frankly for support and without much pretense. On December 7th, five days after the heavy defeat by Lucca on the Serchio, Florence remarked to Venice that it was no longer so much a matter of acquiring Lucca as saving its own state.⁵¹⁴ Florentine troops were being held captive, and a new contingent was

⁵¹¹ *Ibid.*, p. 769: "...sopravvenne di subito novella che i Lucchesi aveano dato Pietrasancta in mano de' Genovesi, cioè del duca di Milano, et così l'altre terre marine aveano promisso di dare..."

⁵¹² *Ibid.*, "Che vogliamo adunque dire di questo tempo della guerra doppo la ruina di Paulo Guinigi, se il popolo di Lucca maggiore et più formidabile nimico si mettea in casa?"

⁵¹³ Griffiths, *The Justification of Florentine Foreign Policy*, p. 34. The loss was the storied defeat beside the Serchio river on December 2.

⁵¹⁴ *SCMC*, 33, fol. 21r, "...cogit in presenti tempore nos, plus de defensione et conservatione status nostri, quam de acquisitione lucane urbis cogitare."

delayed in reaching Tuscany to engage Piccinino.⁵¹⁵ The situation did not call for any long exegesis on the justice of the war with Lucca, and instead the focus was shifted to Milan. Since an immediate problem was to counter the influence of Filippo Maria, Florence drew Venice's attention to the faithlessness of the Duke, who had broken the treaty of Ferrara by opposing Florence, and given the allies just cause to oppose him. The letter simply exhorted the Venetians: "the oppressions inflicted upon us by the enemy [Milan] are clear, the broken peace is manifest; with such injuries and offenses against the league, may your highness be moved...and rise against him in Lombardy."⁵¹⁶ It urged Florence and Venice to be "one and the same body" in the war, which referred directly to legal theory behind confederations.⁵¹⁷ In fact a new alliance between Florence and Venice was concluded in early January 1431, by which time the sides were polarized, with Siena soon joining on the side of Lucca and Genoa.⁵¹⁸

Bruni's defenses of the conflicts with Lucca are best read more closely in this immediate context, after Florence had been dealt a difficult loss but determined to recruit Venice and continue the war. Bruni's letter of January 8th to Turretini was succinct and focused on the legality of attacking an adherent, and Florence's just cause and public declaration, which latter were the basic criteria for just war. It was perhaps the legal case that Florentine diplomats carried to other cities as well, though this letter was sent directly to the chancellor of Lucca. Part of Bruni's intention in writing is more personal as well, as he refuses to take any blame for the war, reminding Turretini pointedly that mere chancellors

⁵¹⁵ *Ibid.*, fol. 21v, "Sed retinebuntur captivi ne ad nos reversi pro defensione rerum nostrorum pugnare atque resistere adversus hostilem conatum valeant..."; "Sed dilatio in mittendis gentibus antedictis, ex ea difficultate hactenus processet..."

⁵¹⁶ *Ibid.*, fol. 22r, "...visis oppressionibus ab hoste nobis illatis. Visa fractura pacis manifesta. Visis iniuriis et vilipendiis lige, moveatur celsitudo...et adversus eum a partibus lombardie viriliter insurgat."

⁵¹⁷ *Ibid.*, "Et quoniam unum et idem corpus esse debemus et sumus, nulla pars offensa ab hoste...;" cf. civilian opinion on confederations, ch. 3, pp. 106-7 above.

⁵¹⁸ Bayley, p. 105.

could hardly check the will of their cities.⁵¹⁹ He mentions in concluding that he wrote another defense of the Florentine cause in “popular words,” referring to the *Difesa*, so that the people themselves could understand the case.⁵²⁰ Florentines, if not Lucchese and perhaps other Tuscans, were likely the target audience.

The *Difesa* contains the same legal arguments as the letter though in fuller form. The argument about the status of adherents is given with examples, while the public declaration is narrated at length. In a more humanist fashion, Bruni also includes in the *Difesa* an example drawn from Roman history to support his case, where the will of the Roman people was sufficient to declare war against Carthage.⁵²¹ But it is the justification for the continuation of the war, lacking in the letter, that sets the *Difesa* apart and suggests the main reason behind its composition. It is this last section that may have been aimed at Florentines skeptical of continuing the war after the heavy defeat at the Serchio, as well as emphasizing that the commune had the will to pursue the conflict. To these ends, the *Difesa* was also fitted with a more elaborate rhetoric, and included traditional appeals to Florence’s role as a defender of liberty.⁵²² Indeed the appeal to liberty and tyranny also came in the final section, where Bruni claimed a just cause for Florence because the Lucchese had preferred to install tyrants rather than live in liberty. Florence, thus threatened, was obliged to continue to defend its own liberty through just war.⁵²³

⁵¹⁹ Viti, p. 95.

⁵²⁰ The point is discussed in Viti, *Leonardo Bruni e Firenze*, pp. 95-6, and Griffiths, pp. 35-6. Bruni’s asserted purpose for writing is worth quoting, from Viti, p. 95: “Ego tamen invitatus licet, quoniam me provocas, defensionem scripsi quam tibi mitto. Et quia de re populi agitur, popularibus verbis uti placuit, ut populi ipsi, quorum causa agitur, non ab interprete sed ex se ipsis intelligere possint.” The *populi ipsi* refers to the citizens of Florence, though possibly also Lucca.

⁵²¹ *Difesa*, p. 766.

⁵²² *Ibid.*, p. 769, e.g., “Per la qual cosa se in libertà vivere voleano, si proferiva loro non solamente non offendere la libertà loro ma etiamdio difenderla da chi occupare la volesse.”

⁵²³ *Ibid.*

Florence's claims do not appear very strong, but give a good sense of the uses to which just war arguments could be put in diplomacy, where justification was important. Also important here is that Bruni ably offered two careful and technical arguments on just war for the conflict with Lucca. Parts of them were much more legalistic than rhetorical. It may be true that Bruni was putting into writing legal points that had been provided by Florentine lawyers, but there is nothing to suggest that Bruni was incapable of such arguments himself, and in fact he had probably received enough legal training as a young man that would have allowed him to make them.⁵²⁴ As well, it should be noted that the *Difesa* was not just an opportunity to employ the political idea of Florentine "liberty." It is not unimportant that *libertas* was added to the *Difesa* while being absent from the letter; but it was added as part of a just war argument which referred to traditional criteria and technical aspects of treaty law. Invoking a defense of *libertas* helped Bruni to bolster Florence's argument of a just cause for continuing the war. Ultimately, again, it was essential that cities made such legal representations to adversaries and allies, and just war arguments in public missives could be quite thorough.

Elements of just war can also be found in Bruni's more strictly rhetorical writings, though usually those writings, when touching on war, praise martial virtue and even Florentine imperialism. Praising Florentine military prowess was typical (the speeches of the *Oculus Pastoralis* are one example). Florence in the early fifteenth century, however, was a rather rapidly expanding territorial state, which likely encouraged Bruni to praise the city in imperial terms. In his *Oratio in funere Ioannis Stroze*, which Bruni wrote on the death of a knight, Giovanni Strozzi, he both highlighted the deceased man's valor and

⁵²⁴ Lauro Martines, *The Social World of the Florentine Humanists*, p. 117. It is not yet known conclusively if Bruni finally obtained a degree in law.

claimed that Florence's virtue allowed it to conquer its neighbors, adding Pisa and other cities to its dominion (*imperium*).⁵²⁵ In the treatise *De militia*, Bruni limited himself to praising the martial virtue of a leading Florentine patrician, Rinaldo degli Albizzi, and explained how true knights ought to behave, after giving a historical exegesis on the institution of knighthood. The work aimed to describe knightly ethics in a civic context and held that knightly valor (directed rightly within the city and without) was crucial to the well-being of Florence.⁵²⁶

Bruni's most famous work in praise of Florence, the *Laudatio Florentinae urbis*, describes in greatly exaggerated terms the excellence of the city's history, institutions and citizens. James Hankins has called the oration "essentially an imperialist tract, a celebration of Florence's potentiality to be the center of world empire," which is not untrue, and the work makes a few unabashed statements to that effect.⁵²⁷ It also fits a certain context, as Bruni wrote the work in the wake of Florence's unexpected triumph over Milan in 1402, to praise the city as Florence was swept up in a tide of collective relief and civic pride.⁵²⁸ A more personal context is important as well. As Jerrold Seigel has pointed out, Bruni at the time was probably trying to curry favor with Florentine elites, and a bravura performance like the one he gave in the *Laudatio* might increase his chances of landing the job of

⁵²⁵ Susanne Daub, ed., *Leonardo Brunis Rede auf Nanni Strozzi* (Stuttgart and Leipzig, 1996), pp. 284-5, e.g., "...ut quantum memoria extat hominum, nunquam non caput Etrurie hec civitas fuerit. Digni etiam laude et qui nunc sunt in presenti etate constituti cives, qui civitatis potentiam de patribus acceptam magis etiam extulerunt Pisis et aliis quibusdam magnis urbibus virtute et armis ad imperium adiunctis."

⁵²⁶ Bayley, *War and Society in Renaissance Florence*, pp. 369-97, gives an edition and notes to the text.

⁵²⁷ James Hankins, "Rhetoric, history and ideology: the civic panegyrics of Leonardo Bruni," in *Renaissance Civic Humanism: Reappraisals and Reflections*, p. 146. Hankins gives a few examples, including: "sufficientem autument ad totius orbis dominium imperiumque adipiscendum." Florence may be fit to rule the whole world, but because they are such just, excellent actors *vis à vis* any other polity.

⁵²⁸ Hans Baron's *The Crisis of the Early Italian Renaissance*, pp. 38-46, heroically, and somewhat fancifully, evokes this atmosphere in Florence at the end of the war and after.

chancellor of the republic, engaged in transmitting the affairs of state.⁵²⁹ The work thus, not surprisingly, includes a fulsome review of Florence's qualities and achievements in foreign affairs. Interestingly, the section on Florentine foreign affairs in the *Laudatio* is based on a rather elaborate just war theory, which ultimately is conducive to the work's latent (and sometimes overt) imperialism.⁵³⁰ More directly, the just war arguments lead to Bruni's essential point, that in foreign affairs Florence has a responsibility to be a virtuous interventionist.

As a general claim, Bruni declares in the *Laudatio* that all of Florence's wars are just, and gives as one example its resistance against Henry VII in 1312.⁵³¹ He states that this was a case of simple defense against Henry's attack, and adds that "not only in resisting was this city strong, but formidable also in using force, that is in avenging injury (*ulciscenda iniuria*)."⁵³² He thus takes up the juridically acceptable forms of war, namely, strict self-defense and repayment for injuries inflicted, which trace back to Cicero and Augustine. He assures that Florence has never harmed anyone without suffering a prior injury, but when injury has been inflicted it has shown itself zealous to defend its dignity.⁵³³ In war, Florence is also immaculate: it always upholds the rights of its enemies, preserves faith (in treaties) and never deceives.⁵³⁴ At the conclusion of a war, the city cancels injuries received (*ad*

⁵²⁹ Jerrold Seigel, "'Civic Humanism' or Ciceronian Rhetoric? The Culture of Petrarch and Bruni," *Past and Present* 34 (1966), pp. 3-48; at p. 16, n. 33. In fact, Bruni only secured the position permanently in 1427.

⁵³⁰ As noted, traces of imperialism were possible in legal thought also; see ch. 3, pp. 91-2, on the opinion of Paolo di Castro, which was of the same period.

⁵³¹ Leonardo Bruni, *Laudatio Florentine Urbis*, ed. S. Baldassari (Florence, 2000), p. 25; "Cesar" in this case is Henry.

⁵³² *Ibid.*, pp. 25-6, "Non solum in resistendo fortis hec civitas fuit, sed etiam in inferenda vi, hoc est in ulciscenda iniuria, formidabilis."

⁵³³ *Ibid.*, p. 26. Bruni does not specify the gravity of the injury necessary for war or some retribution short of that, but it will be remembered that just war theory is similarly vague on this point.

⁵³⁴ *Ibid.*, p. 24, "Quod cum a principio vidisset et ita iustum esse censuisset, ob nullam utilitatis speciem adduci unquam potuit ut pacta, conventa, federa, iusiurandum, promissa violaret;" also: "Usque autem adeo fides et integritas in hac civitate plurimum valuit ut iura etiam hostibus religiosissime servavit, nec unquam vel in hoc

remittendum iniurias) through war, and makes restitution for losses inflicted where it is just, always paying to each his due (*ut suum cuique ius diligentissime tribueret*).⁵³⁵ It is notable that in this section much of the discourse is legal, and considers aspects of *jus ad bellum* (self-defense and avenging injuries), *jus in bellum* (honoring faith given to an enemy) and *post bellum* (cancelling injuries and making restitution).⁵³⁶ In adhering to a legal discourse Bruni found it important to emphasize that for all its glory in war, Florence has always acted with strict justice and in a legal manner.

Not surprisingly Bruni also sees a strong role for Florence as policeman and arbiter in foreign affairs, and considers it the most beneficial player in regional politics if not Italian politics generally. He notes that a number of cities are oppressed by the violence of tyrants and the conspiracies of their neighbors, which cities Florence is willing to sustain with money and councils.⁵³⁷ Bruni's argument reveals an aspect of what might be called Florentine foreign aid, which naturally is in the service of justice and does not promote any selfish foreign policy goals. More importantly, Florence sends embassies to cities in conflict in order to join them together, which is virtuous and for the good of all.⁵³⁸ Presumably this refers to Florence's role as a mediator and arbitrator in disputes. With all zeal Florence tries with words and by its authority to bring enemies to peace, but if that fails it defends the weak (*imbecilles*) against the stronger, so that no city of Italy might suffer destruction. The implication is that Florence has a kind of tutelary care for Tuscany if not the whole

genere inveniatur mentita. Ex quo factum est ut ne inimici quidem unquam dubitarint huius rei publice fidem sequi, sed etiam apud eos civitatis nomen maximam semper habuerit auctoritatem."

⁵³⁵ *Ibid.*, p. 24-5. The key is paying to each his due, which is a classic definition of justice from Roman law (cf. *Inst.* 1.1: "Iustitia est constans et perpetua voluntas ius suum cuique tribuens"). Bruni depicts Florence as justice personified, and able to conclude a war with perfect equanimity.

⁵³⁶ Perhaps there is a chance that Bruni wanted to show his familiarity with the legal language of diplomacy as one way to show suitability for the position of chancellor.

⁵³⁷ *Ibid.*, p. 23: "Testes sunt etiam permulte civitates que, cum vicinorum conspiratione aut tyrannorum violentia opprimerentur, consilio, opibus, pecuniis sustentate sunt et difficillimo tempore conservate."

⁵³⁸ *Ibid.*

peninsula.⁵³⁹ By supporting weaker against stronger, Bruni seems also to indicate that Florence understands the principle of a balance of powers in the peninsula, a balance which Florence maintains.

This reasoning leads to a strong defense of interventionism. Bruni says that Florence always takes up the causes of others, almost as much because they need help as that their cause is just.⁵⁴⁰ At this point the defense of liberty against tyranny is again emphasized, essentially in order to justify Florence's broad interventionism and allow the city to intercede on behalf of any other city whose liberty has been threatened or suppressed.⁵⁴¹ In Tuscany, Bruni says, Florence has often defeated the Sienese and Pisans when they became tyrannous, while defending the Lucchese against such enemies.⁵⁴² And of course the commune does not intercede for its own sake, but rather for that of others and of all Italy: Florence is always willing to enter the fray to vanquish tyranny.⁵⁴³ The ultimate model for its defense of liberty is Rome, and to some extent Florence carries on Roman tradition, according to Bruni.⁵⁴⁴ Such intervention has rewards, however, as a natural effect: it has brought Florence great riches and glory and the enlargement of its territory, all of which

⁵³⁹ *Ibid.*, pp. 23-4, "Quod si convenire non potuit, ei semper parti opitulata est cui a potentioribus inferebatur iniuria. Sic enim imbecilles omni tempore defendit, quasi ad curam suam pertinere existimaret ne quis Italie populus excidium pateretur."

⁵⁴⁰ *Ibid.*, p. 27: "Illud tamen preclarum est, quod magnos labores magnasque dimicationes non tam pro sua quam pro aliorum utilitate suscepit. Hoc enim maxime convenire arbitrata est sue amplitudini sueque dignitati, si pro aliorum salute ac libertate pericula adiret multosque suo patrocinio tutaretur."

⁵⁴¹ It might be argued more fundamentally that Florentine "virtue," and perhaps particularly their greatness of spirit and liberality, justifies such interventions.

⁵⁴² *Ibid.*, "Hac illa magnitudine animi sepe Seneses prostravit, sepe Pisanos delevit, sepe potentes hostes tyrannosque contrivit."

⁵⁴³ *Ibid.*, "Non enim privatim duntaxat huic vel illi urbi benefica fuit hec civitas, sed universe simul Italie;" "Que cum ita esset animata, pro incolumitate vicinarum urbium se pugilem prestitit, et quotiens vel finitima aliqua tyrannis vel avara potentia populis immineret, ita diversus eam se opposuit, ut cunctis mortalibus palam faceret sibi patrium esse pro libertate Italiam dimicare."

⁵⁴⁴ *Ibid.*, pp. 28-9, for such statements, e.g., "Sciebat enim generis esse romani pro libertate Italie contra hostes pugnare," "O vere romanum genus stirpemque romuleam!"

redound to Florence's honor.⁵⁴⁵ Bruni's vision is sweeping. In it, Florence becomes a city that justly reconciles enemies, aids the weak and suffering cities of Italy, and vanquishes malefactors, all while the city grows in reputation, wealth and territory.

Mikael Hornquist has emphasized, based on writings including the *Laudatio*, that Florence's imperialism was an intrinsic part of its republican ideology.⁵⁴⁶ On this view, following classical Roman doctrine, Florentine liberty at home was believed to be accentuated and glorified by domination abroad.⁵⁴⁷ In Bruni's *Laudatio*, however, there is an equal and more basic link between just war and beneficent interventionism, which still has imperialistic consequences. In Bruni's vision in the *Laudatio*, it is Florence's virtue – with a sense of medieval moral justice as well as classical excellence – that gives the city a responsibility to intervene, aid the weak, settle disputes, and the like. Because it only goes to war for just reasons, so the rhetoric goes, and only acts justly in foreign relations, Florence can take a leading role in peninsular politics. The gloriousness of Florentine activity in Italy, and its deserved position, depends on this justice. Intervention is required on the principle that helping friends is a duty, drawn from traditional just war theory; Bruni makes this into a special moral responsibility that Florence has to defend the weak or oppressed. In this sense, the defense of *libertas* or opposition to tyranny can be used to broaden the cause for intervention and war, but the law, and just war theory (in an expanded version), can offer a key to understanding Bruni's view of foreign policy in the *Laudatio*. In

⁵⁴⁵ *Ibid.*, p. 29, "Nam et divitie et pecunie et eiusmodi omnia victorum sunt premia, quibus in bello si quis parcit et, cum illis se tutari posset, illa mavult, hostium negotium magis gerit quam suum." And p. 26: "Possum commemorare munitissima oppida manu capta, innumerabilia pene trophea de finitimis populis ab hac urbe constituta, egregia rei militaris facinora edita ipso populo florentino exeunte atque armis fruyente."

⁵⁴⁶ Hornqvist, "Two Myths," and see his *Machiavelli and Empire* (Cambridge, 2004).

⁵⁴⁷ "Two Myths," pp. 125-9. Hornqvist notes generally what is true, that there is no incompatibility in Florentine thought between liberty at home and empire abroad.

Bruni's *Laudatio*, at least, there is more than simply an ideology that seeks liberty at home and domination abroad.

It is important that elements of traditional Romano-canonical just war theory endured and coexisted, even in Bruni's rhetorical works, with appeals to liberty and tyranny as a justification for hostilities. Indeed these elements were constitutive of Florentine political discourse from an early period, though used as public justifications much more than private ones, where appeals to utility and honor were more common. Such traditional justifications remained most essential in a diplomacy that was inextricably bound up with law and legal claims throughout the period, and perhaps became more so through the fourteenth and into the fifteenth centuries. Though the enumeration of injuries which gave a just cause was a small part of diplomacy, it was still generally necessary for the official *diffidatio* and the initiation of formal hostilities. Such a *diffidatio* was often the end result of a dispute that began with complaints over territorial encroachments and disturbances, or commercial violations, and which often had a basis in prior agreements. As has been seen, these disputes were approached by the cities, and particularly Florence, from a strongly legal perspective. Turning to examine Florentine diplomacy in the period of 1396-1402 in more detail, it is hoped, will allow a better look at some of the legal issues which might be addressed, and at how the law justified and constrained Florentine foreign policy during its wars.

Chapter 5

Diplomacy and law in Florence's war with Milan, 1392-1402

In the previous chapter, the aim was to show that arguments for just war played an enduring role in Florentine diplomacy, where they were relied on to justify Florentine wars to enemies and allies. Here the intent is to consider Florence's use of the law in wartime diplomacy more broadly, in part so that a fuller range of *jus commune* legal theory on war and peace can be seen in practice. At the same time, by looking at a particular slice of Florentine diplomatic history, we can analyze foreign affairs with a view to better understanding the role that law played in relations between the cities of Italy. To this end, Florence's conflict with Giangaleazzo Visconti of Milan will be considered, in its second phase, from 1392-1402, in part to continue the earlier examination of that conflict. Specifically, six *consilia*, or legal opinions, generated during the period will help to characterize the law's role and re-examine Florence's approach to disputes during war. All of the *consilia* were written for Florence by Angelus de Ubaldis, who as noted earlier was an important jurist and contributor to the developing theory of war and peace in the Trecento *jus commune*.⁵⁴⁸ With a focus on the legal concerns of Florentine wartime diplomacy, as they emerged in *consilia* and directions to ambassadors, it should be possible to highlight the processual character of inter-city relations in the period.

Agreements between the Italian cities were usually memorialized and signed by the representatives of the parties, and to a significant extent these agreements – peace, truce,

⁵⁴⁸ On his contributions, see chs. 2 and 3, particularly pp. 83-5 and 101, 105-10.

alliance and commercial treaties – bound the cities together. They also became the most important basis of negotiation and complaint during diplomacy, as issues routinely arose over the status and disposition of territory, the nature of commercial rights, the responsibilities of peace treaties and similar questions.⁵⁴⁹ For such complaints, and the kinds of negotiation which addressed them, lawyers were indispensable as ambassadors and advisers, as Martines has noted.⁵⁵⁰ As importantly, however, the *jus commune* was the lexicon which these lawyers shared, and was a useful tool, if not a weapon, that could be used in the dispute processes that marked the complex relations between the cities. In particular, it is clear from *consilia* that highly technical legal arguments could find some role in diplomatic proceedings and inter-city arbitration. Understanding the full role that the *jus commune* played in dispute processes among the Italian cities requires more investigation, but such *consilia* help to mark the importance of the law in Trecento Italian diplomacy, and confirm a role for the interpretative capacities of the *jus commune* within it. The law did not transcend hard politics and the reality of power relations in Italy, but did mediate them.

The uneasy peace that ended Florence's first war with Giangaleazzo Visconti in 1392 resulted largely from the financial strain of the war and the lack of material gains on either side.⁵⁵¹ As Mesquita has observed, Giangaleazzo probably did not relinquish any of

⁵⁴⁹ Important documents for inter-city relations also include charters granting land and rights, documents memorializing submission to another government or agreeing to taxation, and other deeds and pacts, but treaties of peace, truce and alliance were the most dynamic and contested in wartime. For Florence, important collections including examples of these are found in P. Santini, *Documenti dell'Antica Costituzione del Comune di Firenze*, 2 vols. (Florence, 1895); C. Guasti, *I Capitoli del comune di Firenze: inventario e regesto*, 2 vols. (Firenze, 1866); G. Arias, *I trattati commerciali della Repubblica fiorentina*, v. 1, secolo XIII (Florence, 1901).

⁵⁵⁰ Martines, *Lawyers and Statecraft*, pp. 311-84.

⁵⁵¹ Visconti did lose Padua, which reverted to the Carrara. This pattern, of few material gains and exorbitant costs, would mark the conflicts among the major northern powers throughout the Quattrocento. The powers tended in practice to balance each other, and normative expressions of a "balance of power" in the period

his territorial ambitions after the peace. But apart from considerations of his own costs, he recognized that his allies in Tuscany could hardly afford the war and that he might lose their support if it continued.⁵⁵² Even after the peace, the coalitions remained intact and some of the intractable issues that had caused the war endured, making the treaty of Genoa appear in hindsight as largely a truce.⁵⁵³ At the same time, however, Florentine diplomacy of the first years after the Peace of Genoa, in January 1392, was marked by a certain care and respect for the letter of the treaty, and a willingness to address unresolved issues that arose from it. That doubts and suspicions were voiced immediately in council meetings is not surprising, nor is the fact that Florence and Milan were capable of undermining the treaty with tit-for-tat stratagems. Ultimately, neither side was ready for or wanted to come to open war. In the meantime, concerted diplomatic efforts sought to mitigate offenses and address differences, particularly before the end of 1395 and until 1396, when war resumed in earnest.

The treaty signed at Genoa also became the principal point of reference in subsequent questions and disputes that arose among the parties until 1396, and to some extent throughout the second Visconti war. It was not unusually punitive (with one main exception), but left key issues unresolved. Its contents are important to consider, however, for their immediate importance in subsequent diplomacy. The punitive clause of the treaty was the heavy indemnity that Francesco Carrara was forced to pay Milan, of 10,000 florins annually, as compensation for the loss of Padua; if the money was not paid, Giangaleazzo

largely reflect that reality. Cf. Riccardo Fubini, "Lega italica e 'politica dell'equilibrio' all'avvento di Lorenzo de' Medici al potere," in *Italia Quattrocentesca: Politica e diplomazia nell'età di Lorenzo il Magnifico* (Milan, 1994), pp. 220-52.

⁵⁵² Mesquita, *Giangaleazzo*, p. 142.

⁵⁵³ The Florentine coalition, memorialized by the League of Bologna in April 1392, principally united Florence, Bologna Ferrara, Padua, Faenza, Imola and Ravenna, while Mantua was added in September (Mesquita, p. 144-5). The League had the unofficial support of Venice, which had a key role in maintaining it. Milan retained the support of Siena, Pisa and Genoa and a number of petty nobles and *signori*. Where he could, Giangaleazzo tended to take formal overlordship of his allies rather than create a broad-based league. The second Visconti war also brought frequent wavering and some defections, which will be noted below.

could ostensibly use the failure as a just cause to restart the war.⁵⁵⁴ As far as monetary damages, it was agreed that the 100,000 florins assessed to each side canceled the other out.⁵⁵⁵ As was typical of peace treaties, the treaty also generally remitted (forgave and legally cancelled) the injuries, killings and damages that occurred during the war. However, Ferrara and Milan reserved their rights in this respect, suggesting that a path remained open to them to pursue grievances.⁵⁵⁶ Much of the treaty was concerned with restoring lands taken in the war, mainly in Tuscany. The Sienese and their adherents were held to restore to Florence any lands taken in the war, and vice versa; the same held for Florence, Cortona and Perugia, and Florence was to receive back land from the lords of Pietramala. Importantly, however, the ownership of Montepulciano and Lucignano, issues hotly contested by Florence and Siena before the war (and a prime cause of it), were left unresolved. Arbitrators were to decide their status, though for the moment they remained as they were, in Florentine hands.⁵⁵⁷

The recall and restoration of exiles and *banniti* was stipulated in another problematic clause of the treaty. Here the problem had nothing to do with the treaty but rather the political will of the signatories.⁵⁵⁸ Cities did not want to bring potentially dangerous political opponents back and exiles might not want to return. But the 1392 treaty demanded,

⁵⁵⁴ Guasti, *I Capitoli*, ii, pp. 400-6, no. 61; *Cap* 14, fols. 149r-156r.

⁵⁵⁵ *Ibid.*, pp. 403-4.

⁵⁵⁶ *Ibid.*, p. 400.

⁵⁵⁷ *Ibid.*, p. 403 (Guasti's translation): "Eccettuato il luogo Montispoliciani e la terra Lucignani de Aretio, che dovranno restare come ora sono, fino a che noi arbitri non provvederemo con particolare deliberazione; alla quale dovranno stare contenti, nonostante che fosse spirato il termine del compromesso." Florence in fact had already won an arbitration decision from Bologna, awarding Lucignano to Florence but requiring that it pay 8,000 florins for the town to Siena, in 1387; see E. Repetti, *Dizionario geografico, fisico, storico della Toscana*, 6 vols. (Florence, 1833-46), ii, p. 921.

⁵⁵⁸ The criminal ban was an important political and legal remedy in medieval Italy. Work on it includes Desiderio Cavalca, *Il bando nella prassi e nella dottrina giuridica medievale* (Milan, 1978); Peter Pazzaglini, *The Criminal Ban of the Sienese Commune: 1225-1310* (Milan, 1979); Randolph Starn, *Contrary commonwealth: the theme of exile in medieval and Renaissance Italy* (Berkeley, 1982); and recently on Florentine exile, Fabrizio Ricciardelli, *The Politics of Exclusion in Early Renaissance Florence* (Turnhout, 2007), with extensive bibliography.

for instance, that Padua allow all its exiles back into its territory with the full restoration of their legal rights and possessions.⁵⁵⁹ Florence, Siena and Perugia were to do the same, and were not allowed to shelter in their territory any exile from another of those territories.⁵⁶⁰ The intention of course was to remove political exiles, who incited unrest at home, from enemy territory where they were effective, and to try to reconcile them with the governments they had opposed. In a related spirit, the respective spheres of influence of Florence and Milan were agreed to be those from the treaty of Pisa of 1388, which did not bar Milan absolutely from Tuscany nor did it keep Florence unequivocally out of Lombardy.⁵⁶¹ Beyond the uncertainty of any “sphere of influence,” the porousness of territorial boundaries gave exiles ample chance to remain in foreign territory, whether that government was sympathetic to them or not. Those problems, along with the practical unwillingness of governments to take exiles back, were factors that militated against lasting peace.

Still, the legal importance of the treaty, and the diplomatic efforts launched to support it, deserve emphasis. Immediately after the signing, in fact, a legal case arose in Florence which seems to offer testimony to the desire to maintain amicable relations. The case concerned a Florentine citizen, and spy, who had passed information from Florentine council meetings to Milan during the war.⁵⁶² The citizen, Paolo da Castiglionchio, had evidently been held as a traitor, was investigated, found guilty and put in a Florentine prison, the *Stinche*, for life.⁵⁶³ The case is made particularly interesting by the fact that Paolo was

⁵⁵⁹ *Ibid.*, p. 402. One family, the Malabarbi, was excepted; a few other families were explicitly included in the treaty.

⁵⁶⁰ *Ibid.*, p. 403.

⁵⁶¹ *Ibid.*

⁵⁶² Angelus de Ubaldis, *Consilia*, no. 257 (Frankfurt 1575, fol. 175rb).

⁵⁶³ Angelus, *Consilia*, fol. 175rb.

the son of a leading citizen of the commune, the lawyer Lapo da Castiglionchio (d. 1381), an arch-Guelph conservative who provided counsel to the Florentine government.⁵⁶⁴

Lapo's son's betrayal of the city must have been a highly sensitive issue, and it was undoubtedly made more so when Paolo's procurator, or legal representative, petitioned the commune for his release.⁵⁶⁵ The procurator argued, on the face of it rather audaciously, that Paolo should be included in the peace agreement as an official adherent of Milan, released and fully restored to his rights.⁵⁶⁶ On behalf of the city, the syndic of Florence had staunchly opposed the petition. The case was not left to stand with the judgment of the syndic, perhaps in part because Paolo had some prominent support in Milan, if not Florence as well. Indeed, the case likely had real diplomatic implications, at a time when Florence and Milan were striving to maintain good relations in the aftermath of the peace.

The details of the case also merits examination, because they begin to shed light on the role lawyers played in mediating disputes arising from treaties. The case also reveals how complex the legal positions taken by the parties could be, as lawyers sorted through and tried to reconcile the stipulations of the treaty with domestic laws. Faced with such issues, lawyers could potentially question whether treaty provisions should be allowed to trump the

⁵⁶⁴ It is something of a twist that Lapo was exiled as a member of the oligarchy by the broader-based Ciompi government in 1378; his name and penalty are found in *Il Libro del Chiodo*, ed. F. Ricciardelli (Rome, 1998), pp. 337-9. On Lapo's exile, F. Ricciardelli, "L'Esclusione politica a Firenze e Lapo da Castiglionchio," in *Antica possessione con belli costumi: due giornate di studio su Lapo da Castiglionchio il Vecchio*, ed. F. Sznura (Florence, 2005), pp. 46-61. On Lapo's position as a lawyer, Lauro Martines, *Lawyers and Statecraft in Renaissance Florence* (Princeton, 1968), pp. 45, 189, 395-6; Lawrin Armstrong, *Usury and public debt in early Renaissance Florence: Lorenzo Ridolfi on the Monte Comune* (Toronto, 2003), pp. 14, 51; and on his contributions to the theory of the Florentine public debt, Armstrong, *Usury and public debt*, pp. 81-2, 94, 236-41, 359-60, 367-69, and Julius Kirshner, "From Usury to Public Finance: The Ecclesiastical Controversy over the Public Debts of Florence, Genoa and Venice (1300-1500)." Ph.D thesis, Columbia University, 1970, pp. 191-4.

⁵⁶⁵ Brucker, *Civic World*, p. 141, has found that both Paolo and his brother Michele were accused of spying for Milan in September 1391. They were allegedly recruited by two Milanese agents, and Paolo eventually wrote letters to his brother in Genoa concerning Florentine foreign policy and public opinion, which the brother turned over to the agents. The accusations are in *ACP*, 1896, fols. 2r-3v, 10r-11r.

⁵⁶⁶ Angelus, *op. cit.*, fol. 175rb.

domestic laws of a city or in part derogate from a city's sovereignty. In this case in particular, the nature of Paolo's betrayal of his home city must have been difficult for some to overlook.

Not surprisingly given the delicate nature of the case, it appears that a Florentine court solicited a legal opinion from the noted jurist Angelus de Ubaldis. Angelus was teaching at the law school at Bologna from 1391-94, when he was probably asked to opine on Paolo's case. He had already taught in Florence in 1388 and would return to teach there in 1398-99, while his ties to Florence extended back at least to 1385.⁵⁶⁷ Angelus's background thus drew him more toward Florence and its allies than Milan, but his stature as a renowned jurist (and brother of the preeminent jurist Baldus de Ubaldis) undoubtedly conferred a certain legitimacy on his findings. Beyond that, Angelus ultimately, and by a rather tortuous path, found in favor of Paolo. The opinion he rendered appears to be a *consilium sapientis*, by which Angelus would have officially decided the case; as such it should have been binding on the court and may well have released Paolo from prison.⁵⁶⁸

⁵⁶⁷ On Angelus's career, Andrea Gloria, *Monumenti dell' Università di Padova, 1318-1405*, vol. 1 (Bologna, 1888), pp. 178-80. Angelus had contact with the prominent Florentine Cavalcanti family in 1385, when a Cavalcanti appointed a kinsman as his procurator in Padua, with Angelus as his witness. Importantly for early ties, Angelus's brother Baldus had taught in Florence in 1359-64, and received citizenship. In fact, Florence sought Baldus to teach in Florence again in 1385, though unsuccessfully. It was Milan in 1390 that finally secured Baldus's services, and Giangaleazzo employed the jurist until his death in 1400. For Baldus in Florence, see Kenneth Pennington, "Baldus de Ubaldis," *Rivista internazionale di diritto comune* 8 (1997), pp. 35-61.

⁵⁶⁸ Angelus, *op. cit.*, fol. 175va; it is difficult to tell with certainty whether this *consilium* was written on behalf of the court or on behalf of the client. In the Italian municipal courts, *consilia* written on behalf of the client operated in much the way they do today, but *consilia sapientis*, written on behalf of the court, were requested by the parties at law or the judge, from an outside jurist (or jurists) whose written opinion would be accepted to settle the case. Both kinds of *consilia* have the same formal features, however, and it can be difficult to tell one from the other unless it is specifically stated. This appears to be a *consilium sapientis* because the two sides, represented by the procurator and the syndic, seem to have already made their cases. On the *consilium pro parte* and *consilium sapientis*, see Julius Kirshner, "Consilia as Authority in Late Medieval Italy: The Case of Florence," in *Legal Consulting in the Civil Law Tradition*, ed. Mario Ascheri et al. (Berkeley, 1999), pp. 107-40; Mario Ascheri, "Il *consilium* dei giuristi medievali," in *Consilium. Teorie e pratiche del consigliare nella cultura medievale*, ed. Carla Casagrande, et al. (Florence, 2004), pp. 243-58; G. Rossi, *Consilium sapientis iudiciale* (Milan, 1958); W. Engelmann, *Die Wiedergeburt der Rechtskultur in Italien durch die wissenschaftliche Lehre* (Leipzig, 1938); L. Lombardi, *Saggio sul diritto giurisprudenziale* (Milan, 1967).

In a long *consilium* that suggests the importance and sensitivity of the case, Angelus addressed the arguments raised by Paolo's procurator on one side and the Florentine syndic on the other. The procurator's case was simple and direct. He noted that a stipulation of the Genoese treaty had instructed that "all depictions, pictures and writings" which censured the subjects or adherents of the enemy, be "erased, deleted and destroyed" now that there was peace.⁵⁶⁹ In fact, after the treaty, Florence apparently had deleted a "shameful" public depiction of Paolo, and Paolo's name was erased from a register of condemned enemies of the commune.⁵⁷⁰ The deletion suggested that Florence did consider that Paolo was included in the treaty. That argument in fact was given by Paolo's procurator, who took Paolo to be an acknowledged adherent of Milan.⁵⁷¹ There could be objections to this: it might be contended that the picture was deleted mistakenly, or for some other reason than the execution of the treaty; and more importantly, that Paolo as a citizen of Florence could not be an adherent of Milan.

The Florentine syndic offered a few technical objections to the petition, which Angelus amplified and addressed, before treating the main issue. The syndic argued that the *podestà*, or lead judge of the city, did not have the jurisdiction to revoke the sentence against Paolo.⁵⁷² He noted that Florentine statutory law held that foreign officials could not revoke *sententia lata* in criminal cases, and the *podestà* was by definition a foreign official. Angelus responded by considering the treaty, observing that those who had the power to approve the peace agreement should also have the power of enforcing it, otherwise the treaty

⁵⁶⁹ Angelus, *op. cit.*, fol. 175rb; for the treaty stipulation, Guasti, *I Capitoli*, ii, p. 405: "Sentenziamo, arbitriamo ec.: che tutti i dipinti e le pitture e le scritture fatte dal tempo della lega di Pisa in poi, per una delle parti in vituperio dell'altra o dei sudditi, seguaci ec. delle stesse parti, siano cassate e abolite dentro due mesi..."

⁵⁷⁰ Angelus, *ibid.*

⁵⁷¹ *Ibid.*

⁵⁷² *Ibid.*, fol. 175rb: "Primo, quia potestas civitatis Communis Florentiae, non est iudex competens, imo est adempta sibi omnis jurisdictio..."

would be in vain.⁵⁷³ In this case, ostensibly the Florentine *populus* as represented by the city council, would have the power to enforce each stipulation. Angelus also dismissed another objection, that in Florentine law such criminal cases could not be petitioned for appeal by procurators. After tracing an extended line of reasoning he concluded that the case was “of a mixed nature,” having both criminal and civil elements.⁵⁷⁴ As a consequence, the procurator could pursue the case while in fact any judge of delicts could rescind the sentence.⁵⁷⁵

Beyond the lesser objections was the main objection, namely, that Paolo was not included in the treaty and should not be released because of it. Angelus dealt with this as well, by sticking close to the procurator’s petition.⁵⁷⁶ As the procurator noted, Paolo’s name had been removed from a register of condemnation, suggesting that he was considered an adherent of Milan by Florence. Angelus proceeded to accept Paolo as an adherent of Giangaleazzo, most importantly because the Count had named him as such, despite the fact that Paolo was formally nominated at the end of the war and after the time limit specified in the treaty for doing so.⁵⁷⁷ Angelus argued further that even Paolo’s legal condemnation as a spy for Milan tended to disgrace not only Paolo but principally the Count of Virtú, which was unacceptable according to the treaty.⁵⁷⁸ Ignoring the issue of Paolo’s Florentine

⁵⁷³ *Ibid.*, fol. 175vb.

⁵⁷⁴ *Ibid.*, fol. 175va-176va; 176rb: “Sed his non obstantibus, dico et concludo, dictam causam nec fore, vel esse mere civilem, nec criminalem, sed mixtam, eo quod participat de natura cuiuslibet extremorum.”

⁵⁷⁵ *Ibid.*, fol. 176va: “...rescissio ad iudicem maleficorum spectat.”

⁵⁷⁶ *Ibid.*, fol. 176vb.

⁵⁷⁷ *Ibid.*; *Capitoli*, ii, p. 405, gave a month to the principal signatories to name adherents who would be included in the peace.

⁵⁷⁸ *Ibid.*, fol. 177rb: “Quis igitur negare potest, nominationem praedictam ad ipsius comitis opprobrium pertinere principaliter propter se, ac etiam secundario propter adhaerentiam dicti Pauli...”

citizenship, Angelus asserted that Paolo, as a declared adherent of Milan (which by implication Florence had accepted), should be immediately released from jail.⁵⁷⁹

That Angelus was willing to abrogate Florence's rights and domestic laws to such an extent to uphold the treaty was rather remarkable, and it reflects the importance of the treaty. As importantly, however, it is likely a testament to the significance of Paolo's case as a diplomatic issue, since Paolo's release may have been good policy after the end of the war. Milan had (although belatedly) nominated Paolo as an adherent, and some within Florence may have been receptive to the man's release. In fact, in arguing for Paolo's release, Angelus relied on a common *jus commune* principle which accepted the importance of adherents, even if it did not envision the extreme nature of Paolo's case. From a tradition extending back at least to Innocent IV, it was acknowledged that each principal signatory of a treaty had a duty to look after its adherents and followers, either corporate or individual, without whose protection (at least against the other side), a lasting peace could not be made.⁵⁸⁰ And as Angelus argued in the *consilium*, Giangaleazzo was held not only to look after the safety of his adherents but also their reputation.⁵⁸¹ It was really this underlying *jus commune* principle that Angelus applied, in a broad way, to argue for a convicted Florentine spy.

⁵⁷⁹ *Ibid.*, "...et maxime ex quo per Commune dictus Paulus est abrasus ex albo cum omnibus ibi depictis, et sic in ea parte facta est executio laudi, et approbata declaratio domini comitis, licet post terminum per satisfactionem praedictam." On releasing Paolo, fol. 177vb.

⁵⁸⁰ See ch. 3, p. 111-12.

⁵⁸¹ *Ibid.*, 177rb: "Quis igitur negare potest, nominationem praedictam ad ipsius comitis opprobrium pertinere principaliter propter se, ac etiam secundario propter adherentiam dicti Pauli, *quem adhaerentem et sequacem una cum aliis adhaerentibus et sequacibus facere tutum et securum debuit, tam adversus infamiam, quantum possibile est, quam etiam, quoad tutelam bonorum et corporis...*" (my italics).

Even if Angelus did secure Paolo's release, however, any true reconciliation with Florence was a different proposition.⁵⁸² With a glance at electoral and taxation records, the strong suggestion is that reintegration and reconciliation did not occur. Paolo's father Lapo had been part of the commune's ruling elite, and between 1320 and 1390 the da Castiglionchio family was chosen to sit thirteen times in the *Tre maggiori*, the primary governing councils in Florence.⁵⁸³ Yet from the time of Paolo's imprisonment until the 1460s, the family was completely absent from the main Florentine councils.⁵⁸⁴ There is little doubt that the Florentine government remained inimical to Paolo and his family, and proscribed them from office: if Paolo was released from prison he was likely sent off to Milan, while his family may have suffered political disabilities for decades and perhaps exiled because of him. Indeed, the family is wholly missing from Florence's comprehensive 1427 tax assessment, the *catasto*.⁵⁸⁵ If the government was willing to let Paolo go, they were not willing to forgive the betrayal. Beyond (the failure of) personal reconciliation, Paolo's case does cast further doubt on Florence's willingness to recall opposition exiles from other territories, though in the course of subsequent diplomacy certain concessions and shows of "good faith" might be made.

The difficulties in fulfilling the treaty of Genoa were ultimately due to the complex and unstable political situation in northern Italy. The treaty was not, in any case, a solid

⁵⁸² Though Angelus demanded Paolo's release from prison, he did not mention the restoration of Paolo's full rights or property.

⁵⁸³ See the *Florentine Renaissance Resources, Online Tratte of Office Holders, 1282-1532*. Machine readable data file. Edited by David Herlihy, R. Burr Litchfield, Anthony Molho, and Roberto Barducci. (Florentine Renaissance Resources/STG: Brown University, Providence, R. I., 2002). The family name entered as "Dacastiglio."

⁵⁸⁴ Even between 1460-1500 they served a mere three times; see the *Online Tratte*.

⁵⁸⁵ I have not consulted the lists of exiles to see whether the whole family was banned, but they are missing from the 1427 *catasto*. See the *Online Catasto of 1427*. Version 1.3. Edited by David Herlihy, Christiane Klapisch-Zuber, R. Burr Litchfield and Anthony Molho. [Machine readable data file based on D. Herlihy and C. Klapisch-Zuber, *Census and Property Survey of Florentine Domains in the Province of Tuscany, 1427-1480*]. Florentine Renaissance Resources/STG: Brown University, Providence, R.I., 2002.

enough resting point. As a precaution, in April 1392, Florence concluded the League of Bologna to shore up its coalition and (although not declaredly) resist the influence of Giangaleazzo in eastern Lombardy, the Romagna and Tuscany.⁵⁸⁶ In the meantime Giangaleazzo tried to strengthen his relations with his Tuscan allies Siena and Perugia. He worked with Siena to negotiate an agreement with the mercenary companies to leave that area, and in Perugia sought to intervene as well, when feuds broke out after Giangaleazzo's former mercenary captain, Biordo Michelotti, arrived and took power.⁵⁸⁷ Perugia eventually submitted to the Pope to quell the social unrest, but the pattern of Giangaleazzo's relationships in Tuscany was similar to what it had been before the war.⁵⁸⁸ The main exception was Pisa, whose ruler Pietro Gambacorta had sought a conciliatory path between Milan and Florence and remained moderately sympathetic to Florence. But Gambacorta was overthrown and killed at the instigation of his top advisor, Jacopo d'Appiano, in October 1392.⁵⁸⁹ In d'Appiano, the new lord of Pisa, Giangaleazzo gained a strategic and fairly secure ally.

Despite the new threat in Tuscany, Florence raised no great outcry against d'Appiano and instead focused its energies on diplomacy.⁵⁹⁰ Although Florence played the diplomatic game in its home territory with less success than Milan – since the neighboring cities tended to fear Florence's power and find safer support with Giangaleazzo – there was important scope for Florentine efforts. After the war factionalism had grown in Perugia, Pisa, Genoa, and other cities; and Florence, like Milan, tried to interpose itself as a mediator to help

⁵⁸⁶ *Cap*, 13, fols. 178r-188v; *Cap*, 12, fols. 190r-194r, seems to be another recension, just prior to the addition of Mantua.

⁵⁸⁷ Mesquita, p. 148.

⁵⁸⁸ *Ibid.*

⁵⁸⁹ Minerbeti, 1392, cap. 19-20, pp. 165-6; *HFP*, 11.12, p. 179. Minerbeti, p. 166, notes that d'Appiano relied on some men resident in Lucca for the uprising, who were probably exiles.

⁵⁹⁰ Brucker, *Civic World*, p. 149; Mesquita, p. 153. Both authors note the officially conciliatory attitude toward d'Appiano, as they feared the worst but hoped for better from his government.

pacify the factions and disperse the mercenaries somewhere beyond those cities' territories.⁵⁹¹ At stake in such interventions was also continued or increased influence in those cities, which particularly in places like Genoa both Milan and Florence coveted. But Milan and Florence also promised results for those cities, consisting largely in the ability to bring peace and order, even if with military aid, that would assure the city of their usefulness as allies. The relationship might be more economic as well, as Florence even extended a hand to Siena when they suffered a famine in the first Visconti war.⁵⁹²

Genoa, in particular, experienced the sharp pangs of factionalism after the peace agreement, and it is probable that the peace, and any relaxation of the policies against political exiles, worked to the detriment of Genoa's stability. Here, too, Florence sought to intervene to bring the parties to some accord, though one that would also benefit Florence. The Ligurian city had been in Milan's ambit, but the doge sympathetic to Giangaleazzo, Antoniotto Adorno, was driven out in June of 1392, leaving a government in place that was less certain in its sympathies.⁵⁹³ Florence was quick to assure the new government of its friendship and even encouraged the city to join the League of Bologna.⁵⁹⁴ Though nothing came of it, Florence was still making overtures two years later. Although the influence of Giangaleazzo in Genoa had increased by that time, the political situation remained unstable, and Florence again offered to act as a mediator between competing sides. Florence's embassy to Genoa in March 1394 in fact had a number of aims, for Florence solicited cooperation from the city and offered help in quelling internal disturbances, while also

⁵⁹¹ E.g., embassy to Genoa, March 4, 1394, *SCMLC*, 1, fols. 2r-3v; embassy to Pisa, May 19, 1394, *SCMLC*, 1, fols. 11r-12v.

⁵⁹² Minerbetti, 1391, cap. 46, pp. 152-3. Siena would only ask for the importation of grain through Florentine territory. The chronicler claims this was allowed: "Per li Fiorentini fu loro conceduta e fatta la grazia ch'elli domandavano liberamente; di che molto si tennero contenti li detti ambasciatori."

⁵⁹³ Steven Epstein, *Genoa and the Genoese, 958-1528* (Chapel Hill, 1996), pp. 242-5. He returned as doge in 1394, continuing his tumultuous political career.

⁵⁹⁴ *SCMLC*, 1, fol. 2r-3v, embassy to Genoa of March 4, 1394.

seeking redress for injuries its citizens received at the hands of the Genoese.⁵⁹⁵ The issues raised reveal some of the complexity of the relationship between the two cities, and how important careful diplomacy was in addressing each issue separately.

On the occasion of the embassy, Florence sent a top lawyer, Filippo Corsini, and a seasoned diplomat, Filippo Adimari, to address the Genoese doge. The first item of business was Genoa's civil discord, and the ambassadors were instructed to offer to hold talks with the Genoese cardinal and leading citizens, to "reduce each to devotion to the Signoria [the government]."⁵⁹⁶ The Florentines also sought to consult with the Fieschi, the powerful Genoese family whom Florence claimed as good friends and Guelph allies, and Florence likely wanted to advance the interests of their side in the civic struggle.⁵⁹⁷ On the issue of joining the League, the Florentines were more chary now, and did not initially give their ambassadors the power to make such an offer; there was a legitimate fear that Genoa could follow Giangaleazzo and become a fifth column within the League.⁵⁹⁸ Florence did suggest talks on the question, and offered to send a brigade to Genoa if necessary.⁵⁹⁹

The Genoese must have been receptive to the League, however, and the Florentines at least warmed to the idea, for additional instructions to Corsini and Adimari, dated April 9, gave them the authority to negotiate for Genoa's inclusion, and asked the Genoese to provide 18 florins monthly for the stipendiary troops.⁶⁰⁰ Florence also asked that the term

⁵⁹⁵ *Ibid.*

⁵⁹⁶ *Ibid.*, fol. 2r.

⁵⁹⁷ *Ibid.*, "...noi speriamo avere molta audienza col messer. lo cardinale et tutti gli altri della progenie dal Fiesco per l'antica amicitia abbiamo colloro et anchora in molti altri loro grandi et potenti cittadini."

⁵⁹⁸ *Ibid.*, fol. 2v.

⁵⁹⁹ *Ibid.*, "Ma che voi vi rendiate certi, che ogni volta che colla nostra signoria et con nostri fratelli et compagni de collegati volessono venire alle cose convenevoli et affare buona et utile compagnia chon loro, troverebbono disposta la brigata a ogni loro piacere et a quelle cose fossero ragionevoli et honeste et ancora vantaggiando la loro signoria."

⁶⁰⁰ *Ibid.*, fol. 3r, "E sopra il capitolo del soldo delle lanci, siamo contenti sia fiorini xviii il mese."

endure for five, or preferably eight, years.⁶⁰¹ Though ready to listen, the Genoese did not commit at this point or later. Genoa's inclusion in any case was of questionable value, but Florentine diplomats often drove hard bargains and in other cases would rue missed chances.⁶⁰²

Of separate but important concern to the ambassadors was the treatment of some Florentine merchants by the Genoese, for which the ambassadors registered a complaint and sought redress.⁶⁰³ Corsini and Adimari charged that some of their goods had been seized and dumped, even after a treaty of concord had been drawn up between the Genoese and the corporation of Florentine merchants in Genoa.⁶⁰⁴ As the reason for stripping the goods, the Genoese had apparently alleged reprisals. Reprisals, mentioned briefly above, were a quasi-judicial remedy for a denial of justice that were practiced among cities in medieval Italy.⁶⁰⁵ If one jurisdiction refused to address an injustice committed within it against a citizen (or citizens) from another, the offended citizen could ask his own courts or government for

⁶⁰¹ *Ibid.*

⁶⁰² Particularly in 1397 with Pisa, which momentarily wavered in its allegiance to Milan, but Florentine terms for an agreement were too tough and Pisa rejected them; see Brucker, *Civic World*, p. 164. In his history of Florence, Leonardo Bruni puts into the mouth of Rinaldo Gianfigliuzzi, a leading Florentine statesman, a trenchant general critique of Florentine foreign policy, which accuses it of being too careful and unresponsive to any but the most immediate danger. See *HFP*, 11.74-81, pp. 241-51. The critique is in line with Gianfigliuzzi's hawkish policy toward Milan, and his political conservatism, which urges that foreign policy should be in the hands of a few experts who can act quickly, rather than the masses in large deliberative councils (e.g., his argument on p. 241). The argument is also echoed by modern scholars; see Gene Brucker, *Civic World*, pp. 167-8, where the indecisiveness of Florence's large councils paralyzes effective foreign policy. But more to the point, as Brucker admits (p. 164), Florence often put forward difficult terms which drove potential allies away.

⁶⁰³ *SCMLC*, 1, fol. 2v. They asked first, in fact, for the payment of debts owing from a few Genoese citizens, totalling a sum of 6,227 florins. Sums were requested by name from Batista Lugiardo, Arrigho Squarzzafico, Simone Doria, and Messer Giusto di Marino.

⁶⁰⁴ *Ibid.*, fol. 2v-3r: "a Saona è stata scaricata roba de nostri cittadini sotto pretesto di ripresaglia antica...[e]t questo arrestamento è stato fatto pendente trattato di concordia che era fra l'università de nostri mercatanti et coloro che domandano."

⁶⁰⁵ See above, pp. 40-1; p. 76, and *passim*. For reprisals in the late medieval period in Florence, the best work is still A. del Vecchio and E. Casanova, *La rappresaglia nei comuni medievali e specialmente in Firenze, saggio storico* (Bologna, 1894); Lauro Martines, *Lawyers and Statecraft in Renaissance Florence* (Princeton, 1968), pp. 359-361, gives a quick overview of the practice in Florence.

redress.⁶⁰⁶ Ideally, the home city would investigate the petition to determine its validity, and then petition the foreign city for redress. If unsatisfied, the home court or government would then authorize reprisals against citizens of the other city or territory, usually to the amount that the offended citizen had lost. Reprisals usually pertained to commercial violations, often the failure to repay debt, and Florence frequently enforced this commercial revenge by seizing goods or money from the relevant foreign merchants who were residing in Florentine territory. However the remedy had to be used carefully: heavy or quick reliance on reprisals could easily destroy good relations and set the stage for further conflict. The cities involved were also usually trading partners, making reprisals a particularly sensitive legal and diplomatic issue.

In this case, Genoa alleged that the Florentine government had failed to address a prior injustice committed by Florentines against Genoese citizens, and thus Genoa had authorized reprisals against Florentine merchants. Somewhat provocatively, however, these were *ripresaglia antica* and did not pertain to any recent incident.⁶⁰⁷ Moreover, the treaty of concord that had been reached would usually include the cancellation of past disputes.⁶⁰⁸ The problem was now essentially a diplomatic one, but had its basis in a violation of law and the law could still have an important scope in addressing it. Although there seems to be no other mention of this incident in Florence's diplomatic correspondence, another legal case for which Angelus de Ubaldis supplied a *consilium* pertained precisely to a question of very old reprisals between Genoa and Florence, adding a bit of circumstantial evidence that

⁶⁰⁶ For the general characteristics of reprisals, see del Vecchio and Casanova, *op. cit.*, pp. 1-51, and pp. 97-246 for a detailed description of the procedures required for it in Florence, which were fairly rigorous.

⁶⁰⁷ *Ibid.*, fol. 2v: "...sotto pretesto di ripresaglia antica..."

⁶⁰⁸ Though I have not been able to locate the accord in question.

it may have been the same incident.⁶⁰⁹ Angelus's *consilium* appears to be *pro parte* in favor of Florence, and again may have been submitted by the city in the course of diplomacy.⁶¹⁰ It would be interesting to know how the case was resolved, and whether it indeed refers to the diplomatic issue with Genoa in 1394, but such legal opinions are in any case good illustrations of the legal character of Florence's diplomacy.

The question Angelus was asked to address in his *consilium* was whether a grant of reprisals by Genoa against Florentine merchants was valid or not. The reprisals had been conceded a full eighty years earlier, but the Genoese claimed they were still valid because they had been suspended for much of that time.⁶¹¹ In considering the case, Angelus scrutinized the Genoese procedure for granting the reprisals, before questioning the lapse of time. Angelus noted first that according to the Genoese statutes, the offended party should have pled and proved his case before the Genoese *podestà*, while in fact a notary who had been licensed by the *podestà*'s vicar had examined the case.⁶¹² Angelus pointed out that canon and Roman law were clear that the notary lacked jurisdiction, and that authority to hear the case could not be delegated either to the notary or even to the vicar of the *podestà*.⁶¹³

⁶⁰⁹ Angelus de Ubaldis, *Consilia*, no. 196 (Frankfurt 1575, fols. 129ra-130rb). The case is also undated but would fit into the period around 1394, when Angelus was teaching at Bologna and offering advice to Florence.

⁶¹⁰ As noted in the introduction, p. 18, it is unclear here, and with the remainder of the *consilia* examined in this chapter, whether these *consilia* were submitted directly to other side or to an arbitrator; but it seems more likely that they were submitted to an arbitrator as part of rather formal proceedings. My conjecture is that, with the exception of the Castiglionchio case (above, p. 162ff), the *consilia* are all *pro parte*, written by Angelus on Florence's behalf; certainly the ones written while Angelus was resident in Florence would seem to be *pro parte*.

⁶¹¹ *Ibid.*, fol. 129ra: "Iam sunt octuaginta anni et ultra, quod quidam Ianuerises contra Commune Florentiae, et eius habitatores, et incolas laudum repraesalium obtinuerunt..."

⁶¹² *Ibid.*, fol. 129rb-va: "...secundum formam statuti Ianuae, ante concessionem debet fieri probatio, propter quod repraesalium postulatur coram potestate Ianuae; sed dicta probatio facta fuit coram notario, qui sibi examinandi licentiam dicit fore concessam per vicarium potestatis."

⁶¹³ *Ibid.*, fol. 129va: "...dicta receptio testium et probationes factae coram iurisdictione carente (scilicet coram ipso notario) nullae sunt ipso iure, nam que expedienda sunt coram iudice, non possunt coram notario vel per notarium expediri..." and nor could the vicar: "unde non est hoc delegabile, maxime penes vicarium."

More procedural issues, Angelus argued, posed obstacles. The statutes held that a *nuncius*, or messenger, be appointed to notify Florence of Genoa's complaint; in this case, the messenger was to be approved by the Genoese *mercanzia*, or corporation of merchants, and had to be a resident of Genoa. But these were conditions that were not fulfilled either.⁶¹⁴ As well, Genoa should have communicated its charges not to the *podestà* of Florence (as it had, Angelus wrote), but to the persons or body that represented the city as a corporate entity, since the reprisals pertained to Florence *in toto* (and could in fact affect any of its citizens).⁶¹⁵ On this issue, Angelus acknowledged what was an important question among trained medieval jurists: whether a certain body or officials could stand in for the corporation and be said to represent it.⁶¹⁶ Further particulars posed difficulties as well. The Florentine merchant against whom the case arose had been absent from the city and was never summoned over his unpaid debt. Instead another man, whose powers as a legal representative or a curator of the man's goods there was no record of, apparently stood in for him.⁶¹⁷ Finally, the document declaring the reprisals was a copy and not the original.⁶¹⁸ All

⁶¹⁴ *Ibid.*

⁶¹⁵ *Ibid.*, fol. 129va-b: "Si quis autem totam dicti processus papyrum discurrat, non inveniet Communitatem Florentiae requisitam: sed solum Potestatem Florentiae, qui tunc regimen possidebat, ut ostenditur ex praesentatione literarum, quae apparet registrata in dicto processu. Constat autem, non sufficere requiri praesidem, ubi est ipsa universitas requirenda, imo requirenda est in consilio vel arengo."

⁶¹⁶ *Ibid.*, fol. 129rb: "Qualiter autem admonita dicatur, sunt opinio. Cyn. ibi dicit, sufficere syndicum admoneri, et compelli per superiorem posse ad syndicum constituendum...[e]t si syndicum non habent, dicit Cyn. eam admonendum in consilio vel arengo, ut dixit Glossator. Innocent autem dicit, in factis universitatis sufficere citari administratores eius, aut maiorem partem." Angelus left it in doubt whether he agreed that the whole council, or syndics and rectors should be cited. Innocent IV had treated the question of who could represent certain corporations and act for them legally in comments that shaped the subsequent debate. A good overview of the question and its responses is found in J. Canning, "The corporation in the political thought of the Italian jurists of the thirteenth and fourteenth centuries," *History of Political Thought*, I (1980), pp. 9-32; and see ch. 3 above, pp. 106, fn. 359.

⁶¹⁷ *Ibid.*, fol. 129vb, "...Bladus, qui fuisse dicitur curator bonorum datus Iache. fuerit cura. suum ergo mandatum non invenio inter acta, unde omnis examinatio testium, facta ad liquidationem debiti, facta invenitur partibus absentibus, quarum interest, vel interesse potest, vel poterat, non citatis vel monitis, vel aliter requisitis: ergo examinatio nulla...quoniam licet dictus salvus Bladus praesens fuerit, de eius mandato non constat."

⁶¹⁸ *Ibid.*, "Quinto, peccat dicta laus, quae nunc producitur coram Illustri. d. Duce Ianuensi, quia exemplum est, non originale, per ea, quae vidi, non authenticum."

of these problems, Angelus asserted, made the declaration invalid. In closing, Angelus argued that even if the procedure had been in order the reprisals still would have been invalid, given the long lapse of time and that Florence had done everything that was owed in the case.⁶¹⁹

To return for a moment to the embassy of Corsini and Adimari, they were instructed to demand that Genoa restore the goods that had been taken; to that end, the ambassadors were to request that the case be submitted to arbitrators.⁶²⁰ Whether or not Angelus's *consilium* was submitted on this occasion, following the request of Corsini and Adimari, it was likely submitted in this way, as part of the arbitration process itself and representing Florence's case. The *consilium* also reveals some of the extent to which this quasi-judicial institution of reprisals was regulated by city statutes and, when it came to interpretation, by the *jus commune*. Having raised what it viewed as legitimate issues, and with the weight of a jurist of Angelus's stature behind it, Florence might have success in pressing for a positive resolution through arbitration. And if necessary, Florence also had in its diplomatic arsenal the threat of counter-reprisals. Yet even these measures usually stopped short of violence, while the basic aim of regulating reprisals – as an inflammatory kind of retributive justice – was to limit violence as well.

⁶¹⁹ *Ibid.*, fol. 130ra, “Et dico, etiamsi rite dicta laus concessa fuisset, tamen ipsi laudi et contra ipsam fore praescriptum lapsu lxxx. annorum, vel circa, intra quod omnis pupillaris aetas includitur: et inclusa ad praescriptionis consummationem non obstat tanta temporis discursio (ut patet ad sensum) quo cursu temporis omne ius tollitur, publicum et privatum.” *Ibid.*, on Florence's responsibility: “Comunitas autem Florentina fecit, quicquid debet: ergo cessat dictum remedium taediale dictarum repraesaliarum.”

⁶²⁰ *SCMLC*, 1, fol. 3r: “Et per tanto fate rachomandiare al dogie questi nostri cittadini. Et che adoperiate collui che queste cose arrestate si ristituischino. Et che questa quistione si ditermini costi in Genova per huomini di mezzo.”

The appeal to arbitration was also an important diplomatic strategy among cities, just as it was among individuals in late medieval Italy.⁶²¹ Modern observers, historians as well as anthropologists, often point out the long history of various arbitration procedures, and indeed any voluntary appeal of disagreeing parties to an impartial third party (or parties) to decide an issue might be characterized as arbitration.⁶²² In late medieval Italy, however, arbitration may have flourished among individuals because, although it appeared as a fluid, extrajudicial way to restore equity, it was backed by a formal legal system that could validate and help enforce settlements.⁶²³ For inter-personal disputes arbitration could be quite rigorous, adopting the procedures of a court and giving the arbitrator powers similar to a judge.⁶²⁴ As well, guarantees were usually given that the arbitration decision would be followed, to which city statutory law added penalties for non-compliance. On the inter-city level, arbitration naturally faced much different problems of enforceability, even if there was

⁶²¹ There is a sizable bibliography on arbitration among individuals in the Middle Ages in transalpine Europe, and some for arbitration among individuals in Italy, but further study of arbitration between cities and other political entities would be useful. For inter-city arbitration from a Florentine perspective, see Lauro Martines, *Lawyers and Statecraft*, pp. 347-59, though he did not locate actual *compromissa*, *pro parte consilia*, *consilia sapientis* or arbitration decisions in another form. On arbitration among individuals, Thomas Kuehn, "Arbitration and law in Renaissance Florence," pp. 289-319, and on the theory of arbitration, see above, p. 115, fn. 389. For Italy, Chris Wickham, "Land Disputes and Their Social Framework in Lombard Carolingian Italy, 700-900," in *The Settlement of Disputes in Early Medieval Europe*, ed. W. Davies and P. Fouracre (Cambridge, 1986), pp. 105-24; Massimo Vallerani, "L'arbitrio negli statuti cittadini del Trecento. Note comparative," in *Tecniche di potere nel tardo medioevo: Regimi comunali e signorie in Italia*, ed. M. Vallerani (Rome, 2010), pp. 117-32; and Andrea Zorzi, "Giustizia e società a Firenze in età comunale: Spunti per una prima riflessione," *Ricerche Storiche* (1988), 458ff. For northern Europe, a few examples include Edward Powell, "Arbitration and the Law in England in the Late Middle Ages," *Transactions of the Royal Historical Society*, 5th ser., 33 (1983), pp. 49-67; idem, "Settlement of Disputes by Arbitration in Fifteenth-Century England," *Law and History Review*, 2:1 (1984), pp. 21-43; Lorraine Attreed, "Arbitration and the Growth of Urban Liberties in Late Medieval England," *The Journal of British Studies*, 31:3 (1992), pp. 205-35, and William Ian Miller, "Avoiding Legal Judgment: The Submission of Disputes to Arbitration in Medieval Iceland," *American Journal of Legal History* 28 (1984), pp. 95-134.

⁶²² E.g., Sally Moore, "Law and Anthropology," *Biennial Review of Anthropology* (1969), pp. 252-300; Francis Snyder, "Anthropology, Dispute Processes and Law: A Critical Introduction," *British Journal of Law and Society* 8 (1981), pp. 141-180; Edward Powell, "Arbitration and the Law in England in the Late Middle Ages."

⁶²³ Thomas Kuehn, "Arbitration and Law in Renaissance Florence," p. 291.

⁶²⁴ *Ibid.*, pp. 292-94. Kuehn points out the technical differences in the *jus commune* between the more formal *arbitrator*, and the *arbitrator* who might seek to restore "a more indefinite *aequitas*," but acknowledges that in practice the distinction usually disappeared.

some procedural rigor. Two cities might willingly concede penalties for whomever did not accept a decision, but of course there was no ultimate authority to enforce them.

Still, arbitration among cities could be effective. On important issues, disputing parties might submit their differences to a panel, if it seemed that a single arbitrator might be insufficient or drawn too easily to one side or the other.⁶²⁵ In high-profile disputes, the panel might be thought to represent a court of public opinion, with powerful players asserting their own preferences through their decisions. Who the arbitrators were made a difference as well, and an important dispute in northern Italy might see the key territorial powers – including Florence, Venice, Milan, Bologna or Genoa – involved as arbitrators if the opportunity arose. As Lauro Martines has noted, for one dispute between Astorre Manfredi, the lord of Faenza, and Giovanni Barbiano, the Count of Cunio, where the arbitrators were Florence, Milan and Bologna, Florence supported Manfredi while Milan supported Barbiano, so that Bologna might be viewed as a more neutral tie-breaker.⁶²⁶ When disputes between Florence and Milan arose in the early 1390s Venice was a usual candidate for arbitrator, as well as the pope, emperor and king of France. In that period Venice was interested in Milanese containment, but was not a member of the League and ultimately no supporter of Florentine influence in the Romagna either. The *Serenissima* favored a balanced approach that avoided open conflict, and was fairly suited to the role.⁶²⁷ Arbitrators represented parts of this complex community of powerful interests, and the expression of those interests in the judgment to which their role entitled them might be

⁶²⁵ Martines, *op. cit.*, p. 349, describes a dispute between Florence and Siena over Lucignano where Bologna alone was the arbitrator, which was probably the more usual practice.

⁶²⁶ *Ibid.*, pp. 350-1. In this case, however, Bologna was actually in favor of Barbiano, which more generally created tensions between Bologna and Florence.

⁶²⁷ Thus Florence appealed to Venice, though the *Serenissima* never got involved officially in the dispute with Giangaleazzo over the Mincio in 1394; see pp. 183-85 below.

respected on prudential grounds. Flagrant violation of arbitration decisions, particularly when the result gave something to both sides, could easily find the disfavor of the arbitrator(s) and alarm sections of the larger community.

Careful diplomacy would be particularly important for Florence in its relations with Genoa. Significant trade passed between the two territories, but their relationship was delicate since Genoa was often guided by the French crown and Milan in the period. That a *consilium* from a renowned jurist was submitted in a reprisals dispute with Genoa, whether on the 1394 embassy or not, suggests how important it was to Florence to take a strong but careful, procedural approach to the Ligurian city.⁶²⁸ There was also of course a perceived possibility in the early 1390s that Florence could ally with Genoa and forge stronger ties. The various aims of the Florentine embassy – seeking friendship and alliance, as well as redress for unjust reprisals – were coordinated but pursued separately through skillful diplomacy and careful legal arguments. That Giangaleazzo succeeded in forming an alliance with Genoa in 1395, is in this case not as much an indication of Florence's diplomatic failure as much as Genoa's overriding strategic considerations and its old relationship with Milan.⁶²⁹ Even after that point the relationship remained an important one, and Florentine merchants continued to trade through Genoa until later in the war.⁶³⁰

Before 1396, when Giangaleazzo began to effectively surround Tuscany, and Florence allied with the French against Giangaleazzo, disputes passed through familiar diplomatic channels. A Florentine embassy to Siena in early 1394 reflects Florence's

⁶²⁸ Complaints seeking the restitution of merchants' goods were common; e.g., on an April 28, 1394 embassy to Perugia (*SCMLC*, 1, fols. 9v-10r), after Florence claimed that their merchants were robbed in Perugian territory.

⁶²⁹ E. Jarry, *Les origines de la domination française à Gênes, 1392-1402: documents diplomatiques et politiques* (Paris, 1896), pp. 160-3, 186-7.

⁶³⁰ *HFP*, 12.3, pp. 254-5, describes some of Giangaleazzo's restrictions on trade.

measured approach to disputes, which was driven as usual by legal claims and offers for arbitration with respect to the nagging problems of exiles and the mercenary companies.⁶³¹ It is also a good example of Florence's diplomatic approach to its enemies, since Siena remained strongly inimical to Florence and was one of Milan's staunchest allies throughout the period. As a matter of policy, it is likely that Siena was encouraging exiles as well as mercenary forces to harass Florentine territory and possessions, while Florence was no stranger to similar stratagems to keep its enemy in check.⁶³² There was still, however, room for at least temporary solutions that could assuage the tensions between the two Tuscan cities. Indeed, the path open was a legal one that focused on duties arising from the Treaty of Genoa.

The Florentine embassy answered complaints by Siena that damage and crimes had been committed in Sienese territory by men from Florentine territory, some of whom were Sienese exiles. The ambassadors, Matteo di Arrighi and Maso degli Albizzi, hastened to assure the Sienese that the interests of the two communes were linked together, and that they had not ordered and did not know of the offenses committed.⁶³³ Florence would, of course, do everything it could to bring the matter to a satisfactory conclusion. These were the pleasantries and denials of diplomacy, but there were more concrete responses in the Florentine repertoire as well. Albizzi and Arrighi were to declare that Florence had recalled all Sienese exiles from the border territory between the cities and warned them away from

⁶³¹ *SCMLC*, 1, fols. 6v-8r, embassy of March 21, 1394. *HFP*, 11.23, p. 189, accuses Siena of supporting the *condottieri* Broglia and Brandolino as they ravaged Aretine territory, a Florentine acquisition dating to 1384. Cf. Minerbetti, 1394, cap. 14, pp. 190-2.

⁶³² E.g., *HFP*, 11.40-41, pp. 207-9, admitting Florentine deceptions of a similar nature.

⁶³³ *SCMLC*, 1, fol. 6v: "Impero che per sperientia si vede, che essendo el loro et nostro comune insieme amici e fratelli, non puote perire la libertà, né del'uno, né dell'altro, e tutto'l paese multiplica in ricchezze e in ogni bene...", and the denial of wrongdoing or knowledge, *ibid.*, "Alla secunda parte de trattati direte [che] questo dispiaceri cordialmente, ma che si rendino certi questo non essere mai proceduto né per nostra ordinatione, né di nostra saputa."

further trouble.⁶³⁴ Concerning the question of crimes committed by the exiles and Florentine *contadini*, Florence ordered the rectors of the affected towns to investigate any crimes and punish them in person or corporately.⁶³⁵ If there were still disagreements, Florence suggested mediators to address the question, or another way that Siena might suggest.⁶³⁶ The Florentine ambassadors finally were to remind Siena that the Sienese were doing the same to Florentine towns and lands, and should equally desist.⁶³⁷

In their complaint, the Sienese had also demanded to have land back as an unfulfilled part of the Genoese treaty. Here again the Florentine defense was legal. Florence naturally admitted that land was to be returned under the treaty, but argued that the castles in question were never acquired by Florence or its people. Instead the owners of the castles had revolted from their Sienese lords (if, the Florentines added, Siena ever held them) and came formally under the protection of Florence in a time of war.⁶³⁸ Florence did not hold the castles, and could do no more than those who held them wished – the latter had in effect their *libertà*.⁶³⁹ The argument seemed subtle but interestingly had some support in the *jus commune*, in which a city or lands which came under the protection of another still retained their own jurisdiction.⁶⁴⁰ The Florentine ambassadors, despite refusing to return the castles

⁶³⁴ *Ibid.*, fols. 6v-7r, “Ma acciò che si tolga di ciò materia e sospetto, noi abbiamo rivotati tutti questi loro usciti da confini e daremo ordine che staranno sì loro da lungi che non potranno simili cose tentare.” The instruction was also a tacit admission that they did have influence over those exiles.

⁶³⁵ *Ibid.*, fol. 7r.

⁶³⁶ *Ibid.*, “Ultimamente proferrete un bargello o ufficiale comune, fra loro e noi, o qualunque altro modo paresse lor più utile e migliore. Impero che siamo presti di fare ogni cosa per effare queste cose, le quali ci sono in tanto dispiacere quanto dire si potesse.”

⁶³⁷ *Ibid.* An embassy to Perugia around the same time brought up similar border issues, requesting respect for territorial boundaries, and freedom from any incursions: *SCMLC*, 1, fols. 9v-10r.

⁶³⁸ *Ibid.*, “Ma perche queste fortezza non s’aquistorono né per noi, né per nostra gente, ma furono ribellate da coloro (se le tenevano), e in nostra accomandiga vennono al tempo della guerra, e siamo obligati a defendere loro...”

⁶³⁹ *Ibid.*, “...noi non possiamo in questo [fare] più che si voglino coloro, che le tengono...”

⁶⁴⁰ Cf. Martinus Garatus, *Tractatus de confederatione, pace et conventionibus principum*, ed. Wijffels, p. 428, qu. 39: “Terrae recommendatae Florentinis non dicuntur de districtu Florentino, sed dicuntur confederate,” citing the contemporary opinion of Francesco Zabarella on Clem. 1.3.2, and p. 436, qu. 56, for an opinion

outright, were to assert that they would do what was rightful and again to suggest that the case be referred to mediators or arbitrators for resolution.⁶⁴¹ The recourse to arbitration could also be part of a delaying strategy and other political calculations, but again might work as a temporary, if not more permanent, solution.

The Florentine ambassadors finally asked that Siena allow the citizens of Montepulciano to cross into Sienese territory, offering the same to the Sienese if done peacefully.⁶⁴² Montepulciano had been acquired by Florence in the last war and, as the treaty stated, was to remain at least temporarily under Florentine control.⁶⁴³ The town was situated more in Sienese territory, however, making access to Siena logical, though Siena may have attempted to restrict traffic through it. The Florentine instructions added that if Siena raised a threat of reprisal, the ambassadors were to try to get them suspended and have the whole matter reviewed after the facts were investigated.⁶⁴⁴ In the end, the Florentines even came down to details about the conflicts of individuals in the area and complaints made over particular animals.⁶⁴⁵ Such was a diplomacy that took cognizance of the smallest activities around the border of Florence and Siena, and could supply detailed responses to the gamut of Siena's complaints. Underneath it was a view, both on the part of Florence and Siena, to upholding rights and reminding the other side of responsibilities. Through negotiation, formal arguments based on treaties and various asserted rights, and particularly

rooted in older canon law and Bartolus: "Si in capitulis pacis continetur, quod talis civitas sit sub protectione regis vel ducis, rex vel dux non habet iurisdictionem in tali civitate. ca. ex parte tua. el. i. de privilegiis [X.5.33.13]."

⁶⁴¹ *Ibid.*, fol. 7r-v: "E che, ciò che siamo tenuti di fare di ragione siamo presti conpiutamente farlo...[e] che piaccia loro commettere in alcuni savi huomini..."

⁶⁴² *Ibid.*, fol. 7v.

⁶⁴³ See above, p. 160.

⁶⁴⁴ *Ibid.*, "E se volessono dire d'una rapresaglia ch'alcuno loro città d'uno pretende, pregate li che suspendino questa cosa, et in questo mezzo si cerche accordo e che si veggia la verità del fatto, el tempo fate sia maggiore si puote."

⁶⁴⁵ *Ibid.*

procedures like arbitration, it was hoped that at least some of the lesser questions pending between the cities could be resolved, even if a number of larger issues proved more intractable.

In relations with Milan most importantly, Florentine diplomacy was driven by a legal construction of rights and responsibilities based on the 1392 treaty. Before war restarted in 1396, Florentine diplomacy with Milan was usually so circumspect that it would not admit any grounds for quarrel between the sides. This was done in part on strategic grounds, to deny or mitigate offenses it committed, but there were occasions when Florence protested loudly. The dispute over the Mincio river in fact was the most significant of the early complaints which Florence lodged on behalf of the League.⁶⁴⁶ The diplomatic dispute arose when Giangaleazzo began to dam the Mincio river in Milanese territory and to build a channel to divert the river from its natural course through Mantua, which would have seriously threatened the city. Mantua had recently defected from Milan's side and joined the League, leaving the allies in little doubt about Giangaleazzo's motivations. Further angering the Count, Florence was helping Mantua to build a bridge at Borgoforte, which would have allowed easy military access into eastern Lombardy.⁶⁴⁷ The League still became alarmed by Milan's activities, and convened a meeting to discuss the problem; Florence then led the embassy to Giangaleazzo in April 1394 to register its protest.⁶⁴⁸

The delegation was led by two of the most skilled Florentine lawyers, Rinaldo Gianfigliuzzi and Ludovico Albergotti, whose instructions were to get right to the issue of

⁶⁴⁶ On the "fatto del Mincio," Mesquita, pp. 165-7; Martines, *op. cit.*, pp. 352-55; Minerbetti, 1393, cap. 12, pp. 174-75. The allies would eventually be able to prevail on the issue because Giangaleazzo was not willing to come to war over it and diplomatic opinion was against him.

⁶⁴⁷ Martines, p. 352, observes that Florentine aid to Mantua's project was the prior and provocative cause of the dispute.

⁶⁴⁸ *SCMLC*, 1, fols. 14v-16v.

the Mincio. Florence argued that diverting the Mincio was a violation of nature and of “civil, canonical, human and divine” right.⁶⁴⁹ They alleged that it was a violation of the Treaty of Genoa and argued that in the name of peace and concord Milan should not continue its plans.⁶⁵⁰ If Giangaleazzo did not agree, Florence suggested that the matter should be submitted to some outside party or arbitrator (*persona di mezzo*), since Milan should not be its own judge in the case.⁶⁵¹ Florence’s admonition referred back to legal theory as well, since to judge in one’s own cause was the right of a sovereign and the basic right anchoring the sovereign’s ability to make war.⁶⁵² By warning Milan against judging for itself, Florence indicated that it should take into account the other interested parties, and implied a community on whose interests there was no absolute right to infringe except in defense and as a last resort. Indeed, this was still a basic assumption of diplomacy, despite juridical opinion that emphasized the right of a sovereign to judge its own cause.

Florence stuck naturally to law in arguing their case, reminding Milan that the question had to be determined according to rights and reason and the stipulations of the peace agreement. Tact and strategy were involved, for Florence wanted Milan to accept Venice as an arbitrator, instructing its ambassadors to bring up the proposition carefully and

⁶⁴⁹ This was again the familiar appeal to a violation of law and rights: fol. 14v, “E che volere fare cosa, segno principio et attitudine di tanto grave offesa, quanto sarebbe torre via quelle fiume a Mantova, el quale la natura, e eternale evidentia anche existentia, e ogni cagione civile et canonica, humana e divina gli à conceduto, et sicurare chon premesse chon parole et chon scritture non è abastanza.”

⁶⁵⁰ *Ibid.*, fols. 14v-15r.

⁶⁵¹ *Ibid.*, fol. 15r, that Milan, or Giangaleazzo, should not be judge in his own cause: “E chelli non debba di questa differenzia esserne giudice egli medesimo, e non è convenevole...,” and on submitting it to arbitrators, “Se pure non volesse rimanere contento, mostrandoli che esso non si ponga buon, direte chesso proffera uno modo, e noi ne profeciamo un altro, e che al lui non pare el nostro, ne a noi el suo, e chelli sia contento rimetterlo in persona di mezzo, vegga l’uno modo e l’altro, e quale gli pare più honesto e più ragionevole e migliore, quello seguiti e ciascuno sia contento a quello sia dichiarato.”

⁶⁵² See ch. 3 above, pp. 71-92. Bartolus and Paolo di Castro, for example, emphasized that when there was no superior authority, it was licit to judge and pursue one’s own cause, which included a right to war. Of course, in practice, though there was no superior authority, the power and interests of other members of the community were recognized and made for limitations. And treaties and arbitrations did not create a superior authority but did create legal obligations.

with a certain amount of dissembling.⁶⁵³ For its part, Milan of course objected to the work on the bridge at Borgoforte, by which Mantua would have easy access to Milanese territory. In view of Milan's fears, Florence suggested that the dam work at Valleggio and bridge at Borgoforte be suspended and placed in the hands of the arbitrator until the dispute was concluded.⁶⁵⁴ Florence also suggested offering the pope or king of France as guarantors that the bridge would not be used for military action against the Count.⁶⁵⁵ As far as a negotiated resolution was concerned, Florence allowed that Milan should first air a solution to the problem and see if Florence might agree to its proposal.⁶⁵⁶ Wrangling over the issue continued for some time after the embassy, and Venice was not officially called upon as arbitrator, but partly with the weight of public opinion against him, Giangaleazzo abandoned the effort to divert the river. Florence likewise withdrew support from Mantua for the Borgoforte project.⁶⁵⁷ From a diplomatic perspective, Florence took it as a victory, remarking famously to the Ferrarese that, "it is much better to spend the time in embassies, than to break off negotiations and embark on a war, which would involve more expense every day than these embassies cost in a year."⁶⁵⁸

It was not just financial calculation that caused Florence, and indeed all of the cities, to expend so much effort on diplomacy. The opportunity to resolve disputes in other ways,

⁶⁵³ *Ibid.*, fol. 15v., "Sicché chon tutti quelli honesti modi che sapete, adoperate [che] venga ne Vinitiani, dissimulando et faccendoni dalla lunga, e mettendo prima in fodo le qualità debbono essere nel mezzano, e restrugendo per modo che quasi per necessita finenga ne Vinitiani."

⁶⁵⁴ *Ibid.*

⁶⁵⁵ *Ibid.*, fol. 14v.

⁶⁵⁶ *Ibid.*, fol. 15v.

⁶⁵⁷ Mesquita, p. 166, notes that Giangaleazzo would have known that Venice would not be favorable to him.

⁶⁵⁸ Brucker, *op. cit.*, p. 150; *SCMLC*, 1, fol. 30v. Immediately after expressing such a sanguine attitude toward diplomacy to their *collegati*, Florence reassured that they were still bound to come to their aid: *SCMLC*, 1, fol. 30v, "et ultra ciò direte noi siamo disposti dove le chose non prendano buona forma a metter avere et persone per difesa di tutti e honore della lega."

due to the consequent promise of peace, found continued support in Florentine councils.⁶⁵⁹ Positive legal or diplomatic resolutions were still victories; diplomacy might be characterized as war by other means, but there was a procedural regularity and a reliance on legal claims and formal processes to try to resolve contentious issues.⁶⁶⁰ Though legal arguments were not often judged impartially, strong legal arguments, based often on treaties, and sometimes relying for support on the technical and philosophical apparatus of the *jus commune*, could have an effect. Moreover, with an eye to equity, arbitrators could give something to each side to diffuse tensions. Diplomatic negotiation and arbitration did not represent a system that could solve the deepest problems of foreign relations, but they could find solutions to particular issues and obviate the need for immediate commercial or military retaliation. Admittedly, chronic distrust, deeply-held territorial ambitions and structural instabilities were not well addressed by such legal and negotiated approaches in the long term. These were primary contributors to the restart of the war in 1396, but there were also in the early 1390s a number of smaller conflicts that disrupted the fragile balance and set the stage for war between the principal powers. At the same time Milan and Florence had territorial ambitions of their own, and shared responsibility for some of the smaller conflicts, while those conflicts shaped the perception and policy of the primary antagonists.

The central issues that endured after the peace, as is clear from the embassies, were foremost the problem of mercenaries, of repatriating or in another way containing exiles and border raids, and attempting to address satisfactorily the outstanding territorial disputes.

⁶⁵⁹ Brucker, *op. cit.*, pp. 149-50, emphasizes this, from a consideration of the *Consulte e Pratiche*.

⁶⁶⁰ Beyond the context of war and dispute, diplomacy of course served a host of functions, helping to maintain good relations, communicate intentions and gather information, while relying on ritualistic shows of praise, honor and deference. Of course it was used to conclude accords and commercial agreements as well. On the various functions of diplomacy in the period the basic work is still Garrett Mattingly, *Renaissance Diplomacy* (London, 1955).

These issues faced difficult prospects of being resolved simply through negotiation, but attempts had been and were made even on larger territorial issues, like the question of Lucignano, which turned between Florence and Siena. Yet even before 1395, Florentine relations with Pisa's Jacopo d'Appiano in Tuscany became perilous, and events in the Romagna also brought increasing instability, such that peace became increasingly difficult to maintain on all sides by 1395 and certainly 1396. The diplomatic challenges in the war itself would be somewhat different than before, as Florence turned to focus on addressing disputes among the allies and coordinating their activities in Tuscany and in the highly fractious Romagna.

In the Romagna, a succession struggle in Ferrara between Niccolo and Azzo d'Este eventually saw Florence and Milan support the opposing claimants. Niccolo came to power after the decease of his father Alberto in 1393, while the more distant kinsman Azzo sought refuge in Venice and then Florence.⁶⁶¹ Azzo lost Florentine support when he mounted a campaign to topple the Ferrarese government, but was aided by the local lord Giovanni da Barbiano, who was eventually supported by Milan.⁶⁶² As Azzo engaged in attacks on the Ferrarese state, the Ferrarese themselves and the region divided, with towns like Forli and Ravenna backing Azzo, and Astorre Manfredi, the lord of Faenza and old enemy of Azzo, supporting Niccolo militarily.⁶⁶³ Florence took up Niccolo's cause and officially sent forces to the area: indeed, Florence was held to Ferrara's defense by the stipulations of the League. It was often the case, though, that exiles and mercenary companies were available as

⁶⁶¹ Trevor Dean, *Land and Power in Late Medieval Ferrara: The Rule of the Este, 1350-1450* (Cambridge, 2002), pp. 14-27, addresses some of the complex family politics of the Este family in this period.

⁶⁶² Giovanni da Barbiano was a relative of Alberico da Barbiano, one of Giangaleazzo's leading *condottieri*. Both later directed their forces against Tuscany and Florence, partly on account of their own grievances stemming from Florentine intervention in the Romagna. Bruni gives a colorful account of Giovanni's personal animosity toward Florence, *HFP*, 11.28, pp. 193-5.

⁶⁶³ For the beginnings of the conflict, Minerbetti, 1394, cap. 14, pp. 190-2; 1395, cap. 1, p. 194; *HFP*, 11.26-7, p. 191-3.

undeclared proxy agents, and local conflicts in the Romagna and Tuscany tended to draw the support of Florence and Milan and become, at their worst, proxy wars between the larger powers.

Even in these regional conflicts, however, Florence also tried to play a role as official or more informal mediator, particularly among its allies. It has been noted that Milan, Florence and Bologna tried to settle a dispute between Azzo and Astorre Manfredi. Before Azzo found support for his political ambitions in Ferrara, Florence was also willing to intercede in other land disputes on his behalf. At that time, in the summer of 1394, Azzo was a paid mercenary for Florence and looked on with some favor.⁶⁶⁴ Controversies had arisen over the control of certain towns in Ferrarese territory, including Pavullo nel Frignano, Sassuolo and Castellarano, and Florence sought to bring Azzo's envoy to Bologna and Ferrara to discuss matters, supporting some of Azzo's claims.⁶⁶⁵ When Giovanni Barbiano in 1396 invaded the lands of Niccolo d'Este and Astorre Manfredi, Bologna was implicated as the instigator, and Florence again tried to step in to contain the crisis among its allies.⁶⁶⁶ Between 1394-96, however, it became clear that in the Romagna, negotiated approaches would have limited success. The main cities beyond the Apennines were united under the League but, aside from the pressures of defecting, local competition among them posed a perennial threat to their cohesion. And while Florence's diplomatic efforts to maintain the League were concerted, they also used their interventions to advance their own territorial interests – even in the Romagna – which angered the allies.⁶⁶⁷

⁶⁶⁴ Azzo was under contract to the League in 1394, perhaps partly to keep him under some control; *SCMLC*, 1, fol. 28v, states that Azzo's wages had been paid through September.

⁶⁶⁵ *SCMLC*, 1, fols. 29v-30v. *HFP*, 11.21, p. 186, notes that Florence, "for their love of the [Este] family, tried to lead Azzo back to concord [with them] through arbitration (*ad arbitrium*)," which may mean more loosely through negotiation. Cf. Minerbetti, 1394, cap. 14-15, pp. 190-2.

⁶⁶⁶ Mesquita, p. 195.

⁶⁶⁷ E.g., the affair of Castrocaro, on which see below, p. 201, fn. 720.

The complexity of intervention played out in Tuscany also. In 1394, Florence felt threatened by mercenaries who had been discharged from Giangaleazzo's service only to attack the territory of Arezzo (officially Florentine territory).⁶⁶⁸ The perception among some Florentines was that their old adversary Siena was now paying the troops and that the strategy had the backing of Milan.⁶⁶⁹ Florence sent troops to relieve a besieged castle at Gargonza and protests to Giangaleazzo. The latter were effective: Giangaleazzo responded by prevailing on his sometime captain Broglia to withdraw from the area. Florence also responded in a positive manner. For its part, Florence beseeched Biordo Michelotti, the ruler of Perugia and Florentine *condottiere*, to avoid at all cost invading the territory of Siena or Pisa.⁶⁷⁰ They sent similar warnings with their ambassadors to the *condottieri* in August 1394, worried now that they might try to attack Lombardy itself.⁶⁷¹ Milan had allies in Siena and Pisa, and finally Genoa, through which it maintained its political involvement in Tuscany, but its public interventions with those allies could be good diplomacy. And when asked to intercede with various mercenaries to clear them out of the region, Giangaleazzo's "beneficent" diplomacy could also redound to his public credit. Certainly Florence's interventions with Biordo and its other *condottieri* also had value as good diplomatic moves, as both sides entered the fray to mediate or arbitrate, admonish mercenaries, help allies and themselves.

There were also serious problems in controlling the non-contracted mercenaries, which caused problems for an open and successful diplomacy. In particular, the freedom of

⁶⁶⁸ Arezzo was acquired by Florence in 1384, making this a strike at Florence as well. The mercenaries were Ceccolo Broglia and Brandolino Brandolini, who Florence followed keenly; e.g., *SCMLC*, 1, fol. 9v, Florence asked their ambassadors on an April 28, 1394 mission to learn of their movements and intentions.

⁶⁶⁹ Minerbetti, 1394, cap. 15, p. 192; *HFP*, 11.23, p. 189.

⁶⁷⁰ *SCMLC*, 1, fol. 23r.

⁶⁷¹ *SCMLC*, 1, fol. 28v.

the mercenaries contributed to an atmosphere of suspicion – which in some cases was quite justified – since the unofficial or clandestine use of the mercenaries' services was very difficult to determine. This was a serious liability that undermined the treaties and any negotiated solutions. The soldiers who gave up Gargonza in fact moved on to attack Lucchese territory, at the reputed bidding of Jacopo d'Appiano, Pisa's new ruler, and possibly without any approval from Giangaleazzo.⁶⁷² With mercenaries in some cases pursuing their own territorial agendas, and in others working unofficially for smaller powers like Ferrara or Pisa, the prospect of regional peace was again dim. The mercenaries' continual presence in Tuscany in the early 1390s certainly did help to inflame an old conflict between Lucca and Pisa which later became a real war, and threw the independent-minded Lucca onto Florence's side.⁶⁷³ Deep antagonism between Pisa and Lucca had emerged soon after d'Appiano came to power: the military incursion into Lucca in 1395, which was likely directed by Pisa, was only one incident in a difficult relationship, but was a key turning point.⁶⁷⁴ Lucca joined the League on account of it, and Pisan depredations in the following year, 1396, led to open war, not only between Pisa and Lucca, but finally Milan, Florence and the allies.

Florence's relationship with Pisa under Jacopo d'Appiano was difficult and adversarial almost from the start. Florence's relationship with Pisa was often similar to that with Siena, and the diplomatic issues that arose among them were frequent, with complaints of depredations and disorder, and some fighting, around the borders. On a 1394 Florentine

⁶⁷² Mesquita, p. 202, believes that Pisa may have put Giangaleazzo in an uncomfortable position in this case. If true, it may have led Giangaleazzo to a fuller engagement earlier than he wished, providing an example of a smaller power that was able to force the hand of its patron. By 1396, it became clear that the mercenaries were under d'Appiano's control and had Giangaleazzo's backing.

⁶⁷³ Christine Meek, *Lucca 1369-1400: Politics and Society in an Early Renaissance City-State* (Oxford, 1978), p. 301. Lucca had remained aloof from the League of Bologna, though as early as 1392 they were included in a Florentine treaty with the companies, promising immunity from attack.

⁶⁷⁴ *Ibid.*, p. 303. d'Appiano was implicated in a plot to put Lucca under Pisan rule even by 1392.

embassy to Pisa, Florence had to make assurances that exiles residing in Florentine territory would not be allowed to aggress upon Pisan territory.⁶⁷⁵ There were also mercenary companies around Florentine territory which threatened Pisa. Florence thus had to tread carefully, and instructed its ambassadors to claim that the companies were being paid not to attack Florence but were under no obligations of service.⁶⁷⁶ The men were allowed, however, to pass through Florentine territory.⁶⁷⁷ Of such claims Pisa must have remained skeptical at best. Florence in general could play the same game as Pisa, uneasily defending certain companies, or the remnants thereof, as free, and trying to absolve itself of responsibility for harm they might inflict.⁶⁷⁸ A notable absence on the embassy was the offer to settle matters by arbitration, which may be some indication of the deep distrust between Florence and Pisa even in 1394. The issue of responsibility for mercenaries was certainly a burning one, but here the law could really only play a role when the relationships between mercenaries and their masters emerged from the uncertain world of rumor and intrigue, and found expression in explicit promises and contracts.

In the Pisa-Lucca conflict in fact a legal matter arose concerning mercenaries, though it was not as much a question of responsibility for the mercenaries' actions, as of honoring a

⁶⁷⁵ Embassy of July 19 to Pisa, *SCMLC*, 1, fol. 24r-26v. In particular, Florence assured that the family and supporters of the deposed Pisan leader, Pietro Gambacorta, were forbidden to offend Pisa, fol. 24r: "Et che oltre ciò abbiamo fatto comandare a tutti nostra ufficiali di fuori facciano bandire che niuno ardisca, sotto pena delle avere et della persona, andare sul lor terreno o di Siena, con queste gente [the Gambacorti] o senza loro, a fare alcuna offesa." As usual, Florence said that its officials had been instructed to publish warnings to this effect throughout their cities.

⁶⁷⁶ *Ibid.*, fols. 24r-v., "E che una volta vogliano credere la verità, che queste genti sono signori di se, e non sono tenute ubidirci più che si vogliano."

⁶⁷⁷ *Ibid.*, fol. 24v.

⁶⁷⁸ The truth of Florence's claim in this case was uncertain. In 1396, they denied that mercenaries who ravaged Giovanni Barbiano's lands were in their service, when they had encouraged them, at least according to Bruni (*HFP*, 11.40, pp. 205-7): "...quoniam et ipsi [Florentines] eisdem artibus oppugnabantur, auctores fuerunt ut Ludovicus Cantelli cum Bartolomeo Pratensi et Antonio Obici, qui tunc in Mutinensi bellum gerebant, in societatem latrocinii coiret, quo et ipsi pari fallacia inimicos ulciscerentur." Cf. Minerbetti, 1396, cap. 3, pp. 204-5.

promise made to them. It also called again on the services of Angelus de Ubaldis.⁶⁷⁹ In this case an official safe conduct had been granted by Lucca to certain mercenaries, who were passing from Pisa through Lucchese territory on into Lombardy. The soldiers, a certain Cristoforo and six knights from Parma, along with their goods and attendants, had been given immunity for six days within which to cross Lucchese territory, but had been ambushed and arrested on the Pisan road to Lucca by certain of its mercenaries.⁶⁸⁰ The detained mercenaries, and Pisa on their behalf, protested; and Pisa probably submitted Angelus's legal opinion to Lucca as part of that protest or as part of an arbitration process to which the sides consented.⁶⁸¹ In any case, Angelus came down firmly in favor of the mercenaries and Pisa, carrying the implications of the safe conduct to their logical conclusion. The issue probably arose in early 1397, during a period when the two cities were at war, and the *consilium* is dated May 1397, giving a *terminus ante quem* for the events it treats.⁶⁸² The detail is important because Angelus, though working from Padua, frequently worked on Florentine cases in the period. He was associated with Florence, took up residence and taught there in the following year, but was independent in 1397 and decided in favor of an enemy of the commune.⁶⁸³

In his *consilium* on the case, Angelus asked whether the mercenary and his men were justly detained, and whether the safe conduct should be able to secure their release. Angelus considered the import of the safe conduct, finding it absurd that safety while travelling the

⁶⁷⁹ Angelus, *Consilia*, no. 363, fol. 259rb-vb.

⁶⁸⁰ *Ibid.*, fol. 259rb.

⁶⁸¹ Indeed, the internal evidence is not enough to determine in what manner the *consilium* was submitted. However, in June 1397, a month after the *consilium* is dated, Spinetta Malaspina was acting as mediator between Pisa and Lucca, in an attempt to make peace; see Meek, *op. cit.*, p. 305. As part of a general peace effort, the sides may have consented to arbitration over this specific issue of the violated safe conduct.

⁶⁸² *Ibid.* Angelus noted the war: "...praesupposito de guerra, vigente inter Commune Pisarum et Lucae." The date is at the end, fol. 259vb.

⁶⁸³ Gloria, *Monumenti*, vol. 1, p. 179.

road to Lucca, even in Pisan territory, was not also guaranteed by the promise.⁶⁸⁴ The point seemed clear enough, but was not a given in a period when tortuous legal logic could be employed to reach tortured conclusions. With refreshing simplicity, Angelus held that if an individual should be free from violence in a certain place, he should likewise be free from it in coming to and leaving that place.⁶⁸⁵ He also noted that ambassadors were agreed to have immunity under Roman law not only in the place to which they were travelling, but through the places they travelled.⁶⁸⁶ Since all of Pisa was, as Angelus said, a gateway to Lucca, the mercenaries should have enjoyed full protection from the Lucchese in Pisa and Lucca.⁶⁸⁷ To do otherwise was to offer the safe conduct with *dolo malo*, or fraudulent intent and full culpability.⁶⁸⁸ As a result, Angelus demanded the release of the men. The jurist also assumed that the mercenaries were working for Lucca and declared as much, whether it had been admitted or not.⁶⁸⁹ If they had denied it, actions like conveying captives to Lucchese prisons would have helped establish the link. But only in rare cases could a denial of responsibility for the mercenaries' actions be pierced through.

It is also important to emphasize that formal legal protests went forth in the midst of war. Indeed, just as multi-party peace conferences sat frequently during the war of 1396-1402, smaller-scale negotiations, protests and arbitrations continued with equal interest

⁶⁸⁴ Angelus, *op. cit.*, fol. 259va: "Et si aliud diceremus, ab eo aliud sequeretur absurdum, videlicet exeunte Christophoro de territorio Lucae, et intrante in territorium Lombardiae, in isto caperetur per gentes Lucae, quod nihil adversus securitatem praedictam factum esset, quod est falsum."

⁶⁸⁵ *Ibid.*, "Item qui non debet violentiam mihi in loco: nec etiam extra locum, per quem ad locum illum venit." Angelus employed analogous legal reasoning in another case, in which Venice had given Genoese merchants the right to travel on their waterways, but later tried to legally forbid them from using the ports along those waterways (Angelus, *Consilia*, no. 290, fols. 205va-207rb).

⁶⁸⁶ *Ibid.*, fol. 259va: "Pro hoc: quia legati hostium ad Romanorum populum Romani populi tanquam sancti securitatem habent, et illa fruuntur non solum intra praesidia eorum, ad quos transmittuntur, imo intra praesidia transmittuntur, ne intra illa possint offendi."

⁶⁸⁷ *Ibid.*

⁶⁸⁸ *Ibid.*: "Quid enim prodesset securitas, si adversus illam excogitato dolo quis aliquid ageret in via...[a]d quid autem prodesset securitas, si in via machinatio et dolus contra securitatem habentem exerceretur? Certe nihil."

⁶⁸⁹ *Ibid.*, fol. 259rb.

among the individual parties, on which *consilia* might be generated.⁶⁹⁰ Among the smaller, but sometimes still inflammatory disputes, were prisoner cases: one has been noted.

Another such case, of lesser legal importance but interesting political significance, was brought up during a Florentine embassy to Milan in August 1395.⁶⁹¹ It concerned the captivity of the son of Rinaldo Gianfigliuzzi, a leading lawyer and top diplomat of the commune. Rinaldo's son, Giovanni, was captured while serving in the army of the Count of Armagnac, probably in 1391 when the Count allied with Florence and brought an army into Italy to help crush Giangaleazzo.⁶⁹² But the Count had been killed and the army scattered by Milanese forces on July 25 of that year, with the young man's capture probably taking place around the same time.⁶⁹³ That there was still a diplomatic issue over Giovanni in 1395 is somewhat surprising, but while it appears that a ransom payment remained in dispute, it is not clear that Giovanni was any longer in captivity.

Giovanni's case also became the subject of a *consilium* by Angelus, which offers an example of the *jus commune* confronting (and avoiding) the customs of knightly warfare.⁶⁹⁴ Giovanni had been captured by an Englishman named John and sometime during his captivity promised to act secure the release of one of John's countrymen, a certain Robin, from a Florentine prison, the *Stinche*.⁶⁹⁵ Securing Robin's release was likely a condition for

⁶⁹⁰ Mesquita, pp. 215-16, notes the frequent peace conferences that sat during the war. Five of the *consilia* Angelus penned – nos. 363, 367, 368, 390, 391 – were submitted for cases that arose in 1397-98, and various legal grievances must have been common during the war.

⁶⁹¹ *SCMLC*, 1, fols. 63r-64r, an August 25, 1395 embassy to Milan, celebrating the elevation of Giangaleazzo to Duke of Milan. Florence was represented by Maso degli Albizzi, Cristofano degli Spini and Baldo della Tosa; Rinaldo himself did not go. Florence's hawkish, deeply anti-Viscontean faction was composed of some of its most active diplomats, including Maso, Rinaldo, Spini and Filippo Corsini.

⁶⁹² Angelus, *Consilia*, no. 226, fol. 153ra, "Ioannes Domini Raynaldi de Glanfigliatis de Florentia, in conflictu Comitit de Armigerach, et suarum gentium sibi dato per gentes domini Comitit Virtutum captivatas..."

⁶⁹³ William Caferro, *John Hawkwood*, pp. 303-5, gives a description of the events and context.

⁶⁹⁴ Angelus, *op. cit.*, fols. 153ra-b.

⁶⁹⁵ *Ibid.*, fol. 153rb: "...remansit captivus Ioannis Dentis Anglici, qui Ioannes Domini Raynaldi in sua fidelitate, fide et legalitate promisit se facturum et curaturum, quod Robinus Combriae Anglicus detentus in stichis Communis Florentiae cura sua et opera relaxaretur de dictis stichis: et relaxatus, praesentaretur eidem Ioanni

Giovanni's own release. Angelus held that Giovanni had upheld his end of the bargain, as Robin had been released, but a legal issue arose over the question of whether Giovanni still had obligations to fulfill.⁶⁹⁶ Angelus noted that if Giovanni had made any additional promises, he would not of course be released from those further promises simply by fulfilling the first.⁶⁹⁷ However, the jurist went on to ask whether any ransom promise Giovanni made could be valid *de jure*; skirting the issue, he wrote that it was beyond the scope of the consultation.⁶⁹⁸ Angelus's *consilium* did not reveal the full scope of the issue at hand, and of course did not indicate if the man was released. But on the 1395 embassy to Milan, long after it should have been resolved, the issue of an outstanding ransom payment of 500 florins was still in dispute.⁶⁹⁹

Though it is difficult to fill in the details of the case, it highlights the limits of the law, and the learned law, in such a situation. Certainly, *consilia* submitted in the course of diplomacy, and arbitration decisions, might not have any effect on the other side. And in this case the other side was not a city but an English mercenary, who accepted personal

Denti per ipsum Ioannem Domini Raynaldi, vel alium eius nomine.” Dent is in Cumbria, making the two reasonably close countrymen.

⁶⁹⁶ *Ibid.*, fol. 153rb: “...ponendo per constanti, quod omnis promissio facta per ipsum Ioannem Domini Raynaldi valuerit, dico, quod quatenus dictus Ioannes Domini Raynaldi promisit se facturum et curaturum, quod dictus Robinus detentus in dictis carceribus stincharum Communis Florentiae libere relaxeretur, et successive post relaxationem praesenteretur dicto Ioanni Anglico, quod dictus Ioannes Domini Raynaldi fuerit, et fit plenarie absolutus et liberatus, omnisque obligatio tam naturalis quam civilis, propter satisfactionem.”

⁶⁹⁷ *Ibid.*, “Si autem aliud promississet dictus Ioannes Domini Raynaldi dicto Ioanni Anglico, nec absolutus, nec liberatus esset dictus Ioan. Domini Raynaldi per aliqua verba, apposita in absolute et liberatione predicta, quoniam omnia sunt restricta ad dictam promissionem faciendi, et curandi, et cetera...”

⁶⁹⁸ *Ibid.*, “Si autem quaeretur, an dictus Ioannes Domini Raynaldi teneatur de iure fidem observare (si quam promissionis) dicto Ioanni Anglico...,” and goes on to say, “non sum de hac re consultus.” He did, however, admit that it was a legitimate question, and remained in doubt: “et etiam considerato, quod ad se obligandum erat inhabilis ex forma statutorum Florentiae, prohibentium filiumfamilias obligari, nisi sub certa forma.” Being under the legal power of a *paterfamilias*, or head of household, the *filiumfamilias* had limitations on what contracts he could enter into. For Giovanni, as a *filiumfamilias*, obligating himself *in corpore* was legally problematic.

⁶⁹⁹ *SCMLC*, 1, fol. 64r: “Pregherrete ancora il conte gli piaccia fare che mess. Jacopo d’Appiano finisca in fatti del figliuolo di mess. Rinaldo Gianfiglizzi, pagando cinquecento fiorini secondo che mess. Piero di Corte suo comissario ha dichiarato della quale dichi a ragione n’appariste publico instrumento del quale n’avete la copia.” There is a chance he was already released but the ransom payment was still in the balance. Admittedly, more investigation needs to be done on the case.

ransom pledges according to the battlefield norms of the *gentes armorum*, the legality of which Angelus appeared unwilling to comment on. It is unclear in any case what court or military tribunal the case could have been submitted to, and an attempt at private mediation or arbitration may have been the only path open.⁷⁰⁰ In this connection it should be mentioned that the case differed notably from the earlier prisoner case concerning the son of Lapo da Castiglionchio. Giovanni was captured seemingly acceptably in the course of war, and traditional laws of war applied to him.⁷⁰¹ He undoubtedly became an important prisoner when his parentage was revealed, but the issue was not as explicitly political as that of Paolo da Castiglionchio, whose incarceration Milan claimed was a violation of the Treaty of Genoa, a much more serious issue. Giovanni's case was surely a thorn in Florence's side, but whatever Milan's involvement in it, or Pisa's later on, it was formally a matter that turned between private soldiers.

Little speculation is needed concerning the more general purpose of the Florentine embassy to Milan. Florence went officially to celebrate Giangaleazzo's investiture as Duke of Milan, but more importantly to seek assurances of peace at a time when it had become very fragile. Significantly the ambassadors urged Giangaleazzo to approve a compromise (*compromesso*), an agreement to submit a dispute to arbitration, involving Giovanni

⁷⁰⁰ Maurice Keen, *The Laws of War in the Middle Ages* (London, 1965), pp. 23-59, discusses military tribunals in France during the Hundred Years War, which often dealt with capture and ransom questions; there is no evidence here unfortunately for the role of similar tribunals.

⁷⁰¹ Mercenaries generally held themselves to a customary code of conduct in war, which importantly included rules on taking spoils, prisoners and ransom. These rules could be strictly enforced: in one example reported by Minerbetti and Bruni, Bernardone, a captain-general of the Florentine forces, executed a subordinate captain for failing to distribute spoils to the whole army as was customary (Minerbetti, 1397, cap. 9, pp. 217-8; *HFP*, 11.55, pp. 221-23). On the laws of war among soldiers Keen is still a reliable guide; see *Laws of War*, pp. 156-85. For *jus commune* opinions on ransom, ch. 3 above, pp. 112-15. A good overview of the (slow) changes in spoils and ransom practice is found in Philippe Contamine, "The growth of state control. Practices of war, 1300-1800: ransom and booty," in *War and Competition Between States*, ed. P. Contamine (Oxford, 2000); cf. M. Mallett and J. Hale, *The military organization of a Renaissance state: Venice, c. 1400 to 1617* (Cambridge, 1984), p. 143ff.

Barbiano.⁷⁰² Barbiano was a primary cause of disruption in the Romagna: his mercenaries supported Azzo and had attacked Ferrara and Faenza, and he had at least tacit support from Milan. The ambassadors were to ask Milan to help reign in Barbiano by means of an arbitration decision, which Florence and Bologna were apparently already behind; it would need Milan's approval to have any chance of being effective.⁷⁰³ The proposed compromise also emphasizes the value of arbitrators drawn from opposing sides: any compromise imposed would tend to represent an agreement by the supervening arbitrators who had interests in the conflict. In this case, however, the process failed when Milan withdrew and Florence and Bologna found themselves in disagreement.⁷⁰⁴ The failure was indicative of a growing divide by 1395 that separated not only Florence and Milan, but Florence and its Romagnol allies as well.

Despite diplomatic efforts, the prospect of war loomed larger through late 1395 and into 1396. The inability to contain Giovanni Barbiano was significant, for he continued to cause problems, moving alarmingly into Tuscany in early 1396. Barbiano and a large group of mercenaries inflicted considerable damage on Arezzo and Cortona in March, and Florence resorted to bribery to induce some of them to desert and leave the area.⁷⁰⁵ Florence then encouraged the "purchased" mercenaries to cause damage around Reggio Emilia and Parma, about which Giangaleazzo immediately complained, while Florence denied responsibility.⁷⁰⁶ Depredations continued on both sides in Tuscany through the spring, and it is testimony to the imminent danger of open war that Florence quickly convened a

⁷⁰² *SCMLC*, 1, fol. 64r.

⁷⁰³ *Ibid.*, "Direte anchora che nostra intentione fa, e è chel compromesso chel conte Joh. da Barbiano si faccia nella forma chella sua signoria rimase d'accordo chon gl'ambasciadori di Bolognesi e nostri."

⁷⁰⁴ Mesquita, p. 195. Bologna was in fact a sometime supporter of Barbiano.

⁷⁰⁵ *HFP*, 11.38-9, p. 205. For the plan to buy off mercenaries, *DBLC*, 2, fols. 16v-17r.

⁷⁰⁶ According to Bruni: *HFP*, 11.40, pp. 205-7.

conference with Giangaleazzo and the northern cities, and signed a treaty at Florence to reassure their concord on May 16.⁷⁰⁷

The treaty echoed some of the terms of the Treaty of Genoa, but this document was a clear confession of the most intractable obstacles to peace and underlined again the limits of diplomatic solutions. The first provision held particularly that no subjects or adherents offend or permit offense to the other side or its subjects or adherents.⁷⁰⁸ Following provisions treated mercenaries. The accord required that “men at arms” had to be employed with a contract, and by an oath which would assure that the mercenaries would not offend the other side after the contract expired.⁷⁰⁹ If the mercenaries did ravage some territory after the contract expired, the allies and Milan were held, at the petition of the other side, to send aid against those mercenaries, “according to their ability,” to disperse them.⁷¹⁰ The sides were not to allow (presumably uncontracted) mercenaries to form into a company in their territory, nor allow those men safe passage through their territory or give them aid.⁷¹¹ Nor could they remain in the employer’s territory beyond the contract. The treaty also tried to break up the company after the contract was finished. One provision treated exiles, though ambiguously, agreeing that they had to report to the government of the place where they had

⁷⁰⁷ The treaty is found in *Cap*, 11, fols. 186r-191v; Guasti, *I Capitoli*, ii, pp. 115-18, no. 43.

⁷⁰⁸ Guasti, p. 116.

⁷⁰⁹ *Ibid.*, pp. 116-7. The period of time the mercenaries could not offend the other side after the contract was the same as the stipulated limit of the contract, one year. If observed, it would make continuous war difficult.

⁷¹⁰ *Ibid.*, p. 117: “Che se una qualche gente d’arme, in modo di compagnia ec., volesse offendere o verisimilmente si sospettasse volere offendere una delle parti ec., debba l’altra, a petizione di quello che si volesse offendere, dar aiuto di gente d’arme secondo la sua possibilità, fino a perseguire, dissipare ec. quella compagnia...”. The phrase “according to ability (or opportunity)” emphasized what was true of all treaty obligations. As good faith agreements they would always be fulfilled “according to ability.” The League’s members, including Florence, would use that clause to avoid providing money and troop support when the war became difficult and was waged on two fronts.

⁷¹¹ *Ibid.*

sought refuge.⁷¹² A final provision demanded that if any foreign lord or king came into the peninsula to offend one of the sides, the other was held to give aid to expel him.

The accord, and particularly the laws set up to hedge in the mercenaries, certainly did not lack ambition, but was unrealistic even if there was a common political will to enforce it. Putting the whole accord into effect would have seriously hampered Giangaleazzo and the allies' ability to make war even legitimately. Yet the provisions addressed the problems comprehensively, tacitly acknowledging that supporters like Pisa were able to push Milan and Florence toward conflict, and explicitly acknowledging that the mercenaries were not well controlled. Stipulations demanding a contract, an oath not to offend the other side even after the contract and not to linger in the employer's territory or be allowed to cross through it, seemed to admit that the cities played a role in exacerbating the problem of free-wheeling mercenaries. But if mercenaries could not be eliminated or very firmly controlled, and if there was no political will to do so (the provisions had no effect and war started not long after the treaty was signed), a question arises as to whether the parties negotiated the accord in good faith, an important issue in formal negotiation and dispute resolution.

There is some evidence on the Florentine side, at least, that they were not negotiating in good faith, but had already decided to pursue an alliance that would bring France into the peninsula to vanquish Giangaleazzo. Gene Brucker has noted the deep divisions in Florentine councils over its foreign policy, particularly on whether to steer a diplomatic course in trying to resolve the Milanese conflict, or begin war with Giangaleazzo at the most

⁷¹² *Ibid.*, p. 117. It is unclear what punishment the exile faced in doing so, or if it was merely a surveillance measure; though failing to report made the exile liable to capture by officials from their home territory.

opportune moment.⁷¹³ The evidence Brucker produces supports the argument that a small group of leading statesmen pushed strongly for war beginning in 1395. The majority of Florentine councilors may have favored peace and negotiation, but this small war party sent a secret agent to Avignon in March 1396, allegedly to lay the foundation for an alliance with France.⁷¹⁴ It would be this alliance, agreed in September 1396, on which peace would utterly founder.⁷¹⁵ A Franco-Florentine alliance was certainly the subject of another Florentine embassy sent directly to the French court in May.⁷¹⁶ On that second embassy, concurrent with the Pavia accord, Maso degli Albizzi had instructions to negotiate an offensive alliance with the French against Milan.

However, an argument can be made that Florence was not negotiating the treaty wholly in bad faith. As a first point, opinion in Florence was divided on whether to begin a war with Giangaleazzo or continue a diplomatic course. Brucker notes that the war faction sent emissaries to the French in secret and with the approval only of the Ten on War, the war council. The merits of a French alliance were not discussed in the Florentine councils or subjected to a vote.⁷¹⁷ This pro-war faction, in fact, was eventually able to take control of foreign policy in 1395-96 and push the city into conflict, aided by external events that led Florentines to doubt that Tuscany would remain secure, and by a few aggressive Florentine policies.⁷¹⁸ Within the *reggimento* as well, the war party successfully eliminated key

⁷¹³ Brucker, *The Civic World*, pp. 152-60.

⁷¹⁴ *Ibid.*, p. 156.

⁷¹⁵ For the treaty, *Cap*, 14, fols. 89r-103v; Guasti, ii, no. 63, pp. 406-9.

⁷¹⁶ Based on the instructions of the *Dieci di Balìa* (Ten on War) the war council, Brucker notes (p. 156) that the ambassador was to assure France that they would not enter an alliance with the Genoese doge. This may have intended to lay a foundation for a future French alliance, but it is not clear.

⁷¹⁷ *Ibid.*

⁷¹⁸ For combatting external threats, the re-establishment of the war magistracy, the *Dieci di Balìa*, in February 1395, was a pivotal *coup* for the war party, who would use it to exert increasing influence over foreign policy. Also, by late 1395, border issues with Siena and now Pisa were more acute. As a November embassy to Pisa shows (*SCMLC*, 1, fols. 66v-67v), threats, raids and killings between Pisa and Florentine subject Volterra

moderate voices.⁷¹⁹ Given the fact that opinion in Florence was not unanimous, and that some of the preparations for war were relatively secret, there is some possibility that Florence was pursuing both paths. Their good faith in concluding the treaty was perhaps insufficiently small and quite conditional, but again it is possible that they were signing the accord without outright fraud. If this sounds like a legalistic argument, it may well be; but it underscores the point that the law was one of a few tools to achieve desired ends in foreign policy. And it certainly was viewed by these political actors as a tool, as well as something that had some normative force. But in this case, with the enduring danger of mercenaries in Tuscany, the government probably had enough reason to make a last effort to address the problem while it began to pursue other options.⁷²⁰

Nevertheless, the state of affairs showed no improvement through the summer of 1396. The difficulties in Tuscany actually intensified when Barbiano returned to aid Pisa against Lucca, and Alberico da Barbiano was released from service to Milan to join his kinsman, along with a larger host of mercenaries than Tuscany had seen since the last Milanese war.⁷²¹ Florence interposed itself between Lucca and Pisa to make a truce in

appeared to be endemic. The Minerbetti chronicler reports that by March 1396, the councils agreed that any offenses against Florence and its *contado* should be considered acts of war (1396, cap. 13, pp. 211-12). As evidence of Florence's own aggressive tactics, the matter of Castrocaro, in 1395, is significant. The hawkish party prevailed over the councils to lay siege to the town, as Florence then claimed publicly that Castrocaro had been purchased legally and that they were only defending their rights. The justification was legal and familiar, but it was believed by Bologna that Florence had serious territorial ambitions in the Romagna. Florence eventually withdrew, but the incident marked a turning point in its relations with Bologna and perhaps regional ally Ferrara, and was watched closely by Milan. For the incident, Minerbetti, 1395, cap. 8; *HFP*, 11.31-2, pp. 195-9; Mesquita, p. 194; Brucker, pp. 153-5. For some of the negotiations Florence made to secure the town, *SCMLC*, 1, fols. 18v, 28r-v. It was the experienced and later very distinguished statesman Niccolò da Uzzano who was in charge of negotiations, and who was also an ally of Maso degli Albizzi.

⁷¹⁹ Brucker notes, pp. 155-8, that after the exile of the leading moderate, Donato Acciaiuoli, in 1396, opinion within the government inclined strongly to war. There were however a few subsequent conspiracies against the government and continued votes against war funding.

⁷²⁰ E.g., the problems concerning mercenaries raised in the November embassy to Pisa, *SCMLC*, 1, fols. 66v-67v, and more directly the conflict with Lucca.

⁷²¹ *SCMLC*, 2, fol. 28r.; Minerbetti, 1396, cap. 3, pp. 204-5; *HFP*, 11.40-5, pp. 207-213. It has to be remembered that the Barbiano brothers had a personal animosity toward Florence, and some of their actions

August, a condition of which was the dispersal of the mercenaries.⁷²² Fighting abated momentarily, but the situation naturally deteriorated after Florence signed the alliance with France.⁷²³ Sustained campaigns were too difficult to mount through the winter, but in the following spring Giangaleazzo, aware of the alliance, took the offensive against Mantua.⁷²⁴ Florence sent reinforcements to the region, while the war between Pisa and Lucca flared up again in Tuscany.⁷²⁵

With the war open on two fronts by March, Florence finally adopted in their spring diplomacy a case justifying war against Pisa, and claimed evidence that implicated Milan. In March, Florence declared to Bologna that Pisa had broken the peace agreement by attacking Lucca and now Florence, and was waging war.⁷²⁶ Florentine ambassadors were to claim that they had intercepted letters from Alberico da Barbiano, the lead captain for Milan, in which he declared himself to be in Jacopo d'Appiano's service.⁷²⁷ This was evidence needed for a just cause for war: it was not the free companies that were offending the commune, but the hired soldiers of Pisa and the duke of Milan.⁷²⁸ The Florentine government also argued that not only d'Appiano but Milan caused the recent rebellion in the

may have been at their own initiative. In any case it gave the government cause for concern, and Maso's group an excuse to go forward with the French alliance.

⁷²² Minerbetti, 1396, cap. 3, p. 205: "Poi del mese di agosto si fece certa concordia per certo tempo tra' Pisani e I Lucchesi, e la compagna di messer Bartolomeo si parti, e andossene verso Siena...;" *HFP*, 11.42, p. 209; *DBLC*, 2, fols. 41v-42v, notes the mercenaries' departure.

⁷²³ Giangaleazzo had sent forces to destroy the Borgoforte bridge in Mantua in July, according to Minerbetti, 1396, cap. 15, p. 212-3, so that there was little question that the Florence-Milan agreements had been fruitless.

⁷²⁴ Mesquita, p. 210-12. The Minerbetti chronicler remarks the fighting at the end of 1396, in the Florentine *contado* and Mantuan territory (1396, cap. 14-5, pp. 212-13). *HFP*, 11.50-1, pp. 217-19, also notes the increasing intensity of incursions in Tuscany.

⁷²⁵ Minerbetti, 1397, cap. 1, p. 215; *HFP*, 11.52, p. 221. Florence also attacked Siennese territory, now that war was "in the open."

⁷²⁶ *SCMLC*, 1, fol. 74v-75v, embassy of March 23, 1397 to Bologna, led by Filippo Magalotti.

⁷²⁷ *Ibid.*, fol. 74v: "Impero che noi abbiamo lettere del conte Alberigo nelle quali dice chelli è soldato de mess. Jacopo et lui a ad ubidire."

⁷²⁸ *Ibid.*, "Sichè non si può dire che compagne ci offendino ma solo gente del conte di Vertu e di mess. Jacopo d'Appiano."

Florentine town of San Miniato, which had been close enough to the city to give real cause for fear.⁷²⁹

The ultimate purpose of such declarations was to get the allies, and in this case Bologna, to join military maneuvers in Tuscany. Florentine relations with Bologna had been frayed badly by Florence's activity in the Romagna and Bologna's sometime support for Giovanni Barbiano on account of its regional feuds with Ferrara.⁷³⁰ Indeed, fractious relations between the allies would be a grave obstacle to a united response against Giangaleazzo, and a central problem that the allies faced throughout the war. On this embassy and two others to Bologna in the same period, the ambassadors tried various appeals on behalf of the war effort.⁷³¹ They recalled Florence and Bologna's old friendship, the obligations owed between them and their brave, joint opposition to Milan in the first Visconti war.⁷³² In particular, Bologna was to send whatever knights and foot soldiers they could to the Pisan conflict, and keep up payments for the mercenaries the League contracted in the Romagna.⁷³³ Because peace had been broken, it was no longer a matter of defense: Florence urged Bologna to go on the offensive and join in the *vendetta* that Florence would make.⁷³⁴ Florentine efforts to draw Bologna into Tuscany, however, would remain largely

⁷²⁹ *Ibid.*

⁷³⁰ Particularly the Castrocara incident rankled Bologna. By 1397, Mesquita claims that Florence and Bologna were barely allies, p. 229. Perhaps above all, Bologna was upset that Florence unilaterally signed the offensive alliance with France, drawing them into war. *SCMLC*, 1, fol. 74r, the Florentine ambassadors had to cajole Bologna in 1397 to ratify the new League with France, and it is somewhat remarkable that the allies would support the agreement at all. In doing so, they aimed to protect their own territories, while in such circumstances the risk of defections to Milan's side grew.

⁷³¹ *SCMLC*, 1, fols. 73r-74v, embassy of February 9, 1397; and fols. 76r-77v, embassy of March 28, 1397.

⁷³² *Ibid.*, 75r. On the February embassy, the Florentine ambassadors gave elaborate reasons for the necessity of a bond between the two cities, fol. 73r, including that the liberty of both states depended on their unity, they had always extended aid to each other, and their allegiance gave faith to their friends and allies.

⁷³³ *Ibid.*, 75r, "Et qui v'ingegnate, mandino quanto di forza possono, e di pedis e di cavallo, e subito e tosto, non mostrando però che noi siamo per a negare. Ma dicendo loro che questa oppressione per la gratia di dio passerà, e tosto. E che servigii si fanno a così stretti bisogni non si dimenticano." Fol. 76v, on payments to the mercenaries in the Romagna.

⁷³⁴ *Ibid.*, fol. 76r-v.

unsuccessful, and the allies more generally, divided by numerous individual aims and grievances, would have serious difficulty in maintaining the League.

Florentine diplomacy in 1397 focused by necessity on rallying the allies, hiring *condottieri* for service to the League, and negotiating with Milan to conclude the war. At this point in the conflict bilateral negotiation and arbitration could go forward among allies, but negotiation between the opposing sides often had to involve (at least officially) all parties. Behind the continuing military actions in Tuscany and the Romagna in fact, a major peace conference was convened at Imola, which sat through the summer.⁷³⁵ Venice acted as the official mediator to which both sides aired their grievances, with each accusing the other of breaking the peace of Genoa and the Pavia accord.⁷³⁶ Florence rehearsed a litany of charges against Milan going back to violations from the first war, and including more recently Giangaleazzo's consent that Broglia and Brandolino should attack Lucchese and Florentine territory, his support of Azzo d'Este and Giovanni Barbiano against Ferrara and order to send Paolo Savelli against Lucca, among other accusations.⁷³⁷ Florence was still willing to remit the injuries and damages suffered in the attacks by Pisa and Milan and "live in peace," but demanded Lucignano, Marciano and Toppole, which Siena and Milan could not countenance.⁷³⁸ At the same time Pisa, with Milan's support, demanded parts of Lucchese territory, including Motrone, Viareggio and Pietrasanta, which Lucca and Florence

⁷³⁵ Minerbetti, 1397, cap. 24, p. 223-4.

⁷³⁶ Florence sent a few embassies with instructions to the conference. Their lawyer at the talks, Ludovico Albergotti, may have stayed in Imola for the duration of the conference, from May until September; see *SCMLC*, 1, fols. 80v-83r, instructions of May 22, 1397, and fols. 98r-99r, instructions of September 20, 1397. Lucca had an ambassador there, Niccolò di Ceccorino di Poggio, from June to September. See Meek, pp. 319-21, for Lucca's role in the negotiations. Minerbetti, 1397, cap. 24, p. 223, has it that emissaries from the Pope also played a role as mediators.

⁷³⁷ *SCMLC*, 1, fols. 80v-83v.

⁷³⁸ *Ibid.*, fol. 81v, "...pero che semper siamo desiderosi di pacie, siamo contenti rimettere l'engiurie e stare chon lui in pacie e in buona fratellanza," but with Florence's territorial interests satisfied, fol. 82r: "Domandate per nostra parte Lucignano, Marciano e Toppole."

would not concede.⁷³⁹ By September, the issues were still unresolved; Florence did not budge on Lucignano, Marciano or Toppole (though was willing to concede other land taken in the war), but there were now other claims to address.⁷⁴⁰ Florence supported Mantua in its demand for the restitution of all lands taken from it and the reconstruction of the bridge at Borgoforte at Milan's expense; and supported the demands of allies like Padua.⁷⁴¹

With so many intractable and often long-standing claims, the peace conference proved fruitless. Milan pressed its interests, but Florence, the most powerful of the allies, was also uncompromising and could alienate its partners by nakedly seeking its own advantage. In one example, Florence had an opportunity to negotiate with Pisa for peace at the end of 1397, when Giangaleazzo requested direct control of the city and it sought briefly to distance itself from him.⁷⁴² But Florence demanded the restoration of the commercial rights it enjoyed before 1369, which included access to Pisan ports with low duties on goods.⁷⁴³ Florence's intransigence also infuriated Lucca, which felt Florence was pursuing its trading rights at the expense of a peace Lucca badly needed.⁷⁴⁴ Pisa in any case would not concede, and turned back to Milan, while a more distrustful Lucca began to drift slowly into Giangaleazzo's sphere of influence as well. At the conference, Florence's old

⁷³⁹ Meek, p. 319-20. These were crucial towns on the sea, and particularly Motrone was relied on by Lucca and Florence for trade since access to Pisa was blocked. By demanding them, Pisa and Milan knew they would cut Lucca and Florence off and put their commerce under great strain.

⁷⁴⁰ *SCMLC*, I, fol. 98v, "Chon quella da Pietramala fate che nominatamente rendano Marciano e Toppole... richiedete Lucignano, offerendo di render le terre tolto o che si togliesseno poi inanzi da poi fu la guerra, e prima pacie sia fatta."

⁷⁴¹ *Ibid.*, fol. 98r, "Item fate e procurate che tutte le terre tolte al Signore di Mantova, liberamente sieno restituite al detto signore e questo non manchi per niuno modo. Fate ancora, chel Ponte a Borgoforte si debba rifare alle spese del nemico e reporre in quello stato era inanzi la guerra."

⁷⁴² Pisa, after seeing the Florentine proposals, renewed its relationship with Milan. Jacopo d'Appiano passed the lordship of his city to his son, but the son sold Pisa to Giangaleazzo for 200,000 florins in 1399, giving Milan what it had wanted. See the thorough O. Banti, *Jacopo d'Appiano, economia, società e politica del comune di Pisa al suo tramonto* (1392-1399) (Pisa, 1971); cf. Mesquita, pp. 246-7; Meek, p. 316-22; Brucker, pp. 164-69, and Morelli, pp. 245-6.

⁷⁴³ Meek, pp. 317-18; Brucker, pp. 164.

⁷⁴⁴ *Ibid.*, p. 318.

commitment to Lucignano and Marciano were obstacles as well. Indeed, the most powerful players, like Florence – and even more so Venice – were able to make war or peace more easily than the others, according to their own needs. To some extent the smaller cities had to follow along, while supplying the minimum material aid necessary to stay in the League, or alternatively to defect to the other side.

The opportunity to conclude a separate, bilateral peace, whereby a city would opt out of the League, was lessened by joining all the parties together at the peace conferences. On the other hand, outright defection, or virtual defection through a bilateral agreement, were possibilities, and gave currency to the demands of the smaller cities. Certainly Florence had to support eastern allies like Mantua and Padua because they were needed (at the least) as diversions to mitigate the force of the war in Tuscany. There was thus a limit to how bluntly Florence could pursue its own agenda. But again it did manage to alienate its allies both in Tuscany and the east on crucial occasions.

Venice, by contrast, supported the eastern cities tacitly because they were a buffer between Giangaleazzo and its own territory.⁷⁴⁵ Venice often played its hand more successfully than Florence, not only in the east but in the conflict generally, largely because it was able to remain officially uninvolved for a longer period of time. Venice seemed to understand that it could play kingmaker by joining on either side, but knew that with the war won, it might face a more direct and permanent threat from either Florence or Milan. Thus Venice's canny neutrality allowed it to keep both sides somewhat in balance and to avoid the costs of war, while being able to act frequently as a mediator. It also took up its role without much outward partiality; indeed, when Florence instructed its ambassadors at the Imola conference to ask for a private hearing on a particular issue, apart from Milan, they

⁷⁴⁵ Mesquita, p. 216, notes Venice's interests in the peace conferences.

expected Venice to reject the request.⁷⁴⁶ These were the pleas for separate negotiation that had to be avoided, and Venice likely did ensure that the form and solemnities of the conference were followed, particularly since a secure peace was also in Venice's interest.⁷⁴⁷ But after extended talks failed to address the issues adequately in 1397 and 1398, Venice would finally seize the opportune moment to protect its interests on its own terms.

As the Imola conference continued inconclusively, Florence was also directing its mercenaries and getting military aid to and from the allies. The government was in constant contact with its forces and often tried to persuade new captains, sometimes in Milan's service, to join its side.⁷⁴⁸ But the cost of supporting the growing forces was also very high, with the frequency and weight of war-time taxes causing widespread complaint among citizens.⁷⁴⁹ The financial strain experienced by other cities was similar, and more than politics this was the root cause of problems concerning the allocation of military resources. There were ample grounds for reproach among the allies on account of it: Lucca complained that Florence was slow in providing aid against Pisa and gave insufficient aid when it did, while Florence repeatedly pressed Bologna for help.⁷⁵⁰ The commune made pleas that the League not lose its honor and reputation through inaction, but both in Tuscany and in the

⁷⁴⁶ *SCMLC*, 1, fol. 83r.

⁷⁴⁷ Minerbetti, 1397, cap. 24, p. 223, gives brief insight into the process of negotiation at the subsequent Venice conference, noting that the sides had to discuss their proposals in the presence of the Doge, reviewing together each of the chapters of the proposed (or past) peace agreement and making their demands to each other accordingly.

⁷⁴⁸ By 1397, Florence had convinced Ceccolino Michelotti, Biordo's brother, to come to the service of the League, as well as Paolo Orsini (*HFP*, 11.52, p. 221). Biordo himself was in service, and Francesco Carrara, Astorre Manfredi, conte Mostarda, conte Currado, Ludovico Cantelli and Carlo Malatesta, and lesser figures like Bindo da Montopoli (*SCMLC*, 1, fol. 84r; fol. 77r), among others.

⁷⁴⁹ On the financial crisis in Florence brought on by the war, Anthony Molho, "The Florentine Oligarchy and the *Balie* of the Late Trecento," *Speculum* 43: 1 (1968), pp. 23-51.

⁷⁵⁰ Meek, pp. 314-5; on Bologna, *SCMLC*, 1, fols. 76r-77v; fols. 86r-87v; fols. 101r-102v.

Romagna Florence was unwilling and somewhat unable to come to its allies' aid as well.⁷⁵¹

In the summer of 1397 Florence flatly rejected Bolognese requests to send all forces to the defense of Mantua.⁷⁵² They had earlier asked the Bolognese to pay the wages of Carlo Malatesta, who was defending Mantua against Milanese attacks, while telling Mantua to be patient and asserting that it was oppressed too much in Tuscany to send more support.⁷⁵³

The treaties of alliance, as a kind of contract, spelled out the commitments required of the various *collegati*, and are a useful place to look for how the League should have operated. Typically, the number of lances required from each of the allies was specified in the agreements, as well as provisions stating how quickly they had to be assembled, and how many times a year the forces had to be available for review by the other colleagues.⁷⁵⁴ For a Florentine alliance with Bologna, Pisa, Perugia and Lucca in 1390, during the first Visconti war, Florence was to have 374 lances under contract, while the smallest commitment, Lucca's, was for 25.⁷⁵⁵ Additionally, each colleague was held to house the soldiers in its own territory until they were needed for service.⁷⁵⁶ As far as hostilities, the allies were to aid any member who was attacked and asked for help, though the enemy had to be in the

⁷⁵¹ *SCMLC*, 1, fol. 77r, instruction to Florentine ambassadors at Bologna and Mantua, March 28, 1397: "E fate giusta posse questo si riserbi a tempo piu congruo e che ora faccenda all'offesa e alla guerra, sicche la lega non perda sua reputatione, e abbia suo honore."

⁷⁵² *Ibid.*, fol. 86r. Florence badly needed to defend itself also, as it repeated on almost all diplomatic missions.

⁷⁵³ *Ibid.*, 84v, "Quando serete a Bologna serete chon *I Dieci* e adoperate che eglino paghino Malatesta per noi. Considerate abbiamo pagato Polo Orsino per loro e per tutta la lega che Mantova più che non fa quello." Payments were obviously fluid, but Florence covered payments in Tuscany to Orsini, while expecting Bologna to pay Malatesta in Mantua. Much of the diplomacy with the allies had to do with negotiating payments and levels of forces; e.g., the missions to Bologna in February and March 1397 (*ibid.*, fols. 73r-77v). For excuses given to Mantua, see the embassy to Mantua, Bologna and Ferrara, May 27, 1397 (*ibid.*, fols. 84r-v).

⁷⁵⁴ Though not of primary interest here, the *condotta* contracts by which mercenaries obligated themselves to the cities were also important; they specified the pay, time of service and kind of soldier to be hired, and included provisions not to turn against the employer for a certain period after service. See Caferro, *John Hawkwood*, pp. 75-6.

⁷⁵⁵ Guasti, *op. cit.*, p. 241. A lance was composed of a knight, lightly armed sergeant and page or mounted servant; see M. Mallett and J. Hale, *The Military Organization of a Renaissance State*, p. 82.

⁷⁵⁶ Guasti, *ibid.*

territory of the colleague or within forty miles of it.⁷⁵⁷ Once help was given, bilateral peace agreements with the adversary were ruled out; again, this would jeopardize the integrity of the league. The 1398 treaty also held the allies to aid their besieged friend within a period of fifteen days.⁷⁵⁸ No contract could be made with mercenaries to help one colleague and not the others, and the mercenaries had to give an oath not to offend the other colleagues. Whichever colleague broke the treaty was to pay compensation of 10,000 florins.⁷⁵⁹

The alliance treaties, drawn up by lawyers and notaries, were detailed agreements which tried to limit the kinds of problems that collective action among independent but aligned powers might face. However, there were numerous issues that could arise due to the fluid nature of war. In war the number of troops needed might quickly multiply, and there could be little foresight concerning the total amount necessary, or who was to pay for the increases. The question of how troops should be allocated among allies went unaddressed as well, though it was impossible to answer when war was open in multiple areas to various degrees. And if Florence itself was sufficiently threatened, it could very lawfully renege on its obligations to aid another city. On the other hand if Florence's non-performance displeased another colleague sufficiently, the 1389 treaty laid out steps to find a remedy through arbitration: in fact any issue that caused dissent among the *collegati* was to be referred to the League in its entirety.⁷⁶⁰ In turn, the *collegati* would appoint auditors to hear and decide the dispute.⁷⁶¹ If the decision was not obeyed, the colleagues were to treat the

⁷⁵⁷ *Ibid.*, pp. 241-2.

⁷⁵⁸ *Ibid.*, p. 241.

⁷⁵⁹ *Ibid.*, p. 243.

⁷⁶⁰ *Ibid.*, pp. 242-3.

⁷⁶¹ Cf. the views of Baldus and Angelus on confederations, ch. 3, pp. 105-11. Baldus felt that the *maior pars* should guide the decisions of the colleagues. The jurists' opinions, of course, could be fairly simple in comparison with the complexity of practice.

recalcitrant city as if it were an enemy.⁷⁶² The existence of an arbitration provision in the alliance treaty is important, and seems to have been used at least once in the second Visconti war.⁷⁶³ The treaty also indicates the flexibility with which the cities had to approach alliance agreements in practice.

Despite some degree of coordination among members, Milan's military pressure strained the League to the breaking point. With Bologna and Mantua struggling to defend themselves against Milan in the east, Venice felt it had to act to save the League – but more specifically to preserve itself and its interests in eastern Lombardy.⁷⁶⁴ Thus in March 1398 Venice finally joined the League of Bologna, with the significant (and for Florence dismaying) condition that it would have the power to make war and peace for the allies.⁷⁶⁵ For a moment, it appeared that Giangaleazzo's fortunes had reversed, for Venice's inclusion caused new allies to materialize and some of Giangaleazzo's own supporters to rebel, due to the League's new preponderance of strength.⁷⁶⁶ Faced with such opposition, Milan now sued for the peace it had rejected earlier; the *Serenissima* was happy to accommodate, as an agreement would save it from the costs of war. Venice was able to use the concession it received in joining the League to broker a ten-year truce that was in its interests and those of its immediate neighbors, while it neglected to provide explicitly for Tuscany.⁷⁶⁷

Thus the truce of May 11, 1398 was to some extent a “separate peace,” by which Venice bargained its way out of the League and became neutral again. Importantly, Mantua,

⁷⁶² *Ibid.*, p. 243.

⁷⁶³ For an issue that arose between Florence and Mantua see directly below.

⁷⁶⁴ Mesquita, p. 219, notes Venice's active role in proposing solutions, due to the urgency of the situation. Venice presided over another failed peace conference beginning in December 1397; Minerbetti, 1397, cap. 24, p. 223.

⁷⁶⁵ *Cap*, 12, fols. 229r-232v; Guasti, pp. 255-59. And Venice's power to make war and peace, p. 256. Florence did retain the power to make war and peace with Siena and Pisa in Tuscany, p. 257.

⁷⁶⁶ Mesquita, p. 222, names the Count of Savoy and Leopold of Austria as potential new allies, and areas around Bergamo and Brescia as rebellious.

⁷⁶⁷ *Cap*, 11, fols. 197r-199v; Guasti, pp. 118-20. There was no provision for the return of lands in Tuscany.

remembering how vulnerable it had been during the war, hung on to Venice to get the best terms it could, though it would later defect to Milan's side.⁷⁶⁸ The move played into Giangaleazzo's hands as well: he had in the past employed partial or "separate" peace agreements to split allies and attack them sequentially.⁷⁶⁹ This time, Tuscany had been isolated and could now receive the bulk of his attention. Florence understood immediately how difficult its position was, and sent a protest to Venice over the truce.⁷⁷⁰ However, it did not forcibly alienate the *Serenissima* because it might still reverse course if threatened again by Giangaleazzo.

Now vulnerable in the wake of the truce, and with the League weakened, Florence had to further reduce its commitments in the Romagna and focus on its own defense. Since the truce could be construed to exclude Florence, there was little hesitation to find excuses to avoid extra outlays to the allies.⁷⁷¹ Arguments over the terms of the agreements and their fulfillment still proceeded on legal grounds, of course, and had to be as careful and as reasonable as possible. This was true particularly in regard to Venice, in order to reduce the risk of alienating the best (if only potential) ally and counterweight to Milan's power. Thus Florence complained to the maritime city that the truce prevented the sides from holding mercenaries on contracts *in aspetto*, which would greatly hinder Florence's ability to defend

⁷⁶⁸ Milan and Mantua promised to return, as usual, all the lands taken in war, but Mantua also got the right to fortify the bridge at Borgoforte and all castles to better secure its territory, without fear of Milan's attacks. Padua also had the 10,000 florins it owed annually to Milan, as part of the 1392 peace agreement, suspended: *Guasti*, p. 119. Venice sought favorable terms for its neighbors to better protect itself.

⁷⁶⁹ Brucker, pp. 131-3, discusses Florence's wariness over such peace overtures in 1389.

⁷⁷⁰ *SCMLC*, 1, fols. 115r-117v, embassy of 5 July, 1398 to Venice.

⁷⁷¹ Florence was effectively excluded by the truce due to provisions in the alliance. The alliance Venice signed gave it sole power to make war and peace with Milan, but also gave Florence the right to make war and peace with Pisa and Siena, and the right to war in Tuscany as much as it wished (*Guasti*, p. 257).

itself against attack from Milan.⁷⁷² Florence continued to quibble over some *capitula* of the agreement, while agreeing on others, but laid blame for the truce at Giangaleazzo's feet rather than accusing Venice.⁷⁷³

With other allies Florence was similarly careful but more firm. This was especially true in regard to Mantua, since the city's defense during the war had drawn deeply on Florentine coffers, and its allegiance was now suspect.⁷⁷⁴ Thus Florence was willing to address an issue that arose between the two cities in strong legal terms, and in fact through another *consilium* of Angelus de Ubaldis.⁷⁷⁵ Since disputes within the League were to be settled by arbitrators appointed by the League, it may be that Florence submitted the *consilium* again as part of an arbitration.⁷⁷⁶ In any case, the *consilium* stands as a good indication of Florence's attitude toward the League and its increasing wariness over commitments to it, in the immediate aftermath of the truce.

The opinion took up the question of whether Florence had provided Mantua the aid it owed under the League of Bologna, and whether Mantua had honored its obligations to Florence in the recent war against Milan. In brief, Angelus argued that Florence had fulfilled its treaty obligations, while Mantua had failed to give the aid that it owed to Florence. The questions arose from Milan's spring 1396 war – declared against Florence in March and against Mantua in April – which ended with the truce of 1398. The obligations

⁷⁷² *SCMLC*, 1, fol. 115v. A contract *in aspetto* held the mercenaries to service if war arose or they were otherwise needed, at which time it would be converted into a full contract. Milan could be somewhat less concerned about its mercenary forces because it also had a larger army raised from its own territory.

⁷⁷³ *SCMLC*, 1, fol. 115r, "Poi direte come possono comprendere che il duca di Melano è venuto su questa triegua chon molta malicia e chon occulto suo vantaggio, selle cose rimanesseno così."

⁷⁷⁴ Mantua eventually defected in the summer of 1399, according to Mesquita, p. 240, when Francesco Gonzaga and Giangaleazzo resolved their territorial disputes and the latter offered protection to Mantua.

⁷⁷⁵ Angelus, *op. cit.*, no. 391, fols. 281rb-283rb. The *consilium* is dated July, 1398.

⁷⁷⁶ Settling disputes by arbitration also went for the 1392 League; see *Cap*, 13, fol. 187v. The *consilium* would certainly seem to be *pro parte*, since Angelus was resident and teaching in Florence at the time (Gloria, p. 179).

owed by the allies in the conflict were spelled out in the 1392 treaty of the League of Bologna, which Angelus considered and reviewed fully in his *consilium*.⁷⁷⁷ Thus the case did not pertain to aid that Mantua or Florence was presently demanding, but there was a need to settle past accounts and see if further cooperation between the cities would be possible. From the “odious penalty” that Angelus later mentioned, it seems that Mantua demanded the amount stipulated by the League for violating its conditions.⁷⁷⁸ Before defending Florence against Mantua’s accusations, Angelus first considered Mantua’s obligations to Florence. He noted that under the League’s twenty-eighth *capitulum*, Mantua was not obliged to give aid to the *collegati* against a city that was a neighbor to itself, which would allow Mantua to avoid being drawn into war with Milan unless directly attacked by it.⁷⁷⁹ But Angelus considered whether Pisa and Siena had been at war with Florence as equals of Milan and distinct from it, in which case Mantua *would* owe aid to Florence against those cities.⁷⁸⁰

The argument thus turned on the status of Pisa and Siena, and whether they were mere adherents of Milan in the war or accepted as *collegati* and equals.⁷⁸¹ If they were mere adherents, Angelus admitted, they would make war only on Milan’s behalf and in Milan’s cause; but if they were *collegati*, they were responsible for war in their own right.⁷⁸² Not surprisingly, Angelus argued that Pisa and Siena were *collegati* and equals, and did so by

⁷⁷⁷ *Cap*, 12, fols. 180r-182v, reviews the details; *Guasti*, ii, pp. 259-64.

⁷⁷⁸ Angelus, fol. 283rb.

⁷⁷⁹ Angelus, fol. 281va.

⁷⁸⁰ *Ibid.*, fol. 281vb: “Et ista passus mihi dubius est: quem in quatuor puncta distingo. Primo est: Pisani et Senenses intrauerunt in guerra, tanquam sola et simplex sequela ducis, et istud est clarum, quod non tenebatur dominus Mantuanus [to give aid]...[s]ecundum membrum est: Si Pisani et Senenses intrauerunt in guerra, tanquam principaliter inimici Communis Florentiae, qui re vera erant propter multa odia et rancores, ac damna, hinc inde illata sub fictis et velatis coloribus, ut in Thuscia est notorium: et hoc casu sine dubio adversus ipsos, aut alterum ipsorum dominus Mantuanus debet praestare subsidia contra factorias ipsorum Communium...”

⁷⁸¹ *Ibid.*, fol. 281vb-282ra.

⁷⁸² *Ibid.*

examining the text of the 1397 truce. In answering the question Angelus noted that only through “words, deeds, writings and omissions is intention conjectured.”⁷⁸³ He observed that the 1397 truce named as adversaries and signatories “Milan, Pisa, Siena,” before adding the “accomplices and followers and adherents of the said lord Duke.”⁷⁸⁴ For Angelus the text was clear that the named signatories were equals to Milan, and had been at war with Florence in their own right.⁷⁸⁵ As support for holding that *collegati* were at war with Florence in their own cause as well, Angelus turned to Roman law. He argued that a league was a *societas*, where members were equal and equally shared the burdens of the undertaking.⁷⁸⁶ In this case, it did not seem the most apt comparison, since he wanted to separate the responsibility of Siena and Pisa for war from Milan’s; but insofar as he wanted to support the idea that they were equals the analogy could work. Angelus had also compared an alliance to a *societas* in his commentary on the *Digest*, where he had a more consensual approach to responsibility.⁷⁸⁷

Angelus went on to suppose that even if Mantua had fulfilled its obligations to Florence, Florence also had fulfilled its obligations to Mantua. Reading another *capitulum* of the League, Angelus affirmed that when Mantua was attacked by Milan the members of the League owed 2,000 florins monthly for Mantua’s defense.⁷⁸⁸ But Angelus claimed that Florence had paid up to 50,000 florins and provided 400 lances already, which more than

⁷⁸³ *Ibid.*, fol. 282ra, “Per verba enim gesta, facta, scripta, et neglecta, coniecturatur intentio.”

⁷⁸⁴ *Ibid.*

⁷⁸⁵ *Ibid.*, fol. 282rb, Angelus added that it would not be fitting for such noble cities to be adherents: “Non enim convenit insignibus esse de aliorum sequela, cum multis sint privilegiis decorati...”

⁷⁸⁶ *Ibid.*, fol. 282ra: “Nam plures socii simul aliquod negotium aggredientes, pariter tenentur, pariterque alios sibi obligat, ff. pro socio, l. duo. societatem [D.17.2.71]; ff. de pactis, l. si unus [D.2.14.27]. Societas enim qualitas introducit, ut nullus alterum, vel alter alium in superiorem appellet, nisi aliud actum fit, unde pariter sunt omnia attribuenda cum sociis, ff. de fideiusso, l. generaliter [D.46.1.5]; ff. ad Velleia, l. vir uxori [D.16.1.17].” On the theory of a *societas* as applied to a league, see ch. 3, pp. 108-9 above, and Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, p. 454-55, on the responsibilities of the members of a *societas*.

⁷⁸⁷ See above, pp. 108-9.

⁷⁸⁸ *Ibid.*, fol. 282rb.

fulfilled its obligation.⁷⁸⁹ And even if Florence had not fulfilled its obligation, Angelus asserted, the *collegati* were not held to do more for their allies than they were able to do in good faith.⁷⁹⁰ Since Florence itself had been faced with a bitter war, whatever aid it offered Mantua fulfilled its commitments. The reasoning behind the good faith argument was again based on the *societas*, where allies were legally analogous to the *socios*, who were bound to help each other only as much as they were able to in good faith, and not above.⁷⁹¹ In concluding his opinion, Angelus noted that the penalty for violating the League was, in any case, far too high.⁷⁹²

It is uncertain what became of the dispute, and whether the result had any practical effect, but it underscores in clear legal terms Florence's attitude toward its colleagues at that critical moment in the war. It is also more broadly reflective of some of the divergent interests of the League members. Florence did not want to allow Mantua to impugn its support of the eastern allies during the war, and again sought a legal path in responding to Mantua's claims. As usual Florence's policy toward its allies was measured. This was true especially here, given Florence's isolation in Tuscany between hostile Pisa and Siena, the wavering Lucca, and a Perugia whose leader, Biordo Michelotti, had been assassinated in March 1398: Florence needed its allies more than they needed Florence.⁷⁹³ Whatever aid it could receive from them at this rather desperate point was necessary. It also needed to keep a sensitive finger on the pulse of the allies to know which ones were threatening to defect, and to dissuade them if possible. Thus it would follow all the accepted forms of dispute and

⁷⁸⁹ *Ibid.*, fol. 292va.

⁷⁹⁰ *Ibid.*, "...vere quidem obligatio facta est, et in facto consistit et semper debet intellegi pro posse et arbitrio boni viri."

⁷⁹¹ *Ibid.*, "Nam socius socio in plus, quam commode facere potest, non tenetur ff. de re. iudi., l. sed hoc ita, sec. quod autem [D.42.1.22.1], et l. sunt, qui in id. eo. ti [D.42.1.16]. Et equum fuit, ita iura constitui, cum fraternitas instar et imaginem societatis obtineat..."

⁷⁹² *Ibid.*, fol. 283rb.

⁷⁹³ *HFP*, 11.64, pp. 232-3; Mesquita, p. 250.

pursue what diplomatic channels it could to defend itself and seek support from the allies, however nominal that support was. Though the League was even more ineffective now, and had certainly struggled after 1396, it was not an option to forcefully break from it.

Beyond the question of fulfilling aid obligations under the League, the problem of defection was the most serious one faced by Florence in its relations with its allies, particularly between 1398 and the official end of the Visconti war in 1402. Eventually not only Mantua, but Perugia defected, while Ferrara and Lucca wavered and Bologna, while trying to remain independent, saw a period of strong Milanese influence as well.⁷⁹⁴ Among smaller cities and *signori*, there were more defections, like that of Cortona in 1399 and the lords of Bagno and Modigliano, east of the city in the Casentino.⁷⁹⁵ The smaller defections were just as alarming for Florence because a number occurred in Tuscany around the Florentine borders. In particular, the June 1398 defection of the lord of Poppi, Roberto da Battifolle, caused enough concern that Florence requested a *consilium* on the matter from Angelus, at least a copy of which was submitted to Milan.⁷⁹⁶ Defections of course were political decisions based on considerations of advantage and self-protection, but they also fell within the scope of law, as the most serious kinds of treaty violations. In this case, Florence claimed that Roberto Battifolle had been formally aligned with Florence before the May truce and could not be permitted now to ratify the truce as an adherent of Milan, which he had done.⁷⁹⁷ More generally the opinion is another symptom of Florence's anxiety in the

⁷⁹⁴ Mesquita, pp. 252.

⁷⁹⁵ *HFP*, pp. 238-9; *SCMLC*, 1, fol. 112r, Florence tried to persuade some of them to remain loyal.

⁷⁹⁶ Angelus, *op. cit.*, no. 390, fols. 280rb-281vb. The *consilium* is dated July, 1398, and addressed to Angelus's brother Baldus ("frater karissime"), who was employed by the Duke of Milan at the time. On Baldus's career, see Joseph Canning, *The political thought of Baldus de Ubaldis*, pp. 1-6. A diplomatic protest to Venice on July 5, 1398 (*SCMLC*, 1, fols. 115r-117v) mentioned the problem, arguing the injustice of Poppi's ratification of the treaty as an adherent of Milan. Minerbetti, 1398, cap. 7, p. 231, makes note of the switch in adherence, which ambassadors of Roberto Battifolle apparently announced to Florence.

⁷⁹⁷ *Ibid.*, fol. 280rb.

wake of a treaty that left the city vulnerable, and indicates how quickly Tuscany recognized what effect the truce might have on the League.

In the opinion itself, Angelus argued that Roberto was a manifest adherent of Florence in the war. As a simple matter of fact, the jurist wrote, Roberto had sent men to aid Florence in the war with Milan, and sent letters to Florence that he intended to continue in his “accustomed devotion” to the city.⁷⁹⁸ Milan thus had no power to name Roberto as an adherent in the truce, after a war in which Battifolle supported Florence. Further, the lord of Poppi had declared his allegiance to Florence by letter after the truce was signed, and Angelus dismissed the idea that Roberto’s letter only represented his mind at the time, affirming that it had introduced a real obligation on the nobleman’s part.⁷⁹⁹ Roberto had allegedly also given an oath to a soldier of the French king, that he would support the Guelph cause and Florence in perpetuity.⁸⁰⁰ Such a violation of his oath was perjury and an infamy which should exclude him from the truce.⁸⁰¹ To drive his points home, and with almost a literary flair, Angelus denounced Roberto for a double infidelity, since he effectively claimed to be faithful to both sides at once, which was impossible and treacherous to each.⁸⁰² Angelus did not argue, however, that the case was as simple at pointing to a previous treaty which the lord of Poppi had ratified as an adherent of Florence:

⁷⁹⁸ *Ibid.*, “Misit enim gentes suas in eorum subsidium, contra dictum dominum ducem tempore opportuno: misit literas suas sui animi declarativas, qualiter intendebat in solita devotione et filiatione Florentinorum persistere...misit bravium continuo in signum suae fidelitatis, ita quod monstravit se hostem dicti ducis.”

⁷⁹⁹ *Ibid.*, fol. 281ra, “...quinimo et post treugam factam scripsit Communi Florentiae, quod a suis mandatis nullo modo intendebat recedere, quae literae post initam treugam obligavit ipsum Communi Florentiae de non recedendo a mandatis suis: quoniam haec obligatio inter absentes confici potest. Ergo tales literae eum obligant, et obligatione inductam probant, ff. de consti. pec., l. Titius, et l. 2. Non enim sunt literae enunciativae, et sui animi indicativae, sed etiam obligationis inductivae, ut patet ex earum tenore evidentior.”

⁸⁰⁰ *Ibid.*

⁸⁰¹ *Ibid.*, “Si ergo vult conferre nunc se ad numerum hostium et inimicorum, periurus est, et infamis, et non debet, nec potest dicta ratione gaudere beneficio dictae treugae.”

⁸⁰² *Ibid.*, fol. 281ra-b.

indeed it seems that he had given aid and declared his intention without an official ratification, which made his status at least somewhat debatable from a legal standpoint.⁸⁰³

In Angelus's mind there was no doubt, however. Allowing the lord of Poppi to adhere to Milan now would give an absurd result, Angelus wrote, because it would permit any city or individual who publicly adhered to one side or was subject to it, to secretly adhere to the other side, and at some point be named publicly as an adherent of that other side.⁸⁰⁴ Indeed Angelus's argument rested on a basic legal assumption, that society, much less treaty relations, could not survive with contracts and promises made and broken at will, and a system of aligned cities could not survive with open, double allegiances.⁸⁰⁵ Of course secret, double allegiances occurred in practice, but a city that worked quietly with two adversaries could be a danger to each.⁸⁰⁶ Milan probably did not buy that argument, though, believing that the lord of Poppi would be reliable enough, and usefully harass Florence in Tuscany, which he did. There was little Florence could do but it complained to Milan and apparently Venice without success.⁸⁰⁷ As an interesting coda to the case, the lord of Poppi on his deathbed in 1400 switched back to Florentine allegiance and repudiated Milan.⁸⁰⁸

⁸⁰³ Certainly Milan might question, or had questioned, whether Roberto's letters to Florence created a real obligation

⁸⁰⁴ *Ibid.*, fol. 281ra: "Est enim multum advertendum, quia dicta adhaesio fuit fact clam et occulte: et de ipsa adhaesione domini Florentini non cogitabant, nec cogitare poterant verisimiliter. Unde licentia concessa de declarando adhaerentes, non porrigitur ad non adhaerentes, nec qui non adaeserunt, sed in guerra oppositi dicto domino duci, inter quos fuit ipse comes: alias sequeretur, quod si Civitas Pistorii, aut terra Prati, aut aliqui cives Florentini clam et occulte adhaesissent duci, quod possent declarari adhaerentes ducis, et eadem ratione, si particula civitatis adhaesisset." Though the details of Paolo da Castiglionchio's case are different, Angelus of course supported an even more flagrant switch in adherence there.

⁸⁰⁵ See above, pp. 98-100, on the principle of *pacta sunt servanda*.

⁸⁰⁶ Astorre Manfredi, after the truce of 1398, would be a good example. Astorre may have ratified one copy of the treaty as a Bolognese adherent and another as a Milanese adherent. Mesquita, p. 233, found a Venetian document to this effect.

⁸⁰⁷ *SCMLC*, 1, fols. 115r-117v. See G. Bolognini, "Le relazioni tra Firenze e Venezia nell'ultimo ventennio del secolo xiv," *Nuovo Archivio Veneto*, 9 (1895), pp. 102-3, for Venice's unwillingness to get involved.

⁸⁰⁸ *HFP*, 12.8, p. 259; Morelli, p. 247-8, 249; *SCMLC*, 3, fols. 28v-29r, for Florence's renewed good faith toward Roberto's son.

The move may have been occasioned by a guilty conscience, but more likely by the knowledge that his heir was ill-equipped to handle Florence as a near neighbor and enemy.

Though the truce which Venice had concluded left Florence in a vulnerable position from a military, diplomatic and legal standpoint, Giangaleazzo did not attack Tuscany directly afterward. He instead stirred up the lords of the Casentino, including the lord of Poppi, to harry Florence with attacks and raids, while strengthening his grip on the region.⁸⁰⁹ Jacopo d'Appiano's death in 1399 turned out to be a windfall, since the Pisan ruler's weak son almost immediately sold the city to Milan for 200,000 florins.⁸¹⁰ In May Lucca sent ambassadors to Milan to entertain overtures of an alliance, while later in the year Siena transferred direct control of their city to Giangaleazzo.⁸¹¹ By early 1400, after Florence failed to dissuade Perugia, it too agreed to give Giangaleazzo lordship over the city.⁸¹² Two months later, in March, Venice signed an official peace with Milan, a further indication that it wanted to distance itself from Florence and its worsening problems in Tuscany.⁸¹³ Adding to the difficulties, Giangaleazzo put economic pressure on Florence through an unofficial blockade of commerce.⁸¹⁴

A last strategic failure for Florence came with its failed bid to bring Rupert of Bavaria, the newly crowned Holy Roman Emperor, into Italy to defeat Milan. Rupert accepted sizable money and finally crossed the Alps with an army, but retreated after a single defeat. Florence protested with detailed legal arguments, reading Rupert's contractual obligations closely, but was again left rather helpless, while Milan complained against

⁸⁰⁹ Minerbetti, 1399, cap. 11, p. 243, details some local fighting in the Casentino.

⁸¹⁰ See above, fn. 744.

⁸¹¹ Minerbetti, 1399, cap. 4, p. 238; *HFP*, 11.71, pp. 238-9; Morelli, pp. 246-7. Brucker, pp. 166-9, records the response in Florentine councils to these developments as alarmed but not panicked.

⁸¹² Minerbetti, 1399, cap. 14, p. 244; *HFP*, 11.72, pp. 240-1; Morelli, p. 247; Mesquita, p. 252.

⁸¹³ Minerbetti, 1399, cap. 18, pp. 247-8. Mesquita, pp. 255-6, notes that the agreement is published in H. Helmolt, *König Ruprechts Zug nach Italien* (Jena, 1892), pp. 165-81.

⁸¹⁴ Mesquita, p. 255.

Florence's aggression and had clear grounds for war.⁸¹⁵ Soon afterward, Bologna, which had been under the rule of Giovanni Bentivoglio, was toppled by Milan despite Florentine aid.⁸¹⁶ Historians have wondered at Giangaleazzo's failure to capitalize on Florence's loss and the fall of Bologna by quickly mounting a direct attack on Tuscany, but perhaps due to his health, the need to secure the new territory, or disorganization among the *condottieri*, Giangaleazzo let the opportunity pass.⁸¹⁷ Not long after, in the height of the summer of 1402, Giangaleazzo's health began to grow worse and he died of fever in August, so that the worst of the threat to Florence abated.

However, even with the severe blows to its position in Tuscany and the Romagna before the death of the Duke, Florence had not been completely lost. Venice was deeply worried by the situation in Bologna and the loss of Mantua, whose lord had even led the attack on Bologna. Florence in fact rejected an alliance with Venice as late as the summer of 1402, when the terms were not favorable enough, while it also negotiated with the Pope for an alliance, and had offers from Ladislaus of Durazzo, who had taken over the kingdom of Sicily.⁸¹⁸ So there were still potential allies at the end of the Milanese conflict, though Florence sometimes had too much confidence in its own position. In reality, Florence likely felt it had time to join forces if it faced a siege in Tuscany. In Florentine diplomacy throughout the war, Brucker has seen what he believes was extreme hesitancy and endemic

⁸¹⁵ The fiasco with Rupert is well-documented in Brucker, pp. 176-9, who emphasizes the incident in order to argue that Florentine diplomacy was marked by unsteady, sometimes inexplicable policies. Cf. Minerbeti, 1401, caps. 10-14, pp. 265-9; Morelli, pp. 255-8; *HFP*, pp. 262-79.

⁸¹⁶ Minerbeti, 1402, caps. 4-8, pp. 276-8; *HFP*, 11.39-44, pp. 290-7; Morelli, pp. 259-65.

⁸¹⁷ The immediate reports in Florence were of a Milanese offensive, which never materialized; Mesquita favors the idea that the mercenaries had their own ambitions in the Romagna, which did not include immediate conquest of Tuscany, pp. 290-1. Cf. Morelli, pp. 264-5, also claiming that personal ambitions of the *condottieri* prevented further action in Tuscany.

⁸¹⁸ Mesquita, p. 260, 285.

vacillation.⁸¹⁹ Though he rightly notes that the commune's war expenditures were not always rational, the policies (with the exception of the transalpine misadventures) are better characterized as conservative and rather consistent, if shortsighted.⁸²⁰

Giangaleazzo's death did not end the war either, since Florence went on the offensive in Lombardy, faced continued trouble in Tuscany and new problems with the allies. Its foreign involvement after the Duke's death was more aggressive and expansionist, as the Tuscan city, like others, pressed a weakened Milan and attempted to take territory and reclaim allies. But the death of Giangaleazzo also brings the period under examination here to an end, artificially but somewhat usefully as well. The aim was to look at Florentine foreign relations closely in a time of war, when diplomatic debate and tension were at their peak, giving closer attention to the legal dimensions of those foreign relations. Doing so also allowed a better view of the strategies Florence employed in foreign affairs in the period from 1392-1402.

Florentine military action in 1396-98, and to 1402, operated at the same time as intense protests and negotiations, including arbitrations and peace conferences. Throughout the period, Florence defended itself vigorously and laid accusations with arguments that asserted legal rights, while reminding others of their obligations. The role that the law played in this diplomacy was fundamental, and calls for more study. Two perspectives, at least, would seem to be able to bear results. One is a historical and sociological perspective,

⁸¹⁹ Brucker, pp. 183-6.

⁸²⁰ Brucker, p. 185. Brucker arrives at his judgment largely from a close examination of the *Consulte e Pratiche*, the record of the city council meetings. The diversity of opinions, threats and complaints which came out of those meetings naturally gives a vacillating, disjointed view of foreign policy. On the other hand, relying on instructions to ambassadors and legal disputes, as was done here, admittedly tends to give a procedural view of foreign policy. In truth there may be three levels of relevant analysis for Florentine foreign affairs: 1) public and more clandestine activities that forward policy goals, including belligerent action; 2) the procedural activity of diplomacy; and 3) internal discussion, which goes to characterize a city's "frame of mind" concerning various policies. An approach that effectively synthesizes all three would be best, but the first two would seem to deserve more emphasis than the third.

which would analyze in depth the mechanisms and effects of dispute processing among the Italian cities, based on more detailed case studies than have been examined here. The other, from the perspective of legal history, would trace the jurists who were involved in inter-city disputes and examine more learned law and *consilia*; it would perhaps also consider later commentaries and treatises and the impact of *consilia* on them. With such a focus, a fuller legal history would come to light, and a better understanding of the role that the *jus commune* played in Italian foreign relations. Perhaps both research directions can be useful, and usefully combined.

Chapter 6

Conclusion

A summary of the territory and arguments covered in the chapters above may be useful, particularly since the thesis unites under a common theme disparate material. The first aim was to examine, from the perspective of legal history, the development of the law on war and peace in the medieval *jus commune*, or the learned tradition of canon, Roman and feudal law. This is not an unfamiliar subject, given that medieval just war theory is referred to even in contemporary discussions of just war. But the law on war in the medieval *jus commune* went beyond just war theory, and particularly interpretations of war in Roman law have not received adequate treatment. In taking up the law on war in the fourteenth and early fifteenth centuries, this study tried to fill a *lacuna* and give coherence to the tradition on war in that period, particularly since it largely came out of Italy and can be related broadly to Italian politics. The second aim was to examine how ideas from the learned law on war were applied in the practice of the Italian cities or at least, as was the case here, of Florence. We found that in practice just war arguments were given as justifications of policy in the course of diplomacy, and also that the learned law offered opinions that had application in dispute processing between Florence, its allies and adversaries.

It would be well to review here, at somewhat greater length, the conclusions that were reached. Although other scholars have ably covered the just war tradition in canon law and theology, elements of the tradition deserved renewed emphasis. The medieval theory of just war reached its maturity by 1300, and canonists and theologians generally stayed close

to the criteria of just authority, just cause and proper intention. However, the middle of the thirteenth century did see important contributions to legal theory, with the work of Innocent IV and following him Hostiensis. Innocent cannot be said to have stepped outside of the Augustinian tradition received through Gratian, but he was more concerned to describe different kinds of licit war, some of which were drawn from Roman and feudal law. Importantly, Innocent included as one type the full Roman war, which was appropriate for “the prince who recognized no superior.” Innocent also identified a type of limited war, reprisals, which were available to individuals when there was no judge before whom a complaint could be presented. In Innocent IV, proper authority and proper scope for hostilities were the central issues, which made him influential for fourteenth-century discussions that reexamined authority, cause and intention.⁸²¹

Roman law as codified by Justinian always had a more minimal requirement for licit war than traditional canon law, taking proper authority as the essential criterion. Medieval jurists were aware of this, and during the fourteenth and early fifteenth centuries some Roman jurists articulated more clearly a vision of war that was more permissive than traditional canon law.⁸²² Bartolus of Sassoferrato, among Roman jurists, appears as a key figure in motivating new discussion of war, particularly in (what were very influential) legal discussions in Italy. In a key contribution to medieval political theory, Bartolus asserted that a number of Italian cities had effective sovereignty, and his discussion of reprisals in the *Tractatus represaliarum* probably influenced the opinions of some subsequent jurists on war, the most outspoken of whom was probably Paolo di Castro. Paolo saw war in the absence of a superior authority as licit, based on the actor’s “primeval” rights to make law

⁸²¹ For these arguments, see ch. 2.

⁸²² See ch. 3.

for himself and prosecute his own causes against all others. When it came to deciding which side had a just cause in the absence of an effective or legitimate superior authority, jurists like Angelus de Ubaldis and Raffaele Fulgosius agreed that wars could proceed in the face of doubts. These views reflected anxieties over the difficulty of adjudicating the ultimate justice of a conflict, particularly in view of the independent cities. In practice, among cities and other political actors in Italy, sufficient authority and cause was often accepted, or at least not easily contested.⁸²³ But despite the more extreme statements of Paolo di Castro – including the view that wars for conquest might be licit – relations between cities and other political actors in Italy were not without a substantial amount of normative rules and formal law.

Italian cities like Florence often attempted to prevail in narrower legal disputes with other cities by means of elaborate legal arguments, protracted negotiation and sometimes arbitration. These went on even in wartime. Issues that arose frequently in such disputes included the status of captives and adherents (*adherentes*), obligations arising from peace treaties and alliances, and questions pertaining to grants of reprisals. Of course, disputes also arose directly over the underlying causes of hostilities, like rightful ownership of property and restitution. Importantly for this study, the *jus commune* was able to provide, and further developed in the course of the fourteenth century, a range of legal concepts on some of these more particular subjects.⁸²⁴ Italian jurists were well-versed in these topics,

⁸²³ In one well-documented, though non-Italian case, the overall justice of a war between Poland and the Teutonic Order of knights was sent before the Council of Constance in 1411. Although detailed just war arguments were submitted by each side, no decision was reached and the conflict continued until a peace was reached in 1466. On the case, see Frederick Russell, "Paulus Vladimiri's Attack on the Just War: A Case Study in Legal Polemics," in *Authority and Power: Studies on Medieval Law and Government Presented to Walter Ullmann on his seventieth birthday*, ed. B. Tierney and P. Linehan (Cambridge, 1980), pp. 237-54. But more usually, as Russell noted, "war was deemed just when waged for an ostensible just cause by a power claiming the requisite authority;" Russell, *ibid.*, p. 238.

⁸²⁴ For some of these narrow issues surrounding war, ch. 3, pp. 96-119.

given their common legal training, and indeed could employ the *jus commune* to frame and argue legal disputes in the course of diplomacy. In particular, the *jus commune* was sometimes employed formally in inter-city disputes, as seen in *consilia* that were produced by trained jurists, often it seems for arbitration proceedings.⁸²⁵ The channels available for dispute resolution again were practical, and seemed rarely to judge the overall, and particularly moral, justice of a war. However, it was important to point out that just war arguments could form a part of diplomacy, insofar as they were used as public recitations of a city's case for war, proffered to a wider community when hostilities were imminent.⁸²⁶ Making a public case for war aimed most importantly to shore up support among allies and follow customary protocol.

Opinions in the learned law on war and peace grew in the fourteenth century, and jurists' involvement in particular disputes appears to have increased as well. By mid-century, Bartolus had admitted that Italian cities could make peace and federate amongst themselves freely, while other civilians added new opinions to the commentary literature on the nature of confederations and truces, on the importance of arbitration between cities and the powers of mercenaries, among others. Martines has noted the prevalence of trained lawyers in diplomacy at least by the Trecento, and the commentary literature reflects a closer engagement with issues of war and peace.⁸²⁷ As well, the early Trecento marks the first period in which we have collections of *consilia*, and the number of these collections grew significantly in the second half of the Trecento.⁸²⁸ Though most cases contained in

⁸²⁵ It may be true, however, that submitting *consilia* in dispute processing between political actors was an extraordinary procedure.

⁸²⁶ See ch. 4 for these observations.

⁸²⁷ Martines, *Lawyers and Statecraft*, pp. 311-15. Some contributions from Trecento commentary literature are discussed above in ch. 3.

⁸²⁸ See Mario Ascheri, "Il *consilium* dei giuristi medievali," in *Consilium. Teorie e pratiche del consigliare nella cultura medievale*, ed. Carla Casagrande, et al. (Florence, 2004), pp. 243-58

them do not deal with disputes on an inter-city level, there appear after the middle of the century cases on issues like reprisals, truces and the validity of treaties.⁸²⁹ Renowned lawyers whose *consilia* have been collected, and whose careers date to the later Trecento and Quattrocento, certainly were in demand and maintained a high profile in their often itinerant careers. They might not only teach, but maintain a private practice and take a more public role as counselors to city governments where they worked. In the case of Florence, the government was certainly interested in having a noted foreign jurist like Angelus de Ubaldis live and teach there, and sometimes give legal advice to the commune. Other cities also drew high-profile jurists into their service, the best example of which is the *coup* Giangaleazzo himself achieved in drawing Angelus's brother Baldus to Lombardy.⁸³⁰

Angelus's *consilia* for Florentine disputes are interesting as legal documents, and help to shed light on the character of diplomacy in Florence, at least during the conflict with Giangaleazzo Visconti of Milan. More needs to be filled in on the cases for which Angelus wrote *consilia*, but they testify to Florence's willingness to submit disputes to arbitration, while using the most advanced legal tools available to defend its interests.⁸³¹ The *consilia* and diplomatic correspondence from the period also testify to the deliberative nature of

⁸²⁹ From a quick survey of Bartolus's *consilia*, it does not seem that he dealt with any cases related closely to war and peace, but Angelus of course did, as well as other contemporaries. Cf. Bartolus, *Commentaria*, 5 vols. (Turin 1589, V), for his *consilia*. For *consilia* of other jurists that cover issues of peace, truce, reprisals, hostages, and similar, see e.g., Paolo di Castro, *Consilia* (Frankfurt 1582), nos. 15, 21, 78, 295, 400, 424, 429; Filippo Decio, *Consilia*, 5 vols. in 2 (Lyon 1546): vol. 1, no. 7; vol. 4, no. 520; vol. 4, no. 460; vol. 5, no. 689; vol. 5, no. 692; Alessandro Tartagni, *Consiliorum seu responsorum Alexandri Tartagni ... liber primus [-septimus]*, 7 vols. in 3 (Venice 1597): vol. 1, no. 16; vol. 2, nos. 37, 46, 174. Prominent jurists each seem to have a handful of cases pertaining to these kinds of issues, though their total output averaged in the hundreds, so this is a small portion.

⁸³⁰ Florence had tried to attract Angelus's brother Baldus back to Florence in 1385, after he had taught there between 1359-64 and received citizenship. Baldus ultimately went to Milan in 1390, and counselled Giangaleazzo Visconti on a number of disputes pertaining to his dominions. It is somewhat interesting that Angelus worked fruitfully on Florentine cases in the same period. See Kenneth Pennington, "Baldus de Ubaldis," pp. 35-61, and the bibliography.

⁸³¹ For Florentine diplomacy in this period, see ch. 5. The offer to submit disputes to arbitration does not seem unusual, but their actual frequency needs further study, in Florence and elsewhere.

Florentine diplomacy. Florence may have been slow to respond to dangers and opportunities in the Milan conflict, and council speeches reveal the depth of Florentine anxiety and the difficulties it faced in taking decisive action.⁸³² But the diplomatic machinery ground along, making offers and counter offers, raising issues for dispute, attempting mediation and arbitration, and generally negotiating a complex set of obligations and expectations. Florentine diplomacy was cautious, took cognizance (or tried to) of all changes in the positions of its enemies and allies, and by nature put off the most intractable problems. Diplomacy worked alongside military action, covert deals and provocations, and was no less important than those other methods. A just appraisal of Florentine foreign policy has to take a fuller account of diplomacy and dispute processing, the slowness and caution of which could protect Florentine interests and defer hostilities. A fuller appraisal, in fact, may be used to balance a competing emphasis on the vacillations, divisions and fears so apparent in Florentine council debates.

More broadly, law in late medieval Italy, when bolstered by the *jus commune* and when embodied by more customary practices, played an important role in the system of inter-city relations. Treaties of peace and alliance, as well as commercial treaties and any other written agreements, formed obligations whose violation usually led to a diplomatic outcry and gave a familiar basis for dispute. Such disputes might continue for many years, and see military interventions, outside mediation or arbitration, and further agreements and treaties come into play before being resolved. But diplomatic means were at least as familiar as purely military ones to pursue policy, and agreements did have some staying power, partly because their violation triggered monetary penal clauses and furnished cause for war, because a community of political actors looked on expectantly, and because

⁸³² On the various opinions of council meetings, Brucker, *The Civic World*, pp. 144-86.

cooperation could bring benefits. On the other hand, the observance of obligations often likely related to the relative power and interests of the parties involved. The realities of power politics should still, unquestionably, be at the forefront of any analysis of inter-city relations in the period. But complex sets of obligations, and the instruments which contained them, were also observed by these political actors and bound them together.

It is true that overarching political interests were probably the most important factor in determining whether agreements would be observed in medieval Italy. And of course treaties could be, and were, entered into lightly and without the intention of fulfilling them. Nor is this saying very much: the law did not make relations between political actors less competitive or self-interested. But again there were benefits of upholding, and appearing to uphold, agreements. Beyond that, the legal culture of late medieval Italy was well suited to help organize not only internal municipal and territorial affairs, but the diplomatic relations of the city-states, and to help mediate disputes between them. It seems most basically that law could play a detailed role on that level because the main political powers shared a language and relied on each other for commerce and open commercial routes. War was one means to increase territory and trade, but the relative equality of the leading powers, and the frequent possibility of achieving political ends by purchases and other agreements, made legal approaches valuable. The law was used strategically by the political actors, and just war pronouncements in particular were often used to legitimize a course of action. But legal arguments over treaties and other agreements, and long-term disputes that resulted from them, formed part of a more complex process by which claims and interests were negotiated, deferred and modified.

To return to the final note of the last chapter, there are a number of issues raised here that merit further study. The mechanisms of negotiation in diplomacy, and the use of the *jus commune* within the diplomatic process between Italian cities, is one place to start.⁸³³ It might be difficult to recreate a whole dispute process in detail, but some aspects of it could be amplified, arbitration being one of them.⁸³⁴ It may be that offers to go to arbitration in the late Middle Ages arose freely between cities and other political actors in the course of their disputes, as seems to be the case for Florence during the Visconti conflict. But more work could be done to locate the *compromissa* that would have formally bound the parties to arbitration, and the *sententiae* that gave the arbiter or arbitrator's decisions.⁸³⁵ As well, more *consilia* could be examined and set in the context of the disputes which gave rise to them, which, along with the other relevant documents, could help to reconstruct dispute processing at this level somewhat more fully. To the extent possible, less formal arbitrations, which lack *consilia* or elaborate *compromissa*, should also be studied and compared.⁸³⁶

Questions on the development of these institutions arise as well, including how a practice like arbitration may have changed from the earlier to the later Middle Ages and early Renaissance. Here the line of questioning would consider how frequently arbitration

⁸³³ For some bibliography on arbitration, see ch. 5, p. 176, fn. 622. There does not seem to be work on arbitration, analyzing cases from different areas and drawing conclusions from a comparison of them, on the inter-city or interpersonal level.

⁸³⁴ One notable study that examines at length the disputes between Savoy and Montferrat in the 1390s, including close examination of arbitrations, is Ferdinando Gabotto, *Gli ultimi principi d'Acaia e la politica subalpina dal 1383 al 1407* (Torino, 1898), and 308ff. for Giangaleazzo Visconti's role in some disputes between them.

⁸³⁵ Gabotto, *Gli ultimi principi*, pp. 308-12, for example, details a *compromissum* between Savoy and Monferrat. I have not found examples of these documents yet for Florence.

⁸³⁶ Of course, individual noblemen might be disputants, and dukes or counts might enter arbitration in their own names, even when effectively representing their territory and people. These might be less formal and undertaken without lawyers; it would be important not to generalize practice from a small sample, since in some areas (not to mention different times) arbitration would be more dependent on custom, while in others it might be marked more clearly by the influence of the *jus commune*.

was resorted to, what role the *jus commune* played in its evolution and when and how often *consilia* by trained jurists were submitted in disputes between the Italian cities.⁸³⁷ It is probably true that there is no clear linear development, but the mid- to late Trecento, which saw the rise of the territorial powers, perhaps also witnessed the development of a more sophisticated approach to law on the inter-city level in dispute processing. Certainly *consilia* on disputes related to war begin to appear in the second half of the Trecento; but to the extent possible, practice in the earlier Middle Ages would need to be considered.⁸³⁸ And Florence's role as a leader in any more sophisticated use of law in inter-city disputes may deserve attention. It would not be surprising if a preeminently law-oriented and litigious city like Florence submitted *consilia* in inter-city disputes more frequently and earlier than other, smaller cities (or indeed lords).⁸³⁹ Finally, there is the possibility of comparing dispute practices in Italy, and particularly arbitration, to those in areas of northern Europe.⁸⁴⁰

Throughout this study, I have used the term "inter-city dispute" to describe the diplomatic conflicts that arose between, in this case, Florence and a variety of cities in northern Italy. It is a rather narrow term, and unfortunately not the ideal one, since

⁸³⁷ Martone's work, *Arbiter-Arbitrator*, is an excellent start for this kind of approach.

⁸³⁸ Oldradus da Ponte, a jurist active by the beginning of the Trecento, stands at the beginning of the *consilia* tradition; see Norman Zacour, *Jews and Saracens in the Consilia of Oldradus da Ponte* (Toronto, 1982), pp. 3-12. Baldus's teacher, Federicus de Senis, also has a surviving collection of *consilia*; see Mario Ascheri, *I consilia dei giuristi medievali* (Siena, 1982), p. 22, fn. 39. But early collections are rare. Angelus and Baldus (after Bartolus) are in the generation of jurists, active from around 1350, for whom there are *consilia* collections, and the brothers each wrote at least a handful of *consilia* on inter-city disputes.

⁸³⁹ Arbitration in Florence, at least, reached a level of particular sophistication, supported as it was by statutory law and enforceable in municipal courts. It was formally "extrajudicial" but also quite tied to judicial structures: Kuehn, "Arbitration and Law in Renaissance Florence," pp. 295ff.

⁸⁴⁰ Particularly comparisons to practice in England might be interesting, where the procedure seemed very similar and lawyers were actively involved. Edward Powell, "Settlement of Disputes by Arbitration in Fifteenth-Century England," pp. 33-4, describes English practice in the fifteenth century. Disputants agreed to submit to the arbitration and its award, then agreed to arbitrators and even nominated an "umpire" to make a final decision if the arbitrators could not agree. This "umpire" had the same role as the *bonus vir* in Roman law descriptions of arbitration. According to Powell, parties would offer a surety to observe the decision and might present "memoranda" and evidence to the arbitrators to support their case (p. 34). This seems similar to arbitration procedure in Florence.

numerous issues arose between cities and territorial lords, and among those lords; and the papacy itself became one of the most powerful territorial lords. Of course, the bias in this thesis was towards cities, and not only cities but the most prominent: as suggested above, future research could undertake to examine a wider range of disputes and disputants. Still, a more inclusive and representative term would have been preferred. The choice of “inter-city” conceals another and larger issue of word choice, since the term was preferred to “international.” This latter was passed over, first because these *were* cities (although territorial ones which may be considered city-states), and were located within what is now a single modern state. While the emphasis of the thesis was on the political independence of these cities, and the relations which held between them, I also wanted to avoid suggesting that the Italian network of relations was “international” in any modern sense. This is because the cities’ sovereignty, acknowledged *de facto* by Bartolus and others, was limited *de jure* by the prerogatives of Church and empire, and so could not form the basis of an international state system, as occurred from the early modern period onward.⁸⁴¹

Yet a focus of the thesis is law between cities, and some comment should be made on the extent to which Italian “inter-city” relations, grounded in part on custom, treaties and the *jus commune*, did imply an international law or something that functioned as one. As other scholars have observed, there is no reason to deny to the Middle Ages a form of international law, even though it differs from the modern form.⁸⁴² The customs of nations,

⁸⁴¹ Even Bartolus’s attempt to theorize the juridical relations of the Italian cities had the empire and church as the foundation and continuous reference point. Juridical relations between Italian cities were not theorized *per se* in any detail.

⁸⁴² E.g., Bruno Paradisi, “Studi e opinioni recenti sulla storia del diritto internazionale,” in *Civitas Maxima: Studi di Storia del Diritto Internazionale* (Florence, 1974), pp. 550-609, surveys work on international law in antiquity, reinforcing also his own views on the long continuities of international law; also Arthur Nussbaum, *A Concise History of the Law of Nations* (New York, 1954), chs. 1 and 2. Modern international law again is based on the state system. It also has a body of case law and some courts are officially given jurisdiction, like the International Criminal Court, if only by treaty agreement.

including the treatment of ambassadors, rules applicable to merchants, as well as treaties, have antique origins, and this basic kind of international law naturally persisted into the medieval period. Moreover, forms of custom, like reprisals, were given expression, and refined guidelines, not only within medieval statutory law, but in the *jus commune*. As well, the law on treaties was also given a basic construction within the learned law: opinions like *pacta sunt servanda*; that a prince could remit the rights of his subjects in a peace; should not diminish his territory; and could (or could not) be held by the agreements of his predecessors, originated in or were significantly adumbrated in medieval Italian jurisprudence.⁸⁴³ These rules could be applied to relations between the cities, and were argued in actual disputes by way of legal *consilia*. Certainly, *consilia* on inter-city disputes can add a layer to the description of “international law” that existed in late medieval Italy. Although there was no tradition of recognized case law on this level (just as it was lacking in municipal courts), and no permanent tribunals, elements of a normative theory and sophisticated tools of argument were available to the cities, as well as established custom.

An even closer look at the development of this “inter-city” or “international” law as reflected in the *jus commune* is warranted. This might include consideration of the period under study here, as well as the period from roughly 1450-1600. There is also more to be done in connecting the jurisprudence of the medieval *jus commune*, on questions of war and peace, to early modern international law in the seventeenth century, as found in writers like Grotius.⁸⁴⁴ As one example, the historian James Muldoon has traced the influence of canon

⁸⁴³ On *pacta sunt servanda*, the closest model in Roman law is D.2.14.7.7: “Pacta conuenta, quae neque dolo malo, neque aduersus leges plebis scita senatus consulta decreta edicta principum, neque quo fraus cui eorum fiat facta erunt, seruabo,” but it was given a stronger meaning in canon law, where *pacta nuda* were considered enforceable.

⁸⁴⁴ Peter Haggemacher, *Grotius et la doctrine de la guerre juste* (Paris, 1983), shows in excellent detail Grotius’s precursors on the just war doctrine, though more work can be done on the strong influence of medieval *jus in bello*. Richard Tuck, *The Rights of War and Peace*, chs. 1 and 2, gives a perceptive and

law on early modern international law, though his comments are confined to the question of dominion, and the justification for European conquest of the Americas.⁸⁴⁵ The medieval and early modern debate about rightful dominion was key to the justification of conquest, but medieval canon and Roman law had much else to contribute to the content of early modern international law, and to attitudes toward international relations. In truth, it was still the medieval *jus commune* on war and peace which formed the basis of the international rules that were applied to early European states.

A separate study would be needed to trace in full detail the influence of the medieval *jus commune*, particularly the influence of the medieval *jus in bello* tradition, on early modern international law. But a few brief observations might be made on the *jus ad bellum* theory found in a few Renaissance treatises on war, to highlight the influence of earlier tradition even when it was modified to articulate new positions. After Giovanni da Legnano's treatise, another of the early treatises devoted to war was the *De re militari et de bello* (1563) of Pierino Belli (1502-75).⁸⁴⁶ Belli had degrees in canon and civil law, and though he displayed a wide knowledge of classical literature, the foundation of his treatise was the medieval *jus commune*. He quoted the canonist Oldradus da Ponte, for instance, that sovereigns had the power to wage wars, and following Bartolus included among sovereigns any *populus* (or city-republic) which lived by its own laws.⁸⁴⁷ This focus on authority alone was later tempered by a quotation from Baldus on just war, and Belli's assurance that a just cause was also required.⁸⁴⁸ Belli noted that wars for the defense of

challenging account of what he terms the scholastic and humanist backgrounds to early modern theories of the state and relations between states.

⁸⁴⁵ James Muldoon, "Medieval Canon Law and the Formation of International Law," pp. 64-82.

⁸⁴⁶ Pierino Belli, *De re militari et de bello*, 2 vols., trans. H. C. Nutting (Oxford, 1964).

⁸⁴⁷ *Ibid.*, pp. 5-6. He also quoted Hostiensis in support of the right of sovereigns to war, not something Hostiensis would have accepted without the qualification that a judicial decision should be sought first.

⁸⁴⁸ *Ibid.*, p. 59.

liberty were just, and repeated the medieval idea that defense of the fatherland was a duty.⁸⁴⁹ On classical footing, Belli, similar to Paolo di Castro, held that war for empire was licit.⁸⁵⁰ Though he had a somewhat classical mindset, the fabric of Belli's work was the medieval tradition, and he drew discussions of captives and ransom, spoils, protections for non-combatants and the obedience required of soldiers from it, adducing the opinions of Bartolus, Baldus, Angelus, Paolo di Castro and many others.⁸⁵¹ He also urged that arbitration be used to resolve disputes.⁸⁵²

A jurist who did introduce a new, wide-ranging discussion of licit war was the civilian Alberico Gentili (1552-1608). Tuck has classified Gentili as "Renaissance" in his approach to war, by which he means that Gentili's reading of classical sources, including Thucydides and Cicero, led him to lower the threshold necessary to justify war.⁸⁵³ I noted in the introduction that I agreed that Gentili was permissive on war, but argued that more immediate support for Gentili's approach can be found in Roman law and the medieval *jus commune*. Gentili's treatise *De iure belli libri tres* (1598), put a wide knowledge of classical literature on display, but the *jus commune* was the key foundation.⁸⁵⁴ One example can be found in his analysis of national self-defense, which he borrowed partly from medieval Roman analyses of personal self-defense. The result, in Gentili's *jus ad bellum* theory, was a strong affirmation of the preemptive strike.

⁸⁴⁹ *Ibid.* The defense of liberty featured in Florentine political and civic discourse; see ch. 4 above, pp. 131-2. Accursius, in his gloss on the *Digest* 1.1.2, gave fighting for the fatherland ("*pugna pro patria*") as an example of a command of the *jus gentium*; Gaines Post, *Studies in medieval legal thought: public law and the state, 1100-1322*, pp. 435-52.

⁸⁵⁰ Belli, *ibid.*, p. 61.

⁸⁵¹ E.g., pp. 80ff. on non-combatants; p. 63 on obeying orders; pp. 85ff. on ransom and spoils.

⁸⁵² *Ibid.*, p. 18.

⁸⁵³ Tuck, *The Rights of War and Peace*, pp. 16-50.

⁸⁵⁴ Alberico Gentili, *De Iure Belli Libri Tres*, trans. John Rolfe (Oxford, 1933; Repr. New York, 1964).

Justifying the preemptive strike made some sense in context, since Gentili was an Italian Protestant who fled to England and taught civil law at Oxford from 1584, at a time when Spain threatened England. A robust theory would be quite welcome to Gentili's audience, and his treatise did respond closely to contemporary politics.⁸⁵⁵ On self-defense, Gentili argued that a nation did not have to wait to be attacked, but that a fear of attack, based merely on the power and reputation of another nation, was sufficient to strike first.⁸⁵⁶ The immediate roots of Gentili's theory can be traced to medieval civilians, including Azo and Jacobus de Ravanis, who had argued that a "weak" defender could strike first if a strong attacker threatened force.⁸⁵⁷ Jacobus had also held that a defender could strike first if the other party had a reputation for violence.⁸⁵⁸ This was the general line on self-defense that Gentili followed, and he quoted *consilia* by Baldus, and the civilians Alessandro Tartagni (1424-77) and Filippo Decio (1454-1535) in support.⁸⁵⁹ He later cited the speech of the Mytilenes to the Athenians from Thucydides, that Athenian power always represented a threat and thus could be opposed by force.⁸⁶⁰ The classical example did add to the analysis, but the framework was the *jus commune*.

Elsewhere Gentili was also permissive on war, though on secular and not religious grounds, and his account was fairly nuanced. He explicitly rejected the legitimacy of war for religion, following the innovative opinion of Francisco de Vitoria (c. 1485-1546), and claimed importantly that religion referred to God and man alone; causes for war were

⁸⁵⁵ *Ibid.*, p. 14a (introduction).

⁸⁵⁶ *Ibid.*, pp. 62-5.

⁸⁵⁷ Tuck, pp. 18-31, taking Cicero and Thucydides as the exemplars. On the medieval civilian theory of self-defense, see ch. 2 above, pp. 56-62.

⁸⁵⁸ See above, p. 59-60. However, the attacker also had to boast of his intentions or flash a weapon.

⁸⁵⁹ Gentili, *op. cit.*, pp. 62-3. The *consilia* Gentili noted, which pertain to personal self-defense, refer back to the opinions of the earlier jurists on self-defense. See, e.g., Alessandro Tartagni, *Consiliorum seu responsorum...liber primus[-septimus]* (Venice 1597, VII fol. 90ra-91va).

⁸⁶⁰ *Ibid.*, p. 63.

strictly human, according to Gentili, by which he discarded a sizable part of the Augustinian and canon law tradition.⁸⁶¹ Again the argument had a political context, since Gentili observed that the Spanish conquest of the Americas in the name of religion merely veiled greed and the desire for dominion.⁸⁶² Gentili further maintained, consistently, that a sovereign could not wage war against his subjects to change their religion, and that victors in general should not change the religion or customs of the conquered.⁸⁶³ He even rejected the idea, familiar from Giovanni da Legnano, that men could be naturally inimical to one another, particularly on account of hatreds motivated by the planets.⁸⁶⁴ For Gentili war arose simply from the acts and varying customs of men. While the “just” cause was in theory fenced in by the law of nations – which by definition was the customs, and the principles derived from reason, which all humans shared – the concrete limits of the *jus ad bellum* in Gentili were not very strong.⁸⁶⁵

Gentili ruled out religion but accepted offensive wars as licit. One type he endorsed was war for necessity: this might arise when a group of people was forced to leave its homeland due to emergency or decree, and had to find a new land. In order to gain a foothold and survive elsewhere, these people had the right to wage offensive war.⁸⁶⁶ There was also a justification for simple expansion, which would later develop into the English defense of expansion in the Americas: nature abhorred a vacuum, and uncultivated land could essentially be taken, by force if necessary, even if it was formally part of the territory of some sovereign.⁸⁶⁷ As Tuck has pointed out, this theory prefigured the “labor theory” of

⁸⁶¹ *Ibid.*, p. 39, citing Vitoria; p. 41, rejecting war for religion.

⁸⁶² *Ibid.*, p. 39.

⁸⁶³ *Ibid.*, pp. 42-8; pp. 340-8.

⁸⁶⁴ *Ibid.*, p. 54.

⁸⁶⁵ *Ibid.*, pp. 55-6.

⁸⁶⁶ *Ibid.*, pp. 79-80.

⁸⁶⁷ *Ibid.*, pp. 80-1.

property found in Locke's *Two Treatises of Government* (1689), in which dominion over unoccupied land went to whomever mixed his labor with it, and was itself preceded by a similar point in Thomas More's *Utopia* (1516) and even earlier in law by Francesco Accolti (1416-88).⁸⁶⁸ Gentili was somewhat conciliatory, since he suggested that a sovereign could retain jurisdiction over unoccupied land, while the exiles or settlers would abide by existing laws.⁸⁶⁹ In fact, the settlers would have (by appropriation however) what was similar to an emphyteusis in late Roman law, which often developed into a perpetual lease, and effective ownership, of unoccupied, uncultivated land.⁸⁷⁰

Gentili added another category of offensive war, which was simply the avenging of injuries that had been a constant in the just war tradition. He referred to the point which had been made with convenient clarity by Paolo di Castro: sovereigns, over whom there were no magistrates, could pursue their own causes, just as individuals were able to do before there were public officials.⁸⁷¹ Gentili averred that pursuit of these causes "will always be just when there are no magistrates or when they cannot be approached."⁸⁷² This was the medieval point, and was permissive, but Gentili had an extreme application of it. He supposed that if someone had written a "scurrilous" book against someone else, and there was no magistrate to appeal to for redress, the offended party could protect himself by force of arms against such calumny. Not only were injuries which justified hostilities construed broadly, but rights were as well. Gentili argued, in a familiar vein, that free passage was a

⁸⁶⁸ Tuck, *op. cit.*, pp. 47-50; 173-181.

⁸⁶⁹ Gentili, *op. cit.*, pp. 81-2.

⁸⁷⁰ On emphyteusis, see R. Sohm, *The Institutes: A Textbook of the History and System of Roman Private Law*, 3rd ed., trans. J. C. Ledlie (Oxford, 1901), pp. 348-50; W. Buckland, *A text-book of Roman law from Augustus to Justinian*, 3rd ed., rev. by P. Stein (Cambridge, 1966), pp. 275.

⁸⁷¹ Gentili, *op. cit.*, p. 84.

⁸⁷² *Ibid.*

right available to all.⁸⁷³ He also argued, on the basis of the *jus gentium*, that commerce was essentially a free right; while there were exceptions to the rule, ports generally were to be open to all, as well as waterways.⁸⁷⁴ In the age of expansion, a broadening of the rights of war would be natural for jurists: it is argued by Tuck and at the center of his thesis, that competition between nations due to (and as cause of) expansion helped to move rights discourse in a modern direction.⁸⁷⁵ The idea of “just” war is significantly transformed by Gentili to fit his contemporary context, and again is permissive; but the ideas had a basis in medieval law and particularly medieval Roman law.

Finally, Hugo Grotius (1583-1645), in his *De jure belli ac pacis* (1625), which is often thought to mark the beginning of modern international law, also argued on a wide variety of sources, but made primary use of the medieval tradition on war.⁸⁷⁶ He rejected – perhaps with Gentili in mind – the permissive account of self-defense that allowed a defender to attack first based simply on the reputation or power of a supposed attacker.⁸⁷⁷ Self-defense was only licit, according to Grotius, if an attack was actually in progress, or clear and threatened.⁸⁷⁸ Following the medieval tradition, war was just in response to injuries and to recover what was unlawfully denied to a state. As the rights that were free for any people, Grotius, like Gentili, included those to passage, waterways and the sea, and also permitted the same right of colonization, namely, a displaced people could take permanent residence in another country, but they had to submit to the laws of the

⁸⁷³ *Ibid.*, pp. 86-7.

⁸⁷⁴ *Ibid.*, pp. 89-92.

⁸⁷⁵ Tuck, *op. cit.*, pp. 1-15; and see, e.g., chapter 3 on Grotius, pp. 78-108.

⁸⁷⁶ Hugo Grotius, *De jure belli ac pacis libri tres*, trans. F. W. Kelsey *et al.* (Oxford, 1925; repr. New York, 1964).

⁸⁷⁷ *Ibid.*, bk. 2, ch. 22, pp. 546-56.

⁸⁷⁸ *Ibid.*, bk. 2, ch. 1, pp. 169-85.

“established government.”⁸⁷⁹ As Tuck has rightly suggested, this jurisdiction that was retained by the original people was essentially vacuous, since it could not stop European colonization of any open or uncultivated land, or commerce.⁸⁸⁰

Grotius also re-introduced an aggressive aspect of the canon law tradition. He cited Innocent IV in affirming that perversions of the “laws of nature” could be punished by (not the Church but) sovereigns through war.⁸⁸¹ Grotius did not accept that war could be waged to enforce Christian belief or settle Christian religious disputes, though he did agree with medieval canonists that Christian preaching was everywhere permissible.⁸⁸² Moreover, certain minimal religious principles were universal, guided morality and inspired reverence for government.⁸⁸³ There was thus in Grotius a fairly complex response to a number of contemporary problems, including religious conflict, American colonization and what he viewed as the importance of establishing (or uncovering) universal laws to mediate the struggle of European nations for the New World.⁸⁸⁴ Along with genuinely Renaissance and classical influences, there is still, in the work of Grotius, Gentili and Belli, a strong rootedness in the traditions of canon and Roman law.⁸⁸⁵ The Aristotelian position on natural slavery, or the view that war for glory was licit, sometimes became elements of this early

⁸⁷⁹ *Ibid.*, bk. 2, ch. 2, pp. 186-205; quote at p. 201. “Established government” itself indicates a level of institutional and legal development that Grotius would not recognize among the native peoples of the Americas.

⁸⁸⁰ Tuck, pp. 106-8.

⁸⁸¹ Grotius, *op. cit.*, bk. 2, ch. 40, pp. 504-6; and above, pp. 46-7. Those perversions might well include a number of “barbaric” practices of the natives of the Americas.

⁸⁸² *Ibid.*, bk. 2, ch. 49, pp. 517-18. Like canonists he held that those missionaries, if they were mistreated, could be protected by force.

⁸⁸³ *Ibid.*, bk. 2, chs. 54-56, pp. 508-514. Grotius’s attitude toward the importance of civic religion features in Machiavelli and later in Hobbes and others. Grotius appeared to be thinking about how to permissibly “civilize” new peoples, whether in the east or west, without exporting all of Europe’s sectarian religious conflicts. It was a balancing act that would come out of existing legal precepts.

⁸⁸⁴ Grotius also sought to push back against Spanish and Portuguese justifications for control of the New World, and favor Dutch interests and its approach to colonization.

⁸⁸⁵ There is also, admittedly, the sometimes cautionary influence of the Spanish scholastics, and particularly Francisco de Vitoria.

modern *jus ad bellum* discourse, but strands of the medieval legal tradition are essential as its foundation. And although it would take a separate and detailed study, medieval influence on early modern thinking about *jus in bello* seems to be just as strong or stronger, even if writers like Grotius and Gentili interspersed it with crops of classical references.⁸⁸⁶

Although desirable, it is not possible to do justice here to the complexity of Grotius's thought or properly situate him in the history of international law and international relations. Nor is the analysis above meant to suggest that Grotius was simply traditional and not innovative. But as scholars like Haggenmacher and Tuck have observed, he was not radical, and he borrowed from Gentili, from the Spanish scholastics, and in many other cases reached back to the stalwarts of medieval canon and Roman law. Grotius, like all the early modern jurists – and we might also include political theorists like Hobbes and Locke – deeply engaged with a legal tradition that achieved its first maturity in the high and late Middle Ages, namely the *jus commune*.

This learned law, which has cast such a long shadow over European legal and political thought, had its own complex development, taking substantial shape between 1150 and 1400. It made essential contributions to the institutional development of the medieval Church and secular institutions, including the laws and government of the precocious Italian cities. On questions of war, the *jus commune* made foundational contributions that we still contemplate today in thinking about the possibility and conditions necessary for justice in war. Interestingly, however, the *jus commune* was also rather more modern than we might

⁸⁸⁶ The motives for doing so were generally to move away from the appearance that medieval canon law, with all its Catholic and papal significance, should play a key role in Protestant (or even post-sectarian) descriptions of a general law that could hold among all peoples. There are important debates over Grotius's position as a theorist of natural law, and the extent to which he offered a new account of the law of nations; see *Hugo Grotius and International Relations*, ed. H. Bull, B. Kingsbury and A. Roberts (Oxford, 1990), particularly the introduction, pp. 1-64.

expect in its understanding of the limitations of theory on war. The European Middle Ages are still sometimes thought of as subject to the unifying authority of Church and empire, but medieval jurists understood the problems that war in Europe posed for that model, and sometimes admitted that there was no tribunal to adjudicate disputes among sovereigns.

In Italy, as elsewhere, multiple claims to sovereignty – and endless claims to just causes and just war – resulted from the lack of a sure political hierarchy, but hardly gave way to unfettered action. Indeed, the relations between cities and other political actors in medieval Italy were complex but mediated importantly by law and diplomacy, as well as the familiar politics of strategic interests and personal relationships. For the leading cities and powers, a deliberative approach to disputes is not surprising, at the least because it tended to reduce quick and expensive recourse to open war, and sounded out the changing positions of multiple parties. At the same time, treaties and negotiated settlements created legal obligations and conferred measures of legitimacy, that all-important commodity, more than simple conquest or usurpation. Here the formal rigors of the *jus commune* could come into play, and the legal skills and arguments valuable for debating detailed treaties, and useful in any range of disputes, could shift into focus.

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