

ROMAN LAW AND THE *CAUSA LEGITIMA* FOR REPRISAL IN BARTOLUS

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1. Introduction

I became acquainted with Laurens Winkel when I attended a course on the history of international law, which he presented at the Erasmus University in Rotterdam. I passed this course by writing what I generally refer to as my ‘second master’s thesis’, a paper dealing with the development of rules governing conflict between the legal systems of the Italian city-states in the various works of the famous fourteenth-century jurist Bartolus de Saxoferrato. This paper led to a proposal that I conduct research into the possibility that there might be in Roman law a precursor to the modern idea of human rights. I wrote my doctoral thesis, supervised by Laurens Winkel, on that subject, and obtained my doctorate at the Erasmus University in 2011. This dissertation features many of the ideas treated previously in the master’s thesis as well as themes dealt with in the course on the history of international law, such as the reception of Roman law from the Middle Ages onwards, and the development of the notion of *ius gentium*. When supervising doctoral theses, Laurens Winkel also inspires in his own students his great passion for legal history. Other students will have experienced this before me and it is to be hoped that many will do so after me. It is for this reason that I dedicate this article to him in friendship and appreciation, as a small appendix to my ‘second master’s thesis’.

The reception of Roman law in the early development of a law of nations in the later Middle Ages and early modern period, particularly with regard to ‘private law analogies’ as studied by Lauterpacht, is one of the main themes in the publications of Laurens Winkel, for example in a paper published in 2004¹. Even though the jurist Bartolus de

1 L. Winkel ‘The peace treaties of Westphalia as an instance of the reception of Roman law’ in R. Lesaffer (ed.) *Peace Treaties and International Law in European History. From the Late Middle Ages to World War One* (2004) 222-237, generally referring to Lauterpacht’s private-law analogies at 224; and to *uti possidetis* at 230; and military occupation at 232 in the treaty of Westphalia in particular. Cf. H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927); R. Lesaffer, ‘Argument from Roman law in current international law. Occupation and acquisitive prescription’ 2005 *European Journal of International Law* 25-58.

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** The author wishes to express his grateful thanks to Prof. dr. J. Hallebeek (VU Amsterdam) for his comments and suggestions.

Saxoferrato may be seen as of fundamental importance in both the reception of Roman law in Western Europe and the development of international (private) law², he hardly figures in the work of Lauterpacht. It was other historians of international law, such as Ziegler and Grewe, who read a type of analogy between the *ius belli* doctrine and the theory of reprisals into Bartolus' *Tractatus represaliarum* (1354), which they characterised as a 'höchst scharfsinnigen und eingehenden Darstellung des Repressalienrechts'³. At first glance, it seems that the reprisal Bartolus had in mind does not coincide with a state's right to defend itself, comparable to the right later enshrined in article 51 of the Charter of the UN. It is, rather, a precisely formulated alternative type of legal remedy, primarily available to commercial traders as private parties where they cannot appeal to a tribunal or court⁴. Moreover, even though Grewe suggests that Roman law did have some influence on Bartolus when he was developing his doctrine of reprisals, he also states that the jurist did not find any precursors of the right of reprisals in Roman law itself⁵, and emphasises that as regards the 'analogy' to the *ius belli*, Bartolus had recourse to scholastic rather than Roman legal sources⁶.

2. Reprisal and self-defence in Roman law

The question whether Bartolus made use of Roman law in developing his doctrine of reprisals, possibly even analogous to his theory on the *ius belli*, was addressed somewhat indirectly by Winkel in another publication⁷. He there referred to Bartolus when discussing whether there had already been precursors of Vitoria's theory of a 'just war on both sides' in medieval civilian scholarship. Undoubtedly, these could be found in theology and canon law, as confirmed by Haggemacher⁸, but in medieval Roman-law doctrine this was not so obvious. Winkel suggested that a Roman-law basis for a theory of just war, based on self-defence, may be found in D. 43.16.3.9, but that Bartolus did not refer to it. Winkel's suggestion is interesting when one considers the content of this Digest text, which in theory seems to provide the 'sedes materiae' for a doctrine of reprisals and a possible connection between reprisals and the theory of just war:

D. 43.16.3.9 Ulpianus *Libro sexagensimo nono ad edictum*: "Eum igitur, qui cum armis venit, possumus armis repellere, sed hoc confestim, non ex intervallo, dummodo sciamus non solum resistere permissum, ne deiciatur, sed et si deiectus quis fuerit, eundem deicere non ex intervallo, sed ex continenti." (Thus, the one who comes with arms we may drive

2 For instance, K.-H. Ziegler 'Die römischen Grundlagen des europäischen Völkerrechts' 1972 *Ius commune* IV 16; P. Stein 'Bartolus, the conflict of laws and the Roman law' in *The Character and Influence of the Roman Civil Law* (1988) 83-90.

3 Q. 3.2.3: *concedere repraesalias est indicere bellum*; Ziegler (n. 2) 17; G. Grewe *Epochen der Völkerrechtsgeschichte* (1984) 145.

4 Grewe (n. 3) 145-146.

5 *Idem* 146.

6 *Idem* 147.

7 L. Winkel 'Francisco de Vitoria on just war on both sides and on the legal position of Burgundy' 2007 *Tijdschrift voor rechtsgeschiedenis* 358.

8 *Ibid.*; cf. P. Haggemacher *Grotius et la doctrine de la guerre juste* (1983) 209-221.

back with arms, but at once, not after a lapse of time. We should know that it is not only permissible to offer resistance in order to avoid being expelled, but that even if someone is expelled, he may expel the other, albeit not with the lapse of time, but at once.)

The text was originally written in the context of the *interdictum de vi armata*, in terms of which one may defend one's property by force if necessary⁹. This is certainly not the only source of a doctrine on reprisals and self-defence in the Roman legal sources. Self-defence and self-help constituted a fundamental principle of Roman law in its classical period, expressed by the maxim *vim vi repellere (licet)*¹⁰. For instance, in the early Empire the jurist Gaius Cassius Longinus employed the maxim in the context of the *interdictum unde vi* as stemming from the *ius naturale*¹¹.

In this respect, it has been argued that the Roman jurists' approach to self-defence was influenced by Greek philosophy. The following text was thought to suggest this¹²:

D. 1.1.3 Florentinus *Libro primo institutionum*: "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." (And that we offer resistance against violence and injustice, because from this right it follows that what someone does to protect his own body, is considered to have been done rightfully; because nature established between us a kind of fellowship, it is accordingly wicked for one man to attack another.)

In the text, defence of one's own body is said to be lawful because there is a common bond among all human beings. Thus self-defence is not only 'legal' and 'natural' as Cassius argues, but is also, according to Florentinus, founded on a distinctly Stoic theory of justice, one based on a natural fellowship between men¹³. In view of these texts, adopted in Justinian's Digest, the suggestion made by Mladen that the *Corpus iuris* does not mention reprisals at all, seems to be false or at least misleading¹⁴. On the other hand, the reprisal that Bartolus has in mind seems to differ from the notion of reprisal in the maxim *vim vi repellere (licet)* of Roman law. Whereas the *Corpus iuris* compared the practice of self-defence with the protection of legal remedies¹⁵, in the *Tractatus represaliarum*

9 O. Lenel *Das Edictum perpetuum* (1883) 374-376.

10 T. Mayer-Maly 'vis' RE 2 17 Band IX A1 (1961) col. 318: 'eines Zeitpunkts vor Cassius und Sabinus', referring to *Pro Milone* 10-11, but also Cicero is 'kaum der Erste'.

11 D. 43.16.1.27; O. Lenel *Palingenesia juris civilis* I (1889) col. 122 no. 118; A. Wacke 'Notwehr und Notstand bei der Aquilischen Haftung. Dogmengeschichtliches über Selbstverteidigung und Aufopferung' 1989 ZRG RA 474. Compare T. Mommsen *Römisches Strafrecht* (1899) 620-621; Mayer-Maly (n. 10) col. 314; W. Waldstein 'Vorpositive Ordnungselemente im Römischen Recht' 1967 *Österreichische Zeitschrift für öffentliches Recht* 1-26.

12 Lenel (n. 11) col. 171 no. 1; L. Winkel 'Die stoische oikeiosis-Lehre und Ulpian's Definition der Gerechtigkeit' 1988 ZRG RA 677-678.

13 E. Schrage *Libertas est facultas naturalis* (1975) 41 n. 42; H. Wagner *Studien zur allgemeinen Rechtslehre des Gaius* (1978) 166; Winkel (n. 12) 677-678; Wacke (n. 11) 474 n. 28; J. Giltaij *Mensenrechten in het Romeinse recht?* (2011) 137-138.

14 L.M. Mladen 'Bartolus the man' 1978 *Annals of the New York Academy of Sciences* 334.

15 See also D. 9.2.45.4; Lenel (n. 11) col. 1280 no. 1809; Mayer-Maly (n. 10) col. 314-315; Wacke (n. 11) 474.

the reprisal is depicted as a type of legal remedy, albeit one enforced by one city-state against another.

3. Reprisal in the *Tractatus represaliarum*

Does this mean that Bartolus did not refer to the *Corpus iuris* at all in his *Tractatus represaliarum*? While commenting on the notion and function of the reprisal in the *Tractatus represaliarum*, Woolf has illustrated the difficulty of reconciling the Holy Roman Emperor's loss of *de facto* power with the rise of the Italian city-states in the fourteenth century¹⁶. *De iure* the operation of the statutes of the city-states could not extend beyond their walls. Yet the Emperor was often *de facto* unable to adjudicate disputes that were outside the scope of the jurisdiction of individual city-states¹⁷. This led to a dramatic rise in the use of reprisals as a means of individual self-help in the thirteenth and fourteenth centuries¹⁸. Although Bartolus reluctantly acknowledges the right of self-defence¹⁹, he also tries to minimise and formalise this right in the context of reprisals as much as possible²⁰. According to Van de Kamp, in granting reprisals the procedure is as follows: if one has a claim against someone in another *civitas*, first one has to go to the debtor's *civitas* and request a judgment against him. If this fails, the next step is to seek permission for the reprisal in one's own *civitas*, taking into account the formalities of the statute of that *civitas*. If the statute does not contain specific regulations, the procedure has to comply with the *ius commune*. Reprisals are not granted where there appears to be no right, or the debtor finally pays his debt or promises to do so²¹.

From this discussion, it is clear that there is a major difference between the notion of self-defence in Roman law and the reprisal as formulated in the *Tractatus represaliarum*. Bartolus himself even indicates this in the *Proemium* to the *Tractatus* itself, stating that the question of reprisals did not arise in the days of the Roman Empire, since the parties to a conflict always had recourse to a higher jurisdiction²². In the time of Bartolus,

16 C.N.S. Woolf *Bartolus of Sassoferrato* (1913) 203-204.

17 Woolf (n. 16) 204; Q.R.D. Skinner *The Foundations of Modern Political Thought* I (1978) 10-12; Stein (n. 2) 85.

18 J.G. O'Brien 'In defense of the mystical body: Giovanni da Legnano's theory of reprisals' 2002 *Roman Legal Tradition* 26.

19 Woolf (n. 16) 202 conceded to the 'bannitus' 'de iure naturali' and 'de iure gentium'. In his comment on D. 1.1.3, Bartolus makes the same distinction: Bartolus de Saxoferrato *Opera omnia* (1589) ad D. 1.1.3.17-20. Calasso, among others, indicates the basic view in the works of Bartolus that reprisals were unlawful: F. Calasso *Medio evo del diritto I. Le fonti* (1954) 576.

20 Similarly, in one of his *consilia* (no. 228), Bartolus declares a judgment in a case involving self-defence void, since the plea had not been properly considered, and witnesses had not been heard. The decision is founded on Roman law, with regard not to the legality of the act or the plea itself, but the procedural aspects; D. 4.7.1pr.: H. Coing 'Die Anwendung des Corpus Iuris in den Consilien des Bartolus' in D. Simon (ed.) *Gesammelte Aufsätze* I (1982) 145.

21 J.L.J. van de Kamp *Bartolus de Saxoferrato 1313-1357* (1936) 56-57.

22 *Proemium* to the *Tractatus represaliarum* as quoted by Woolf (n. 16) 203. Also, Van de Kamp (n. 21) 56.

reprisals were thus only allowed when a supreme jurisdiction was lacking²³, in which case, they were allowed in accordance with the jurisdiction of the individual city-states²⁴. Therefore, reprisals were only lawful when two conditions were satisfied: firstly, they might only be granted by those who had no superior²⁵. Thus the city-states involved must not be subject to a higher jurisdiction. Moreover, the city-states in question themselves had to be ‘superior authorities’, which meant that the cities of both the debtor and the creditor had to be *civitates sibi princeps*, in which the Holy Roman Emperor did not function as a *de facto* adjudicator²⁶. Secondly, the reprisal could be sanctioned only for a just cause²⁷. It is this second condition that interests us the most: Haggenmacher states that the analogy between the *ius belli* and the reprisal in Bartolus is to be found chiefly in reliance on a *causa legitima*²⁸.

4. References to Roman law in the discussion of the *causa legitima* for a reprisal?

The *causa legitima* as a requirement for both a just war and granting a reprisal has to be an act of aggression (*vis*) or injustice (*iniuria*)²⁹. Interestingly, this dichotomy between *vis* and *iniuria* also appears in a Roman legal text, namely D. 1.1.3 as quoted above³⁰. Moreover, in his commentary on this text as well in the *Tractatus represaliarum*, Bartolus indicates that the act of aggression has to consist of more than a slight injustice³¹. However, according to Haggenmacher, Bartolus refers to no Roman legal texts in discussing the *causa legitima* for granting reprisals. Instead, his discussion appears to be based on works in the field of moral theology, mainly by Augustine and Thomas Aquinas³². Certainly, this is the case in *Quaestio* 1.1 of the *Tractatus*, dealing with the reprisal *in foro conscientiae*. In this context, Bartolus adds the requirement of an *intentio recta*, citing Augustine (*Contra Faustum*, XXII.74) and Thomas Aquinas (*Summa theologiae*, Secunda secundae partis, Q. 40, art. 1). However, in the subsequent *Quaestio* 1.2 Bartolus proceeds to discuss whether reprisals are allowed *in foro civili* and

23 Woolf (n. 16) 204-205: Q. 2.5.12 and Q. 3.2.3. See also, Giovanni da Legnano’s theory: O’Brien (n. 18) 26 n. 3.

24 Woolf (n. 16) 204: Q. 3.2.4.

25 Woolf (n. 16) 204; O’Brien (n. 18) 30 n. 20; Q. 3.2.3: *et sic ex parte concedentis represalias requiritur quod sit talis qui superiorem non habet*.

26 J.N. Figgis ‘Bartolus and the development of European political ideas’ 1905 *Transactions of the Royal Historical Society* 157-159; Skinner (n. 17) 11-12; M. Ryan ‘Bartolus of Sassoferrato and free cities’ 2000 *Transactions of the Royal Historical Society* 66, 84-85. The distinction between *de iure* and *de facto* authority is moot according to Van de Kamp (n. 21) 56.

27 Woolf (n. 16) 205: Q. 1.2.4, see below.

28 Haggenmacher (n. 8) 169 n. 633: Q. 1.2.4.

29 Haggenmacher (n. 8) 170 n. 636: Q. 2.4.

30 Apart from D. 1.1.3, also Florentinus in D. 1.5.4pr.: *nisi si quid vi aut iure prohibetur*; Schrage (n. 13) 47.

31 Compare Bartolus (n. 19) *ad* D. 1.1.3.18-19 and Haggenmacher (n. 8) 170.

32 Haggenmacher (n. 8) 169, and 154 for the just war-theories of Augustine and Thomas Aquinas.

if so when. *Quaestio* 1.2 commences by referring to the problem of the debtor's *civitas*, refusing to provide a legal remedy for the creditor in question³³. When there is indeed no other legal remedy available, the creditor's *civitas* may grant him the reprisal, provided it has 'superior authority'³⁴.

At this point, Bartolus comments on the second condition for granting reprisals, the 'legitimate cause'³⁵:

Bartolus de Saxoferrato, *Tractatus represaliarum*, *Quaestio* 1.2.4-6: ... "Causa autem legitima esse uidetur, quod dominus, gens, vel populus requisitus iustitiam facere neglexerit ... Hoc idem videtur tenere sanctus Thomas de Aquino, ut dixi in praecedenti quaestione. Si bene aduertantur praedicta, mihi videtur, quod ius concedendi represalias non iure civili, uel canonico sit inductum, sed magis iure diuino, dicto capitulo Dominus noster (C. 23 q.2 c.2), et de iure gentium quidam permittunt bella licita, l. Ex hoc iure ff. de iust. et iu. (D. 1.1.5) et quod ibi notauimus. Et bellum licitum est ex causis praedictis, quod etiam probatur, quia de iure gentium est, quod id quod quis ob tutelam sui corporis fecerit, videtur fecisse iuste, ut ff. de iustit. et iu. l. Vt vim. (D. 1.1.3). Corpus intellego siue loquamur de uno individuo, siue de uno corpore mixto. Vnde ob tutelam unius cuius potest civitas indicere bellum, sicut unus particularis potest indicere bellum contra omnes ob tutelam personae suae, et suarum rerum, ubi superioris copia, uel aliud remedium haberi non potest, ut dictis iuribus et ff. quod ui aut clam. l. Si alius § Bellissime (D. 43.24.7.3) ... et praedicta puto iuri gentium, et ueritati ciuili consonare" (It seems to be a legitimate cause, however, that the prince, tribe or nation which is assaulted has neglected to provide justice ... Saint Thomas Aquinas seems to hold the same, as I have stated in the preceding *quaestio*. If the aforementioned things are correctly observed, it seems to me that the right to concede reprisals is not introduced by civil or canon law, but rather by divine law, as in C. 23 q.2 c.2, referred to above, and on the basis of the law of nations just wars are simply allowed, as stated in D. 1.1.5 and my commentary on that provision. And a war is permitted on the grounds mentioned above, which is also demonstrated because it is in conformity with the law of nations that what one does to protect one's body is regarded as having been done justly, as is stated in D. 1.1.3. I understand the term body to mean either a specific body or a 'united body'. Hence, in order to protect one citizen the state is entitled to declare war, just as one individual is entitled to declare war against all to protect himself and his assets, where there is no recourse to a supreme authority or another remedy, as in the provisions mentioned and in D. 43.24.7.3 ... and I am of the opinion the aforementioned is in conformity with the law of nations and the civil truth ...)

Apart from the references to Thomas Aquinas and the *Decretum Gratiani*, we find several allusions to texts from the *Corpus iuris civilis* in this part of the *Tractatus represaliarum*.

- 33 Q. 1.2.3: *Et (represaliae) sint licitae, cum gens, et populus iustitia requisiti facere neglexerint, ut C. 23 q. 2 c. 2 ubi hoc est expressum. C. 23 q. 2 c. 2* 'Dominus noster' of the *Decretum Gratiani* concerns the conditions for waging a just war.
- 34 Woolf (n. 16) 205 n. 2; Q. 1.2.4: *Doctores omnes communiter in sententiam istam inclinant quod si quidem contra illum hominum vel populum, qui iustitiam facere et debitum reddere negligit, potest haberi recursus ad superiorem, tunc represaliae sunt licitae duobus intervenientibus. Primo requiritur superioris auctoritas; non enim licet alicui sua auctoritate ius sibi dicere ...*
- 35 For the text, I have used Bartolus de Saxoferrato *Omnium iuris interpretum antesignani consilia, quaestiones et tractatus* (Venice 1590) adn. Iacobi Anelli de Bottis vol. X.

According to Bartolus, the ultimate source for reprisals is not civil or canon law, but rather divine law and the law of nations³⁶. Then the law of nations is discussed, firstly following D. 1.1.5, which states that wars were introduced by the *ius gentium*³⁷. Secondly, since both texts consider the content of the *ius gentium*, Bartolus relates D. 1.1.5 to D. 1.1.3. Constructing an analogy between war and reprisal, the just cause for both under the law of nations is the *tutela corporis* or the protection of one's own body, or of the 'united body' of citizens as a whole. Finally, we do indeed come across a reference to a text taken from a Digest-rubric regarding the *interdictum de vi*³⁸. The text concerns a defence (*exceptio*) seeking to bar the interdict in question, to be used when someone has of his own accord demolished a building that was constructed by force or secretly. The text makes it clear that this form of self-help should be used only when there is good and sufficient cause to do so³⁹. It may be argued that Bartolus refers to the text because a legal remedy is available in the first place, which illustrates the point he made in the *Proemium* about the mutual exclusivity of legal remedy and reprisal⁴⁰.

5. Conclusion

While Bartolus may refer to D. 1.1.3 and other Roman legal sources in this context, it is clear that the reasoning in the Roman texts differs from that of Bartolus. D. 1.1.3 does not explicitly state war to be a consequence of the absence of a legal remedy. Nor is recourse to a supreme jurisdiction suggested as an alternative to reprisal in the text. Moreover, whether scholastic or canon law thinkers or Bartolus himself equated violence against one citizen with a transgression against a 'united body' of citizens, this idea is certainly not to be found in the Roman legal sources. On the other hand, the analogy between reprisal and war that was emphasised in the *Tractatus represaliarum* and referred to by Ziegler, Haggemacher and Grewe is partially formulated according to texts from the *Corpus iuris civilis*. This follows from the connection Bartolus makes between D. 1.1.3 and D. 1.1.5, both pertaining to *ius gentium*. The texts allow Bartolus to declare *tutela corporis* to be a *causa legitima* for reprisal. Furthermore, he refers to texts from the *Corpus iuris civilis* in order to emphasise the basic unlawfulness of reprisal as compared to legal remedies. Therefore it seems that Bartolus does not derive his views on the *causa legitima* for reprisal from any single source or school of thought. As is perhaps typical

36 Woolf (n. 16) 206; O'Brien (n. 18) 30.

37 D. 1.1.5: *Ex hoc iure gentium introducta bella, discretae gentes, regna condita, dominia distincta, agris termini positi, aedificia collocata, commercium, emptiones venditiones, locationes conductiones, obligationes institutae exceptis quibusdam quae iure civili introductae sunt.* Bartolus (n. 19) ad D. 1.1.5.21 notes a war is legitimate to defend oneself as stated in D. 1.1.3.

38 Though not the *interdictum de vi armata*, but the *interdictum quod vi aut clam*: Lenel (n. 9) 387. See, also, Q. 1.2.3-4 which contains a similar reference.

39 D. 43.24.7.3: *Bellissime apud Iulianum quaeritur, an haec exceptio noceat in hoc interdicto quod non tu vi aut clam feceris? ... Quod non aliter procedere debet, nisi ex magna et satis necessaria causa; alioquin haec omnia officio iudicis celebrari oportet.*

40 Compare on Roman law: Mayer-Maly (n. 10) col. 323: 'der Gegensatz zwischen individuellem und behördlichem Vorgehen dargegen beherrschte gewiß schon die Vorstellung der Klassiker'.

of the approach of Bartolus, canon law and scholastic thought, as well as Roman legal sources, all feature in the *Tractatus represaliarum*.

Abstract

Writers on the history of international law, such as Grewe and Ziegler, maintain that in the *Tractatus represaliarum* by the fourteenth-century jurist Bartolus de Saxoferrato, there is an analogy between *ius belli* and reprisal. According to these scholars, Bartolus derived his theory of *causa legitima* for both war and reprisals solely from scholastic thought. This seems curious, since in the *Corpus iuris civilis* itself there are numerous texts dealing with reprisals and self-defence. This article therefore aims to establish whether Bartolus did indeed refer to any Roman legal text in his treatment of the *causa legitima* for reprisal.