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Front cover: *The cut stem of a fir tree in the forest around Vallombrosa Abbey in Reggello, in the Apennines east of Florence. The monastery was founded in 1038, and is surrounded by deep forests tended over several centuries. The concentric rings show the accumulating age of the tree, here symbolising how thought expands and accumulates over time, and how lines or schools of thought are interconnected and cut through periods.*

Back cover: *The forest floor covered by a deep blanket of leaves from past seasons, in the protected forests around Camaldoli Monastery in the Apennines east of Florence. Old leaves nourish new sprouts and growth: the new grows out of the old. We may see this as a metaphor for how thinkers of the past offer an attractive terrain to explore and may nourish contemporary foundational analysis.*

Cicero: *Bellum Iustum* and the Enemy Criminal Law

Pedro López Barja de Quiroga*

The Indians will, I hope, soon stand in the same position towards us in which we once stood towards the Romans.¹

3.1. Introduction

There never was anything that could be included in the modern category of international criminal law in Roman history. Rome punished its enemies but did not take them to trial. It was the privilege of the general, when entering the city in triumph after victory, leading an impressive parade of captives and spoils, to either kill or spare the lives of the defeated and brutally humiliated enemies.² No justification was needed, even if

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¹ Charles Trevelyan, 1838, cited by Neville Morley, *The Roman Empire: Roots of Imperialism*, University of Chicago Press, London, 2010, p. 39.

² Although some sources appear to claim that prisoners were regularly executed when the ceremony of the triumph ended, this has been questioned: see Mary Beard, *El triunfo romano: Una historia de Roma a través de la celebración de sus victorias*, Crítica, Barcelona, 2009, pp. 176–79.

some was offered in particular cases, as when Vercingetorix was executed as a treacherous rebel.³

Other times, however, Rome acknowledged the violation of proper conduct in war. In five cases, at least, Roman offenders were handed over at Roman initiative to a foreign nation: 321 (both consuls to the Samnites, Caudine Forks), 236 (M. Claudius Clineas, Corsica), and 137 (consul Mancinus, Numantia).⁴ These three high magistrates had signed peace treaties and returned home only to discover that the Roman senate did not uphold them. Religious scruples were bypassed through the simple method of handing over the magistrates to the enemies. The remaining two cases concerned injuries suffered by foreign ambassadors: in 266 two senators were sent to Apollonia, whose legates they had struck, and in 188 two men were sent to Carthage for the same offence. In both cases the offenders were returned unharmed. There is one more instance, probably the most famous: in 55, Cato the Younger suggested that Julius Caesar should be handed over to the Gauls, for massacring the Usipetes and Tencteri, two German tribes, when their leaders had come to him as an embassy seeking a truce.⁵ Needless to say, the proposal was laid to rest.

This chapter begins with the intriguing relationship between the two poles that underpin this reflection, namely ‘just war’ (*bellum iustum* in Latin) on the one hand, and ‘enemy criminal law’ (*Feindstrafrecht* in German) on the other. This relationship can be characterised as a *specular* one, for one mirrors the other. ‘Just war’ renders the enemy a citizen who can be submitted to trial, implying that there is a common law binding on States. On the other side, *Feindstrafrecht* renders the citizen an enemy who is not to be protected by the same law as the rest of the citizens. We may have a precedent for this ‘specular relation’ between war and justice in the way crimes were punished in modern Europe. As Michel Foucault pointed out, kings were the ones who decided upon war but also upon their subjects’ lives. Kings waged war against those who had committed a

³ Matthias Gelzer, *Caesar: Politician and Statesman*, Harvard University Press, Cambridge (MA), 1968, p. 284.

⁴ Unless otherwise stated, all dates are BC (that is, Before Christ).

⁵ Appian, *Celtica*, 18; Plutarch, *Life of Caesar*, 22.4; Plutarch, *Life of the Younger Cato*, 51.1–2; Plutarch, *Life of Crassus*, 37.2–3; Suetonius, *Life of Caesar*, 24.3; John Rich, “The *fetiales* and Roman International Relations”, in James H. Richardson and Federico Santangelo, *Priests and State in the Roman World*, F. Steiner, Stuttgart, 2011, p. 199.

crime, for they had implicitly put their power into question. They were ritually killed to restore the natural order of things.⁶

As it is well known, *bellum iustum* goes hand in hand with empires, for it provides a justification for expansion and conquest. Rome is no exception, even if it did not invent the concept.⁷ As an advocate of both ‘just war’ and the (*avant la lettre*) ‘enemy criminal law’, Cicero – the Roman philosopher and politician (106 – 43) – is in a unique position to illustrate their relationship. He was a successful advocate and ascended to the top of the Roman political hierarchy (the consulate) in a very difficult period. He suffered the calamities and atrocities of several civil wars and was killed as a consequence of the proscription by Mark Antony and Octavian (who would be Emperor Augustus). His head and left hand were exposed to the public on the *rostra*, the tribunal in the Forum where orators used to stand up when speaking to the people. He was not very much interested in the military, for clearly he had a talent for words, not for war, but he had time to think about the Roman constitution, including its past history as conqueror of the peoples and territories surrounding the Mediterranean Sea. Traditionally, historians have portrayed him as a writer without ideas of his own, only capable of translating Greek concepts and reflections into good Latin.⁸ Since much of this Greek ‘original’ is now lost, attempts to reconstruct a Greek model for every Ciceronian idea were essentially futile. Fortunately, the perception of Cicero has changed in these past few

⁶ Michel Foucault, *Surveiller et punir: Naissance de la prison*, Gallimard, Paris, 1975, chap. 1.

⁷ Anthony Pagden, “Natural Rights and Europe’s Imperial Legacy”, in *Political Theory*, 2003, vol. 31, no. 2, pp. 171–99; Benjamin Straumann, “Ancient Caesarian Lawyers in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius’s *De iure praedae*”, in *Political Theory*, 2006, vol. 34, no. 3, pp. 328–50. On the Greek precedents, see Silvia Clavadetscher-Thürlemann, *Πόλεμος δίκαιος und Bellum iustum: Versuch einer Ideengeschichte*, Juris, Zurich, 1985. Rome has recently been claimed as the inventor of the ‘civil war’ or *bellum ciuile* by David Armitage, *Civil Wars: A History in Ideas*, Alfred A. Knopf, New York, 2017.

⁸ After Theodor Mommsen’s blunt condemnation of Cicero, the criticism of the orator from Arpinum became widespread. Frederick Pollock, in his *Introduction to the History of the Science of Politics*, MacMillan, London, 1895, wrote: “He succeeded admirably in transcribing the current ideas of the Greek schools [...] More than this he did not attempt and in any case did not achieve. Nobody that I know has as yet succeeded in discovering a new idea in the whole of Cicero’s philosophical and semi-philosophical writings” (p. 31). See William H. Altman (ed.), *Brill’s Companion to the Reception of Cicero*, Brill, Leiden, 2015, p. 215.

years. Now, scholars begin to acknowledge his contributions as a thinker and philosopher.⁹

3.2. The Just and Righteous War

We may start with the ideology of the ‘just and righteous war’ (*bellum iustum piumque*). I will first comment shortly on what this *bellum iustum* was not, and then I will focus on how we can get an idea of what it was by analysing Cicero’s version of it. To take up the former, *bellum iustum* was not reduced to a question of using the right procedure when declaring war (that is, the so-called *ius fetiale*).¹⁰ This is a serious misunderstanding of the role of the *fetiales*, an archaic college of priests (number unknown, perhaps 20) who were involved in the rituals associated with declaring a war, but had no power to decide it.¹¹

Ideally, the procedure as described by Livy (1.32) and Dionysius of Halicarnassus (2.72) consists of three steps: (a) an embassy of *fetiales*, who states Roman claims in front of the foreign political representatives; (b) a debate in the Senate concerning this war; (c) if the Senate agrees on war, then a second embassy of *fetiales* is sent to inform the enemy. This embassy was not meant to conduct any negotiation, but to carry on as instructed by the Senate.¹² As Ferrary notes, any Roman war vote, in the Senate and/or the assembly, must have preceded the despatch of the *fetial* to make such a proclamation, rather than followed it, as some old version (Ancus Marcius) claims.¹³ In short, as other Roman priests, these *fetiales*

⁹ On Ciceronian thought, see my book *Imperio legítimo: El pensamiento político en tiempos de Cicerón*, Madrid, 2007, with bibliography.

¹⁰ Some authors have recently argued that, for Cicero, a *bellum iustum* was simply the one that has been ritually declared, with no ethical reflection upon its causes. In this sense, see Luigi Loreto, *Il bellum iustum e i suoi equivoci*, Jovene, Naples, 2001; Antonello Calore, *Forme giuridiche del ‘bellum iustum’*, Giuffrè, Milan, 2003; Antonello Calore, “*Bellum iustum* e ordinamento *fetiale*”, in *Diritto@storia*, 2005, no. 4. See also the considerations by Jörg Rüpke, *Domus Militiae: Die religiöse Konstruktion des Krieges in Rom*, F. Steiner, Stuttgart, 1990, pp. 237–42.

¹¹ Federico Santangelo, “The *Fetiales* and their *ius*”, in *Bulletin of the Institute of Classical Studies*, 2008, vol. 51, pp. 63–93.

¹² Adalberto Giovannini, “Le Droit *fécial* et la déclaration de guerre de Rome à Carthage en 218 avant J.-C.”, in *Athenaeum*, 2000, vol. 88, pp. 69–116 (see in particular his criticism of Walbank’s views that there was a change in the procedure around 238 BC by which the senatorial decision preceded the embassy and the latter was entitled to negotiate with the enemy and to declare war as they saw fit).

¹³ Jean-Louis Ferrary, “*Ius fetiale* et diplomatie”, in Edmond Frézouls and Anne Jacquemin (eds.), *Les relations internationales : Actes du colloque de Strasbourg 15-17 Juin 1993*, De

were experts who knew the rituals, the prescribed words, and were consulted by the Senate on these issues, but the decision was in the hands of the Senate or the People: they decided whether the war was just or unjust, not basing their decision on whether the rituals had been rightly performed, but on moral issues (more on this later). In 200, the fetial college was consulted by the Senate on the appropriate procedure for announcing the declaration of war against King Philip, and a similar consultation was made in 191 before the war against Antiochus and the Aetolians (Livy, 31.8.3; 36.3.7–12).¹⁴ The decision to go to war was not taken by the *fetiales*, they simply knew how to declare it. In fact, they could be declaring an unjust war, as the ‘official’ formula – no doubt, an antiquarian reconstruction – explicitly stated: “If I unjustly and unrighteously (*iniuste impieque*) demand that those men and those goods (*illos homines illasque res*) be handed over to me, then may I never be allowed to enjoy my fatherland” (Livy, 1.32.7). Not all the wars were declared by Rome using the *fetiales* – they probably ceased being used in pre-war missions around 340, although they continued to be consulted on the proper procedure to declare war – which is enough evidence that a war could be deemed just and righteous without the intervention of the *fetiales*. In short, “the wider role in ensuring the just conduct of the Roman State which the fetials are portrayed as discharging in early times by Dionysius and to some extent by Cicero and Varro is an idealising construct”.¹⁵

There is a well-known episode that may help us understand the concept. In 167, Rome utterly defeated the last king of Macedon, Perseus, in the battle of Pydna. The Senate then discussed what should be done with some other minor powers in the area, such as the relatively small Greek island of Rhodes, which had maintained an ambiguous attitude during the war. Cato the Elder made a famous pronouncement in the Senate, which we can partially read today, where he argued that Rome should not declare war on Rhodes (Aulus Gellius, *Attic Nights*, 6.3). He strove to demon-

Boccard, Paris, 1995, pp. 411–32. See also Ernesto Bianchi, “Fest. s. v. nuntius p. 178, 3 L e i documenti del collegio dei feziali”, in *Studia et Documenta Historiae et Iuris*, 2000, vol. 66, pp. 335–41; François Blaive, “*Indictio belli*. Recherches sur l’origine du droit fécial romain”, in *Revue Internationale des Droits de l’Antiquité*, 1993, vol. 40, pp. 185–207.

¹⁴ Rich, 2011, p. 189, see *supra* note 5.

¹⁵ *Ibid.*, p. 233. Cf. the criticism of Calore and Loreto (cited at *supra* note 10) in Maria Floriana Cursi, “*Bellum iustum* tra rito e *iustae causae belli*”, in *Index*, 2014, vol. 42, pp. 570–85.

strate that the Rhodians were not guilty, using three arguments: firstly, the many favours received and the long-standing friendship between both cities; secondly, that the Rhodians never publicly aided Perseus, for one should not be punished solely for wishing to do harm; lastly, that Rome should not be the first to do what the Rhodians merely wished to do (that is, he declares himself against the so-called ‘pre-emptive wars’). The important thing is that Cato framed the question in moral terms: if Rhodians were guilty, then war would be just. *Fetiales* were simply technicians who faithfully obeyed the decision taken by the Senate or the people because they knew the words to say and the rituals to perform, such as the famous ‘bloody spear’ which should be thrown against the territory of the enemy.¹⁶

So the question comes up: if a just war cannot be defined as one that has been ritually and solemnly declared by the *fetiales*, how can we define it? To answer it, we should now take a look at Cicero’s writings that reflected on this topic: *On the Commonwealth* (published in 51) and *On Duties* (written in 44). It is widely agreed that Cicero’s role in this subject was of paramount importance. According to J.L. Conde, he was instrumental to the transition from a ‘shame culture’ – when Romans only cared about propitiating the gods, but were unapologetically brutal when narrating their victories to other men – to a ‘guilt culture’, when the need was felt to invoke moral principles in order to justify the empire to an auditory of men.¹⁷

Unfortunately, *On the Commonwealth* is badly mutilated and the part of book III where the characters in this dialogue debated on just war is lost. We have to rely on a handful of sentences quoted by other authors, which give us just a highly unsatisfactory (and potentially misleading) approximation. Still, by reading these few sentences that have been preserved together with *On Duties*, four important ideas can be highlighted in the Ciceronian argument. Firstly, a war can be deemed just when started not only for defensive reasons but also for glory. Cicero is quite explicit on this: when the survival of the city is at stake, it is a cruel and fierce war; when the war is a fight for command and glory, then it is of a less brutal

¹⁶ *Hasta sanguinea* (Livy, 1.32.12), which has been interpreted as a reference to the *Cornus sanguinea*, the common dogwood, in Jean Bayet, “Le rite du fécial et le cornuiller magique”, in *Mélanges de l’École Française de Rome*, 1935, vol. 52, pp. 29–76.

¹⁷ Juan Luis Conde, *La lengua del imperio: La retórica del imperialismo en Roma y la globalización*, Alcalá Grupo Editorial, Alcalá la Real, 2008, pp. 103–04.

kind. Nevertheless, both types must have been entered upon with the same intention, namely that of living peacefully, without suffering any harms (*iniuria*) (Cicero, *On Duties*, 1.34 and 1.38). This does not amount to a blank admission of all wars as just, because it is the intention that matters: if the war was prompted by avarice, then it cannot be deemed just. He took an opposing view to that which has become predominant since 1945 with the entry into force of the Charter of the United Nations:¹⁸ Cicero did not rule out all types of aggression from the category of ‘just war’ for he thought that not only defensive wars were ‘just wars’. In a world like his, where conflicts were permanent, the distinction between defensive and aggressive wars probably was not so clear cut.¹⁹

Secondly, Cicero does not focus exclusively on the road to war. Using modern parlance, he also takes into account *ius in bello* and *ius post bellum* (Cicero, *Laws*, 2.14.34). What he has to say of the *ius in bello* is neither extensive nor original, but he has clearly expressed the rule that only proper soldiers can fight. Those who have been dismissed by their general are not allowed to engage in combat (Cicero, *On Duties*, 1.37). This idea, that civilians are not allowed to fight in a just war, may have some relevance for modern thought if connected to the theory of the Partisan, as elaborated by Carl Schmitt, or even to the definition of ‘war crimes’ in the Rome Statute creating the International Criminal Court,²⁰ which includes “killing or wounding treacherously individuals belonging to the hostile nation or army”,²¹ but we may leave this aside for the moment.

As to *ius post bellum*, it is noteworthy that it does not appear in the list of requirements for a just war according to St. Thomas of Aquinas.²²

¹⁸ Nicholas Rengger, “On the Just War Tradition in the Twenty-First Century”, in *International Affairs*, 2002, vol. 78, no. 2, pp. 358–59.

¹⁹ This is a very important point. To my view, Harris is mistaken to consider that all “defensive wars” could be deemed ‘just wars’: this is an anachronistic concept. See William V. Harris, *Guerra e imperialismo en la Roma republicana*, Siglo XXI, Madrid, 1989, pp. 163–72.

²⁰ Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002 (‘ICC Statute’) (www.legal-tools.org/en/doc/7b9af9/).

²¹ *Ibid.*, Article 8(2)(b)(xi). See Mark Klamburg (ed.), CLICC in Lexis (www.cilrap-lexis.org/clicc/8-2-b-xi/8-2-b-xi).

²² Authors such as Francisco de Vitoria or Hugo Grotius (see *infra* chaps. 5 and 7) did not put very much emphasis on this *ius post bellum*. See Gary J. Bass, “Jus post bellum”, in *Philosophy and Public Affairs*, 2004, vol. 32, no. 4, pp. 384–412. Only a few pages were dedi-

Cicero had thought otherwise – for him it was of paramount importance: unless the enemy’s behaviour during the combats had been extremely brutal and savage, the obligation of the conqueror was to preserve the vanquished. This does not mean that Rome abstained from taking advantage of its victories. We know of many cases of brutality, where enemies were killed by thousands without remorse. The important thing was not the people but their city, since the city itself should be preserved and not annihilated. To take a minor example: Sallust says that Marius’s complete destruction of the small town of Capsa in Numidia was “against the law of war” (*contra ius belli*, *The Jugurthine War*, 91.3).

Cicero made a very good argument, based on Roman generosity, in granting citizenship. Yesterday’s enemies could be the senators of tomorrow and the Emperor in a couple of days’ time. Rome’s record concerning the *ius post bellum* (which may have some connections to the modern concept of ‘nation-building’) is clearly outstanding when compared to other empires in world history, who blocked the accession to power by local oligarchies. Speaking about the Spanish Empire, Doyle underlined the contrast between Spanish ‘nationality’ and Roman citizenship: “While an Indian could become a Christian he could not become a Spaniard”.²³ In a similar way, in the British empire, local elites were educated and trained to serve as loyal servants in the colonies, without any chance to occupy a position among the rulers of the empire.²⁴ For this reason, Rome’s treatment of its subjects has been taken as a template for imperialism in modern times by many politicians and scholars, including Charles Trevelyan, whose observation about the relations between Great Britain and the Indians is quoted at the beginning of this chapter.

cated to this subject in Walzer’s seminal book, under the general principle that no outcome whatsoever may compensate for the losses in human lives during the war. See Michael Walzer, *Guerras Justas e injustas: Un razonamiento moral con ejemplos históricos*, Tomás Fernández Aúz and Beatriz Eguibar eds. and trans., Paidós, Barcelona, 2001, pp. 161–69; translated from Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations*, 3rd edition, Basic Books, New York, 1997.

²³ Michael W. Doyle, *Empires*, Cornell University Press, Ithaca, 1986, p. 122. Roman citizens could also be found lower down the social hierarchy, particularly among freedmen and veterans of the auxiliary troops. On this point, see Myles Lavan, “The foundation of empire? The spread of Roman citizenship from the fourth century CBE to the third century CE”, in Katell Berthelot and Jonathan Price (eds.), *Citizenship and Political-Religious Self-Definitions in the Roman Empire*, Peeters, Leuven, 2018 (forthcoming).

²⁴ See Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, 2nd edition, Verso, London, 1991, pp. 83–94.

Thirdly, a just war ought to be solemnly declared, and this could only happen with enemies Rome had recognised as such. Therefore, a war against pirates does not fall into this category, “for a pirate is not included in the number of lawful enemies, but is the common enemy of all the world; and with him there ought not to be any pledged word nor any oath mutually binding” (Cicero, *On Duties*, translation by W. Miller, 3.107). According to Cicero, pirates had no common authority and they acted mainly for profit. As we have seen, when avarice was the cause of the war it could not be deemed ‘just’.²⁵

Fourthly, it can be seen that the subject of ‘just war’ was very important to him. Cicero built his most important dialogue (*On the Commonwealth*) upon the idea that the Commonwealth (the *res publica*) was defined by justice: unjust Commonwealths were not true republics. Therefore, for it to be the ideal regime he had in mind, Cicero had to prove that Rome had conquered its empire with no injustice on its side.

3.3. States of Exception

3.3.1. Carl Schmitt and Walter Benjamin

The very famous first sentence of Schmitt’s *Political Theology* (written in 1922) reads: “Sovereign is he who decides on the Exception” (*Souverän ist, wer über den Ausnahmestand entscheidet*).²⁶ The eighth thesis of the “Theses on the Philosophy of History” written in 1940 by Walter Benjamin contains an explicit reference to this Schmittian idea:

The tradition of the oppressed teaches us that the “emergency situation” [*Ausnahmestand*] in which we live is the rule. We must arrive at a concept of history which corresponds to this. Then it will become clear that the task before us is the introduction of a real state of emergency; and our position in the struggle against Fascism will thereby improve. Not the least reason that the latter has a chance is that its opponents, in the name of progress, greet it as a historical norm. – The astonishment that the things we are experienc-

²⁵ Walter Rech, *Enemies of Mankind: Vattel’s Theory of Collective Security*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 29–35. Rech rightly casts some doubts on the translation of *communis hostis omnium* as ‘enemies of all the world’ (for *omnes* is ambiguous). I want to thank my colleague and contributor to this volume Elisabetta Fiocchi Malaspina, for helping me with Vattel (see *infra* chap. 10).

²⁶ Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, George Schwab ed. and trans., University of Chicago Press, Chicago, 2005, p. 5.

ing in the 20th century are “still” possible is by no means philosophical. It is not the beginning of knowledge, unless it would be the knowledge that the conception of history on which it rests is untenable.²⁷

In 2003, Giorgio Agamben devoted a small book to this ‘state of exception’.²⁸ According to Schmitt, the state of exception implies a “suspension of the entire existing juridical order”. Agamben underscores the uncertain and paradoxical character of the resulting condition. The state of exception presents itself as an inherently elusive phenomenon, a juridical no-man’s land where the law is suspended in order to be preserved. The state of exception “is neither external nor internal to the juridical order, and the problem of defining it concerns a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other”. In this sense, the state of exception is both a structured or rule-governed and an anomic phenomenon: “The state of exception separates the norm from its application in order to make its application possible. It introduces a zone of anomie into the law in order to make the effective regulation of the real possible”.²⁹

The state of exception, as conceptualised first by Schmitt in 1922 and then by Benjamin in 1940, has again come to the forefront as a direct consequence of the 9/11 terrorist attacks on United States soil. As Agamben pointed out:

The state of exception has today reached its maximum worldwide deployment. The normative aspect of law can

²⁷ “Die Tradition der Unterdrückten belehrt uns darüber, daß der Ausnahmezustands in dem wir leben, die Regel ist. Wir müssen zu einem Begriff der Geschichte kommen, der dem entspricht. Dann wird uns als unsere Aufgabe die Herbeiführung des wirklichen Ausnahmezustands vor Augen stehen; und dadurch wird unsere Position im Kampf gegen den Faschismus sich verbessern. Dessen Chance besteht nicht zuletzt darin, daß die Gegner ihm im Namen des Fortschritts als einer historischen Norm begegnen. — Das Staunen darüber, daß die Dinge, die wir erleben, im zwanzigsten Jahrhundert ›noch‹ möglich sind, ist *kein* philosophisches. Es steht nicht am Anfang einer Erkenntnis, es sei denn der, daß die Vorstellung von Geschichte, aus der es stammt, nicht zu halten ist”; Walter Benjamin, “Über den Begriff der Geschichte”, in *Gesammelte Schriften*, vol. I, no. 2, Suhrkamp Verlag, Frankfurt, 1974, p. 697. The translation into English is taken from Walter Benjamin, *On the Concept of History*, Dennis Redmond trans., Global Rights, 2016.

²⁸ Giorgio Agamben, *Lo stato di eccezione*, Bollati Boringhieri, Torino, 2003.

²⁹ This paragraph is a quotation from Elena Bellina and Paola Bonifazio (eds.), *State of Exception: Cultural Responses to the Rhetoric of Fear*, Cambridge Scholars Press, Newcastle, 2006, p. viii.

thus be obliterated and contradicted with impunity by a governmental violence that—while ignoring international law externally and producing a permanent state of exception internally—nevertheless still claims to be applying the law.

It is my contention that this ‘state of exception’ idea lies under a new doctrine on criminal law which has been named as ‘enemy criminal law’ or (since the name and first development were attributed to a German professor, Günther Jakobs) in German, *Feindstrafrecht*. The idea is essentially Schmittian: those who reject the tenets of the common constitution are ‘outsiders’ who are not entitled to the same protection by the State as ordinary citizens. They have lost their status as citizens and have become ‘enemies’. A specific and tougher criminal law, less respectful with civic liberties, is created – a criminal law specifically designed for terrorist attacks and totally different from the criminal law applied to ordinary citizens who are considered to be ‘within’ the system.

3.3.2. States of Exception in Rome

When one takes even a cursory look at the several ‘states of exception’ measures of the Roman ‘constitution’, what surely strikes most is their sheer number, their abundance.³⁰ Firstly, we have the dictatorship, which fell out of use after the Second Punic War (at the end of the third century). Although it was later re-introduced by Sulla and Caesar, its nature was changed, for the six-month limit was overruled (Caesar was designated dictator first for ten years and then for life). Mark Antony then passed a law abolishing the dictatorship altogether; as is well known, Augustus did not need the dictatorship to claim sole-power. Schmitt considered that Roman dictatorship does not fit into the state of exception category, but this is too formalistic: “dictatorship was a regularised irregularity”.³¹

The next three (*Senatus Consultum ultimum*, *hostis-Erklärung* and *tumultus*) are best seen together for they constituted the panoply that was at the Senate’s disposal to fight against any attempt at regime change. *Tumultus* was a mass levy, declared by the consul in front of an immediate and serious threat, where, as opposed to the ordinary levy (*dilectus*), the

³⁰ See Figure 2 at the end of this chapter: my emphasis has been on the public instance that had the power to decide on the exception in every different case, the Schmittian approach.

³¹ Michele Lowrie, “Sovereignty before the Law: Agamben and the Roman Republic”, in *Law and Humanities*, 2007, vol. 1, no. 1, p. 44.

ordinary excuses of people avoiding enlistment were invalid.³² The *hostis-Erklärung* is the modern name given to a declaration of the Senate that someone was a public enemy (*hostis*), and thereby had lost his citizenship and could be killed with impunity.³³ The last one is the most important and most difficult to grasp. Scholars have discussed at length the *Senatus Consultum ultimum* or ‘ultimate decree’ (hereafter ‘SCU’); they have debated its legality and they have come to very different, even contradictory conclusions: for some, it had no legal meaning, and carried only a political message, without conferring new capacities or legal powers to the magistrates involved. The truth is that the actual words of the senatorial decree were laconic. Even if there are variants in the sources, we may be confident that this so-called SCU was very short, just one sentence. To take just one example, when Caesar in 49 did not comply with the Senate’s demands, the response was (using his own words) as follows:

Recourse is had to that extreme and ultimate decree of the senate which had never previously been resorted to except when the city was at the point of destruction and all despaired of safety through the audacity of malefactors. Now, he quotes the *senatus consultum*: ‘The consuls, the praetors, the tribunes, and all the proconsuls who are near the city shall take measures that the state incur no harm.’³⁴

It is true that this ‘ultimate decree’ “identified neither the additional powers at the magistrate’s disposal nor the citizen rights which might be overridden for reasons of state”.³⁵ The decree did not set any time-frame, nor do we ever hear of a senatorial decision declaring that this ‘state of emergency’ was over and things had gone back to normal. No specific measure seems here to be contemplated; in particular, there is no mention of the right to kill Roman citizens without trial. According to several Ro-

³² On the *dilectus-tumultus* see Claude Nicolet, *The World of the Citizen in Republican Rome*, Batsford, London, 1980, pp. 96–102.

³³ See Annie Allély, *La déclaration d’hostis sous la République romaine*, Ausonius, Bordeaux, 2012.

³⁴ “Decurritur ad illud extremum atque ultimum senatus consultum, quo nisi paene in ipso urbis incendio atque in desperatione omnium salutis sceleratorum audacia numquam ante descensum est: dent operam consules, praetores, tribuni plebis, quique pro consulibus sint ad urbem, ne quid res publica detrimenti capiat”; see Caesar, *Civil Wars*, A.G. Pékett trans., Loeb Classical Library, Cambridge, 1979, 1.5.3.

³⁵ Wilfried Nippel, *Public Order in Ancient Rome*, Cambridge University Press, Cambridge, 1995, p. 63.

man laws, magistrates were subjected to *prouocatio*, which meant that they could not sentence a citizen to a death penalty if a tribune of the plebs interfered. The judgement had then to be deferred to the assembly of the citizens or a jury court. Citizens were thereby protected from arbitrary punishment, but only if and when a tribune of the plebs gave his protection (*auxilium*) to the accused, which surely only happened in ‘political’ cases.³⁶ Some scholars think that the SCU was devised to destroy this legal protection; for this reason, it was deemed contrary to the Roman ‘constitution’, for the Senate could not pass a decree which was against a law of the people, as the one that embodied this *prouocatio*.

On this subject, modern interpretations have perhaps put too much emphasis on the legal aspects. Roman authors were fully aware of the implications of the measure, which were many and severe. For example, Caesar (*Civil Wars*, 1.7.5) explicitly said that this decree implied an order to the Roman people to repair to arms (*qua uoce et quo senatus consulto populus Romanus ad arma sit uocatus*), against seditious measures pursued by tribunes of the plebs and the consequences have been the killing of the tribunes (the Gracchan brothers and Saturninus). Sallust is more specific:

The power which according to Roman usage is thus conferred upon a magistrate by the senate is supreme, allowing him to raise an army, wage war, exert any kind of compulsion upon allies and citizens and exercise unlimited command and jurisdiction at home and in the field; otherwise the consul has none of these privileges except by the order of the people.³⁷

Modern scholars tend to think that Sallust was wrong, that the consuls could legally take all those measures without needing any special authorisation by the Senate.³⁸ This is hard to believe. We have evidence

³⁶ See Wolfgang Kunkel, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit*, Beck, Munich, 1962.

³⁷ “Ea potestas per senatum more Romano magistratui maxuma permittitur: exercitum parare, bellum gerere, coercere omnibus modis socios atque civis, domi militiaeque imperium atque iudicium summum habere; aliter sine populi iussu nullius earum rerum consuli ius est”; see Sallust, *The War with Catiline*, J.C. Rolfe trans., William Heinemann, London, 1921, 29.3.

³⁸ Hugh Last, in S.A. Cook, Frank Ezra Adcock and M.P. Charlesworth (eds.), *Cambridge Ancient History: Vol. IX, The Roman Republic, 133 to 44 B.C.*, Cambridge University Press, Cambridge, 1962, pp. 84–85. Antonio Guarino, “Nemico della patria a Roma”, in

that the SCU, at least by implication, gave the right to command troops inside the city. This is clearly what happened in the year 100: after the SCU has been obtained, C. Marius as consul distributed among the people weapons that had been guarded in the temple of Saucis and in public arsenals (*armamentarii publici*; Cicero, *For Rabirius, on a Charge of Treason*, 20). According to Cicero, Opimius admitted to having organised the killing of Gracchus but it was done in the public interest when there was a call to arms by a senatorial decree (*rei publicae causa cum ex senatus consulto ad arma uocasset*; Cicero, *On the Orator*, 2.132). All this, together with Caesar's text, gives some credit to Sallust's claim that the SCU authorised "to raise troops". Mommsen was probably right in saying that this 'ultimate decree' established in Rome the law of war, even if it was not automatically followed by a *tumultus*.³⁹ When this 'ultimate decree' was followed by a levy, it was an ordinary one (*dilectus*), not a *tumultus*, but this implies a state of war nevertheless. The decree by itself only authorised the magistrates to do as they see fit. It was a direct response to conflicts or rebellions in the city of Rome, the *urbs*, not Italy or the provinces (when there were problems there, the Senate used the *hostis-Erklärung* doctrine).⁴⁰ It revolves around the idea of preserving the public order in the *city of Rome*, a sacred precinct where the military power (*imperium militiae*) was not valid. If, as we know, no army could legally enter the city and there were no police stations to seek help, how was a rebellion in the city to be crushed? This 'ultimate decree' protected the magistrates if they use their military power (*imperium*) inside the sacred boundary of the city, known as *pomerium*.⁴¹ One exception apparently occurred in the year 49, when the Senate decided that Caesar was to be

Labeo, 1972, vol. 18, pp. 95–100. There is an extensive bibliography on the topic of SCU. Among the main titles, see Jürgen Ungern-Sternberg, *Untersuchungen zum späten republikanischen Notstandsrecht: Senatusconsultum ultimum und hostis-Erklärung*, C.H. Beck, Munich, 1970 (whose idea that the *hostis-Erklärung* was included in SCU has not been generally accepted); Antonio Duplá, *Videant consules: Las medidas de excepción en la crisis de la República romana*, Universidad de Zaragoza, Saragossa, 1990; Roberto Fiori, *Homo sacer: Dinamico politico-costituzionale di una sanzione giuridico-religiosa*, Jovene, Naples, 1996, pp. 415–47.

³⁹ See on "Kriegsrecht": Theodor Mommsen, *Römisches Staatsrecht*, S. Hirzel, Leipzig, 1888, vol. III-2, pp. 1244 ff.

⁴⁰ See Andrew Lintott, *Violence in Republican Rome*, 2nd edition, Oxford University Press, Oxford, 1999, p. 156.

⁴¹ See on "*Domus*": Fred K. Drogula, *Commanders & Command in the Roman Republic and Early Empire*, University of North Carolina Press, 2015, p. 125.

replaced as governor of Gaul, but things are more complicated than that: the SCU was not directed against Caesar (he was straightforwardly declared ‘public enemy’ or *hostis*) but against some of the tribunes in Rome, whose tactics had hindered the Senate’s efforts for too long.⁴² The tribunes knew perfectly well what the implications of the decree were, for they left Rome in a hurry (according to some sources, disguised as slaves) and ran to Caesar.

The actual words of the text are not the only thing that matters: we know also what happened after the Senate passed the decree. What our sources tell us amounts to a proper state of emergency. It was not only the killing of hundreds or even thousands of Roman citizens on the spot, without trial. Their goods were confiscated, their houses razed to the ground and their bodies thrown into the Tiber. Even Caius Gracchus’s widow was not allowed to recover her dowry. Special trials were conducted against the friends of the agitators. The prosecution tried to eradicate even the memory of their deeds. The tribune of the plebs in 99 (Sextus Titius) was sentenced to exile a year later for the only reason of having at home a statue of Saturninus, the violent tribune who had been killed two years before (Cicero, *For Rabirius, on a Charge of Treason*, 24; Valerius Maximus, *Memorable Deeds and Sayings*, 8.1 damn.3). The same fate was reserved to a man called C. Apuleius Decianus: he had showed his sorrow for the tragic death of Saturninus (Valerius Maximus, *Memorable Deeds and Sayings*, 8.1 damn.2).

At the end of the day, it is difficult not to accept that the SCU was very successful: in the eight instances when the Senate resorted to this measure, several thousand Roman citizens – including two tribunes of the plebs – were killed without trial and no one was ever condemned for these crimes, with the only debatable exception of Cicero himself; and debatable it is, for he went to exile in order to avoid standing trial. No one can say if he would have been found guilty. In other cases, such as Opimius in 120, the magistrates who took the lead in the attack under the umbrella of the SCU were formally accused, but the jury pronounced them not guilty. The case of Rabirius in 63 is more complex: he was about to be con-

⁴² Marianne Bonnefond-Coudry, *Le Sénat de la République romaine*, BEFAR, Roma, 1989, p. 769. Recently, Allély, after reviewing all the evidence, concludes that in 49 BC, SCU and the *hostis-Erklärung* took place, affecting both Caesar and his soldiers, see Allély, 2012, pp. 82–84, see *supra* note 33.

demned when the vote of the assembly was interrupted by a trick (the red flag on the Janiculus Hill was lowered) and never resumed.

In its blurry figure, the SCU fits perfectly well into the ‘state of emergency’ as conceived of by Agamben. This has been interpreted by Andreas Kalyvas as proof that, contrary to the conventional wisdom, a ‘mixed constitution’ such as the Roman regime was less – and not more – stable than a democracy, since Athens had no use of the emergency measures:

Whereas democratic Athens banned the tyrannical form of power in the name of freedom, the Roman republic legalised it in the name of liberty. What was excluded from the constitutional arrangement of Athens was fully included in the mixed regime of Rome.⁴³

This is not completely accurate: ostracism was clearly an emergency measure incorporated in the Athenian constitution, for it meant that someone was exiled for ten years without any juridical procedure, as a direct consequence of a popular vote: no evidence against him was presented nor was he given any opportunity to defend himself. The reason underpinning ostracism was the necessity to summarily expel from the city of Athens those people who supposedly were seeking to become tyrants.⁴⁴ Yet, Kalyvas has correctly emphasised the paradox of a constitution which repeatedly needed to invoke emergency measures to avoid being overthrown. The reason is clear: “sovereignty had no stable location in the Roman Republic”.⁴⁵ We will come back to this at the end of this chapter.

3.3.3. Cicero on the State of Exception

It is not easy to give an overview of Cicero’s ideas on this subject, for these were deeply influenced by the moment and the context. Hence, I shall review briefly, one by one in chronological order, the main texts, which are as follows: *For Rabirius, on a Charge of Treason* (63), *Against*

⁴³ Andreas Kalyvas, “The Tyranny of Dictatorship: When the Greek Tyrant Met the Roman Dictator”, in *Political Theory*, 2007, vol. 35, no. 4, p. 431.

⁴⁴ See Aristotle, *Constitution of Athens*, 22 and 43, 5 with Peter J. Rhodes, *A Commentary on the Aristotelian Athenaion Politeia*, Clarendon Press, Oxford, 1981 *ad loc.*

⁴⁵ Lowrie, 2007, p. 32, see *supra* note 31.

Catiline IV (63), *In defence of Sestius* (56), *On Laws* (52-51), *In defence of Milo* (52), and *Philippics* (44-43).⁴⁶

For Rabirius, on a Charge of Treason: This was a very strange case. Saturninus, tribune of the plebs, had been violently killed after being compelled to surrender by the consul, who had the backing of the ‘ultimate decree’. This happened in 100. Almost 40 years later, in 63, Rabirius was accused of having taken part in the violent repression of Saturninus rebellion. Cicero was his lawyer and his discourse revolved entirely around the problem of the ‘ultimate decree’. He was adamant: if sovereignty belongs to the person or the public instance who can declare the state of exception (as Carl Schmitt was to proclaim, many years later), he insisted this one should be the Senate. Accusers did not want only to punish Rabirius, they wanted to destroy the Senate’s power (Cicero, *For Rabirius, on a Charge of Treason*, 2). Cicero called Saturninus ‘enemy of the Roman people’ (*hostis populi Romani*; *For Rabirius, on a Charge of Treason*, 20): he surely was not officially declared as such, but these legal niceties were of little significance to his theory.

Against Catiline: Cicero delivered the first of his famous Catilinarian orations when Catiline was sitting in the Senate (8 November 63). An ‘ultimate decree’ had been passed, but Cicero, as consul, wanted to have complete and unequivocal evidence before taking harsh measures against him. Still, he stated very clearly his position: the laws protecting citizens did not benefit those who had “deserted the republic”, and this had always been so in the history of the Republic (Cicero, *Against Catiline*, 1.10.28). The day after, Catiline had flown away and Cicero was speaking not in front of the Senate, but the people: “we are conducting a just war against an enemy” (*Against Catiline*, 2.1.1). Cicero threatened with severe punishments those friends and allies of Catiline who remained in the city: he considered them to be *hostes* (public enemies), even if they were born Roman citizens (*Against Catiline*, 2.12.27). In his Third Speech against Catiline (with the conspiracy already dismantled and its leaders in prison), Cicero said they wanted to destroy the city and all its inhabitants and announced to the people that by a decision of the Senate, Lentulus, one of

⁴⁶ See, in general, Thomas N. Mitchell, “Cicero and the Senatus Consultum Ultimum”, in *Historia: Zeitschrift für alte Geschichte*, 1971, vol. 20, pp. 47–61; Antonio Dupl “Política y violencia en la reflexión ciceroniana: legalidad, legitimidad, oportunismo”, in Marcelo Campagno, Julián Gallego and Carlos García MacGaw (eds.), *El Estado en el Mediterráneo antiguo: Egipto, Grecia, Roma*, Miño y Dávila, Buenos Aires, 2011, pp. 351–70.

the leaders, who was also a praetor that year, had forfeited his condition as citizen (*Against Catiline*, 3.6.15). But it is in the Fourth Speech (5 December, in front of the Senate) where we find the clearest expression of Cicero's thought in this issue. He very specifically referred to the Sempronian law, according to which only the People (not the Senate or any magistrate) could pass a capital sentence against a Roman citizen; again, Cicero said, those who are public enemies of the Republic are not citizens (*Against Catiline*, 4.5.10). They were not just 'criminal citizens', *improbissimi ciues*, but the most cruel enemies (*Against Catiline*, 4.7.15): they were worse than *hostes alienigenae* (foreign enemies). Those mad men (*dementes*) who had decided to become enemies of their country, could not be compelled by force nor gained with benefits – this is the reason why war against them is eternal (*Against Catiline*, 4.10.22).

We cannot be sure, but it is probably at this point in time, in this particular context, that Cicero invented his new theory, "namely that a citizen who was guilty of *perduellio* forfeited his rights of citizenship retrospectively to the time when his crime was committed, and could therefore be summarily dealt without trial".⁴⁷ This idea was accepted by later jurists. In the Severan period (early third century), Paulus pointed out that those who had been declared 'public enemies' (*hostes*) by the Senate or a law forfeited their Roman citizenship.⁴⁸

On Laws: Cicero's dialogue *On Laws* provides insight on the general argument underpinning Cicero's view on *hostes*. Cicero's philosophical approach rested on the idea of natural law, that is, natural reason (Cicero, *On Laws*, 1.18), which only the Wise Man has (*On Laws*, 2.8). Laws are not those texts which have gone through all the established procedures, but "the highest reason, implanted in nature, which orders those things that are to be done and prohibits the opposite" (*On Laws*, 1.18). Only just laws are truly laws and should be called that; if unjust then they are not laws (*On Laws*, 1.42–44). When a band of thieves lays down some rules for its own use, these are not laws. In a similar way, those that are proposed by 'radical' tribunes do not deserve to be called laws (*On Laws*, 2.14). Cicero applied the same reasoning to republics (they only exist

⁴⁷ K.A. Bauman, "The Hostis Declarations of 88 and 87 BC", in *Athenaeum*, 1960, vol. 51, p. 281.

⁴⁸ Dig. 4.5.5.1. Cf. Carla Masi Doria, "*Salus populi suprema lex esto*: Modelli costituzionali e prassi del Notstansrecht nella res publica romana", in Carla Masi Doria, *Poteri magistrature processi nell'esperienza costituzionale romana*, Jovene, Naples, 2015, pp. 1–21.

when founded upon just laws: *On Laws*, 1.42) or to criminals: they are not so because a legally established court has pronounced them guilty, but rather because natural law says so. This argument led Cicero to a forgone conclusion: taking natural law as a guide, there is no need to declare a ‘state of emergency’ of any kind, for the good citizen can identify by himself where the danger to the Republic lays. Against the dangerous citizen everybody may lawfully stand up and oppose his evil intentions.

In this dialogue, Cicero sought to reinforce the power of the Senate: a dictator is to be appointed (for no longer than six months) with full powers against an external war or internal conflicts (*On Laws*, 3.9.2) so there is no need of an ‘ultimate decree’ which he does not mention (but we should take into account the fact that the text as preserved is not complete). It is in the Senate’s power to decide if and when a dictator should be appointed. Book 3 is badly damaged so we do not know if Cicero perceived the dictator’s powers to be limited by *prouocatio*. We may suspect that he did not, for Cicero does not appear to have a negative view of the dictatorship, not even when used against internal enemies, as an instrument to re-construct the Republic (Cicero, *On the Commonwealth*, 6.12). The government of Rome should be in the hands of the Senate (Cicero, *On Laws*, 3.28).

In defence of Sestius: Cicero had just returned from exile and now stood in defence of Sestius, accused of violence because of the riots and the fights between Ciceronian partisans and their enemies. The description our orator made of the street fight is highly evocative:

Having occupied the Forum, the Comitium, and the Senate House late at night with armed men, for the most part slaves, they attacked Fabricius, lay hands upon him, kill some of his party, wound many. As that excellent and most steadfast man, Marcus Cispus, a tribune of the commons, was coming into the Forum, they drive him away by force, wreak great slaughter in the Forum, and then all together, their swords drawn and dripping with blood, it was my brother, my excellent, my most brave and devoted brother, that they began to search for, to clamour for, in every quarter of the Forum... You remember, gentlemen, how the Tiber was filled that day

with the bodies of citizens, how the sewers were choked, how blood was mopped up from the Forum with sponges.⁴⁹

All the blame is laid on the ‘enemies’ who are held responsible of the riot. Cicero’s main idea is the defence of a ‘consensus of all the excellent people’ against the rest. Who is this rest? According to him, they belong to three different categories: firstly, madmen, people with a pathological mind (further explored below); secondly, those who are troubled by their heavy debts; and lastly, those who need to avoid punishment for their very serious crimes. In short, Cicero refuses to see his opponents as politicians, with different views from their own: they are criminals wanting to destroy the Republic (Cicero, *In defence of Sestius*, 99–100). This, in modern parlance, translates as terrorists, for they use violence in order to unsettle the democratic order.⁵⁰

The ideas Cicero expressed in his speech *In defence of Milo* are not very different. This was Cicero’s last speech in his long career as an advocate. Milo had killed his rival Clodius in a fortuitous clash on a road 20 kilometres away from Rome. The killing of the charismatic tribune unleashed riots and troubles in Rome at a hitherto unprecedented scale. Even the Senate house (*curia*) was burnt to the ground by the angry mob. An ‘ultimate decree’ was passed, soldiers entered the city and order was restored. Cicero did what he could for Milo, but it was not enough for he was exiled. The discourse revolved around the idea that Clodius’s death was a blessing for the Republic, for he was an enemy of the good people. Milo deserved honour and glory for having killed a tyrant.⁵¹ Cicero des-

⁴⁹ “Cum forum, comitium, curiam multa de nocte armatis hominibus ac seruis plerisque occupauissent, impetum faciunt in Fabricium, manus adferunt, occidunt non nullos, uulnerant multos. uenientem in forum uirum optimum et constantissimum M. Cispium, tribunum plebis, ui depellunt, caedem in foro maximam faciunt, uniuersique dstrictis gladiis et cruentis in omnibus fori partibus fratrem meum, uirum optimum, fortissimum meique amantissimum, oculis quaerebant, uoce poscebant [...] Meministis tum, iudices, corporibus ciuium Tiberim compleri, cloacas refarciri, e foro spongiis effingi sanguinem”, see Cicero, *In defence of Publius Sestius*, R. Gardner trans., Loeb Classical Library, Cambridge, 1966, 75–77.

⁵⁰ The use of the word ‘terrorist’ to denigrate certain violent acts from the Roman past is not wholly uncommon in modern authors. Syme, for instance, called Augustus ‘the terrorist of Perusia’ (Ronald Syme, *The Roman Revolution*, Oxford University Press, 1939, p. 257), but this is entirely different from the Ciceronian view. For him, the question was not how cruel or violent one man (Augustus in this case) could be, but his political objectives.

⁵¹ “Graeci homines deorum honores tribuunt eis uiris qui tyrannos necauerunt. Quae ego vidi Athenis! quae aliis in urbibus Graeciae! quas res diuinas talibus institutas uiris! quos cantus, quae carmina! prope ad immortalitatis et religionem et memoriam consecrantur. Vos

perately tried to convince the jurors that Milo had killed Clodius not only in self-defence but also in defence of the Republic. Clodius, the seditious tribune of the plebs, was a pest and a real menace – and this is the point that needs to be emphasised – because of the laws he was ready to pass through the people’s assembly. In this case, there were no riots or violence to justify the killing, but good Roman laws. Nor was there an ‘ultimate decree’ (previous to the incident which resulted in Clodius’s death) or any other public measure to give the appearance of legality to Milo’s crime. Cicero, in retrospect, wanted to condone political violence without any formal procedure or decision.

Philippics: This was Cicero’s last stand for Republicanism, with mixed results. They gave the orator fame and glory, but also provided justification for his murder during the subsequent proscriptions. In his long tirade against the consul Mark Antony, Cicero knew no bounds. The acts of open rebellion by the young Octavian (who would become Emperor Augustus) were justified by the orator in the name of the Republic. Even if Brutus, the tyrant-slayer, warned him against giving too much power and honours to the young and ambitious heir of Caesar, Cicero paid no heed to his advice. He was true to his ideas: against the tyrant (he had no doubts Mark Antony was aiming at tyranny) every response, every form of resistance, is permitted.

3.4. *Feindstrafrecht*

The ‘enemy criminal law’ was devised as an ‘ideal-type’ by Günther Jakobs for the first time in 1985. This ideal-type became a highly topical issue after the war on Iraq and the debates on ‘enemy combatants’ incarcerated without accusation or trial in Guantánamo. Jakobs’s proposal amounts to the creation of a new type of criminal law, which is governed by three principles:

[F]irst, punishment comes well before an actual harm occurs; second, it contains disproportionate, i.e., extremely high, im-

tanti conseruatorem populi, tanti sceleris ultorem non modo honoribus nullis adficietis, sed etiam ad supplicium rapi patiemini? Confiteretur, confiteretur, inquam, si fecisset, et magno animo et libenter fecisse se libertatis omnium causa, quod et ei non confitendum modo, verum etiam praedicandum”; see Cicero, *In defence of Milo*, 80.

prisonment sanctions; third, it suppresses procedural rights [...]⁵²

There has been some inquiry into the origins of this ‘enemy criminal law’. While Jakobs himself has claimed there is no connection with the notorious concept of ‘enemy’ by the Nazi jurist Carl Schmitt, other more palatable names such as Hobbes and Kant are usually mentioned by him or his followers. Jakobs only acknowledges a connection with those philosophers or thinkers who agree with his defence of the *status quo* and the established order; when the dialectic of ‘friend versus enemy’ is used with revolutionary purposes (by Saint-Just, to cite just one name), he is simply not interested.⁵³ In my opinion, the link between Jakobs and Schmitt’s theories is direct and strong, though there is insufficient space to explore that here.⁵⁴ Our interest lies in the connection with Cicero. As far as I know, the ancient roots of this ideal-type have never been explored.⁵⁵ Yet they are very visible to the observer. In ancient Roman law, citizens were protected by the right to *prouocatio*, which meant, as we have already seen, that they could not be put to death unless by the assembly or a jury of citizens. Cicero argued that he who has conspired against the Republic has voluntarily forfeited his citizenship, and could be dealt with accordingly, that is, as an enemy of Rome. His justification was almost the same as the one Jakobs provided: the state (the Republic for Cicero) has the right to protect itself in order to avoid being destroyed – what Jak-

⁵² Carlos Góómez-Jara Díez, “Enemy Combatants versus Enemy Criminal Law”, in *New Criminal Law Review*, 2008, vol. 11, no. 4, pp. 529–62.

⁵³ Xavier Bastida, “Los baros en el umbral. Fundamentos filosóficos del derecho penal del enemigo”, in Manuel Cancio Mel and Carlos Gómez-Jara (eds.), *Derecho penal del enemigo: El discurso penal de la exclusión*, Edisofer, Madrid, 2006, pp. 277–304.

⁵⁴ In Miguel Polaino-Orts, *Derecho penal del enemigo*, Bosch, Barcelona, 2009, pp. 133–39, Polaino-Orts rejects any connection between Jakobs and Schmitt, but for the wrong reason: according to him, in Schmitt the enmity is ‘private’ (p. 134), but this is not correct; for Schmitt, only a public enemy is an enemy: “Feind ist nur der öffentliche Feind [...] Feind ist *hostis*, nicht *inimicus*”. See Carl Schmitt, *Der Begriff des Politischen*, Duncker and Humbolt, Munich, 1932, p. 16; Gabriella Slomp, *Carl Schmitt and the Politics of Hostility, Violence and Terror*, Palgrave Macmillan, Houndmills, 2009.

⁵⁵ The only hint I have been able to find so far is faint, does not concern Cicero and is incorrect. Bastida, 2006, p. 286 (see *supra* note 53) very briefly refers to a distinction which he claims functioned in Rome between *hostis iudicatus* and *hostis alienigena*, but with no reference to sources. In Cicero, *Against Catiline*, 4.22, *hostes alienigenae* are indeed mentioned in the context of a contrast between *uictoriae domesticae/externae*, but there is nothing here about *hostis iudicatus*. In fact, I have not seen the couple used together anywhere in the corpus of Latin literature.

obs encapsulates as the so-called ‘right to security’ (*Grundrecht auf Sicherheit*).

The application of this enemy criminal law to the ‘war on terror’ was a collective work in which we may mention the role played by John Yoo, a member of the neo-conservative think-tank American Enterprise Institute, a law professor at Berkeley and above all, Deputy Assistant Attorney General in the office of the Legal Counsel of the U.S. Department of Justice between 2001 and 2003.⁵⁶ He is credited, in particular, with a memorandum dated 14 March 2003, which simply dismissed all national and international laws governing the treatment of prisoners: the President of the United States could do with them what he thought fit for national security reasons. It is true that the majority of these prisoners are not U.S. citizens, but when the ‘enemy criminal law’ is set in motion, the issue of citizenship and the protection it provides simply fades away, as is proven by the case, among others, of Yaser Hamdi, a U.S. citizen imprisoned in Guantánamo. The district court declared the following:⁵⁷

This case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal and without access to a lawyer. Despite the fact that Yaser Esam Hamdi (‘Hamdi’) has not been charged with an offence nor provided access to counsel, the Respondents contend that his present detention is lawful because he has been classified as an enemy combatant.

⁵⁶ Scott Horton, “The Return of Carl Schmitt”, in *Balkanization*, 7 November 2005.

⁵⁷ Aglaia McClintock, “Nemico non più cittadino. Il caso di Yaser Hamdi, prigionero a Guantánamo”, in *Fides Humanitas Ius: Studi in onore di Luigi Labruna*, vol. V, Editoriale Scientifica, Naples, 2007, pp. 3479–94.

<i>FEINDSTRAFRECHT</i> (Jakobs)	<i>HOSTIS IN ROMAN LAW</i>
Punishment comes well before an actual harm occurs	“Other crimes you may punish after they have been committed; but as to this, unless you prevent its commission, you will, when it has once taken effect, in vain appeal to justice. When the city is taken, no power is left to the vanquished” (Sallust, <i>Conspiracy of Catiline</i> , 52.4)
It contains disproportionate, that is, extremely high, imprisonment sanctions	Citizens are not sentenced to death but to exile (Polybius, 6.14.7–8; Sallust, <i>Conspiracy of Catiline</i> , 51.22). Yet the opponents of Sulla were killed with impunity (Appian, <i>The Civil Wars</i> , 1.60).
It suppresses procedural rights	<i>Lex Sempronia (provocatio)</i> refers to citizens, those who are public enemies of the Republic are not citizens (Cicero, <i>Against Catiline</i> , 4.5.9)

Figure 1. Ciceronian Foundations of *Feindstrafrecht*.

One last point should be addressed. Who is then a public enemy, an *hostis*? The answer must be: the tyrant, for tyrants do not belong to human society (Cicero, *On Duties*, 3.32). Anybody can kill them without suffering any penalty. Cicero had a very specific word for them, which purports to reveal their true nature: *furiosi*. Contrary to other mental illness such as dementia (*insania*) or stupidity (*stultitia*), *furor* can also affect the Wise Man (Cicero, *Tusculans*, 3.5.11). This is not an inborn illness. Very able men, excellent orators and statesmen, for different reasons became *furiosi* – that is, frenzied, mad, and wild men. It was one of Cicero’s favourite insults, he used it very many times; he applied the insult to each and every popular leader in the recent history of his time, from Tiberius Gracchus and Rabirius, through Catiline and Clodius to Mark Antony.⁵⁸ But there is more to it. *Furiosus* (as Cicero himself said) translates

⁵⁸ See Catiline, *Catilinarian Speeches*, 1.1 and 1.15; Clodius, *Domo*, 113; Saturninus, *In defence of Rabirius*, 22 and 24; Tiberius Gracchus, *On Friendship*, 37; Mark Antony, *Philippics*, 13 and 16. On *furiosus*, from a juridical point of view, see Xavier D’Ors, “Sobre XII tablas V, 7a: *si furiosus escit*”, in *Homenaje al profesor Alvaro Otero*, University of

the Greek *melancholia*, or ‘black humour’, which is the psychological feature of the tyrant (Plato, *Republic*, 573c). When Cicero called his political rivals *furiosi*, he was insulting them for aspiring to tyranny, as tyrants-to-be. He considered them criminals not for what they had done, but because their psychological conditions or personal liabilities (enormous amount of debt, horrifying crimes such as incest or murder) impelled them to destroy the political community.

We may find some connection with the (purportedly vague) notion of ‘enemy’ in Jakobs’s theory: ‘Enemy’ is understood here as someone who:

to a not merely incidental extent in his attitude [...] or his occupational life [...] or [...] by his inclusion in an organization [...], has at any rate presumably permanently [*dauerhaft*] turned away from the law and in this respect does not guarantee the minimum cognitive security of personal behaviour and demonstrates this deficit by his behaviour.⁵⁹

In both cases (Cicero and Jakobs) it is the moral or personal behaviour of the ‘enemy’ that counts, which places him permanently outside the law. Punishment has to change its objective accordingly: it is no more the cure of the convicted; crimes are no longer seen as remedial diseases. Even if some of Catiline’s followers could be transformed into good citizens, it would be in the interest of the Republic that the vast majority perish, be annihilated (Cicero, *Against Catiline*, 2.22). At most, punishment may serve as a warning to other criminals who may then change their behaviour (*Against Catiline*, 3.17). Soon, Cicero convinced himself that this was pointless: their minds could not be cured or changed; his enmity with the Catilinarians was a perpetual war (*aeternum bellum*; Cicero, *In defence of Sulla*, 28).

3.5. Conclusions

It makes little sense to insist on the illegality of measures such as the ‘ultimate decree’: they are emergency measures; therefore they are located

Santiago, Santiago, 1981, pp. 221–49; Carlo Lanza, *Ricerche su furiosus in diritto romano*, La Sapienza, Rome, 1990. The connection between *furor* and the ambition of becoming king is clearly stated in Cicero, *Against Catiline*, 2.19.

⁵⁹ Jakobs, “On the Theory of Enemy Criminal Law”, in Markus D. Dubber (ed.), *Foundational Texts in Modern Criminal Law*, Oxford University Press, Oxford, 2014, pp. 415–24.

outside the law. We have a somewhat unexpected testimony of this in the writings of Julius Caesar, who was an outstanding advocate of the tribunes' rights against the supremacy of the Senate. At the beginning of the Civil War, Caesar criticised the 'ultimate decree' but he did not claim it was illegal; he simply said that the situation was not so extreme. In his view, the Senate had overreacted to the tribunes of the plebs using their veto. The historical precedents he mentions, when the decree was, by implication, justified, include open rebellion and violence but also 'dangerous laws'.⁶⁰ This is revealing, for we have here the 'ultimate decree' *in opposition to laws*: not just violence or riots, but also good and sound Roman laws forced the passing of emergency measures.

The conflict that eventually destroyed the Roman Republic revolved around who could decide on the exception, that is, the question of who was sovereign. Cicero's answer was in the first place the Senate, but at the bottom, it was the Wise Man, for everyone is entitled to stand up against the tyrant. "Publius Scipio, the highest priest, killed Tiberius Gracchus as a private citizen, even though he was moderately disturbing the state of public affairs" (Cicero, *Against Catiline*, 1.3). This leads to a paradox, by which the sovereign is any private man, defending the Republic against the tyrant.⁶¹ Cicero's extreme vision of the emergency measures is incompatible with any rational theory of sovereignty.

Cicero's influence has been indirect but strong both in the 'just war' theory (through thinkers such as Vitoria, Grotius or Vattel) and in modern reflection on 'enemy criminal law' (through Schmitt). From our vantage point in the twenty-first century, Cicero's main contribution to the international criminal law discipline likely lies in two areas: on the one hand, his emphasis on the *ius post bellum*, for too often a poor peace treaty has planted the seed for a new war; on the other hand, his reflections on criminal law are particularly relevant to our present times, when State sovereignty is put into question by very different worldwide forces (that is, globalisation).

⁶⁰ Caesar, *Civil Wars*, 1.7.5–6.

⁶¹ Cf. Wilfried Nippel, *Aufbruch und 'Polizei' in der römischen Republik*, Klett, Stuttgart, 1988, p. 83: the killing of the tyrant is an exception in which 'self-help' is permitted.

	CREATED	APPOINTED/ DECLARED BY	REMARKS
DICTATORSHIP	501-202: 85 instances. Sulla: 82-81 Caesar: I (49); II (Nov. 48-Nov. 47); III (April 46: Ten Years) IV (Feb. 45) Perpetuus: Feb. 44 Abolished (M. Antonius, 44).	Following the Senate's instructions, the consul appointed the dictator. Interrex, <i>lex</i> (Sulla) <i>lex</i> : Caesar	Six months maximum From 300 BC (<i>lex Valeria de prouocatione</i>), under <i>prouocatio</i> A third of all recorded instances were appointed simply to hold elections
SCU = Senatus Consultum Ultimatum (the 'ultimate decree')	121 (C. Gracchus); 100 (Saturninus); 87 (Cinna); 77 (Lepidus); 63 (Catiline); 62 (Nepote); 52 (after Clodius's burial); 49 (Caesar); 47 (Dolabella); 43 (Mark Antony)	Senate	
<i>Hostis-Erklärung</i>	Invented by Sulla in 88 (Marius + 10 others) 87 (twice: Cinna, Sulla) 83 (senators who supported Sulla) 77 (Lepidus) 63 (Catiline and Manlius) 49 (Caesar) 43 (Mark Antony, Lepidus: both annulled in August by S.C.) 40 (Salvidienus)	Senate	Loss of citizenship, property, life.

<i>Tumultus</i>	296 (?) 225 200 193 (Ligurians) 192 (Sicily) 181 (Ligurians) 77 (?) (Lepidus) 73 (?) (Spartacus) 43 (M. Antonius)	Senate	Emergency draft (not dilectus) <i>ad unum bellum</i> . A <i>iustitium</i> was needed.
<i>Iustitium</i>	296; 111; 88 (?) Suggested by Clodius in 56 (Cic. <i>Har.</i> 26).	Consul, praetor or dictator	“complete cessation of public business, preventing all government activities not related to war”. ⁶²
<i>Homo sacer/euocatio</i>	439 Sp. Maelius? 133 Tib. Gracchus?	<i>privatus</i>	Whoever wants the Republic to be safe, follow me!

Figure 2. States of Emergency in Rome (all dates are BC).

⁶² Gregory K. Golden, *Crisis Management during the Roman Republic: The Role of Political Institutions in Emergencies*, Cambridge University Press, Cambridge, 2013, p. 87.

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