

Constructing the Right to War

Alberico Gentili and his Receptions in International Law



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Abstract

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This thesis explains the striking disparity between two narratives about Alberico Gentili, the early modern jurist widely identified as the founder of the classical laws of war. On the one hand, he is conventionally considered as a great humanizer of warfare, a man who tried to use the law to curtail the horrors of war. On the other hand, a few works have emerged suggesting that Gentili was in fact the first to introduce the concept of the enemy of mankind into international law, a concept generally used to justify ruthless forms of violence. In order to explain the tension between these narratives, the thesis investigates both what Gentili was seeking to achieve in his own epoch with his treatise on the laws of war, *De iure belli*, and how his work was subsequently received over time.

Based on an original methodology for the study of great thinkers in International Relations and beyond, the thesis makes the following two-fold argument. First, it argues that Gentili's famous treatise on the laws of war is the work of an absolutist who was attempting to elaborate and defend a controversial approach to war and its law. Gentili's pioneering use of the concept of the enemy of mankind must be understood as the cornerstone of this absolutist project, as part and parcel of a broader attempt to grant unprecedented rights to a small group of sovereigns. Second, it argues that the conventional narrative about Gentili as the father of the classical laws of war and as an avant-garde humanitarian only emerged in the late nineteenth century, turning the Italian jurist into a cipher for a particular view of international law and modernity and developing a myth about the importance of his work. This narrative would eventually be enshrined in Carl Schmitt's deeply influential *The Nomos of the Earth*, and it continues to shape the story of the development of international relations and international law to this day.

In making this argument, the thesis challenges some conventional tenets of the history of international law and international relations, reveals a new facet of the disciplinary history of international law, and makes a broader claim about the need to examine debates about the ontology of war in historical perspective.

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Introduction

Carl Schmitt, a highly controversial figure who has made a remarkable comeback in International Relations,¹ famously lamented the return of what he termed ‘discriminatory war’ in the twentieth century, a development he associated with the rise of Anglo-American power, and with liberalism more broadly. Discriminatory war, to him, entailed a medieval form of warfare based on the assumption of one side having a ‘just cause’ and being therefore entitled to treat the enemy as a criminal rather than as a legitimate rival. This type of warfare, he explained, had been abolished during the early modern period in an effort to ‘bracket’ war, i.e. to limit its scope and humanize its conduct. Schmitt pins much of his influential narrative on the development of war and its laws in the early modern period onto a late sixteenth century jurist, Alberico Gentili (1552-1608), generally considered today to be the father of the classical laws of war, and one of the founders of international law. ‘It was Gentili,’ Schmitt tells us, ‘who succeeded in creating a new concept of war based on the sovereign state... rather than on the justice or injustice of the reasons for war offered by either side,’² opening the way for the more humane approach to warfare he sees as characterizing the period between Westphalia and the rise of Anglo-American dominance.

While this story about Alberico Gentili and his role in the humanizing and legal ordering of warfare is now widely accepted, a handful of works have shed light on a radically different aspect of his writings on war. Gentili, we are told, was the first jurist to bring the concept of the ‘enemy of mankind’ (*hostis humani generis*, or ‘HHG’) into

¹ The two main works are Louiza Odysseos and Fabio Petito, *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order* (London: Routledge, 2007); William Hooker, *Carl Schmitt’s International Thought: Order and Orientation* (Cambridge: Cambridge University Press, 2009). I will discuss the turn to Schmitt at more length in Chapter 5.

² Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press, 2003), 158–159.

international law, notably through his discussion of piracy within his famous treatise on the laws of war, *De iure belli libri tres*.³ As the term ‘enemy of mankind’ suggests, incorporating such a concept into a theory of the laws of war can hardly be couched as a humanitarian move; if anything, excluding individuals from humanity is generally a way to justify their extermination. The thin but compelling literature on this side of Gentili’s treatise on the laws of war suggests that Schmitt’s story about Gentili—and the broader way in which he is celebrated today—may not be entirely accurate.

Taking stock of these dissonant narratives, the present project reassesses the original purpose of Gentili’s *De iure belli* and analyzes the process through which Gentili came to be seen as the father of a ‘modern’ concept of war enabling the ‘bracketing’ of warfare. Crucially, it pays close attention to the gap between what Gentili initially intended to do and how his work came to be known through its different receptions over time. Which aspects of his work were emphasized? And most importantly, which ones were either ignored or deliberately obscured?

My argument is twofold. First, I argue that Gentili’s *De iure belli* has to be understood as an attempt to legitimize a controversial absolutist approach to the laws of war that granted a considerable amount of power to a narrow group of sovereigns. I explain Gentili’s pioneering use of the concept of the enemy of mankind within that context and show the extent to which this notion is in fact co-constitutive of Gentili’s famous definition of war. Second, I claim that while Gentili’s notorious absolutism caused him to remain a secondary figure for two centuries after his death, his revival in the late nineteenth century sidestepped his contentious background and turned his name into a

³ Alberico Gentili, *De iure belli libri tres*, ed. James Brown Scott, trans. John Carew Rolfe (Oxford: Clarendon Press, 1933). Since the original title is written with ‘iure’ rather than ‘jure’ (though the distinction between ‘i’ and ‘j’ in Latin was only introduced in the sixteenth century and the two spellings remain essentially interchangeable in the contemporary literature), I apply this rule throughout the thesis and write ‘ius’ rather than ‘jus,’ ‘iustum’ rather than ‘justum,’ etcetera, unless it is part of a citation.

cipher for a particular view of international law and modernity, eventually enshrined in Carl Schmitt's deeply influential *The Nomos of the Earth*.

I. Alberico Gentili and the history of international law

In a way not dissimilar to the history of political thought, the history of international law has long been told as the history of a collection of great thinkers. Notwithstanding the recent turn towards the disciplinary history of international law,⁴ the development of international law still tends to be mapped onto the writings of the likes of Vitoria (1483-1546), Suarez (1548-1617), Gentili (1552-1605), Grotius (1583-1645), Pufendorf (1632-1694), and Vattel (1714-1767), to name but the most oft-encountered ones. These famous individuals are broadly considered to represent major turning points within the long and sinuous process of elaborating the international law we now know; they constitute the remarkable chapters of a grand narrative inevitably tinged with teleology. Within this context, Gentili is considered to have been crucial to both the development of international law in general, sometimes placed alongside Grotius and Vitoria as one of the three founding fathers of international law, and more importantly for our purposes, he is seen as one of the—if not *the*—founding father of the classical laws of war.

a. Gentili, secularism, and the humanization of warfare

Broadly speaking, Gentili is widely considered as one of the foundational figures of international law, and he is particularly celebrated for having attempted to secularize the law of nations. Gentili, we are told, is 'the first writer who tried to treat systematically the

⁴ See most notably, Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001).

problems of international law,’⁵ and he ‘emerges as the exponent of a progressive law of nations,’ who ‘tried to separate the law of nations from theology and philosophy and to formulate it into a self-contained legal discipline.’⁶ In his seminal work on *International Law and the Use of Force by States*, Ian Brownlie similarly celebrates Gentili as ‘the first writer to develop a system of norms for state relations which was secular and legal in origin,’⁷ while Arthur Nussbaum, in what long remained the main English-language textbook on the history of international law, sees him as ‘the originator of the secular school of thought in international law.’⁸ This celebration of Gentili as the great secularizer of international law is often associated with what is perhaps Gentili’s most famous statement: ‘*Silete theologi in munere alieno*’—let theologians keep silence about matters outside their province.⁹

On war and its laws, specifically, Gentili is commonly seen as the foremost thinker of the modern institution of war, particularly amongst scholars who consider the practice of war to have acquired its modern character when it became narrowed down to organized violence between sovereign states.¹⁰ In general, the idea of Gentili as one of

⁵ Gesina H. J. Van der Molen, *Alberico Gentili and the Development of International Law: His Life, Work and Times*, Second edition (Leiden: Albertus Willem Sijthoff, 1968), 113.

⁶ See also Charles Henry Alexandrowicz, “Introduction,” in *Alberico Gentili and the Development of International Law: His Life, Work and Times*, by Gesina H. J. Van der Molen, Second edition (Leiden: Albertus Willem Sijthoff, 1968), viii; Henry Nézard, “Albericus Gentilis,” in *Les fondateurs du droit international: leurs œuvres, leurs doctrines*, ed. Joseph Barthélemy (Paris: V. Giard & E. Brière, 1904), 38. This view is common amongst historians of international law. For seminal statements, see for instance Coleman Phillipson’s introduction to the 1933 edition of *De iure belli*: ‘The theological basis of the subject, which was generally affirmed or assumed by his predecessors, was once for all undermined by Gentili, and a more acceptable foundation was substituted;’ or Diego Panizza’s classic monograph on Gentili: ‘Theology was losing its traditional role as the main epistemological support for ideologies’ [*La teologia perdeva la sua tradizionale funzione di principale support epistemologico delle ideologie*]. Coleman Phillipson, “Introduction,” in *Alberico Gentili, De iure belli libri tres*, ed. James Brown Scott, trans. John Carew Rolfe, Classics of international law (London: The Clarendon press, 1933), 18; Diego Panizza, *Alberico Gentili, giurista ideologo nell’Inghilterra Elisabetiana* (Padova: Tipografia La Garangola, 1981), 8.

⁷ Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), 11.

⁸ Nussbaum, *A Concise History of the Law of Nations*, 101.

⁹ Gentili, *De iure belli*, Book I, Ch. 12, §92.

¹⁰ For a classic statement, see Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Basingstoke: Palgrave, 2002), 186–189. Barry Buzan summarizes Bull’s understanding of the modern institution of war with the following words: ‘war is by definition about narrowing the right to use force by giving the state monopoly powers over it.’ Barry Buzan, “The English School: A Neglected Approach to

the most important founding fathers of the classical laws of war is commonly accepted in the literature on the history of international law.¹¹ Within International Relations, this point is made perhaps most explicitly by Hedley Bull: ‘All of the early internationalists except Gentili have difficulty coming to terms with the idea that is the foundation of later attempts to accept war between states as an institution of international society, that war may have a just cause on both sides, not merely ‘subjectively’ but objectively.’¹² Similarly, Torbjørn Knutsen explains that Gentili ‘approaches the modern notion that only public authorities are entitled to wage war and that only states can be considered such authorities.’ ‘Through a discussion of the rights and the duties of the prince,’ he continues, ‘Gentili sketches a distinctly modern outline of interstate relations as an anarchical society.’¹³

In line with this observation, Gentili’s succinct definition of war is cited in most classic accounts of the history of international law, and naturally, in histories of the laws of war: *bellum est publicorum armorum iusta contentio*—war is a just contest of public arms.¹⁴ More specifically, scholars generally consider his work to reflect a particularly clear shift away from medieval just war principles and towards ‘bilateral war,’¹⁵ i.e. a form of conflict centered on the belief in the equality of belligerents and the need for

International Security Studies,” *Security Dialogue* 46, no. 2 (2015): 135. According to this approach, the most significant function of the modern institution of war was to enable sovereign states to resolve their differences despite the absence of a higher authority. See for instance Kalevi Jaakko Holsti, *The State, War, and the State of War* (Cambridge: Cambridge University Press, 1996), 2–3.

¹¹ See for instance, Arthur Nussbaum, *A Concise History of the Law of Nations* (New York, NY: Macmillan, 1947), 95; Brownlie, *International Law and the Use of Force by States*, 12; Wilhelm Georg Grewe, *The Epochs of International Law* (Berlin: Walter de Gruyter, 2000), 212; Schmitt, *Nomos of the Earth*, 153, 159.

¹² Bull, *The Anarchical Society*, 29.

¹³ Torbjørn L. Knutsen, *A History of International Relations Theory*, Second edition (Manchester: Manchester University Press, 1997), 71–72.

¹⁴ Emphasis added. See for instance Grewe, *The Epochs of International Law*, 210. The quote is originally from Gentili, *De iure belli*, Book 1, Chapter 2, §18.

¹⁵ This is the term commonly used by Peter Haggenmacher, whose monograph *Grotius et la doctrine de la guerre juste* is generally considered the authoritative work on the subject. Peter Haggenmacher, *Grotius et La Doctrine de La Guerre Juste* (Paris: Presses Universitaires de France, 1983).

mutual respect and reciprocity.¹⁶ In a nutshell, Gentili is seen to have broken with the idea of war as a means for a morally legitimate belligerent to punish an evildoer, and to have put forth an approach that considered that as long as the belligerents were all proper sovereigns, they ought to all be granted the same legal rights and obligation regardless of the cause they were fighting for. This break is often considered to have been the crucial move towards a more moderate approach to war, and a leap forward in the process of the ‘humanization’ of warfare.¹⁷ Going back to Schmitt’s terminology, Gentili is seen to have heralded the shift from a ‘discriminatory’ to a ‘non-discriminatory’ approach to war, a system in which the law did not discriminate between belligerents based on the justness of their cause.

b. Gentili and the concept of the enemy of mankind

Yet, in contrast with this story of avant-garde humanitarianism, a handful of scholars have noted that Alberico Gentili was also the first jurist to introduce the concept of the enemy of mankind, or *hostis humani generis*, into international law, particularly through his use of the figure of the pirate. This line of argument suggests that Gentili’s move was linked to larger debates about sovereignty, and that Gentili may have been trying to advance a specific position within that context rather than taking part in the grand, trans-temporal project of developing modern international law.

Gentili’s reliance on the concept of the enemy of mankind is particularly noteworthy in light of the remarkable importance given to the concept and to its inevitable

¹⁶ The use of ‘just’ (*iusta*) in the formula may seem somewhat puzzling in this context, but Gentili specifically used it not to mean that one side was morally vindicated, but rather that ‘war was not only a “*iust*” way of settling a dispute, but also a “proper” one which satisfied all the formal requirements of the customs of war.’ Grewe, *The Epochs of International Law*, 210. [Grewe’s explanation is pertinent, even though the word ‘*iust*’ actually does not exist in latin.]

¹⁷ From some classic examples of the ‘humanization of warfare’ narrative, see Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (London: Weidenfeld & Nicolson, 1980); Richard Baxter, *Humanizing the Laws of War: Selected Writings of Richard Baxter*, ed. Detlev F. Vagts et al. (Oxford: Oxford University Press, 2013).

historical complement, the figure of the pirate. In the field of international law, David Luban has drawn on the old concept of the *hostis humani generis* explicitly in order to ground the more recent concept of crimes against humanity in historical tradition while trying to develop a rigorous theory of crimes against humanity.¹⁸ Coming from a more critical perspective, Gerry Simpson argues that '[p]irates were, of course, international law's original enemies of humankind' and that 'piracy is a founding metaphor for a whole sub-discipline of public international law: international criminal law or the law of war crimes. Piracy is international law's foundational *bête noire*.'¹⁹ In International Relations, the idea of piracy as international law's foundational other was actually expressed early on by Martin Wight. 'Since the sixteenth century,' Wight claims, 'international society has been so organised that no individuals except sovereign princes can be members of it, and these only in their representative capacity.'²⁰ 'All other individuals,' Wight continues, 'have had to be subjects or citizens of sovereign States. By a famous paradox of international law, the only persons emancipated from this necessity are pirates, by virtue of being *hostis humani generis*.'²¹

What was Gentili trying to do with this concept, then? In his seminal 1989 work on *The Law of Piracy*, Alfred Rubin explains that Gentili was 'the first writer of lasting eminence to convert the confusions of the time to legal principle, to argue that the label 'pirate' carries with it the meaning of outlawry and that what 'pirates' do is forbidden by

¹⁸ Luban's definition of the concept of a 'crime against humanity' relies directly and explicitly on the concept of the pirate as *hostis humani generis*: 'Crimes against humanity are simultaneously offenses against humankind and injuries to humanness. They are so universally odious that they make the criminal *hostis humani generis* – an enemy of all humankind, like the pirate on the high seas under traditional international law...' David Luban, 'A Theory of Crimes against Humanity,' *Yale Journal of International Law* 29 (2004): 90.

¹⁹ Gerry Simpson, 'Enemies of Mankind,' in *Ethics, Law, and Society*, ed. Jennifer Gunning and Søren Holm (Chalgrave: Ashgate, 2006), 87.

²⁰ Martin Wight, 'Why Is There No International Theory?,' *International Relations* 2, no. 1 (April 1, 1960): 18.

²¹ Ibid.

international law.²² Rubin expands on this point, emphasizing that Gentili appears to have been the jurist who innovatively argued that pirates, as opposed to legitimate privateers, were those who lacked a license from an established sovereign. Rubin suggests that in doing so Gentili developed a ‘recognition approach’ whereby legal labels would be attached to groups (e.g. the Barbary states) ‘not on the basis of facts, but on the basis of their legal and political results by a policy choice,’²³ and that this entailed placing ‘a tool of enormous power... in the hands of sovereigns.’²⁴ Rubin concludes his discussion of Gentili’s use of the pirate with an intriguing comment regarding the overlap between Gentili’s ideas and the interests of the rising merchant classes at the time:

the vistas opened by Gentili’s discovery in the ancient Roman law...of a pattern of rules that could justify the most extreme action against non-European political societies, and against international forces resisting the move towards centralized control in the monarchies and bureaucracies of European expansion, were immense and very attractive to the rising merchant classes.²⁵

Informed by Rubin’s original remarks, a few other scholars make a similar claim regarding Gentili’s introduction of the pirate as an enemy of mankind into international law, and they discuss the figure of the pirate in Gentili’s work in some more detail. This area of research generally takes its cue from Carl Schmitt’s writings on the shift towards modern war and the importance of the figure of the pirate as the defining other of the ‘just enemy,’²⁶ although as we will see, Schmitt himself did not write specifically about the importance of the pirate as an enemy of mankind in Gentili’s writings. Four scholars have

²² Alfred P. Rubin, *The Law of Piracy* (Newport, RI: Naval War College Press, 1988), 28.

²³ *Ibid.*, 34. He contrasts this approach with Grotius’ more ‘fact-based’ approach, *Ibid.*, 36–41; 71. Rubin draws a sharp line between Gentili, whom he sees as a positivist, and Grotius whom he sees as a naturalist. This distinction may well have influenced Peter Schröder (see below), but is also a rather contestable categorization, see notably Randall Lesaffer, “The Classical Law of Nations (1500-1800),” in *Research Handbook on the Theory and History of International Law*, ed. Alexander Orakhelashvili (Cheltenham: Edward Elgar, 2011), 408–40.

²⁴ Rubin, *The Law of Piracy*, 30.

²⁵ *Ibid.*, 35.

²⁶ See especially Schmitt, *Nomos of the Earth*; Carl Schmitt, *The Concept of the Political* (Chicago, IL: University of Chicago Press, 2008); Carl Schmitt, “The Concept of Piracy (1937),” *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 2, no. 1 (2011): 27–29.

published works that touch on the latter subject—Daniel Heller-Roazen, Harry Gould, Peter Schröder, and Walter Rech—each time as a brief series of observations on the importance of the pirate as an enemy of mankind for the early modern jurist’s work, dedicating a few pages to the topic at most.²⁷ I outline their respective contributions here to delimit what we know thus far about why Gentili introduced the concept of the enemy of mankind into international law and emphasize the extent to which this feature of Gentili’s work seems to deviate from what is usually assumed about his contribution.

Gould discusses the concept of the pirate as an enemy of mankind in Gentili’s work over a couple of pages in a book chapter that primarily seeks to undermine the idea that in the ancient world pirates were considered enemies of humanity and, as such, subject to universal jurisdiction. He argues that Gentili extrapolated questionable conclusions from Cicero’s original comment about not having to keep oaths made to pirates, that he misconstrued Roman law and practices regarding pirates, and that eventually his mistakes—which he argues were echoed in Francis Bacon’s work—became ‘our starting points and our commonplaces.’²⁸ Gentili’s questionable use of Roman sources in his writings on the pirate as an enemy of mankind is actually explored

²⁷ Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (New York, NY: Zone Books, 2009), 105–9; Harry Gould, “Cicero’s Ghost: Rethinking the Social Construction of Piracy,” in *Maritime Piracy and the Construction of Global Governance*, ed. Michael J. Struett, Jon D. Carlson, and Mark T. Nance (Abingdon: Routledge, 2012), 30–32; Peter Schröder, “Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations,” in *The Roman Foundations of the Law of Nations*, ed. Benedict Kingsbury and Benjamin Straumann (Oxford: Oxford University Press, 2010), 174–179. Schröder also touches on some of the same themes in his analysis of Carl Schmitt’s engagement with the works of Bodin, Hobbes, and Gentili in Peter Schröder, “Carl Schmitt’s Appropriation of the Early Modern European Tradition of Political Thought on the State and Interstate Relations,” *History of Political Thought* 33, no. 2 (2012): 348–71. As far as I am aware, the only scholar who has written a full piece on this aspect of Gentili’s work is Ileana Porras, who did not publish her piece but kindly accepted to share it with me in light of my own interest in the topic. The piece is entitled ‘Atheists, cannibals, rebels and pirates: Cementing the bonds of human society in Gentili’s *De iure belli*.’ Porras emphasizes the importance of the figure of the pirate as the enemy of mankind in Gentili’s *De iure belli*, and suggests that Gentili used it to bolster the reality of a natural world wide society. She presented her work at NYU’s conference on Alberico Gentili in 2008 and her argument may have influenced Peter Schröder, who includes some similar claims in the aforementioned piece, ‘Vitoria, Gentili, and Bodin: Sovereignty and the Law of Nations.’

²⁸ Gould, “Cicero’s Ghost,” 32.

in greater detail in Heller-Roazen's monograph on piracy and the law of nations.²⁹ Heller-Roazen follows Rubin in emphasizing the importance of Gentili for the introduction of the pirate as an enemy of mankind in international law. Noting that Gentili discusses the pirate at length in an entire chapter on those who are not allowed to wage war, Heller-Roazen explains that in his discussion of the pirate, Gentili draws on certain Roman sources 'with manifest imprecision' and then actually demarcates himself from various Roman authors on the question of who actually ought to be considered a pirate instead of a legitimate enemy.³⁰ Heller-Roazen, still following Rubin, then briefly suggests that Gentili's position is a move in the debate over who ought to have the right to wage war.³¹

Peter Schröder and Walter Rech are the scholars who have dedicated the most attention to the topic, although their insights into the role which the concept of the pirate as *hostis humani generis* plays in Gentili's writings on war remain sub-sections within broader discussions. What distinguishes Schröder from Rubin, Gould, Heller-Roazen, and to some extent Rech, is that he is solely interested in the early modern period, and thus contextualizes Gentili's work quite extensively. The main part of Schröder's analysis of the pirate as HHG in Gentili's work is within a broader chapter entitled 'Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations.' This chapter speaks to a wider debate about how to position Gentili vis-à-vis his contemporaries,³² and Schröder, although he does recognize the influence of Vitoria on Gentili, aligns the latter much more with Bodin (1530-1596) and draws a clear line between Gentili and Grotius, the latter of which he considers more aligned with the neo-scholastics. In this context, his

²⁹ Gould cites Heller-Roazen's book but not on this particular point.

³⁰ Heller-Roazen, *The Enemy of All*, 107.

³¹ *Ibid.*, 108–9.

³² On positioning Gentili specifically, see the rest of the edited volume, Benedict Kingsbury and Benjamin Straumann, eds., *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2010). On the difficulty of categorizing certain early modern jurists, and the tendency for scholars often to draw too sharp a line between different approaches, see Lesaffer, "The Classical Law of Nations (1500-1800)."

discussion of the concept of the pirate as HHG in Gentili centers on the role it plays in enshrining and expanding Bodin's arguments about state sovereignty within Gentili's writings on the laws of war. For Gentili, Schröder notes, pirates and brigands are outside international law, and have no right to declare and wage war, by contrast with sovereign states.³³ Schröder suggests in passing—and this is explicitly reminiscent of Schmitt³⁴—that Gentili thus establishes two categories of enemies, 'those who are by their very nature an enemy to all humanity' and 'those who excise their conflicts within the boundaries of international law and enjoy the status of a sovereign state and have thus the capacity to engage in international treaties and customs with their equals.'³⁵ Schröder later notes that Gentili's theory becomes problematic because he does not only designate as outlaws 'those robbing others in absolute defiance of the notions of law, customs, and property.'³⁶ Instead, he briefly notes that Gentili also places Indians, atheists, and (at least partly) the Turks in that category.³⁷ Schröder then moves to a comparison of Grotius and Gentili, without mentioning the figures of the pirate, the brigand, the outlaw, or the enemy of mankind again.

Walter Rech focuses on the concept of the enemy of mankind in Emer de Vattel's work, but the fact that his work on the topic is a full monograph allows him to delve into early modern debates in some detail as well. He discusses Gentili's use of the pirate as an enemy of mankind within the context of the debates over the legitimacy of Barbary corsairs (it was unclear whether they were pirates or privateers), under the label 'Manipulating Universal Enmity.' Rech claims that Gentili delegitimized Barbary

³³ Schröder, "Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations," 174.

³⁴ For instance, 'European international law achieved a bracketing of war. The opponent in war was recognised as a *iustus hostis* to be distinguished from rebels, criminals, and pirates,' in Schmitt, *Nomos of the Earth*, 122.

³⁵ Schröder, "Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations," 175.

³⁶ Ibid., 178. This echoes Ileana Porras' paper and presentation.

³⁷ Ibid., 178–9.

privateering in *De iure belli*,³⁸ only to justify it a few years later in *Hispanica Advocatio*.³⁹ Echoing Schröder, though, Rech notes that in *De iure belli*, ‘Gentili, following Balthazar Ayala, took Bodin’s theory of sovereignty to extremes and interpreted the distinction in Roman law between legal and illegal combatants as a cornerstone of the law of nations.’⁴⁰ As Rech emphasizes, ‘the Roman use of terms such as *bellum* and *hostis* was not yet loaded with implications in terms of sovereignty and international recognition, as would become the case during the modern age.’⁴¹ Their revival under different conditions gave them a new meaning, and a new power.

Rech further examines Gentili’s difficulty in defining what exactly a pirate is, and notes his disagreements with the Roman thinkers he cites, particularly Velleius Paterculus. He suggests that Gentili must ultimately fall back on an argument of just cause in trying to delegitimize the Barbary corsairs, as it is ‘the only argument he could oppose to Bodin’s claim that the Barbary corsairs...were lawful combatants.’⁴² The tension here with Bodin is noteworthy, as it suggests Gentili was trying to take his illustrious predecessor’s ideas about sovereignty onto new grounds. Rech argues that Gentili would eventually adopt a position much closer to Bodin’s in *Hispanica Advocatio*, contradicting the one he had adopted in *De iure belli* to suit the needs of his Spanish client while remaining fair to his English host. Rech concludes that ‘Gentili’s case proves once again how the doctrine of universal enmity could be easily instrumentalised,’ and that while Gentili presented some coherence in *De iure belli*, ‘his incoherence... became apparent later in connection with his practical activity.’⁴³

³⁸ Walter Rech, *Enemies of Mankind: Vattel’s Theory of Collective Security* (Leiden: Martinus Nijhoff, 2013), 54–59.

³⁹ Alberico Gentili, *Hispanicae advocacyonis libri duo* (New York: Oxford University Press, 1921). Rech, *Enemies of Mankind*, 59–64.

⁴⁰ Rech, *Enemies of Mankind*, 55.

⁴¹ *Ibid.*, 57.

⁴² *Ibid.*, 59.

⁴³ *Ibid.*, 64.

Overall, this existing research suggests that Gentili's *De iure belli* may not have been as much about developing a humanitarian framework for the conduct of war as about making an argumentative move amidst debates about sovereignty, states, and the right to wage war. *De iure belli* appears to be remarkable in its use of the figure of the pirate; while the pirate had appeared sporadically in international law in the past, Gentili gave it a very specific purpose because he associated it with being an outlaw, or more specifically, an enemy of mankind, and delved at length into what the implications of this status were. Rech and Schröder's writings on Gentili and the sovereignty debate, in particular, provide some very helpful insights and gesture towards the need to understand Gentili's use of the concept of the enemy of mankind within that context. Doing so entails moving away from the conventional narrative about Gentili and inquiring: what were Gentili's original intentions when he wrote *De iure belli* in the late sixteenth century, and how should one understand his reliance on the concept of the enemy of mankind in light of that context?

The conventional narrative, however, is thought provoking on its own terms. Gentili is a particularly interesting figure in the history of international law because he was nearly forgotten for over two centuries following his death and the publication of Grotius' work—upon which Gentili had a now widely recognized influence⁴⁴—and then was reinstated as the 'other father of international law' in the last quarter of the nineteenth century. The pantheon of the great founders of international law has since been significantly expanded (and Grotius' clear-cut primacy irremediably undermined), but as I have suggested, Gentili remained from that point on a key figure in the narrative about the development of international law and of the laws of war. It is clear from the existing

⁴⁴ Peter Haggemacher, "Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture," in *Hugo Grotius and International Relations*, by Hedley Bull, Benedict Kingsbury, and Adam Roberts (Oxford: Oxford University Press, 1992), 133–76.

literature on Gentili's use of the concept of the enemy of mankind that if Gentili's writings on war may have sought to humanize warfare by restricting the right to wage it to sovereign states (or 'princes,' in Gentili's terminology), they also contained a much more violent and exclusionary aspect. This part of his work, evidently, completely fell out of the story about Gentili and the origins of the laws of war during the process of the reception of his work. How can one explain this truncated recovery of Gentili's famous treatise on war?

c. Significance

Understanding what Gentili's intentions were in introducing the concept of the enemy of mankind in *De iure belli*, and why that part of his famous treatise fell out of the story about Gentili's importance to the development of the modern concept of war and of the classical laws of war, is important for a number of reasons. Beyond its purely exegetical value, the significance of this incursion into Gentili's thought and its reception pertains to three distinct sets of issues.

First, this project explicitly addresses the question of how to take into account a great thinker's reception over time when engaging with his or her ideas. The question arises particularly sharply in the case of Gentili because of the disparity between the different stories told about his work. Indeed, the contrast between, on the one hand, the remarkable weight that Gentili acquired retrospectively in the conventional narrative about the development of international law and of the laws of war and, on the other hand, the fact that Gentili's use of the exclusionary concept of the enemy of mankind appears to be missing from the story entirely raises some significant questions. Most importantly, it points to the necessity of understanding why this conventional narrative emerged and of reassessing its value. What purpose did this narrative about Gentili and the modern

laws of war serve when it was first elaborated? Did it embrace certain normative commitments we would be weary of making today? Would bringing back the missing elements fundamentally alter the nature of the story and ultimately, should we be telling a different story altogether? In addressing these questions, the thesis contributes to the expanding literature on disciplinary history in International Relations and international law. It problematizes the canon by tracing the way one of its key figures came to form part of it and by highlighting both the personal and sociological aspects of this process and the broader political context that led to the development of a particular narrative about Gentili.

More broadly, though, the need to critically investigate an author's reception is a point that can be made about the study of any 'great thinker' in IR and beyond. By explicitly addressing this issue, and by proposing a methodology for a more systematic study of great thinkers and their reception, this project speaks to the literature on the study of great thinkers in IR, notably the works on the value of importing Cambridge school contextualism into the discipline⁴⁵ and the few existing works that do examine the reception of certain great thinkers in IR.⁴⁶

Second, the thesis directly contributes to the literature on the history of international law. By thoroughly analyzing Gentili's use of the concept of the enemy of mankind, it challenges the conventional understanding of Gentili's contribution to the

⁴⁵ See notably Duncan S. A. Bell, "Language, Legitimacy, and the Project of Critique," *Alternatives: Global, Local, Political* 27, no. 3 (2002): 327–50.

⁴⁶ Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002); Edward Keene, "Images of Grotius," in *Classical Theory in International Relations*, ed. Beate Jahn (Cambridge: Cambridge University Press, 2006), 233–52; Michael C. Williams, "The Hobbesian Theory of International Relations: Three Traditions," in *Classical Theory in International Relations*, ed. Beate Jahn (Cambridge: Cambridge University Press, 2006), 253–76; Julian Reid, "Reappropriating Clausewitz: The Neglected Dimensions of Counter-Strategic Thought," in *Classical Theory in International Relations*, ed. Beate Jahn (Cambridge: Cambridge University Press, 2006), 277–95; Edward Keene, "The Reception of Thucydides in the History of International Relations," in *A Handbook to the Reception of Thucydides*, ed. Christine Lee and Neville Morley (Chichester: Wiley Blackwell, 2015), 355–72. For a related but somewhat different approach, see Karma Nabulsi, *Traditions of War: Occupation, Resistance, and the Law* (Oxford: Oxford University Press, 1999).

development of international law, turning a few valuable but scattered insights into a fully-fledged counter-narrative. In doing so, the project notably builds on the recent attempts to reassess the history of the concept of the enemy of mankind and its inevitable counterpart, the figure of the pirate. The concept of the enemy of mankind has indeed made a comeback in both international law and in broader political discourse in the aftermath of 9/11, with scholars and practitioners alike invoking the history of the concept to justify its contemporary use. The most common manifestation of this trend are the calls to treat today's terrorists as yesterday's pirates, considering them as enemies of mankind and excluding them from the protection of international law.⁴⁷ This idea was notably put forward by John Yoo, the former Deputy Assistant Attorney General of the United States and author of the infamous set of legal memoranda commonly referred to as the *Torture Memos*, as they legally justified the torture of detainees at Guantanamo.⁴⁸ Like many others, Yoo invoked the history of piracy and couched pirates as the ultimate outlaws, who throughout time have been universally repressed and excluded from the protection of the law. This history, however, has become increasingly contested,⁴⁹ and the fact is that we actually do not know much about how the concept arose and developed over time.

⁴⁷ See most notably Douglas R. Burgess Jr, "Hostis Humani Generi: Piracy, Terrorism and a New International Law," *University of Miami International & Comparative Law Review* 13 (2005): 293. See also Tina Garmon, "International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th," *Tulane Maritime Law Journal* 27 (2002): 257–75. This line of argument has also been promoted in the context of the Israeli/Palestinian conflict. For instance, political science professor Louis René Beres states: "We must always call things by their correct names. Palestinian terrorists are not 'freedom fighters.' They are *Hostes Humani Generis*, 'Common Enemies of Mankind.' Any further association of murderers with 'freedom' will surely undermine the very structure of civilized international relations," Louis René Beres, "An Enemy of Mankind," *Jerusalem Post*, 3 Nov. 1995, p. 5. For a broader discussion of the phenomenon, see Mikkel Thorup, "Enemy of Humanity: The Anti-Piracy Discourse in Present-Day Anti-Terrorism," *Terrorism and Political Violence* 21, no. 3 (2009): 401–11.

⁴⁸ In an interview, John Yoo made a comment that has remained famous since: "Why is it so hard for people to understand that there is a category of behavior not covered by the legal system? What were pirates? They weren't fighting on behalf of any nation. What were slave traders? Historically, there were people so bad that they were not given protection of the laws. . . If you were an illegal combatant, you didn't deserve the protection of the laws." Quoted in Jane Mayer, "Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program," *The New Yorker*, February 14, 2005. See also John Yoo, "Transferring Terrorists," *Notre Dame Law Review* 79 (2003): 1183–1235.

⁴⁹ See most notably Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation," *Harvard International Law Journal* 45, no. 1 (2004): 183–238.

The present project provides a series of insights into the context in which the concept emerged into international law, further undermining the conventional claim that it was intended to try and punish the worst kinds of criminals.

Additionally, because Gentili's revival occurred in the late nineteenth century, at the same time as the development of international law as a professional discipline, the project engages explicitly with the literature on the origins of modern international law, focusing on the construction of international law's disciplinary canon.⁵⁰ Taking stock of the concerted efforts to revive Gentili and hail him as the true father of international law, the thesis sheds lights not only on the fact of a canon being artificially constructed, but on the process through which a particular author gets singled out for canonization and crucially, on the shape which this author's ideas come to take in their next context, or in other words, on the reinterpretation that occurs during this process of posthumous glorification.

Third, and finally, this project speaks to the recent call to problematize the ontology of war. This call has emerged particularly strongly within the developing field of Critical War Studies,⁵¹ but its primary emphasis has been the expansion of the definition of war as a social scientific concept. By contrast, by delving into the historical debates over what did or did not constitute a 'war' in legal terms, the present project

⁵⁰ The standard account of this process being Koskeniemi, *Gentle Civilizer*.

⁵¹ The main statement is arguably Tarak Barkawi, "Decolonising War," *European Journal of International Security* 1, no. 02 (2016): 199–214. See also Etienne Balibar, "What's in a War? (Politics as War, War as Politics)," *Ratio Juris* 21, no. 3 (2008): 365–86; Tarak Barkawi and Shane Brighton, "Conclusion: Absent War Studies? War, Knowledge and Critique," in *The Changing Character of War*, ed. Hew Strachan and Sibylle Scheipers (Oxford: Oxford University Press, 2011), 524–42; Tarak Barkawi and Shane Brighton, "Powers of War: Fighting, Knowledge, and Critique," *International Political Sociology* 5, no. 2 (2011): 126–43; Christine Sylvester, "War Experiences/war Practices/war Theory," *Millennium Journal of International Studies* 40, no. 3 (2012): 483–503; Caroline Holmqvist, "Undoing War: War Ontologies and the Materiality of Drone Warfare," *Millennium Journal of International Studies* 41, no. 3 (2013): 535–52; Astrid H. M. Nordin and Dan Öberg, "Targeting the Ontology of War: From Clausewitz to Baudrillard," *Millennium Journal of International Studies* 43, no. 2 (2015): 392–410.

analyzes the contested ontology of war from a different perspective, taking stock of the very concrete consequences which these debates could have in practice.

The starting point for these considerations is the growing body of research that points to the pitfalls of approaches to the study of war in modern international relations that focus almost exclusively on inter-state warfare. Following Janice Thomson's seminal work, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe*,⁵² a literature has emerged on the role of privateers, mercenaries, and mercantile companies in conflicts between the early seventeenth and the mid-nineteenth century.⁵³ The thesis examines arguments about what counted as a 'war' proper and who had the right to wage it, a debate often pitting those who fought for the right of non-state actors to take up arms against those who tried to exclude these actors from the conduct of warfare. Specifically, it speaks directly to this literature by analyzing various claims that were made over the period about the construction of the definition of sovereignty and the delimitation of the right to war. Its emphasis on the exclusionary flipside of these arguments—the claims that hinged on the concept of the enemy of mankind—provides a number of insights into the attempts that were made to exclude certain actors from the right to participate in conflict based on the legal definition of war, and on the way this move was received at different points in time.

⁵² Janice Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton, NJ: Princeton University Press, 1996).

⁵³ See notably, Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*; Alejandro Colás and Bryan Mabee, *Mercenaries, Pirates, Bandits and Empires: Private Violence in Historical Context* (New York, NY: Columbia University Press, 2010); Sibylle Scheipers, *Unlawful Combatants: A Genealogy of the Irregular Fighter* (Oxford: Oxford University Press, 2015). For a broader discussion of the variety of actors involved in the international relations of the early modern period, see Andrew Phillips and J. C. Sharman, *International Order in Diversity: War, Trade and Rule in the Indian Ocean* (Cambridge: Cambridge University Press, 2015). For more theoretical pieces questioning the traditional public/private and state/non-state distinctions in discussion about the evolution of war, see Beatrice Heuser, "Misleading Paradigms of War: States and Non-State Actors, Combatants and Non-Combatants," *War & Society* 27, no. 2 (2008): 1–24; Patricia Owens, "Distinctions, Distinctions: 'public' and 'private' Force?," *International Affairs* 84, no. 5 (2008): 977–90.

II. Thesis outline

The project is rooted in history, and as such, it forms part of the growing body of literature that follows the so-called ‘historiographical turn’ in International Relations.⁵⁴ My original methodology, developed in the first chapter, is grounded in the tools provided by historians, and particularly by the works of historians of political thought. The project presents a challenge, which is that it requires both assessing Gentili’s intentions in *De iure belli*, particularly with regards to his pioneering use of the concept of the enemy of mankind, and analyzing the reception of his treatise and the truncated narrative that developed about Gentili’s contribution to the development of a modern concept of war. The dual character of the interrogation thus presupposes acquiring a strong grasp of Gentili’s intentions in his own context, but also an understanding of the later contexts that shaped the reception of his writings. As such, my methodology critically addresses the question of what it means to study an author ‘in context,’ and of how we can think about the meaning of a text when it is used across different places and epochs. More broadly, I discuss the implications of studying the ideas of a canonized ‘great thinker’ in IR and beyond, taking stock of the extent to which the ideas of famous thinkers go through a process of appropriation and reinterpretation. Building on the expanding literature on international political thought, and on recent efforts in IR to incorporate insights of the

⁵⁴ Duncan S. A. Bell, “International Relations: The Dawn of a Historiographical Turn?,” *British Journal of Politics & International Relations* 3, no. 1 (2001): 115–26. Some key works include Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*; Edward Keene, *International Political Thought: A Historical Introduction* (Cambridge: Polity Press, 2005); Evgeny Roshchin, “The Concept of Friendship: From Princes to States,” *European Journal of International Relations* 12, no. 4 (2006): 599–624; Evgeny Roshchin, “(Un)Natural and Contractual International Society: A Conceptual Inquiry,” *European Journal of International Relations* 19, no. 2 (2013): 257–79; Barry Buzan, *The Global Transformation: History, Modernity and the Making of International Relations* (Cambridge: Cambridge University Press, 2015). Historians have also contributed to this literature, especially David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000); Richard Tuck, *The Rights of War and Peace* (Oxford: Oxford University Press, 2001). It is often suggested that IR’s ahistoricism is one of the reasons why it is ignored by other social sciences, see Barry Buzan and Richard Little, *International Systems in World History: Remaking the Study of International Relations* (Oxford: Oxford University Press, 2000), 3.

Cambridge School, I bring together the tenets of contextualism and some core elements from the broad body of ‘reception theory’ in order to develop a single, unified approach to the study of great thinkers in IR. The thesis then unfolds into two distinct parts.

Part I pertains directly to the immediate context and original intentions of Alberico Gentili, explored in Chapters 2 and 3. I begin by contextualizing Gentili’s thought in Chapter 2, taking stock of existing debates and offering new insights into what Gentili’s intentions might have been in writing his famous treatise on war. Emphasizing the limits of the traditional debate over whether Gentili was a humanist or not, I put forward a new interpretation of *De iure belli* based on an in-depth analysis of Gentili’s sources. Rather than focusing on Gentili’s disagreements with the Spanish theologians,⁵⁵ whom he barely mentions in *De iure belli*, I show that he was deeply influenced by Jean Bodin and by the reason of state writers, and that it is with these thinkers that *De iure belli* seeks to engage most explicitly.⁵⁶ I argue that these influences had a profound impact on Gentili’s understanding of sovereignty, which I claim was strongly shaped by the fact that Gentili had embraced an absolutist stance years before the publication of his controversial tract on the absolute powers of the king. Gentili’s absolutism, I suggest, left him facing a difficult conundrum in trying to develop a treatise on the laws of war.

Building from these observations, Chapter 3 argues that far from being a humanitarian tract, Gentili’s treatise on the laws of war was in fact an attempt to justify an absolutist theory of the laws of war based on what was at the time a deeply contested understanding of sovereignty, and that Gentili brought the concept of the enemy of mankind into international law as a way to ground his controversial approach to war and its laws. The concept of the enemy of mankind, I argue, is co-constitutive of Gentili’s

⁵⁵ The most well known work within this approach being Tuck, *The Rights of War and Peace*.

⁵⁶ I develop this argument in Claire Vergerio, “Alberico Gentili’s *De Iure Belli*: An Absolutist’s Attempt to Reconcile the *Jus Gentium* and the Reason of State Tradition,” *Journal of the History of International Law* 19, no. 4 (forthcoming 2017).

famous definition of war, and it is a way for Gentili to provide absolute sovereigns with an incentive to follow his system of laws, ensuring they will do so despite the lack of enforcement mechanisms against their absolute power. Gentili does not only use this concept to designate vile criminals, he also considers Turks, Indians, atheists, and most importantly for his time, rebels to be enemies of mankind as well. In making this conceptual move, Gentili adopted a stark position within the debates on the nature of sovereignty that were raging at the time, explicitly demarcating himself from those he identified as his intellectual predecessors. *De iure belli*, I thus claim, constitutes a remarkable statement on the nature of sovereignty based on a binary, exclusionary understanding of who has the right to wage war.

Part II then focuses on the reception of Gentili across time, with a particular emphasis on the reception of his most famous text, the *De iure belli* explored in Part I. Chapter 4 examines the two initial receptions of Gentili's treatise; the first, following its publication in 1598, was hardly enthusiastic, and Gentili's work was soon overshadowed by that of the famous young Dutch prodigy, Hugo Grotius. Although some jurists recognized the value of his contribution, Gentili remained a controversial figure in light of his explicitly absolutist stance, and apart from some brief, scattered citations, he remained mostly confined to the dustbin of *passé* thinkers. The second, and much more interesting, reception of his work occurred with the incongruous revival of Gentili by a group of highly influential international lawyers in the late nineteenth century. Based on the virtually unexplored papers of Thomas Erskine Holland, the chapter examines this revival at length, analyzing what these lawyers—many of whom were directly involved in the codification of the laws of war—sought to do through the revival of Gentili, through his crowning as the other great founder of international law, and through the republication of his famous treatise of the laws of war. I analyze the political, social, and personal

dynamics that drove the various episodes of Gentili's revival, and ultimately track the emergence of a dominant narrative about the importance of Gentili, centered on a remarkably selective account of his treatise on the laws of war.

Chapter 5 examines the role Gentili has continued to occupy in histories of the laws of war in the twentieth century and up to this day, focusing on the highly influential narrative about war, the modern state, and international law developed by Carl Schmitt in *The Nomos of the Earth* and later picked up by Wilhelm Grewe in what remains the unrivaled textbook on the history of international law, *The Epochs of International Law*.⁵⁷ Schmitt's story arguably remains the most widely disseminated account on the subject, but I highlight the extent to which, in invoking Gentili as the founder of the modern concept of war, the story again focuses on one particular aspect of his work—his attempt to moderate warfare—at the cost of its more problematic but equally constitutive counterpart, centered on the concept of the enemy of mankind. I suggest that Schmitt's enthusiasm for Gentili, and his partial rendition of Gentili's account of war, has to be understood through Schmitt's ideological positioning, and particularly his attempt to justify Nazi authoritarianism and expansionism. Having shed light on the truncated and ideologically-driven character of Schmitt's influential story about Gentili, the thesis ends by highlighting the contributions it makes to the study of 'great thinkers' in International Relations, to the history of international law, and to the emerging literature on the contested ontology of war.

⁵⁷ Schmitt, *Nomos of the Earth*; Grewe, *The Epochs of International Law*. For the influence of Schmitt's *Nomos* on Grewe's *Epochs*, see Martti Koskenniemi, "The Epochs of International Law," *International and Comparative Law Quarterly* 51, no. 3 (2002): 746–51.

Chapter 1.

Context, Reception, and the Study of Great Thinkers in International Relations

The present project asks a threefold question: Why, how, and with what consequences did Gentili introduce the concept of the pirate as an enemy of mankind in his theory of the laws of war? If the first two tenets of the question—why and how—suggest the need for an in-depth understanding of Gentili’s thought, the third—with what consequences—points in a different direction, beyond the immediate person and context of Gentili. This chapter turns to the tools of intellectual history in order to develop a methodological approach for answering this composite question. In doing so, it attempts to develop a more systematic way of analyzing both the work and the impact of ‘great thinkers’ in International Relations.

International Relations has a long tradition of analyzing, celebrating, and appropriating the thoughts of those it considers great thinkers. Intellectual history and International Relations, however, have had a rather tumultuous relationship. After a so-called ‘fifty years rift,’¹ the past two decades have witnessed a rapprochement of the two fields, which now share a particular interest in the history of international political thought, i.e. political thought on the relation between states, empires, and other political entities,² an area that long remained a blind spot of the history of political thought (HPT), which has generally focused on the state and its internal politics. In this new wave of studies, IR scholars have moved beyond the selective and rather tendentious misreadings

¹ David Armitage, “The Fifty Years Rift: Intellectual History and International Relations,” *Modern Intellectual History* 1, no. 1 (2004): 97–109. See also Martin’s Wight’s classic text, ‘Why is There No International Theory?’

² See most notably Keene, *International Political Thought*; David Armitage, *Foundations of Modern International Thought* (Cambridge: Cambridge University Press, 2012).

of various great thinkers by earlier IR theorists—particularly those of the English School³—and foregone the tradition of preemptively confining them to procrustean categories.⁴ At the same time, IR scholars have come to reflect much more critically on the history of the discipline, accounting for the contingent development of certain approaches and theories and bringing to light their respective normative underpinnings.⁵ At the intersection of these two developments, a few works have specifically analyzed the reception of certain ‘great thinkers’ into IR, examining the processes through which their ideas became considered foundational.⁶ This study of the reception of texts and ideas pertaining to the international echoes a broader move within intellectual history towards the study of the circulation, transmission, and reception of texts, thinkers, and ideas across time and space.⁷

These works open two notable types of paths for methodologically rethinking the study of great thinkers in IR. The first entails elaborating a more rigorous approach for studying these figures in their context, taking stock of the numerous advances in the neighboring field of HPT. The second consists in developing an explicit method for examining the reception of these authors’ ideas. Some strands of IR have had a tendency

³ The criticisms of this approach are numerous and wide-ranging. As Duncan Bell puts it, ‘gross abuse of the history of thought’ is ‘inherent in various attempts to delineate the Grotian, Machiavellian, and Kantian traditions.’ Bell, “International Relations: The Dawn of a Historiographical Turn?,” 123. More broadly, see Armitage, *Foundations of Modern International Thought*, parts II and III.

⁴ These include Martin Wight’s classic ‘realist,’ ‘rationalist,’ and ‘revolutionist’ categories. Martin Wight, *International Theory: The Three Traditions*, ed. Gabriele Wight and Brian Porter (Leicester: Leicester University Press for the Royal Institute of International Affairs, 1991).

⁵ Efforts to make explicit different theories’ normative underpinnings include Christian Reus-Smit and Duncan Snidal, *The Oxford Handbook of International Relations* (Oxford: Oxford University Press, 2008). Critical works on the history of the discipline of International Relations include Brian Schmidt, *The Political Discourse of Anarchy: A Disciplinary History of International Relations* (Albany, NY: State University of New York Press, 1998); Nicolas Guilhot, *The Invention of International Relations Theory: Realism, the Rockefeller Foundation, and the 1954 Conference on Theory* (New York, NY: Columbia University Press, 2011); Robert Vitalis, *White World Order, Black Power Politics: The Birth of American International Relations* (Ithaca, NY: Cornell University Press, 2015).

⁶ Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*; Keene, “Images of Grotius”; Williams, “The Hobbesian Theory of International Relations”; Reid, “Reappropriating Clausewitz”; Keene, “The Reception of Thucydides in the History of International Relations.” For a related but somewhat different approach, see Nabulsi, *Traditions of War*.

⁷ Armitage, *Foundations of Modern International Thought*, 7.

to substantially overestimate the impact that single thinkers can have on the form and conduct of international relations, seamlessly associating the thought of Grotius with the emergence of the modern states-system, to name but one of the most famous examples. Notwithstanding the delightful anecdote about the King of Sweden going to war with a copy of Grotius' *De iure belli ac pacis* under his saddle,⁸ the actual impact of the famed author's text is often assumed away. The emerging literature on the reception of what we now know as canonical texts thus seems a particularly productive avenue for the discipline to turn to, and this chapter seeks to build on these efforts by teasing out how this might be done in a more systematic manner.

Essentially, and to put it bluntly, the discipline of IR simply does not provide a method for studying the reception of great thinkers. This is partly a corollary of its rather infamous misportrayal of great thinkers' ideas more broadly, and of its long-standing aversion to methodological reflection on this front. Since the dawn of a 'historiographical turn' in IR,⁹ some attempts have been made to import the methodological insight of HPT, particularly those of the Cambridge School,¹⁰ into the discipline, and this chapter draws explicitly on this move. Nonetheless, these insights fall short of providing a methodology for the specific study of reception. While there have been some calls for the pairing of these contextualist insights with the tenets of *Begriffsgeschichte*,¹¹ as well as—amongst *longue durée* intellectual historians—a call for a shift towards 'serial contextualism,'¹² that particular approach is geared towards the study of the reception of specific concepts

⁸ Erik Ringmar, *Identity, Interest and Action: A Cultural Explanation of Sweden's Intervention in the Thirty Years War* (Cambridge: Cambridge University Press, 1996), n. 174. See also Hugo Grotius, *The Rights of War and Peace* (Indianapolis: Liberty Fund, 2005), 69.

⁹ Bell, "International Relations: The Dawn of a Historiographical Turn?"

¹⁰ See especially Bell, "Language, Legitimacy, and the Project of Critique"; Duncan S. A. Bell, "Political Theory and the Functions of Intellectual History: A Response to Emmanuel Navon," *Review of International Studies* 29, no. 1 (2003): 151–60.

¹¹ Bell, "Language, Legitimacy, and the Project of Critique," 334.

¹² David Armitage, "What's the Big Idea? Intellectual History and the Longue Durée," *History of European Ideas* 38, no. 4 (2012): 494.

rather than specific authors. Conversely, while there is indeed a handful of studies that do examine the reception of great thinkers in IR¹³ they do not theorize their methodological approach explicitly.

Therefore, what I put forward in this chapter is an alternative form of ‘serial contextualism,’ focused on the reception of an author rather than a concept, and anchored in that author’s original context of writing. The approach is based on a two-part methodology. The first part entails a classic contextualist analysis, based on a synchronic understanding of context. It is geared first and foremost towards attempting to recover the original intention that the author had in writing the relevant text, and particularly her intention in making one or more conceptual moves within that text. The second part takes stock of the recent shift in intellectual history towards a diachronic understanding of context and seeks to understand the impact of that author’s move by tracing the reception of her text over time. In doing so, it moves away from concept-based methods that stem from the history of ideas and draws on the precepts of what is broadly known as ‘reception theory,’ focused on analyzing the reception of a specific author. The serial contexts that are examined are therefore not those in which a concept appears, but those in which the author—and that particular text—are explicitly drawn on, reinterpreted, and re-used. The present project puts this methodological approach to work, examining Gentili’s conceptual move in its original context before analyzing the main receptions of Gentili’s treatise on the laws of war.

In developing this methodology, I will make the case that rather than constitute two separate and possibly irreconcilable forms of methodologies, i.e. a classic contextualist analysis of an author’s idea versus a diachronic study of the reception of the said author, these two paths can actually be combined in highly productive ways. In order

¹³ See *supra* note 6.

to do so, I bring together some of the insights of Skinnerian contextualism, *Begriffsgeschichte*, and reception theory, developing a methodology that aims to be eclectic while avoiding the pitfalls of indiscriminate association. In the first part of the chapter, I begin by outlining the core insights of a contextualist approach, before highlighting the limits of contextualism when it comes to understanding the reception of a particular thinker's ideas. In the second part, I note the recent interest in *Begriffsgeschichte* in IR and the possibilities it has opened up in terms of pursuing *longue durée* intellectual history before emphasizing its limits for a study focusing on the reception of a specific author, and I turn more decisively to reception theory. I argue that the latter can be effectively paired with a classic contextualist methodology in order to better evaluate the journey of an author's ideas over time. I ultimately put forward an approach to the study of 'great thinkers' in IR that is both synchronic and diachronic, but that, unlike recent attempts to reinvent the history of ideas based on the return of the *longue durée*, is focused not on the reception of a particular concept but on that of a particular author.

I. Taking context seriously: Tracking the aims of innovating ideologists

In light of the numerous critiques of IR's abuse of the history of political thought in the construction of its canon and its traditions,¹⁴ the value of contextualist methodologies seems fairly self-explanatory. This avenue is particularly promising in light of the recent surge of interest in international political thought, both from IR scholars and from historians.¹⁵ In its broad commitment to historicism, contextualism urges scholars not to

¹⁴ Bell, "Language, Legitimacy, and the Project of Critique." More broadly, see Beate Jahn, "Introduction," in *Classical Theory in International Relations*, by Beate Jahn (Cambridge: Cambridge University Press, 2006).

¹⁵ This body of works is to be distinguished from the 'problem-solving' approach to IPT discussed (and criticized) by Beate Jahn, in Jahn, "Introduction." In IR, see especially Keene, *International Political*

consider great thinkers as taking part in perennial debates across time and space, nor as speaking a common language and providing insights into solving timeless problems, including those of our own period.¹⁶ More specifically, contextualism emphasizes that texts must be ‘regarded as extremely complex historical objects, which were written with a purpose in mind’ and thus as ‘a form of action.’¹⁷

What exactly this entails in terms of conducting research has been the subject of fierce methodological battles. Skinner is of course the most famous of the ‘Cambridge School’¹⁸ contextualists, and his brand of contextualism, sometimes called ‘Skinnerian contextualism’ or ‘Skinnerian linguistic contextualism’¹⁹ is often associated with the broader label. However, as Bell notes, ‘not all contextualists are Skinnerian.’²⁰ In fact, Skinner himself seems to have evolved quite significantly over the course of his career, and is now rather difficult to place in terms of his own commitment to his initial methodological claims, as well as his evaluation of more recent alternatives, most notably post-analytical historicism.²¹ Much of the problem here stems from the incredibly demanding character of Skinner’s original methodological recommendations, which resulted from his stark philosophical stance and which even he struggled to accommodate in his own historical research.²² Despite these unresolved tensions and debates, some

Thought. In history, see for instance Tuck, *The Rights of War and Peace*; Armitage, *The Ideological Origins of the British Empire*.

¹⁶ For the seminal critique of such approaches (most notably that of Leo Strauss), see Quentin Skinner, “Meaning and Understanding in the History of Ideas,” *History and Theory* 8 (1969): 3–53.

¹⁷ Bell, “Language, Legitimacy, and the Project of Critique,” 116.

¹⁸ The label ‘Cambridge School’ itself has often been criticized in light of the considerable disagreements between its main figures, most notably Skinner and Pocock.

¹⁹ Sometimes also called conventionalism, particularly by Mark Bevir. Mark Bevir, “The Contextual Approach,” in *The Oxford Handbook of the History of Political Philosophy*, ed. George Klosko (Oxford: Oxford University Press, 2011), 11–25.

²⁰ Bell, “Political Theory and the Functions of Intellectual History,” 153. Bell is thinking here of the other Cambridge School historians, particularly Pocock and Dunn. See his note 11.

²¹ Mark Bevir, “Contextualism: From Modernist Method to Post-Analytic Historicism?,” *Journal of the Philosophy of History* 3, no. 3 (2009): 211–24. See also, for instance, Admir Skodo, “Post-Analytic Philosophy of History,” *Journal of the Philosophy of History* 3, no. 3 (2009): 308–33.

²² On the tension between Skinner’s metatheoretical projects and his actual historical research, see Melvin Richter, *The History of Political and Social Concepts: A Critical Introduction* (Oxford: Oxford University Press, 1995), 135–6.

broad principles for investigation can be drawn out for the purpose of the present project. Indeed, these issues around Skinner's original philosophical position notwithstanding, contextualists virtually all agree with the general aim of Skinner's project, that is 'the historicisation of political thought and the attempt to locate texts within their original terms of reference.'²³

The central goal of a contextualist methodology is to recover the intention of the author, which is necessarily suited to achieving a particular objective in a particular context. This entails acquiring a deep understanding of the socio-political context as well as—very importantly—the linguistic context of the author. There are some broad guidelines for achieving this understanding, mainly the study of 'both minor and major texts that existed at the time of writing of the particular text under examination, in order to gain an understanding of the various political languages employed, and the links between them,' and the attempt to relate them to 'the general historical environment.'²⁴ Furthermore, in reading the text of interest, it is essential to grasp both its locutionary and its illocutionary force. This distinction, drawn by Skinner, separates the mere lexical meaning of words (locutionary force), from what the author was actually doing in using them (illocutionary force). The two are deeply intertwined, and capturing the intention of the author ultimately depends on being able to distinguish them and truly grasp the illocutionary force of the text. In order to achieve this aim, Bell suggests that it is 'highly advisable' to use 'a dose of methodological pluralism'²⁵ rather than strictly follow Skinner's original methodological precepts, as suggested by Skinner's own practice in *Liberty before Liberalism*.²⁶

²³ Bell, "Political Theory and the Functions of Intellectual History," 153.

²⁴ Bell, "Language, Legitimacy, and the Project of Critique," 332.

²⁵ Ibid. More broadly, see John Dunn, *The History of Political Theory and Other Essays* (Cambridge: Cambridge University Press, 1996).

²⁶ Quentin Skinner, *Liberty before Liberalism* (Cambridge: Cambridge University Press, 1998).

The purpose of recovering an author's intention through a contextualist methodology is not mere antiquarianism. In Skinner's words, doing so enables one to speak to contemporary concerns by showing 'how the concepts we still invoke were initially defined, what purposes they were intended to serve, what view of public power they were used to underpin.'²⁷ Here, it is important to note that if Skinner has expressed a certain skepticism towards the history of concepts, and particularly the study of unit-ideas as advocated by Lovejoy, he does not reject the study of concepts altogether. In his own words, the argument is simply that 'there can be no histories of concepts as such; there can only be histories of their uses in argument.'²⁸ This caveat does not mean that it is impossible to write about concepts altogether (ultimately, Skinner himself finds it sufficiently manageable to still write on concepts such as liberty or the state); simply, Skinner reminds us that 'concepts must not be viewed simply as propositions with meanings attached to them; they must also be thought of as weapons (Heidegger's suggestion) or as tools (Wittgenstein's term).'²⁹ As a result, one can only understand a particular concept and the text in which the concept occurs if one knows 'who is wielding the concept in question, and with what argumentative purposes in mind.'³⁰

²⁷ Ibid., 110.

²⁸ Restated by Skinner in 1988, in Quentin Skinner, "A Reply to My Critics," in *Meaning and Context: Quentin Skinner and His Critics*, ed. James Tully (Cambridge: Polity Press, 1988), 283. What exactly this entails, though, is not always entirely clear. It is worth noting that Michael Freeden has criticized Skinner's 'hostility to the study of 'the 'idea' itself as a 'unit'', arguing that his hostility is too dependent on a critique of Lovejoy's concept of the idea-unit, and 'does not do justice to the different ways in which an idea unit may be handled.' To discuss ideas, Freeden argues, is 'not tantamount to insisting that they have a life of their own, and it is not therefore necessary to adopt some of the excesses of Idealism or to offend against historical canons. For when those ideas are located within ideologies and their existence is empirically ascertained to relate to concrete groups in specific historical situations, much of the force of the old criticisms of the history of ideas as a discipline is dissipated.' Through this claim, Freeden argues for the political concept to remain the central unit of analysis of the history of ideas, for '[a]fter all, one cannot just disregard the plausible contention that the history of (political) ideas should be about ideas.' Michael Freeden, *Ideologies and Political Theory: A Conceptual Approach* (Oxford: Clarendon Press, 2008), 110–111.

²⁹ See Quentin Skinner's contribution in Stefan Collini, "What Is Intellectual History?," *History Today*, October 1985.

³⁰ Ibid.

Skinner provides some specific tools for analyzing the use of concepts under this specific angle, which I apply to my study of Gentili's usage of the concept of the enemy of mankind. Most importantly, I rely on Skinner's idea of an 'innovating ideologist' and on what he calls 'evaluative-descriptive terms.' The innovating ideologist seeks 'to legitimate a new range of social actions which, in terms of the existing ways of applying the moral vocabulary prevailing in his society, are currently regarded as in some way untoward or illegitimate.'³¹ The innovating ideologist does so through speech acts centered on 'evaluative-descriptive terms,' i.e. words that are used both to describe, and to either commend or condemn certain actions. These terms are of particular importance, because as Skinner puts it, 'it is essentially by manipulating this set of terms that any society succeeds in establishing and altering its moral identity.'³² The innovating ideologist thus seeks to manipulate the meaning of concepts (and/or their application) with the aim of modifying political behavior. Based on the existing works mentioned above, I identify Gentili as an innovating ideologist, and the concept of the pirate as HHG as an evaluative-descriptive term that Gentili sought to manipulate in his writings on war.

In doing so, my project takes stock of the critical potential of using a contextualist approach in IR. This potential has been laid out in some detail by scholars such as Duncan Bell,³³ Beate Jahn,³⁴ and Gerard Holden,³⁵ and I will not restate their arguments here. Suffice it to say that this approach can shed significant light on the role of language in the constitution of political and social life, particularly in terms of how the vocabularies of a given time can both enhance and constrain political legitimacy, and how they can be

³¹ Quentin Skinner, "Some Problems in the Analysis of Political Thought and Action," in *Meaning and Context: Quentin Skinner and His Critics*, ed. James Tully (Cambridge: Polity Press, 1988), 112.

³² Ibid.

³³ Especially in Bell, "Language, Legitimacy, and the Project of Critique"; Bell, "Political Theory and the Functions of Intellectual History."

³⁴ Especially in Jahn, "Introduction."

³⁵ Gerard Holden, "Who Contextualizes the Contextualizers: Disciplinary History and the Discourse about IR Discourse," *Review of International Studies* 28, no. 2 (2002): 253–70.

consciously manipulated in attempts to impact political behavior. As Alasdair MacIntyre puts it, ‘since to possess a concept involves behaving or being able to behave in certain ways in certain circumstances, to alter concepts, whether by modifying existing concepts or by making new concepts available or by destroying old ones, is to alter behavior.’³⁶ The present project relies on a contextualist methodology precisely with this critical agenda in mind.

There are, however, two broad types of limits to this contextualist approach. First, as mentioned earlier, Skinner has not always been consistent in applying his own methodological precepts, and various critiques have been made of Skinner’s original philosophical stance, most notably by Mark Bevir.³⁷ These are part of an ongoing debate on the modalities of textual interpretation, the details of which stem from disagreements about the philosophy of history that are beyond the scope of the present project. Second, and more urgently for our purposes, there are limits inherent to Skinnerian contextualism when it comes to analyzing the reception of texts. Once they have been published, texts take on a life of their own—sometimes for centuries—which often leads them to be understood in novel ways and used for purposes that have little left to do with the author’s original intention so carefully unearthed by a Skinnerian approach. In other words, there is often an important divide between the context of writing and the context of reception, which Skinnerian contextualism does not seek to investigate, being exclusively focused on the matter of understanding the text itself.³⁸

This second form of limitation is directly relevant to the present project. Indeed, the latter is interested not only in recovering Gentili’s intention in introducing the concept

³⁶ Alasdair C. MacIntyre, *A Short History of Ethics* (New York: Macmillan, 1966), 2–3.

³⁷ For an introductory discussion, see Mark Bevir, “The Contextual Approach.”

³⁸ For various critiques of Skinner’s strict understanding of and emphasis on context, see notably Darrin McMahon and Samuel Moyn, *Rethinking Modern European Intellectual History* (New York, NY: Oxford University Press, 2014), particularly the essays by McMahon, Gordon, Müller, and Moyn.

of the enemy of mankind in international law, but also in identifying the consequences of this move, particularly through the reception of Gentili's writings on war, and relating both of these elements to the existing narrative about the role historically played by the concept of the enemy of mankind in international law. I therefore turn to a second set of methodological insights from two approaches that examine the life of authors, concepts, and ideas over the *longue durée*: *Begriffsgeschichte* and, more importantly for our purposes, reception theory.

II. From context to contexts: The diachronic lives of great thinkers

Begriffsgeschichte can of course be seen as a component of reception theory, strictly speaking, but the field of reception theory has developed in its own direction, and as such, the two can now be said to illustrate two related but distinct ways of engaging with the afterlife of authors and their ideas. In the broadest sense, *Begriffsgeschichte* primarily tracks the afterlife of specific concepts, their originator receding into the background, while reception theory focuses more closely on the afterlife of the author herself, examining the reception of her ideas and concepts specifically as ideas and concepts belonging to that particular author.

Begriffsgeschichte is of interest here³⁹ notably because historians and IR scholars have already tried to combine it with Skinnerian contextualism in order to develop new approaches to the study of the history of political thought.⁴⁰ While Melvin Richter and

³⁹ Importantly, while the narrative that underpins the contemporary use of the concept of the pirate as HHG is based on a certain ontological assumption about the enduring, essential quality of the concept, *Begriffsgeschichte* explicitly rejects this type of ontological assumption altogether, echoing Skinner's concerns about our ability to write traditional histories of concepts and opening the way for a more critical investigation. As Richter notes, this is particularly the case in the *Geschichtliche Grundbegriffe*. Richter, *The History of Political and Social Concepts*, 135.

⁴⁰ Inevitably, this position has its critics as well, see for instance Mark Bevir, "The Contextual Approach," 20. For an example of a contextualist study of a central IR concept, see Roshchin, "(Un) Natural and Contractual International Society."

Kari Palonen, especially, have pushed forward this approach in history,⁴¹ Duncan Bell, drawing on their work, has emphasized its relevance for IR. The approach entails ‘tracing the different meanings and usages of political concepts over time, tracing the shifts and rupture in their employment.’⁴² This focus on the history of concepts is presented as a potential remedy to the ‘temporal problem’ of the Cambridge School approach,⁴³ a way to shift the analytical lens from the context of writing to the context of reception. This approach shares much with what David Armitage has termed ‘history *in* ideas,’ a new history of ideas based on ‘a model of transtemporal history, proceeding via serial contextualism to create a history in ideas spanning centuries, even millennia.’⁴⁴ Like Koselleck, Armitage puts forward a means for doing intellectual history over the *longue durée* through the study of specific concepts over time, such as the idea of civil war.⁴⁵

The idea of ‘serial contextualism’ is a particularly interesting feature of

⁴¹ See especially Richter, *The History of Political and Social Concepts*; Kari Palonen, *Politics and Conceptual Histories: Rhetorical and Temporal Perspectives* (London: Bloomsbury, 2014). See also Hartmut Lehmann and Melvin Richter, eds., *The Meaning of Historical Terms and Concepts New Studies on Begriffsgeschichte* (Washington, DC: German Historical Institute, 1996); Kari Palonen, “Rhetorical and Temporal Perspectives on Conceptual Change,” *Finnish Yearbook of Political Thought* 3 (1999): 60–73.

⁴² Bell, “Language, Legitimacy, and the Project of Critique,” 333.

⁴³ Bell, “Language, Legitimacy, and the Project of Critique.”

⁴⁴ Armitage, “What’s the Big Idea?,” 494. There has been an explosion of works in *longue durée* intellectual history over the past decade. Other examples of studies of conceptual transformation (works sometimes called ‘neo-Lovejoyian,’ despite the significant differences) include Jerrold Seigel on the idea of the self (2005), Darrin McMahon on the ideas of happiness (2005) and genius (2013), Lorraine Daston and Peter Galison on objectivity (2007), Peter Garnsey on property (2007), Sophia Rosenfeld on common sense (2011), Rainer Forst on toleration in conflict (2013), and James Kloppenberg on democracy (2016).

⁴⁵ Armitage, “What’s the Big Idea?,” David Armitage, *Civil Wars: A History in Ideas* (London: Yale University Press, 2017). Another example would be the concept of ‘empire,’ as analyzed in James Muldoon, *Empire and Order: The Concept of Empire, 800-1800* (Basingstoke: Macmillan Press, 1999). A particularly interesting corollary to this new approach to the diachronic history of concepts is the recent turn towards the role of translation in the diffusion of concepts. See notably the introduction to Martin J. Burke and Melvin Richter, *Why Concepts Matter: Translating Social and Political Thought* (Leiden: Brill, 2012). In IR, see Einar Wigen, “Two-Level Language Games: International Relations as Inter-Lingual Relations,” *European Journal of International Relations* 21, no. 2 (2015): 427–50. More broadly, on global intellectual history and analyzing the way concepts travel, see the introduction of Samuel Moyn and Andrew Sartori, *Global Intellectual History*, Columbia Studies in International and Global History (New York, NY: Columbia University Press, 2013).

Armitage's proposed method. Essentially, Armitage suggests 'deploying the distinctive procedures of Anglo-American intellectual history, but by doing so diachronically as well as synchronically.'⁴⁶ What he means by this is fairly simple. Although there have been some notable exceptions,⁴⁷ Armitage rightly notes that since Quentin Skinner's famous 1969 piece,⁴⁸ intellectual historians who identify as contextualists have 'construed context synchronically and punctually: that is, defined with a narrow chronology and implicitly discontinuous with other contexts.'⁴⁹ By contrast, he argues, his method entails 'the reconstruction of a sequence of distinct contexts in which identifiable agents strategically deployed existing languages to effect definable goals such as legitimation and delegitimation, persuasion and dissuasion, consensus-building and radical innovation.'⁵⁰ Ultimately, he seems to suggest, what is revolutionary in his approach is not the practice of studying series of contexts,⁵¹ but the fact of explicitly theorizing context in diachronic terms.⁵²

The return to *longue durée* intellectual history is a promising move for IR scholars who share with intellectual historians an interest in international political thought. Constructing diachronic histories of 'big ideas,' i.e. 'central concepts in our political, ethical and scientific vocabularies,' based on serial contextualism is certainly a promising avenue, if also a tremendously challenging one in light of the knowledge of each context required for a rigorous application of this method. The present project, however, seeks to closely track the impact of Gentili's conceptual move—drawing the concept of the enemy

⁴⁶ Armitage, "What's the Big Idea?," 497.

⁴⁷ Skinner's liberty before liberalism is probably the most obvious one.

⁴⁸ Skinner, "Meaning and Understanding in the History of Ideas."

⁴⁹ Armitage, "What's the Big Idea?," 498.

⁵⁰ Ibid.

⁵¹ Armitage suggests that even the Cambridge historians have pursued this approach to a certain extent, citing Pocock's *Machiavellian Moment*, Tuck's *Rights of War and Peace*, and Skinner's *Genealogy of the Modern State*.

⁵² Armitage, "What's the Big Idea?," 499.

of mankind into international law—not through a history of the concept itself, but through a close analysis of the reception of Gentili’s treatise of the laws of war. As such, the project also takes stock of the potential of diachronic histories, but it does so from an altogether different angle. Concept-based diachronic approaches, whether those like Richter’s stemming explicitly from *Begriffsgeschichte* or those like Armitage’s that seek the ‘reinvention’ of the history of ideas altogether (hence the ‘history *in* ideas’), do not provide an explicit methodology for the study of how a specific author—rather than a specific idea—travels. As a result, I turn to reception theory and examine the value of combining its insights with those of contextualism in the study of great thinkers in IR.

Reception theory has been used extensively across numerous fields,⁵³ but it has not had much success in IR despite the existence of a handful of works that directly examine the reception of certain great thinkers.⁵⁴ These few forays have emerged in the context of the aforementioned turn towards the study of international political thought, but they very much remain the exception in a field that continues to acclaim and appropriate original texts without examining how these texts came to form part of the disciplinary canon in the first place. The neighboring field of HPT has a longer and more sustained tradition of engaging with these questions, as exemplified by the extensive literature on the reception of classical thinkers in the medieval and the early modern period,⁵⁵ Aristotle and Tacitus being some of the most famous cases. The literature on the reception of late medieval and early modern thinkers in the nineteenth and twentieth century is noticeably slimmer, even though a number of authors were revived and

⁵³ For a brief survey of the history of reception theory, see Peter Burke, “The History and Theory of Reception,” in *The Reception of Bodin*, ed. Howell A. Lloyd (Leiden: Brill, 2013), 21–38.

⁵⁴ See *supra* note 6.

⁵⁵ Ancient historians and classicists who focus on the legacy of classical antiquity in the later history of political thought include Peter Garnsey, Fergus Millar, Wilfried Nippel, Paul Rahe, Elizabeth Rawson, and Jennifer Tolbert Roberts. Cited in Benjamin Straumann, *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution* (New York, NY: Oxford University Press, 2016), 13.

canonized during that period as well. In another closely related though much younger field—the history of international law—some work has notably emerged on the revival of Vitoria by James Brown Scott in the late nineteenth century,⁵⁶ with Anne Orford making an explicit call for the wider study of the reception of great thinkers in international law, a call that has yet to be applied in practice but that has pricked up some ears.⁵⁷

Examining the reception of great thinkers is an obvious—if, in IR, insufficiently exploited—means of assessing the actual impact of their ideas and evaluating the way their concepts were used, re-used, and misused in their intellectual afterlife. In what follows, I draw two core insights from reception theory that allow for a more rigorous study of the reception of particular authors, and then highlight two core payoffs of applying these methodological precepts.

First, recipients are not passive followers, and what is received or inherited is not necessarily what was given or handed over.⁵⁸ In other words, those who ‘receive’ the

⁵⁶ Anne Orford, “On International Legal Method,” *London Review of International Law* 1, no. 1 (2013): 166; Anne Orford, *What Is the Place of Anachronism in International Legal Thinking* (Université Paris 1, 2013), <http://www.sam-network.org/video/what-is-the-place-of-anachronism-in-international-legal-thinking>. See also Paolo Amorosa’s doctoral work, Paolo Amorosa, “The American Project and the Politics of History: James Brown Scott and the Origins of International Law” (PhD Thesis, Eric Castren Institute for International Law and Human Rights, Faculty of Law, University of Helsinki, n.d.).

⁵⁷ Martti Koskeniemi, “Histories of International Law: Significance and Problems for a Critical View,” *Temple International and Comparative Law Journal* 27 (2013): note 32. Noting that the majority of Anglo-American historians regard anachronism as a mortal sin, Koskeniemi explains: ‘I am inspired, however, by Anne Orford’s defence of anachronism.’ One exception—although it is not quite what Orford is referring to in her call to study the revival of famous jurists and the anachronistic use of their work for new purposes—is the work of Elisabetta Fiocchi Malaspina on the reception of Vattel’s *Le Droit des Gens* in the nineteenth century. Elisabetta Fiocchi Malaspina, “Emer de Vattel’s ‘Le Droit Des Gens’: Its Circulation and Reception in the 19th Century,” *Materiali per una storia della cultura giuridica* 43, no. 2 (2013): 303–20; Elisabetta Fiocchi Malaspina, “Le Droit Des Gens Di Emer de Vattel: La genesi di un successo editoriale secolare,” *Nuova Rivista Storica* 98, no. 2 (2014): 733–54. Fiocchi also provides some broader, fascinating insights into processes of appropriation and reproduction of the doctrines of international law during the 19th century. Elisabetta Fiocchi Malaspina and Nina Keller-Kemmerer, “International Law and Translation in the 19th Century,” *Rechtsgeschichte-Legal History* 22 (2014): 214–26. Another piece that discusses anachronisms and the history of international law—though from a different angle—is Christopher Warren, “Henry V, Anachronism, and the History of International Law,” in *The Oxford Handbook of English Law and Literature, 1500–1700*, ed. Lorna Hutson (Oxford: Oxford University Press, 2017).

⁵⁸ Burke, “The History and Theory of Reception,” 22.

texts of great thinkers have a considerable amount of agency, and they may alter the text in significant ways, whether they directly add elements to it or simply reinterpret it for their own purposes.⁵⁹ Aquinas' famous formulation is often cited on this point: *Quidquid recipitur, ad modum recipientis recipitur*: whatever is received is received according to the manner of the receiver.⁶⁰ It is thus much more useful to think of the process of reception as one of translation rather than transmission. This is a crucial point in thinking about the impact of a specific author's ideas, but as Peter Burke remarks, '[a]lthough the famous epigram attributed to Karl Marx, 'I am not a Marxist,' has been circulating for a long time, the implications for intellectual history of the distance between founders and followers have rarely been made explicit.'⁶¹ A particularly useful tool for further conceptualizing these differences is the concern with the 'horizon of expectations' (*Erwartungshorizont*), found notably in the works of Hans-Georg Gadamer and his student Wolfgang Iser. The underlying idea here is that different readers will approach a specific text with different expectations—including different questions and concerns associated with their own environment—and that this will shape the way they understand the text in various respects. The results can be conceptualized through terms such as 'appropriation' (Ricoeur) or 're-employment' (de Certeau), or as a form of intellectual 'bricolage' (Lévi-Strauss) that turns consumption into a form of production in itself.⁶²

⁵⁹ On this phenomenon in the context of international law, see notably Tomas Wallenius, "The Case for a History of Global Legal Practices" (International Studies Association Conference, Baltimore, 2017).

⁶⁰ Thomas Aquinas, *Summa Theologica* (Cologne: Xist Publishing, 1604), 1a, q. 75, a. 5; 3a, q.5. Cited in Burke, "The History and Theory of Reception," 29.

⁶¹ Burke, "The History and Theory of Reception," 23. Burke points to Benjamin Schwartz on Confucian Thought as an important exception. Benjamin Schwartz, "Some Polarities in Confucian Thought," in *Confucianism in Action*, ed. David S. Nivison and Arthur F. Wright (Stanford, CA: Stanford University Press, 1959).

⁶² Paul Ricoeur, "Appropriation," in *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation*, by Paul Ricoeur (Cambridge: Cambridge University Press, 1981), 182–93; Michel de Certeau, *L'invention du quotidien* (Paris: Union générale d'éditions, 1980). Cited in Burke, "The History and Theory of Reception," 25.

Second, and relatedly, this emphasis on active/creative rather than passive/faithful reception suggests that in order to understand the importance of an author's text, we must examine it not just in its original context but in the various contexts in which it came to play an important role. In other words, it is crucial not just to examine the 'reception' of a text, but its multiple receptions, across different groups, countries, and epochs. Through this process, one may conceptualize the multiple embodiments of a same author, used for different purposes under different circumstances—or, for example, under the same circumstances but for different political purposes. For instance, Kinch Hoekstra speaks of 'multiple Thucydides' in the early modern period, notably highlighting the gap between Gentili's Thucydides and Hobbes' Thucydides.⁶³ The impact of a particular text can thus become kaleidoscopic, refracted through the many contexts in which it is creatively put to use. In analyzing this process, two related avenues of investigation seem particularly fruitful. First, one should compare the original reception of the text, the impact the author had in her original context, with later receptions, that may have altered the author's reputation quite drastically.⁶⁴ Second, one should pay particular attention to the impact the text will have when it is seized on by influential individuals who actually have the means of giving the text a renewed importance and of redefining what is in fact important about it.

Applying these two methodological tenets opens the way for a number of productive intellectual moves, two of which stand out particularly. First, studying an author not just in her original context but through her different receptions over time is a

⁶³ Kinch Hoekstra, "A Source of War: Gentili's Thucydides" (Alberico Gentili - La salvaguardia dei beni culturali nel diritto internazionale, Milan: A. Giuffrè, 2008); Kinch Hoekstra, "Hobbes's Thucydides," in *The Oxford Handbook of Hobbes*, ed. Aloysius Martinich and Kinch Hoekstra (New York, NY: Oxford University Press, 2016), 547–74.

⁶⁴ This is the approach taken in *A Handbook of the Reception of Thucydides*, for instance. The Handbook juxtaposes a chapter on Thucydides' ancient reputation with one his reception in the Renaissance. Christine Lee and Neville Morley, eds., *A Handbook to the Reception of Thucydides* (Oxford: John Wiley & Sons, 2014).

methodological approach that answers David Armitage's call for a return to *longue durée* intellectual history, though in a different way from his own application of it.⁶⁵ It is an approach that is deeply committed to examining the author and her work diachronically, sacrificing some of the depth of traditional contextualist investigations for the breadth of trans-epochal comparisons. This seems a particularly potent approach within IR, where the tendency has been to think about great thinkers diachronically, if without articulating a specific methodology for doing so. Of course, the point of a diachronic approach based on reception theory is not to study authors in a decontextualized manner, applying their categories and concepts indiscriminately across time and space, but rather to pay close attention to the various contexts in which they were explicitly received, potentially stretching the story of their impact over continents and centuries. As such, it distances itself from the English School's concept of traditions as well as from the broader practice of diachronically examining the history of a concept through a long collection of great thinkers.⁶⁶

Second, reception theory provides a particularly useful set of tools for analyzing the construction of intellectual canons. The importance of 'canons' and 'traditions' has not escaped IR scholars,⁶⁷ and indeed, Bell points out that while Skinner is right in being suspicious of 'claims about easily delineated transhistorical ideational bodies,' we must

⁶⁵ David Armitage and Jo Guldi, "The Return of the *Longue Durée*: An Anglo-American Perspective," *Victoria* 700 (2014): 722; Jo Guldi and David Armitage, *The History Manifesto* (Cambridge: Cambridge University Press, 2014). For a brief discussion of the study of receptions as an example of *longue durée* intellectual history, see Straumann, *Crisis and Constitutionalism*, 20.

⁶⁶ For instance, this is a particularly popular approach in the field of just war theory, see notably Cian O'Driscoll and Daniel Brunstetter, eds., *Just War Thinkers: From Cicero to the 21st Century* (New York: Routledge, 2017).

⁶⁷ Though some have been explicitly critical of any attempt to construct them, such as Brian Schmidt, who sees these traditions as developed either for polemical purposes or as a way to legitimize contemporary ideas. Schmidt, *The Political Discourse of Anarchy*, 24. For a more sympathetic approach, see Karma Nabulsi, "The Conceptualization of War and the Value of Political Traditions," in *Traditions of War: Occupation, Resistance, and the Law* (Oxford: Oxford University Press, 1999), 66–79; Karma Nabulsi and Sudhir Hazareesingh, "Using Archival Sources to Theorize about Politics," in *Political Theory: Methods and Approaches*, ed. David Leopold and Marc Stears (Oxford: Oxford University Press, 2008), 150–70.

also ‘recognize the vital role of *perceived* traditions,’ i.e. ‘the relationship theorists sustain with those they consider to be their intellectual progenitors.’⁶⁸ As Freedden explains, ‘[i]nasmuch as people come to attach importance to reified traditions, however erroneously conceived the latter are, they become factors in the formation of human thought and in the explanation of human behavior.’⁶⁹ Traditions can of course be based on various elements, including concepts, as in the case of liberalism, or authors, as in the case of a ‘Grotian tradition’ of international law.⁷⁰ With respect to the latter, an approach that focuses first and foremost on the reception of the author’s text(s) appears essential, and fulfills a distinct purpose from one focused on the transformation of concepts. As such, for author-based traditions, it becomes essential to track the complex story of the reception of the author, particularly as in the case of a discipline such as IR, the interpretation of an author will have been shaped and re-shaped many times before entering the field. Ultimately, the novel interpretation put forward by the receivers ‘may have shaped core concepts in the discipline,’ in which case ‘a historical recovery of their roots is one way of opening up these concepts for critical reflection.’⁷¹

If one wishes to understand the emergence, evolution, modification, and reproduction of a canon,⁷² and ultimately the development of perceived traditions or legacies based on particular authors, it thus becomes imperative to examine the context(s)

⁶⁸ Bell, “Language, Legitimacy, and the Project of Critique,” 333.

⁶⁹ Freedden, *Ideologies and Political Theory*, 110. This echoes Hobsbawm’s concern with ‘invented traditions,’ the study of which ‘throws a considerable light on the human relation to the past... For all invented traditions, so far as possible, use history as a legitimator of action and cement of group cohesion.’ Eric Hobsbawm and Terence Ranger, *The Invention of Tradition* (Cambridge: Cambridge University Press, 1992), 12.

⁷⁰ Hersch Lauterpacht, “The Grotian Tradition in International Law,” *British Yearbook of International Law* 23 (1946): 1–53; Hedley Bull, “The Grotian Conception of International Society,” in *Diplomatic Investigations: Essays in the Theory of International Politics*, by Herbert Butterfield and Martin Wight (London: Allen & Unwin, 1966); Benedict Kingsbury, “A Grotian Tradition of Theory and Practice: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull,” *Quinnipac Law Review* 17 (1997): 3–33. See also Nabulsi, *Traditions of War*.

⁷¹ Jahn, “Introduction,” 13.

⁷² Bell, “Language, Legitimacy, and the Project of Critique”; Jahn, “Introduction.”

of an author's reception, closely examining the shifting representation(s) of that author over time and space. The attribution of 'greatness' to a thinker, her enshrinement into a disciplinary canon, is an active, conscious process. Forgotten thinkers are unearthed and branded as great by those who want to claim them for their own camp, while the rightful legacy of an established 'great thinker' can be a source of extensive debate.⁷³ Inventing a tradition linking one's ideas to those of a long-dead, respected, famous mind is one of the many ways in which one can defend something by giving it 'the sanction of perpetuity.'⁷⁴ As a result, once an author is placed in the category of 'great thinkers,' her name comes to bear a certain weight, to provide a certain degree of legitimacy to those who invoke her as their forerunner. Since reception theory is explicitly geared towards understanding the factors that 'shape' the reception of a text,⁷⁵ it is thus particularly relevant for shedding light on the dynamics behind the canonization of an author. It is notably attuned to the role of political agendas in shaping reception,⁷⁶ a factor that is likely to be found at play in the construction of disciplinary canons.

Ultimately, while the claim here is that we must distinguish between a study of the reception of ideas based on concepts and one based on authors, it may be said that in the case of the canonization of an author, the author itself becomes, in some way, a form

⁷³ For the role of Hobbes as the presumed founder of liberal political theory, and the emergence of this conception of his legacy in the twentieth century, see Roberto Farneti, *Il canone moderno. Filosofia politica e genealogia* (Torino: Bollati Boringhieri, 2002). See also Geoffrey M. Vaughan, "The Decline of Sovereignty in the Liberal Tradition: The Case of John Rawls," in *Souveränitätskonzeptionen: Beiträge Zur Analyse Politischer Ordnungsvorstellungen Im 17. Bis Zum 20. Jahrhundert*, ed. Peter Schröder and Martin Peters (Berlin: Duncker & Humblot, 2000), 157–85.

⁷⁴ Hobsbawm and Ranger, *The Invention of Tradition*, 2.

⁷⁵ Burke, "The History and Theory of Reception," 32.

⁷⁶ Consider, for instance, the various receptions of Erasmus, notably in Spain and Italy. Silavana Seidel Menchi emphasizes the fact that Erasmus' Italian readers had their own agenda, which included disguising their Protestant beliefs and legitimating a political attack on the papacy. Silvana Seidel Menchi, *Erasmus in Italia, 1520-1580* (Torino: Bollati Boringhieri, 1987). Cited in Burke, "The History and Theory of Reception," 26–27. Another example is the case of Locke, whose diverse receptions come to light in Mark Goldie's fascinating anthology. Mark Goldie, *The Reception of Locke's Politics: From the 1690's to the 1830's* (London: Pickering & Chatto, 1999). On the diverging receptions of Locke in the nineteenth and the twentieth century and the ultimate establishment of his 'liberal' credentials, see Duncan Bell, "What Is Liberalism?," *Political Theory* 42, no. 6 (2014): 682–715.

of concept. Invoking the author in question becomes a way to refer to a set of ideas, to a particular understanding of what abstract and contested terms such as ‘sovereignty’ or ‘liberalism’ might mean. In the broadest sense, Bell reminds us that ‘[t]raditions are usually constructed around a canon of renowned thinkers, which serves simultaneously as a reservoir of arguments, an index of historical continuity, and a powerful source of intellectual authority.’⁷⁷ But more specifically, an author’s name can become associated with a precise position, providing a shorthand for what may otherwise necessitate extensive—and possibly contestable—elaboration. When one invokes, for instance, Bodin, Hobbes, or Locke within a tradition, the reference is often not so much to the individuals, with their idiosyncratic lives and the specific aims they had in writing their canonized treatises, but rather to the intellectual statement they provide within a debate, to the positions that are automatically associated with their person. Their name entails a set of arguments (or many different sets, if one takes into account the different interpretations of a single author), a collection of assumptions and their associated ramifications, in a way that is not dissimilar to the role played by a concept such as ‘absolute sovereignty’ or ‘liberalism.’ As such, the emphasis here on the distinction between the study of authors and the study of concepts is made primarily to highlight a shift in terms of the object of study and therefore of the chosen methodology, keeping in mind that a more diligent study of authors and of their reception may in fact underline the extent to which authors can become concepts, fulfilling similar discursive functions and sharing the same purposes as heuristic devices.

⁷⁷ Bell, “What Is Liberalism?,” 686.

III. Conclusion: A combined approach

While it is frequent to read either studies of authors in their original context or studies of the subsequent reception of their ideas, works that combine the two have remained the exception. In this final section, I wish to conclude by emphasizing the methodological potential of an approach to the study of ‘great thinkers’ that combines a synchronic analysis based on the insights of Skinnerian contextualism with a diachronic analysis drawing on the tenets of reception theory.

An emphasis on the reception of a great thinker’s idea may seem at first as a complementary—but separate—project from the examination of the author’s ideas in their initial context, and particularly, from a close analysis of the author’s original intentions. Yet, two main arguments can be made for a unified approach that relies on these two avenues of inquiry at once. First, and in the most obvious sense, any project that seeks to understand both the emergence and the impact of a particular author’s idea will find this methodological approach greatly relevant. In a discipline that has historically paid significant attention to the thought of a few great authors, emphasizing the continued importance of specific concepts within their thought (whether it be Hobbes on sovereignty or Kant on perpetual peace, to name but the most famous ones), developing an approach that encompasses both a rigorous understanding of the author’s context and an analytical commitment to the *longue durée* would seem a valuable endeavor.

The call for such an approach is reinforced by the fact that the discipline of International Relations has sometimes erred in its appreciation of authors’ ideas specifically because it remained abysmally unaware of the process of reception. This is particularly obvious in the case of the English School, which built its ‘traditions’ based on ‘a conflation of nineteenth century appropriations of seventeenth century thinkers,

such as Grotius and Hobbes, with the ideas of those thinkers themselves.’⁷⁸ Systematically untangling what these thinkers actually thought—to the extent that it is possible—from what later generations of historians, lawyers, and other practitioners claimed they did is an essential part of clarifying this muddled field while shedding light on the actual provenance of our disciplinary narratives. If greater efforts have been made to tease out the normative assumptions of each theoretical approach,⁷⁹ surely the fact that IR textbooks continue to propagate a history of the modern states-system and of its presumed intellectual architects constructed by nineteenth century counter-revolutionary historians⁸⁰ should be an immediate source of concern. If the study of IR’s ‘great thinkers’ continues to be an important part of the discipline, particularly in light of the turn to international political thought,⁸¹ this untangling exercise can form the basis for a more rigorous approach both to the nature of their thought and to the impact they had through their actual reception over time.

Second, and more specifically, there is rather straightforward case to be made for the continued methodological relevance of a more traditional, synchronic analysis of an author as a highly insightful component of the study of an author’s reception. Naturally, reception studies encourage scholars ‘not to limit themselves to the reconstructions of

⁷⁸ Kimberly Hutchings et al., “Critical Exchange: Foundations of Modern International Theory,” *Contemporary Political Theory* 13, no. 4 (2014): 389.

⁷⁹ Reus-Smit and Snidal, *The Oxford Handbook of International Relations*.

⁸⁰ Edward Keene, “The Orthodox Theory of Order in World Politics,” in *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002), 12–39. For a more detailed analysis, see Richard Devetak, “Historiographical Foundations of Modern International Thought: Histories of the European States-System from Florence to Göttingen,” *History of European Ideas* 41 (2014): 1–16. Noting Armitage’s remark that ‘the pivotal moments in the formation of modern international thought were often points of retrospective reconstruction,’ Devetak shows the extent to which historians played a role in the depiction of the modern world as a ‘world of states.’

⁸¹ Though for a call to locate ‘international political thought’ beyond a canon of ‘great thinkers,’ see Keene’s remarks in Hutchings et al., “Critical Exchange: Foundations of Modern International Theory.” See also Emma Rothschild, “Arcs of Ideas: International History and Intellectual History,” in *Transnationale Geschichte: Themen, Tendenzen Und Theorien*, by Gunilla Budde, Sebastian Conrad, and Oliver Janz (217–26: Vandenhoeck & Ruprecht, 2006), 220; Quentin Bruneau, “Knowing Sovereigns: Forms of Knowledge and the Changing Practice of Sovereign Lending” (Thesis DPhil--University of Oxford, 2016), 17–46.

major thinkers, but to ask a much wider range of questions about recontextualizations, responses, uses, and so on,⁸² pointing to ‘the illusion of perfect communication’ and, in that process, ‘undermining the importance of the intentions of writers.’⁸³ However, the intention of the author remains an important component of reception for a simple reason: it constitutes a benchmark against which one can measure the extent to which the text has been re-interpreted by the receivers. Burke emphasizes that in studying reception one must ‘look for what is “lost in translation”, or what is distorted,’ reminding us of Cervantes’ famous observations that reading a text in translation is ‘like viewing Flemish tapestries from the wrong side.’⁸⁴ In other words, he explains, one has to measure the ‘degrees of distance from the original.’⁸⁵ It is not clear, however, how one might be able to achieve this without an initial understanding of what the text was originally intended to achieve.

In other words, and to push Cervantes’ metaphor a step further, is it only by viewing both sides of the tapestry that one can appreciate the contrast between the two images. If we only view the ‘wrong side’, we may well be aware that it is indeed ‘wrong’ to some extent and that the actual image is bound to differ in some way, but we remain within the realm of speculative abstraction; the actual image may be slightly different, or it could be entirely unrecognizable—we will never know. To the extent that one is interested in analyzing the construction of traditions and unveiling the scaffolding of intellectual canons, having a concrete understanding of what the gap between the original and its derivatives entails becomes essential. In fact, an awareness of the original is much more critical within this context than suggested by Cervantes’ example. If in the example of the tapestry, the original and its flip-side are literally co-constitutive of each other, this

⁸² Burke, “The History and Theory of Reception,” 32.

⁸³ *Ibid.*, 28.

⁸⁴ *Ibid.*, 32.

⁸⁵ *Ibid.*, 35.

is clearly not the case when we speak of the reception of texts. Indeed, the re-interpretations can depart from the original to remarkable extents, as receivers use the text with few concerns for the dead author's original intentions. One particular instantiation of this point—which is explicitly explored in the present project—is the fact that certain parts of an author's text can be heavily emphasized⁸⁶ while, remarkably, others are entirely ignored or even concealed. In this context, authorial intention truly has an essential role to play in the study of an author's reception, and a commitment to the *longue durée* can thus be paired with a more traditionally contextualist investigation.

There are, of course, certain limitations to this approach, or at least certain challenges that should be flagged. First of all, in studying the reception of an author, one must address the various silences that can occur around the author's work. This can be the case when, as I have suggested, certain ideas or elements of the text appear to be central to the original text but disappear during the reception process. Under such circumstances, one is left to carefully speculate as to what might explain the surprising omission. Even more strikingly, one must consider the fact that over the course of an author's afterlife, there will be periods during which her work may recede to the background or be ignored entirely. This can occur for various reasons, including mere neglect, a controversial reputation, or a falling out of favor of certain types of argument. In light of this, a serial contextualism based on an author rather than on a concept may well be episodic, with important chronological gaps between the different receptions. There is thus an important difference between the *longue durée* entailed by an author-based serial contextualism and that entailed by a concept-based one, as concepts are more likely to appear under different iterations in the work of various writers. When studying

⁸⁶ For instance, in the case of Locke, Bell explains that “[w]hereas parliamentary constitutionalism was central to the British appropriation of Locke (via the retrojection of the Whigs), it was religious toleration (via the retrojection of key elements of Puritanism) that did much of the ideological labour in the United States. Bell, “What Is Liberalism?,” 701.

an author and her reception, a *longue durée* approach is just as much about continuity as it is about discontinuity; the expansive chronological coverage allows one to analyze the moments during which an author's popularity surged and to trace the construction of a seemingly continuous tradition of thought around that author's name, but also to shine a light on the various moments during which the author was not in fact considered particularly remarkable. The latter, of course, is a way to problematize the existing stories of continuity and to highlight the contingency of the established canon.

With this in mind, this chapter proposes to study great thinkers in IR over the *longue durée*, based on a modified form of serial contextualism; in sum, my approach begins with a study of the author in her original context and then turns to the various episodes that marked the reception of the author over time. In addition to being possible, it is in fact productive to combine synchronic and diachronic approaches within the study of great thinkers, whether it is by encouraging a more systematic dialogue between separate projects or by incorporating both approaches within single studies. Ultimately, this chapter has sought to elaborate a unified approach to the study of great thinkers in IR, one which combines the tenets of contextualism with those of what broadly falls under the label of reception theory. I have argued not only for the usefulness of such an approach, but also for the possibility of developing a coherent methodology through the combination of these usually separate strands. The goal is to develop a more rigorous method for analyzing the way a specific author's ideas come to have an impact in practice, and the extent to which these ideas get distorted in the process. The dissertation puts this methodology to work, examining Gentili's intentions in introducing the concept of the enemy of mankind into international law within his own context before proceeding to a diachronic analysis of his reception across centuries.

PART I.

GENTILI'S *DE IURE BELLI* IN ITS ORIGINAL CONTEXT

Chapter 2.

Alberico Gentili's *De iure belli*: Between Bodin and the Reason of State Tradition

Recent years have witnessed a renewed interest in Gentili's writings—particularly his works on war¹—leading to a surge in debates over how to interpret the sixteenth century Italian émigré's ideas. Ever since Richard Tuck identified Gentili with a humanist tradition deeply opposed to the ideas of the scholastics in *The Rights of War and Peace*, Gentili's writings on the laws of war, and especially his masterpiece on the subject, *De iure belli*, have been scrutinized in order to determine where exactly Gentili stood amidst the conflicting ideologies and modes of thinking of his time. In addition, various claims have been put forward to explain the specificity of DIB, both in the specialized literature on early modern legal debates and within broader histories of international law and of the laws of war. This new surge of interest comes amidst a long tradition of treating Gentili's DIB as a pivotal text in the history of international law, notably for its 'secular' underpinnings and for its 'modern' conception of the laws of war.²

The purpose of this chapter is to clarify some of these disagreements by closely examining Gentili's use of sources in DIB. More specifically, through this focus on sources, the chapter seeks to resituate Gentili's DIB beyond the immediate legal debates

¹ The most notable contributions include Kingsbury and Straumann, *The Roman Foundations of the Law of Nations*; Alberico Gentili, *The Wars of the Romans: A Critical Edition and Translation of De Armis Romanis*, ed. Benedict Kingsbury and Benjamin Straumann, trans. David A. Lupher (Oxford: Oxford University Press, 2011); Alberico Gentili, *Il diritto di guerra (de iure belli libri III, 1598)* (Milano: A. Giuffrè, 2008).

² This is particularly obvious in the main textbooks on the history of international law (Grewe, Schmitt, Nussbaum). Gentili's modernity in his approach to the law of war, particularly when compared with Grotius, has also been emphasized in the more specialized literature, including by Haggenmacher, who notes that DIB 'often seems closer, if not to the 1899/1907 Hague Rules of Land Warfare, at least to the spirit of eighteenth-century warfare as reflected by authors like Moser or Vattel, than is the Grotian system, however elaborate, coherent, and profound it may be,' though he does point to the inherent anachronism involved in this type of assessment. Haggenmacher, "Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture," 168 and 173.

that have conventionally framed its analysis, and to place the text within the broader political thought of the period. Gentili's text, the chapter claims, is particularly noteworthy in its attempt to straddle the legal and political debates of its epoch, looking beyond legal sources and turning to various contemporary political writers in what was quite a remarkable move at the time. His attempt to bridge what has been identified within international political thought as the two broad 'languages' of the period—the legal and the political—is an aspect of his work that has not been sufficiently examined, despite its potential for shedding new light on the dynamics that underpinned the development of international law at the time.³

This is not to say, of course, that no attention has been paid to the more political aspects of DIB, and to its affinity, as a legal text, with certain strands of political thought. Much of the current debate about whether DIB—and Gentili more broadly—should be placed within the humanist category, can in a way be understood as a disagreement over Gentili's political leanings. Yet, humanism was only one facet of the political thought of the period, and its age-old premises were being increasingly overshadowed by the rise of new modes of political thinking—particularly the concept of *raison d'état*—that eventually came to characterize the emerging era. This chapter pays closer attention to the latter, emphasizing DIB's surprising and generally underappreciated affinities with these ideas.⁴ It builds upon existing works that highlight Bodin's momentous influence

³ In presupposing a distinction between the two, I am speaking exclusively here of the debates concerning inter-sovereign relations. At the inter-sovereign level, the initial separation between, on the one hand, a 'political' language centered around the concepts of 'reason of state' and the 'balance of power,' and, on the other hand, the 'legal or jurisprudential' language centered on old notions of 'natural law' and 'law of nations' now repackaged to conceptualize the 'rights' of sovereigns and people has been outlined particularly sharply by Keene; see Keene, *International Political Thought*. The broader claim about the existence of different 'languages' of early modern international political thought is drawn from Pagden; see Anthony Pagden, *The Languages of Political Theory in Early-Modern Europe* (Cambridge: Cambridge University Press, 1987). A convincing case can be made for why the boundaries between these areas was much more porous at the domestic level, see for instance John M. Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press, 1992), xvi.

⁴ It is worth noting that in his seminal work on Grotius and his forerunners, Haggenmacher mentions Bodin and his influence only briefly, he cites Machiavelli just once (to note a 'curious coincidence' between his

on Gentili, and expands this analysis by taking stock of Gentili's equally striking reliance on writers from the emerging reason of state tradition, thus articulating Gentili's use of Bodin through his broader engagement with the burgeoning intellectual currents of his time. In doing so, the chapter pushes back against the '(standard) argument' that 'international law arose with modern statehood as a position and a craft that was opposed to the *raison d'état*.'⁵ If Gentili's famous treatise on the law of war is by any means an indicator of how international law initially developed, *raison d'état* certainly needs to be placed back at the heart of how we study the history of international law.

Having set out the context within which Gentili's use of sources can be interpreted, I outline the most striking influences on his text, and explain why these are key to understanding what was so particular about the Italian jurist's famous treatise on the laws of war at the time. Ultimately, I argue that one of the most important reasons why Gentili's DIB stood out was that it was the work of an absolutist who tried to base a theory of the laws of war on what was at the time a groundbreaking and controversial conception of sovereignty. In doing so, Gentili's primary concern was to reconcile Bodin's concept of sovereignty, the teaching of the reason of state writers, and his own commitment to ensuring law would continue to matter in regulating external relations between sovereign polities. Gentili's absolutism, i.e. his commitment to a radical understanding of sovereignty that granted almost unlimited powers to the ruler, has of course been a hotly debated matter, not least because Gentili's stance evolved over the course of his career, and because branding him an absolutist was a very convenient way for Catholic critics to undermine the Protestant jurist's work when it was forcefully

thinking and that of Grotius regarding what the sovereign is entitled to do with his or her state, n. 898), and he never mentions Guicciardini. Haggmacher, *Grotius et La Doctrine de La Guerre Juste*.

⁵ Martti Koskeniemi, "International Law and Raison d'État: Rethinking the Prehistory of International Law," in *The Roman Foundations of the Law of Nations*, ed. Benedict Kingsbury and Benjamin Straumann (Oxford: Oxford University Press, 2010), 303.

revived in the nineteenth century.⁶ DIB, in particular, is not as stark in its absolutist claims as some of Gentili's later writings, nor as systematically coherent in its positions, thus leaving some room for debate. I address these points explicitly in the second part of the chapter.

To this purpose, I first outline some elements of clarification for how we may understand Gentili's work and particularly his *De iure belli*, highlighting some of the major debates concerning Gentili's writings. Second, I point to the well-established influence of Bodin on Gentili, particularly in terms of his absolutist conception of sovereignty, but conclude that while Gentili fully embraced Bodin's absolutist position, he had to look elsewhere in order to adapt Bodin's ideas to relations between early modern states. Third, I examine the reason of state writers to which Gentili turned in attempting to develop a framework for inter-sovereign relations. Fourth and finally, I argue that the main challenge Gentili faced was adapting the ideas of these writers, who saw little use for law in facilitating and stabilizing external relations between early modern states, to his commitment to placing law at the center of this endeavor. In other words, Gentili took what was then the fairly counter-intuitive step of trying to incorporate the increasingly popular concepts of *raison d'état* and balance of power into a legal framework for inter-sovereign relations.

Before I begin, a bibliographical note: *De iure belli libri tres* was first published in 1598, as an expanded version of Gentili's earlier lectures *De iure belli commentationes tres* (1588/89). A few reeditions then appeared, in 1604, 1612, 1770, and in 1877 during the nineteenth century revival of Gentili's work. Finally, in 1933 the treatise was reedited in what is now the most commonly used edition, which contains both a photographic

⁶ See, for instance, Gustave Rolin-Jaequemyns, "Quelques Mots Sur Les Hommages Projetés à La Mémoire de Grotius et d'Albéric Gentil, et Sur Les Dernières Publications Y Relatives," *Revue de Droit International et de Législation Comparée* VIII (1875): 694.

reproduction of the 1612 edition and an English translation of the original Latin. In the analysis that follows, I have referred to this 1933 edition, which allows one to consult the 1612 text in parallel with its English translation. Importantly, the marginalia in the 1933 English translation mirrors exactly that of the 1612 Latin original, and the marginalia of the 1612 version is identical to that of the original 1598 edition.⁷

I. Reading Gentili's *de iure belli*: Some elements of clarification

For all the celebrations of Gentili as a great founder of international law, there is a certain amount of confusion and mystery that shrouds his work. Often his positions across his different publications seem inconsistent, making it difficult to understand where he stood and how exactly his different writings relate to each other. Three main reasons for this confusion stand out: first, while Gentili spent his first Oxonian decade (1581-1590) teaching and writing the treatises that established him as a leading jurist of his day,⁸ the later part of his career (1590-1608) was more fully dedicated to practice and consequently, he wrote numerous opinions that depended primarily on his clients' interests and thus often contradicted each other. Second, Gentili evolved significantly during his career, from a staunch anti-humanist Bartolist following his training in Perugia to what Randall Lesaffer has termed a 'moderate humanist' over the course of his time in England, embracing 'a *via media* between Bartolism and humanism.'⁹ Third, and

⁷ I have verified this by comparing the 1612 photographic reproduction to John Selden's copy of the 1598 original, which is available at the Bodleian Library under the filing number 8°G.6.Jur.Seld.

⁸ In the words of K. R. Simmonds, 'there can be little doubt that at his death in 1608 much of his reputation as a scholar and publicist rested upon the work of his earlier career in Oxford.' K. R. Simmonds, "The Gentili Manuscripts," *Zeitschrift Der Savigny-Stiftung Für Rechtsgeschichte. Romanistische Abteilung* 76, no. 1 (1959): 546.

⁹ For brief statements, see Alain Wijffels, "From Perugia to Oxford: Past and Present of Political Paradigms," in *Alberico Gentili: La traduzione giuridica perugina e la fondazione del diritto internazionale*, ed. Ferdinando Treggiari (Perugia: Università degli Studi di Perugia, 2008), 59–61; Randall Lesaffer, "Alberico Gentili's *Ius Post Bellum* and Early Modern Peace Treaties," in *The Roman Foundations of the Law of Nations*, ed. Benedict Kingsbury and Benjamin Straumann (Oxford: Oxford University Press, 2010), 216; Simmonds, "The Gentili Manuscripts," 546–549. For longer analyses, see

relatedly, the term ‘humanism’ has come to encompass a number of meanings, and in the longstanding debate over whether or not Gentili was indeed a humanist, it is not always clear whether the humanism in question is of a civic, rhetorical, or legal kind. In this section, I will thus outline four crucial elements for situating the work of Gentili—specifically his DIB—and navigating this somewhat muddled contextual landscape.

First of all, Gentili wrote at a time of nothing short of a methodological revolution in international law and history,¹⁰ pitting the traditional ideas of Bartolists (the ‘*mos italicus*’) against the sensational innovations of the initially Bourges-based legal humanists (the ‘*mos gallicus*’),¹¹ and his position within that debate evolved significant throughout his career. The debate was essentially one over how best to understand, interpret, and use Roman law, the vast majority of which was compiled in what became known as the *Corpus iuris civilis*. Throughout the Middle Ages, the assumption of the Bartolists (*mos italicus*) had been that the *Corpus iuris* was a perfect system of jurisprudence, and the resulting approach had been to focus on exegesis of the Roman Law and to creatively adapt Roman concepts to the medieval world. The scholastic method, on which this was based, entailed virtually pure logical analysis with very little historical perspective. The French legal humanists (*mos gallicus*) started out seeking to improve Roman jurisprudence by restoring its original meaning, which sometimes had been lost through misinterpretation, erroneous translations, or copying errors. Their initial endeavor, however, developed into a full-blown critique of Roman law when they

Giovanni Minnucci, *Alberico Gentili tra mos italicus e mos gallicus: l'inedito commentario ad legem juliam de adulteriis* (Bologna: Monduzzi Editore, 2002); Giovanni Minnucci, “Per Una Rilettura Del Metodo Gentiliano,” in *Alberico Gentili: La traduzione giuridica perugina e la fondazione del diritto internazionale*, ed. Ferdinando Treggiari (Perugia: Università degli Studi di Perugia, 2008).

¹⁰ Julian H. Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History* (London: Columbia University Press, 1963).

¹¹ Though as Haggenmacher notes, the relationship of the *mos gallicus* to the *mos italicus* should be characterized as an effort to broaden and transform rather than as a move towards clear rupture and a complete rejection of tradition. In his writings on war, Alciatus, one of the most famous proponents of the *mos gallicus*, is clearly indebted to both the humanists and to the Bartolists. Haggenmacher, *Grotius et La Doctrine de La Guerre Juste*, 47–48.

realized that their attempt to discover the unifying logical underpinnings of the *Corpus iuris* was bound to fail because these were in fact, they concluded, inexistent. Roman law, they explained, was riddled with inconsistencies and logical incoherence, and, perhaps even more importantly, it was based on concepts that were developed in the particular historical context of Rome and that were sometimes completely at odds with the realities of their own world.

As a result, these legal humanists advocated taking a much more critical stance towards Roman law and particularly towards the writings of great medieval authorities on the matter (such as Bartolus and Baldus), as well as looking beyond Roman law to create a better system of jurisprudence. This led to a renewed focus on domestic legal custom, but even more importantly, it led to a crucial turn towards the use of 'universal history' in the reconstruction of a juristic science.¹² In other words, legal humanists—and particularly Jean Bodin on this specific matter—hoped to remedy the deficiencies in the Roman legal system by turning to universal history. Bodin puts it most clearly himself in *République*: the sole way to build a truly universal juristic science, he explained, was to compare 'all the laws of all, or the most famous, states, and to select the best variety.'¹³ The legal humanists thus turned their attention away from the medieval commentators and towards a vast web of sources, with a particular emphasis on the work of historians.

Gentili was trained at Perugia as a Bartolist of the purest kind, and when he first arrived in Oxford, his first publication was a famous attack on legal humanism, *De iuris interpretibus* (1582), which categorically condemned the arguments of the great three—Budaeus, Alciatus, Zasius—and their followers.¹⁴ In the following two years, he

¹² Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History*.

¹³ Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth* (Cambridge: Cambridge University Press, 1992), xvi.

¹⁴ For a summary and analysis of *De iuris interpretibus*, see J. W. Binns, *Intellectual Culture in Elizabethan and Jacobean England: The Latin Writings of the Age* (Leeds: Francis Cairns, 1990), 338–346.

published another attack on legal humanism: his polemical collection of letters and lectures entitled *Lectionum et epistolarum quae ad ius civile pertinent* (1583-4).¹⁵ However, by the time he wrote the first draft of DIB for his 1589 lectures on the laws of war, he had gradually moved away from this complete rejection of the *mos gallicus* and, while he remained faithful to his Bartolist training, he clearly embraced many of the tropes of legal humanism, most notably in his use of sources.¹⁶ Indeed, in addition to citing the *Corpus iuris civilis* and the numerous commentaries on it—particularly those of Baldus—Gentili relies extensively on classical philosophers and rhetoricians (especially Cicero), classical historians (especially Livy), classical poets (especially Virgil),¹⁷ and contemporary historians (such as Paolo Giovio and Paolo Emilio). More tellingly still, he cites Alciatus, one of the foremost legal humanists, whom he calls a ‘great jurist,’¹⁸ 231 times in DIB, second only to the main Bartolist authority, Baldus, whom he cites 315 times, and the *Corpus iuris* itself, which he cites 465 times.¹⁹ Furthermore, while Gentili does regularly cite the Bible (with an overwhelming preference for the Old Testament), it is, with 193 citations, an important source but by no means as central as in the work of his more traditional predecessors. Similarly, he only cites Church Fathers (Tertullian, St Ambrose, St Jerome, St Bernard) between twenty and

¹⁵ Alberico Gentili, *lectionum & epistolarum quae ad ius civile pertinent* (Londini: Iohannes Wolfius, 1583).

¹⁶ A helpful summary of the different ways in which the influence of humanism can be felt in Gentili’s work can be found in Lesaffer, “Alberico Gentili’s Ius Post Bellum and Early Modern Peace Treaties,” 218. This shift towards combining traditional and modern layers of legal expertise should be understood as part of the broader effort by lawyers to maintain their position at the heart of the political decision-making process; see Alain Wijffels, “Antiqui et Recentiores: Alberico Gentili – Beyond Mos Italicus and Legal Humanism,” in *Reassessing Legal Humanism and Its Claims*, ed. Paul J. du Plessis and John W. Cairns (Edinburgh: Edinburgh University Press, 2016), 11–40.

¹⁷ For a detailed discussion of Gentili’s reliance on poetry, see Christopher Warren, “Gentili, the Poets, and the Laws of War,” in *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, ed. Benedict Kingsbury and Benjamin Straumann (Oxford: Oxford University Press, 2010), 146–62.

¹⁸ Ibid., 149. Gentili also calls him ‘the wise Alciati’ (Gentili, *De iure belli*, Book I, §17.).

¹⁹ There is also clear evidence that over his time at Oxford he became friends with Hugo Donellus and François Hotman (both dedicated supporters of Cujas), the latter whom he cites twenty-five times. In fact, Gentili cites Cujas himself thirty times in DIB. On the presence of evidence in the Bodleian manuscripts of Gentili’s friendship with Donellus and Hotman, see Simmonds, “The Gentili Manuscripts,” 548.

thirty times each, a rather low ratio compared to the wealth of other sources that are cited more frequently. Thus, while Gentili ultimately never fully adopted the skepticism of the *mos gallicus* towards the *Corpus iuris civilis* and its medieval interpreters, the influence of legal humanism can strongly be felt in DIB and clearly had a strong impact on the way Gentili developed his positions. As such, the Gentili of the late 1580s and the 1590s is best understood as a 'moderate humanist' in the legal sense, with one foot still squarely within the Bartolist tradition and the other increasingly anchored within the *mos gallicus* and the challenges raised by legal humanism.

Secondly, while a number of scholars have questioned the idea of a definite cleavage between Gentili and the School of Salamanca (particularly Vitoria),²⁰ it is also far from clear that Gentili's main interlocutors in DIB are in fact the theologians. The now conventional emphasis on the humanist/scholastic distinction presupposes that if, as Richard Tuck and Diego Panizza argue, Gentili was indeed a humanist, his main opponents and interlocutors were the theologians of the Second Scholastic, and particularly those of the School of Salamanca.²¹ However, the diversity within forms of

²⁰ In the words of Blane and Kingsbury, '[a]ll three were Christian believers who were engaged in theological debates; Vitoria was a professional theologian influenced by jurists; Gentili and Grotius were theologically-informed jurists.' Alexis Blane and Benedict Kingsbury, "Punishment and the *Ius Post Bellum*," in *The Roman Foundations of the Law of Nations*, ed. Benedict Kingsbury and Benjamin Straumann (Oxford: Oxford University Press, 2010), 246–7. For an insightful account of the similarities between Gentili and the Salamancans on the subject of the treatment of the Ottomans, see Noel Malcolm, "Alberico Gentili and the Ottomans," in *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, ed. Benedict Kingsbury and Benjamin Straumann (Oxford: Oxford University Press, 2010), 127–45. More broadly, Lesaffer and Pagden question Tuck's classic divide between humanists (which in Tuck's account, supported by Diego Panizza, include Gentili) and scholastics, with Pagden arguing that 'the more one examines the humanist/scholastic or humanist/theologian distinction, the more fuzzy it becomes. Anthony Pagden, "Gentili, Vitoria, and the Fabrication of a 'Natural Law of Nations,'" in *The Roman Foundations of the Law of Nations*, ed. Benedict Kingsbury and Benjamin Straumann (Oxford: Oxford University Press, 2010), 345; Lesaffer, "The Classical Law of Nations (1500–1800)," 424–430.

²¹ Tuck, *The Rights of War and Peace*; Diego Panizza, "Alberico Gentili's *De Iure Belli*: The Humanist Foundations of a Project of International Order," in *Atti del convegno bel quarto centenario della morte 2008* (Milano: A. Giuffrè, 2010), 557–86; Diego Panizza, "Political Theory and Jurisprudence in Gentili's *De Iure Belli*: The Great Debate between 'Theological' and 'Humanist' Perspectives from Vitoria to Grotius," in *The Roots of International Law/Les fondements du droit international: Liber amicorum Peter Haggenmacher*, ed. Pierre-Marie Dupuy, Vincent Chetail, and Peter Haggenmacher (Leiden: Martinus Nijhoff, 2013), 211–47.

humanism suggests that different debates may have been at stake, and that Gentili's 'humanist' affinities did not necessarily make engaging the Salamancans his primary interest. In terms of citations, Gentili only cites Covarruvius²² (or Covarrubias, 1539-1613) twenty-two times, Vitoria seven times, and Soto (1494-1560) four times (there is no mention of Molina, 1535-1600). By contrast, he cites political writers—who had little interest in arguing with the theologians—such as the Italian historian and statesman Francesco Guicciardini (1483-1540) and the French jurist and political philosopher Jean Bodin sixty-three and thirty-nine times respectively. In fact, the influence of Bodin on Gentili and the considerable weight Gentili gave to Bodin and his arguments in DIB are well-documented,²³ and I will return to this important point later on in the chapter. For now, this mainly hints towards the fact that Gentili's main motivation in writing DIB may not have been to undermine the arguments of the theologians—who were nonetheless his political rivals—as much as to address the ideas of the French *politiques* and the Italian *ragion di stato* writers, who both emphasized the utmost importance of the well-being of the state and were stirring up considerable debates at the time.

As this discussion suggests, the methodological debates that surrounded Gentili make his use of citations deeply revealing. Summing up and expanding on this analysis, the chart below gives an overview of the main sources cited by Gentili in DIB, dividing them into broad categories based on their nature. It is worth noting that unlike Grotius, Gentili does not appear to follow a systematic pattern in citing different sources. For instance, while Grotius tends to cite religious authorities on each point, before moving on

²² Covarrubias was a canon lawyer rather than a theologian, but he was deeply influenced by the School of Salamanca.

²³ Diego Quaglioni, "The Italian 'Readers' of Bodin, 17th-18th Centuries: The Italian 'Readers' out of Italy--Alberico Gentili (1552-1608)," in *The Reception of Bodin*, ed. Howell A. Lloyd (Leiden: Brill, 2013), 371–86; Diego Quaglioni, "Pour une histoire du droit de guerre au début de l'âge moderne. Bodin, Gentili, Grotius," trans. Jean-Louis Fournel, *Laboratoire italien. Politique et société*, no. 10 (2010): 9–20; Schröder, "Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations"; Wijffels, "From Perugia to Oxford."

to non-religious ones—surely an effective way to satisfy different audiences—Gentili's citations simply seem to follow the trajectory of his argument, with what he considers the most relevant authors cited in support of particular points, regardless of their affiliation. Ultimately, although this quantitative collection of data presents certain limits in terms of establishing how Gentili actually engaged with the different sources he invokes, Figure 1 provides an overview of Gentili's universe of citations and constitutes a first set of insights for assessing the impact of various types of sources on Gentili's thought in DIB. I provide a more in depth analysis of his use of certain key sources, particularly Bodin and Guicciardini, later on in the chapter.²⁴

What becomes clear from these charts is that in addition to the sources one would expect to find in the writings of a civil lawyer of this period, educated within the Bartolist tradition and influenced by both rhetorical and legal humanists—namely, the *Corpus iuris* and various commentaries on it from both legal traditions (Baldus, Alciatus...), scriptural sources (Bible, Church Fathers, canon law, theologians), classical philosophers and rhetoricians (Cicero, Plutarch, Aristotle...)—one key aspect of Gentili's universe of citations stand out as particularly unusual. I am speaking here of his considerable reliance on historians from all ages, and most notably—an uncommon feat at the time amongst jurists—on contemporary historians. Indeed, Gentili relies significantly on classical historians (Livy, Plutarch's biographies, Tacitus, Cassius...) and on other antique historians, especially Jewish and Byzantine ones (Josephus, Procopius, Zonaras), but also on a range of modern historians, particularly historians of Italy, most importantly Paolo Giovio, Francesco Guicciardini, and Paolo Emilio. Additionally, Bodin, who had died just two years before the publication of *De iure belli*, is one of Gentili's contemporaries who

²⁴ This type of two-tier quantitative/qualitative approach is not entirely uncommon, see for example Haggemacher, "Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture," 146–147.

gets the most citations, and as I will explain at greater length in part II, he is in fact discussed extensively throughout the text and has been established as a major influence on DIB through an analysis of Gentili's manuscripts. Moreover, in light of the present discussion on the use of different types of sources, it is worth mentioning that there is indeed a close connection between Gentili's methodological turn to history and his heavy reliance on his French contemporary, a point to which I will return later.

Figure 1: Gentili's main sources, by type



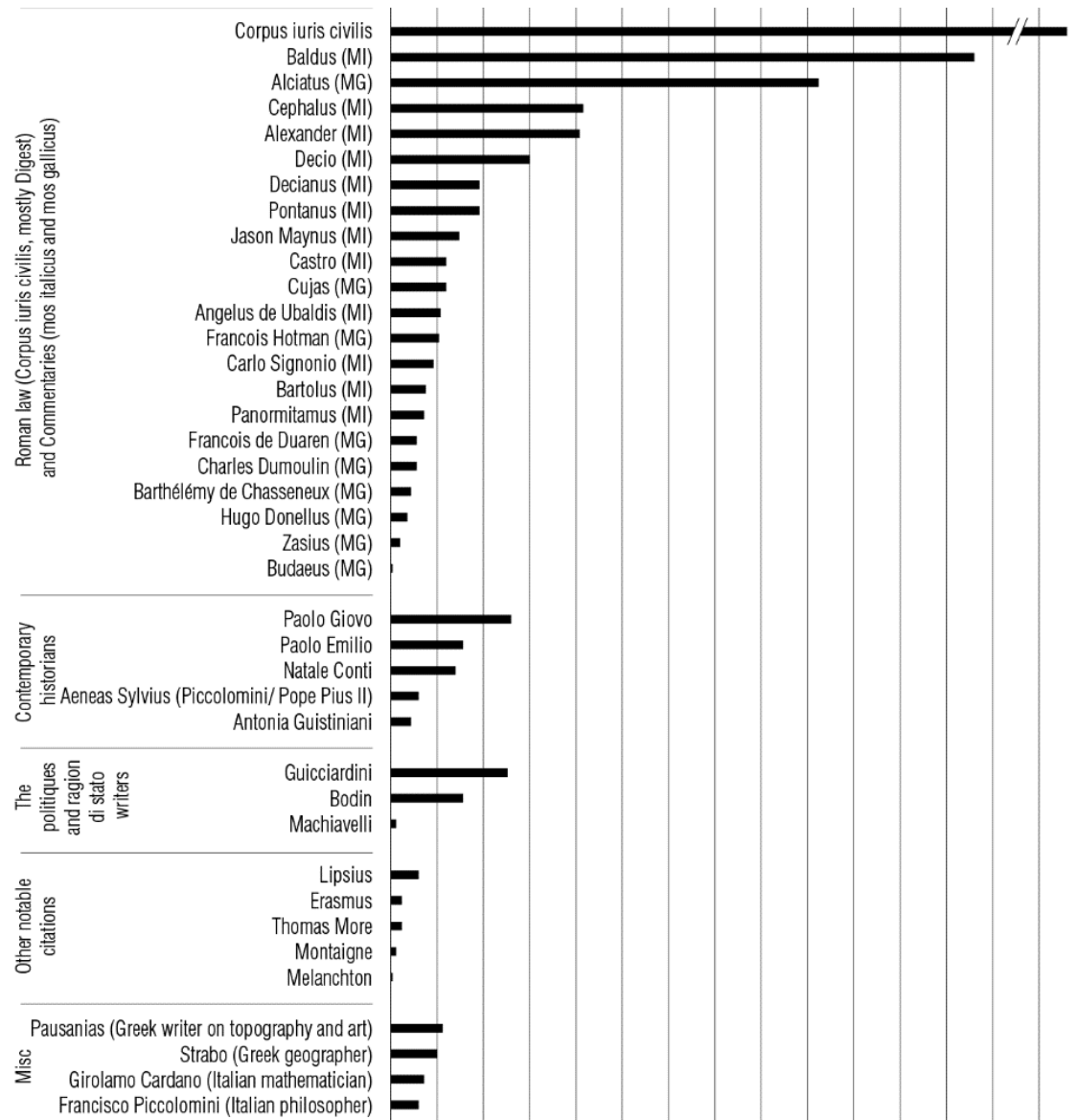


Table 1: Gentili's main sources, by overall citation ranking

Rank	Source	Number of citations
1	Corpus iuris civilis	465
2	Baldus (MI)	315
3	Alciatus (MG)	231
4	Cicero	200
5	Bible	193
6	Livy	154
7	Plutarch	117
8	Cephalus (MI)	104

9	Alexander (MI)	102
10	Augustine	75
11	Decio (MI)	75
12	Corpus iuris canonici	68
13	Aristotle	66
14	Plutarch (biographies)	66
15	Paolo Giovo	65
16	Guicciardini	63
17	Seneca	60
18	Tacitus	54
19	Cassius	48
20	Decianus (MI)	48
21	Pontanus (MI)	48
22	Plato	40
23	Josephus (Jewish)	39
24	Paolo Emilio	39
25	Bodin	39
26	Philo Judaeus	37
27	Virgil (Roman)	37
28	Procopius (Byzantine)	37
29	Zonaras (Byzantine)	37
30	Jason Maynus (MI)	37

Thirdly, although DIB was published in full in 1598, the fact that Gentili wrote most of its content at the end of his scholarly period suggests that the positions he defends within DIB stem from a genuine attempt at developing a system of law rather than the sort of interest-based positions found in works such as *Hispanicae advocationis*, the collection of opinions he wrote while controversially defending the Spanish Crown in the final part of his career. His other main work on war, *De armis romanis* (DAR), although the second part was only published in 1599 (after his scholarly period), was also written around the same time, with the first part published in 1590 and the full draft ready by 1593. While the interpretation of this second work, and particularly its relationship to DIB, is notoriously arduous, it is clear that Gentili spent a significant amount of his scholarly period reflecting on the laws of war from an academic standpoint, prior to

dedicating himself to practice and writing on some of these matters (particularly piracy and privateering) as an advocate in admiralty courts. One should thus appreciate the qualitative difference between what Gentili was attempting to do in writing DIB (and DAR) and in later on defending what have been pointed out as contradictory positions within the context of his career as a lawyer. Importantly, this does not, however, mean that one should discount all of Gentili's later writings as unreliable or written for exclusively instrumental purposes. Gentili did still write some pieces as a scholar rather than as a practitioner (such as his *Regales disputationes tres* of 1605), and his work as a lawyer still offers important insights into his thinking. The main point is that while his arguments as an advocate on, most notably, piracy and privateering, sometimes contradict each other (depending on who his client is) and are sometimes at odds with his earlier claims in DIB, these inconsistencies are not necessarily surprising and should be understood in the context of his dual professional identity.

Finally, one of the most important characteristics of Gentili to keep in mind in analyzing DIB is that he is a Roman law expert, or what the English called a 'Civilian.' This feature followed from his training in Italy, and was further accentuated when he took up the position of Regius Professor of Civil Law at the University of Oxford in 1587. International²⁵ lawyers were logically Roman law experts, as Roman law provided numerous rules for dealing with international or proto-international issues within the Roman empire, whereas common law was based on the assumption that it applied solely within a domestic context, there being no higher authorities than the domestic ones. Yet, being a civilian in a common law country was a rather peculiar situation, and in fact the Regius Chair had only been founded in the 1540s, along with a similar one at Cambridge.

²⁵ Throughout the chapter, I use the term 'international' as a heuristic device to speak of the realm pertaining to relations between independent sovereign polities. At the time, these relations were obviously 'inter-sovereign' rather than 'international' in the modern sense.

In a common law system, Roman law experts were only relevant within two specific types of courts that applied Roman-based civil law, namely ecclesiastical courts and admiralty courts. The latter in particular were a very important space for international jurists like Gentili, as they dealt directly with international issues, particularly with issues of prize and booty at the heart of which stood perennial questions about how to distinguish pirates from privateers. For all other matters, the common law ruled, and there was a deep cleavage between common lawyers and their civilian rivals, who were indeed deeply unpopular. In fact, sometime in the late fifteenth or early sixteenth century, civil lawyers had come to form a separate society of their own, called the Doctors' Commons or College of Civilians, where its members could live, work, consult the library, and follow proceedings of the civil law courts. Gentili thus held a peculiar position as Oxford's Regius Professor of Civil Law, and his work could easily have generated suspicion from his contemporaries working within the common law tradition, as we will see later on with regard to his support of James I. Importantly, it may also go some way into explaining why Gentili's work lost much of its clout after his death only to be properly revived two and a half centuries later.

In fine, Gentili's near-veneration of Roman law was uncommon even for a Civilian. His great admiration for Rome led him not only to give pride of place to Roman law in DIB, but in fact to equate Roman law with the *ius gentium*, and to construct the latter as the content of natural law itself.²⁶ For Gentili, Roman law constituted the content of both the *ius gentium* (at the time, roughly interpreted as what we would call the 'positivist' law of nations, though in the twentieth century it has been equated with the specific law of individuals, e.g. human rights) and the *ius naturale* (natural law), making the *ius gentium* not only universal but also immutable. Roman law, in the eyes of Gentili,

²⁶ Pagden, "Gentili, Vitoria, and the Fabrication of a 'Natural Law of Nations.'"

constituted the finest and final achievement of mankind, and provided an eternal legal framework for all. This position was notably different from that of the Romans themselves (and from that of his later rival, Grotius).²⁷ Indeed, the Romans considered the *ius gentium* to be the law regulating the relationships between Romans and non-Romans; they did not construe it as a universal law in the same way as the early modern jurists, and especially not as Gentili did. In addition to being a Roman law expert, Gentili was thus quite unusual in his conception of Roman law, and it is essential to keep in mind the centrality Gentili gave it in his system of law in order to understand the particularity of DIB. Most importantly, Roman law generally presupposes an emperor, a supreme authority whose doings nobody can judge.²⁸ This underpinned what is perhaps Gentili's most crucial characteristic, to which I next turn: his absolutism.

II. Conceptualizing sovereignty: The influence of Bodin

Gentili expressed his strikingly strong absolutism most famously in 1605, in the first disputation of his *Regales disputationes tres*, entitled *De potestate regis absoluta* and dedicated to the new Stuart King, James I. In fact, Gentili's three disputations of 1605 have sometimes been called 'the most absolutistic piece of writing that appeared in England in the early seventeenth century,'²⁹ and Gentili himself 'the theoretical founder of absolutism in England.'³⁰ Gentili's absolutism made him stand out as a jurist

²⁷ Though it would later be taken up by Giambattista Vico with his concept of the 'natural law of nations.'

²⁸ Although it is worth noting that the Roman tradition also had a Republican phase, and that medieval glossators and commentators had managed to interpret Roman law as to justify a complex web of overlapping sovereignties that was far removed from any sort of absolutist system.

²⁹ Brian Levack, "Law and Ideology: The Civil Law and Theories of Absolutism in Elizabethan and Jacobean England," in *The Historical Renaissance: New Essays on Tudor and Stuart Literature and Culture*, ed. Heather Dubrow and Richard Strier (London: University of Chicago Press, 1988), 229. Though for a more ambiguous interpretation, see Andrew Sharp, "Alberico Gentili's Obscure Resurrection as a Royalist in 1644," in *Alberico Gentili: L'ordine internazionale in un mondo a più civiltà: Atti del convegno decima giornata gentiliana* (Milano: A. Giuffrè, 2002).

³⁰ Brian P. Levack, *The Civil Lawyers in England, 1603-1641: A Political Study* (Oxford: Clarendon Press, 1973), 98. In making this argument, Levack is following Gesina Van der Molen, *Alberico Gentili and the*

(particularly in England) and is, I will argue, a fundamental element to understand the specificity of his theory of the laws of war. Gentili's absolutism stemmed from a combination of his admiration of Roman law with the profound influence that Bodin's theory of sovereignty had on him. Yet, Bodin's theory raised as many problems for Gentili as it provided solutions, and Gentili had to search elsewhere to address these issues. In this section, I give an overview of the importance of Bodin's ideas for Gentili before turning, in part III, to the writers he drew from in constructing a system of laws geared towards the interaction of independent sovereign polities.

While the French Bodin³¹ was not an absolutist from the start, as apparent in his *Methodus* of 1566 (which Gentili does not cite in DIB), by the time he wrote the *Six livres de la République* in 1576 ('*République*'), he had—almost unintentionally—come to adopt the absolutist position he would remain famous for.³² That being said, it is well-established that what Gentili took away from Bodin's work was an uncompromising embrace of the staunchest absolutism. His position—and the influence of Bodin on this

Development of International Law, 227–230. However, almost no one, apart from John Cowell (1554–1611)—Gentili's counterpart as the Regius Professor of Civil Law at Cambridge—'picked up on Gentili's work until it was used to reveal the real kernel of royalist belief in an anonymous parliamentary tract of 1644.' Glenn Burgess, *Absolute Monarchy and the Stuart Constitution* (London: Yale University Press, 1996), 78. For a detailed analysis of the tract, entitled '*Englands Monarchy, or A Conviction and Refutation by the Common law of those False Principles and Insinuating Flatteries of Albericus*,' see Sharp, "Alberico Gentili's Obscure Resurrection as a Royalist in 1644."

³¹ Jean Bodin was a French jurist who wrote in the context of a tentatively constitutionalist France, operating based on a notion of limited supremacy. Two of his major works (the third being the later *De la démonomanie des sorciers*, which addresses a different set of questions), the *Methodus* of 1566 and the *République* of 1576, are conventionally seen as marking a remarkable shift in his thinking, with the *République* shedding the constitutionalist orientation of the *Methodus* and systematically developing a theory of royal absolutism. This shift is commonly associated with the St Bartholomew Day Massacre of 1572, which dramatically polarized French opinion and led Bodin, frightened by the rise of a revolutionary movement based on theories of legitimate resistance, to develop his unprecedented positions.

³² Julian H. Franklin, *Jean Bodin and the Rise of Absolutist Theory* (Cambridge: Cambridge University Press, 1973), 102. Although there is now an ongoing debate about the extent to which Bodin actually had an absolutist conception of sovereignty at all, even in the *République*. For a brief overview of the literature, see Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford: Oxford University Press, 2016), 161, note 12. Lee himself is quite radical in his approach and considers that Franklin erred in his interpretation, confusing popular sovereignty with popular resistance, and he seeks to 'dismantle the interpretive orthodoxy that Bodin was fundamentally hostile to popular sovereignty.' On the contrary, Lee claims, 'Bodin deserves to be properly recognized as perhaps the most important systematic early modern theorist of popular sovereignty' and a profound influence on Locke, Rousseau, and Sieyès (Ibid., 163.)

point—is at its clearest in his aforementioned 1605 tract on the *Absolute Power of the King* (*De postesta regis absoluta*), in which Gentili defends the absolutist theory that the Stuart King James I—who was likely to have been influenced by Bodin himself³³—had put forward in 1598, shortly before his accession to the throne (1603), in *The Trew Law of Free Monarchies*.³⁴ In order to support his position, Gentili cites Bodin even more frequently than Baldus (or Bartolus) as the most relevant authority on the matter of sovereignty,³⁵ and combines Bodin’s new theory with the Roman law principles of *Princeps legibus solutus est* (‘the sovereign is not bound by the laws’) and *Quod Principi placuit, legis habet vigorem* (‘what pleases the prince has the strength of law’).³⁶ Gentili makes his reliance on Roman law explicit: ‘The civil law says that the *princeps* is unbound by the laws and that law is whatever pleases the *princeps*. This law is not foreign, but Roman: It is indeed the most excellent [*praestantissima*] among the laws of men.’³⁷ Importantly, Gentili argued that these Roman law principles were directly applicable to the situation in England,³⁸ and specifically, in an influential move within the English context, ‘that ‘absolute’ authority was not an exclusively Roman notion, restricted only to those nations recognizing the civil law, but a universal one to be found in all independent states, including even in England.’

As I have noted earlier based on Figure 1 and Table 1, the influence of Bodin is also very deeply felt in DIB. While it is true that Bodin is not necessarily at the very top

³³ Quaglioni, “The Italian ‘Readers’ of Bodin,” 373.

³⁴ Koskenniemi, “International Law and Raison D’état,” 303. On Gentili’s defence of absolutist principles, see also Alain Wijffels, “Assolutismo politico e diritto di resistenza: La disputatio gentiliana ‘De vi civium in regem semper iniusta’” (Alberico Gentili, L’uso della forza nel diritto internazionale. Atti del convegno undicesima giornata gentiliana, San Ginesio, 2004).

³⁵ Schröder, “Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations,” 170.

³⁶ Koskenniemi, “International Law and Raison D’état,” 303.

³⁷ Alberico Gentili, *Regales disputationes tres: id est, de potestate regis absoluta. De vnione regnorum Britanniae. De vi ciuium in regem semper iniusta*. (Hanau: W. Antonius, 1605), 9. Translation from Lee, *Popular Sovereignty in Early Modern Constitutional Thought*, 278.

³⁸ Benjamin Straumann, “The Corpus Iuris as a Source of Law Between Sovereigns in Alberico Gentili’s Thought,” in *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, ed. Benedict Kingsbury and Benjamin Straumann (Oxford: Oxford University Press, 2010), 101–25.

of the citation chart, he stands out for being extensively discussed in the text itself whenever he is mentioned. As Diego Quaglioni, drawing heavily on the earlier work of Alain Wijffels,³⁹ explains: ‘the references to the *République* form the framework of Gentili’s *De iure belli*, from the first to the last page of the long treatise’ and ‘Gentili draws on Bodin’s masterpiece not only for his absolutistic scheme of supreme power, but also for many arguments and formulae already proposed by the French jurist.’⁴⁰ Bodin’s doctrine, Quaglioni continues, ‘seems to be the first and major source of Gentili’s *De iure belli*.’⁴¹ This may be somewhat of an overstatement; indeed, in addition to the fact that there are numerous authors cited many more times than Bodin in DIB, Peter Schröder reminds us that given the abundance of sources cited by Gentili, and his reliance—shared by his contemporaries, particularly the humanists—on a complex ‘web of authors,’ it is somewhat risky to single out one author as the leading authority in the context of DIB, including Bodin himself on the discussion of sovereignty.⁴² That being said, and while Gentili does not always agree with Bodin when he cites him, the extent to which sections of DIB read as direct discussions of Bodin’s arguments is indeed striking.

Quaglioni provides numerous examples of Gentili’s discussion of Bodin in the text of *De iure belli*, along with a helpful analysis of what argument Gentili is making in each case, whether he is in agreement with Bodin or demarcating himself from him. I will not repeat this discussion here, but to give an idea of the breadth of topics on which Gentili cites Bodin—either approvingly or disapprovingly as a springboard for his own argument—these include the relationship with exiles, war in the defense of religion, the theory of self-preservation, preventive self-defense, defensive treaties, sureties given to

³⁹ Wijffels, “From Perugia to Oxford.”

⁴⁰ Quaglioni, “The Italian ‘Readers’ of Bodin,” 376. See also Quaglioni, “Pour une histoire du droit de guerre au début de l’âge moderne. Bodin, Gentili, Grotius,” 38. ‘Le Bodin de la *République* est le point de départ et la principale référence de la doctrine gentilienne.’

⁴¹ Quaglioni, “The Italian ‘Readers’ of Bodin,” 378.

⁴² Schröder, “Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations,” 170.

enemies, hostages, expenses, damages from war, and slavery.⁴³ In other words, throughout DIB, Gentili is extensively engaging with Bodin (*République*, overwhelmingly). He is not merely citing him in passing as a source of support or acknowledging him equally fleetingly as the exponent of a conflicting view, but actively dissecting Bodin's arguments and building up his own vis-à-vis those of the famous French jurist.

In addition, Bodin is cited at key moments in DIB—including within the first two pages of Gentili's treatise—which does support the idea that Gentili was drawing on Bodin in framing his arguments. And indeed, Alain Wijffels notes that the Gentili manuscripts, held in the Bodleian's D'Orville collection, make clear that Gentili read *République* cover to cover while he was carrying out the preparatory work for DIB.⁴⁴ Gentili's twenty pages of annotations on *République* closely follow the order of the six books, and the most often encountered annotation in the margins—the capital letter 'B'—is believed to stand for '*bellum*' and thus to indicate the passages used in DIB.⁴⁵ Thus, it is clear at the very least that Gentili had read the *République* very attentively, and that he profoundly admired Bodin's work, even if on certain points, such as the question of slavery, he occasionally did find Bodin 'exceedingly silly.'⁴⁶ All in all, what comes across from Gentili's engagement with Bodin in DIB is, on the one hand, a constant back and forth between agreeing and disagreeing with Bodin on various specific issues, and, on the other hand, a broad acceptance of Bodin's wider principles, both in substance and in method.

⁴³ An in depth discussion of some of these examples can be found in Quaglioni, "The Italian 'Readers' of Bodin," 376–382.

⁴⁴ Wijffels, "From Perugia to Oxford," 68–9.

⁴⁵ Ibid., 69.

⁴⁶ Gentili, *De iure belli*, Book I, Chapter 9, §541.

There are two core elements of Bodin's *République* that appear to have had a particularly important impact on the way Gentili framed his theory of the laws of war. First, Gentili draws heavily on Bodin in his method, praising his critique of modern commentators who seek to derive military law from Roman law alone. More specifically, Gentili 'appreciated Bodin's attempt to put in order and, so to speak, systematize the late-medieval tradition of *ius gentium* into a new comparative legal-historical doctrine.'⁴⁷ Like Bodin, Gentili was quite sympathetic to the criticisms of conventional approaches to Roman law waged by the French legal humanists, and he drew extensively from Bodin's methodology in developing his legal framework in DIB. While unlike Bodin, Gentili saw Roman law as timeless and thus directly applicable to all the problems of his day,⁴⁸ he stepped away from the Bartolists' traditional uncritical and unconditional reliance on medieval authorities to analyze the *Corpus iuris* and drew instead on an extensive web of sources, notably giving pride of place to historians—both modern and classical—in his analysis. Bodin himself had broken off from the conventional *mos gallicus* and drawn extensively from both the legal humanists and the Bartolists in his attempt to elaborate a new legal system, an eclectic approach that must have appealed to Gentili. Gentili's discussion of Bodin on this point—which, as we shall see, also includes a critical dimension—appears at the very start of *De iure belli*, in the fourth paragraph of the first chapter, and clearly serves an important framing function for the work as a whole.

Second, Gentili quite clearly appears to be striving for a way to reconcile Bodin's absolutist conception of sovereignty with traditional understandings of the just war. As Quaglioni puts it, Gentili 'did not ignore the ambiguity of Bodin's concept of just war, the difficulty of finding in it a clear definition, and especially the problem of adapting it

⁴⁷ Quaglioni, "The Italian 'Readers' of Bodin," 383.

⁴⁸ This is particularly striking when Gentili defends the application of Roman law to constitutional issues of his day, as discussed in Straumann, "The Corpus Iuris as a Source of Law Between Sovereigns in Alberico Gentili's Thought," 106–8.

to Bodin's concept of supreme power (*summa potestas*).⁴⁹ It is true that Bodin had in fact written 'a complex elaboration on the concept of just war and more generally of an international law doctrine for it'⁵⁰ in *République*, Book VI, chapters 5 and 6. However, it is not clear whether or not Gentili was actually aware of it, as he only cites the Latin text in DIB and therefore may never have read the French edition which Bodin expanded between 1576 and 1583.⁵¹ In any case, it is obvious from Book I, Chapter 3, entitled 'War is Waged by Sovereigns' that Gentili's considerations on war were driven by the question of how to reconcile supreme authority with ideas about the just war, and one detects in his work a palpable sense of urgency fostered by the intractable wars that were decimating Europe at the time.

Although he does not explicitly cite Bodin in the chapter, the fact that he is indebted to the Frenchman for his conceptualization of sovereignty is hard to miss, and it is unsurprising to note how heavily—and this time, explicitly—Gentili came to rely on Bodin's ideas in his seminal defense of absolutism, *De potestate regis absoluta* a few years later. Bodin defined sovereignty according to the four following principles: it had to be supreme (no superior except for God), absolute (the sovereign cannot be tried, unless he explicitly consents to it), indivisible (it is metaphorically held in only one set of hands, such as the King or Parliament—but not both), and perpetual (it cannot be changing hands).⁵² The sovereign had a specific set of prerogatives held by him alone, most importantly the right to make laws, the 'one attribute above all others,' which 'included the privilege of declaring war and concluding peace, as well as the right of selecting the

⁴⁹ Ibid. See also Diego Quaglioni, "Il 'Machiavellismo' Di Jean Bodin ('République', V, 5-6)," *Il Pensiero Politico* 22, no. 2 (1989): 198–207.

⁵⁰ Quaglioni, "The Italian 'Readers' of Bodin," 383.

⁵¹ Ibid.

⁵² This definition of *maiestas* or *summum imperium* can be found in Jean Bodin, *Les Six Livres de La République* (Paris: Fayard, 1986), Book V., vi. For a brief analysis, see Richard Bourke and Quentin Skinner, *Popular Sovereignty in Historical Perspective* (Cambridge: Cambridge University Press, 2016), 2.

highest magistrates in the state.⁵³ Echoing these ideas very closely, Gentili begins the chapter by stating that sovereigns are 'supreme,' that they 'acknowledge no judge or superior,' and that 'they alone merit the title of public, while all others are inferior and are rated as private individuals.'⁵⁴ 'The sovereign,' he continues, 'has no earthly judge, for one over whom another holds a superior position is not a sovereign.'⁵⁵ The central idea of the chapter, that only sovereigns can make war, also closely follows Bodin's ideas, particularly as private wars and mixed wars (public/private) were still a dominant feature of the age. Gentili repeats and expands on the latter theme in Book I, Chapter 10 ('On the Compacts of Leaders'), emphasizing that sovereigns 'alone can make agreements binding on the state,' that the sovereign 'alone can make war, therefore he alone can end it,' and 'just so it is said that only the sovereign can give a safe-conduct, since he alone can suspend sentence and give immunity from the consequences of a crime.'⁵⁶

There are, it is important to note, a few elements in the DIB that seem less aligned with Bodin's ideas. This raises two interrelated questions: first, how should these elements be understood within Gentili's broader framework? In other words, why might these passages be included in light of their apparent incompatibility with the rest of Gentili's approach? Second, may this suggest that five years before the publication of the incontestably absolutist and Bodinian *Regales disputationes tres*, Gentili was in fact, and despite relying on Bodin very extensively, not an absolutist yet? As I have mentioned, the debate over the extent of Gentili's absolutism has been tainted by political motives, with Gentili's opponents pointing to his absolutist leanings as a way to undermine his broader reputation, particularly during his revival in the late nineteenth century when the accounts of his 'greatness' as an international jurist were systematically elaborated. Since

⁵³ Bourke and Skinner, *Popular Sovereignty in Historical Perspective*, 3.

⁵⁴ Gentili, *De iure belli*, Book I, Chapter 3, §23.

⁵⁵ Ibid.

⁵⁶ Ibid., Book I, Chapter 10, §288.

it is now well-established that Gentili made his absolutism eminently clear in the *Regales disputationes tres*, I will address the main elements in DIB that may suggest he held a different position a few years earlier and argue that these should be understood primarily as exceptions made in light of the surrounding political context and of Gentili's personal obligations.

First, it is true that, as Van der Molen notes, on certain points, Gentili's absolutism is not as stark in DIB as it is in the *Regales disputationes tres*.⁵⁷ Yet, the caveats to sovereign authority that Gentili introduces are hardly incompatible with an absolutist position. For example, Gentili puts forward certain limitations to absolute sovereign power within very specific cases, notably in his discussion of the rather extreme situations where a sovereign would alienate his subjects (i.e. make them subjects of another sovereign) or abandon them altogether.⁵⁸ While this does suggest some limitation to sovereign power, Gentili makes it very clear that these limitations are minimal and mainly intended to avoid tyranny: 'Imagine that the emperor has the freest possible power; yet it is not for purposes of tyranny, but of administration.'⁵⁹ The distinction between an all-powerful king and a tyrant was actually quite common, including in Bodin's writing, and Bodin himself considered tyrannicide permissible (something which Van der Molen finds

⁵⁷ Van der Molen, *Alberico Gentili and the Development of International Law* 1968 (n. 27), 227-230.

⁵⁸ Gentili, *De iure belli*, Book I, Chapter 23, §185. 'It is true,' Gentili explains, 'that the people conferred all sovereignty and power, but they did so in order that they might be governed like men, not sold like cattle' (Book III, Chapter 15, §609). He cites Alciatus approvingly, concurring that '[t]he theologians are mistaken and the jurists flatter, when they maintain that everything is allowed to princes and that they have supreme and unrestricted power' (Ibid.).

⁵⁹ Ibid., Book III, Chapter 15, §610. Similarly, when Van der Molen cites passages from Book I, Chapter 23, 'Of the Overthrow of Kingdoms,' in which Gentili talks about the mutual dependence between princes and subjects and the obligation princes have to rule justly, this is again within a discussion about what subject can do if their sovereign abandons them altogether. Gentili focuses much of his discussion throughout the chapter on the context of Rome and the division of the empire: 'our jurists say, and reason clearly testifies, that subjects deprived of the aid of their prince, as the Roman were by the removal of the emperor to Constantinople, and harassed by the arms of foes, as the Romans then were by the Lombards, may take refuge with another sovereign and adopt him as their own' (Book I, Chapter 23, §185). Ultimately, the fact that Gentili gives some power to subjects within these extreme cases can hardly be seen to undermine his broader absolutist positions.

'strange').⁶⁰ And in fact, while Van der Molen highlights the existence of restrictions to the rights of the sovereign found in DIB 'in spite of no fewer than thirty-five references to Bodin's 'De Republica', it is worth noting that Bodin himself introduced a number of such restrictions in his masterpiece.⁶¹

Second, at the end of his crucial chapter, 'War is Waged by Sovereigns,' Gentili does raise some difficult questions and introduces some additional caveats in his conceptualization of sovereignty, this time with direct references to his geopolitical environment. Most notably, he makes some pragmatic concessions regarding the status of 'states such as Venice,' which he considers to 'have the same power as any supreme sovereign.'⁶² However, this is not entirely surprising, as Bodin's definition of sovereignty raised some extremely difficult questions for the established order in most countries, including France which had long had a mixed constitution, and most importantly for the Holy Roman Empire. Following the publication of the *République*, there was an almost panic-stricken debate amongst German jurists about how to reconcile Bodin's ideas with the realities of the feudal empire, which would last for over thirty years.⁶³ Gentili, who by definition had to engage with the existence of different forms of politics on the international stage in devising his system of laws, was left in a similarly uncomfortable position by Bodin's arguments, and to some extent he tried to make some space for a slightly looser definition of sovereignty in the context of the right to wage war.⁶⁴

Gentili can thus evidently be understood as already having been an absolutist in DIB, with his reliance on Bodin further deepening in the following years. However, in

⁶⁰ Van der Molen, *Alberico Gentili and the Development of International Law*, 227.

⁶¹ Franklin, *Jean Bodin and the Rise of Absolutist Theory*, 70–92.

⁶² Ibid.

⁶³ Julian H. Franklin, "Sovereignty and the Mixed Constitution: Bodin and His Critics," in *The Cambridge History of Political Thought, 1450–1700*, ed. James H. Burns and Mark Goldie (Cambridge: Cambridge University Press, 1991), 309–323.

⁶⁴ A final inconsistency can be found in his chapter entitled 'Defending the Subjects of Another Against Their Sovereigns,' which I will explore more at length in Chapter III.

light of Gentili's difficulty in adapting some of Bodin's ideas to the geopolitical configurations of his time, it is clear that there were some limits to how far Gentili could rely on the *République* to develop his arguments for DIB, particularly in the sense that DIB was specifically geared towards regulating relations *between* sovereign states. Bodin's 'great concern, like that of the whole group of '*politique*' jurists, was civil war and the good and unity of France.'⁶⁵ The *politiques* saw the preservation and broader well-being of the French state as their utmost priority, and the *République* is an attempt to restore order in the French kingdom and to re-establish the institutional bases of French rule at the height of the French civil and religious wars. As a result, these thinkers 'had little to say about any law applicable in France's external relations beyond what was said by Bodin about there being absolutely no real universal empire and that only a kind of *ius fetiale* [the Roman set of rules under which treaties were to be handled] regulated the relations between sovereigns,' a framework which merely provided a limited right of enforcement in cases of outrages against natural law.'⁶⁶ Yet, these external relations were precisely what Gentili was concerned with. In fact, Bodin's chapter in the *République* on the ancient *ius fetiale* (and on treaties and peace)⁶⁷ is 'one of the most extensively annotated chapters in Gentili's manuscript notes, and, correspondingly, one of the most frequently quoted chapter from Bodin's book in Gentili's *De iure belli*.'⁶⁸ In other words, Bodin's ideas were of great appeal to Gentili, who attempted to draw on as much of Bodin's work as he could in light of his own interests, but there were clearly some areas that were central to Gentili's endeavor which Bodin had not covered sufficiently.

Most importantly, Bodin's ideas on sovereignty had significant implications for inter-state relations, and raised one particularly delicate issue. His all-important concept

⁶⁵ Koskenniemi, "International Law and Raison D'état," 308.

⁶⁶ Ibid.

⁶⁷ Bodin, *Les Six Livres de La République*, Book V., vi.

⁶⁸ Wijffels, "From Perugia to Oxford," 70.

of the Commonwealth [*République*], the entity to which his concept of indivisible and absolute sovereignty was to apply, was the central element of his plan for restoring order. Within each Commonwealth, a single sovereign authority would have the power to arbitrate disputes and establish final rules, thus providing a way out of otherwise intractable confessional strife. At a time where constitutional arrangements had been the norm in France, with the King expected to respect the rules of consent and work with institutions such as the General Estates and the *Parlement* of Paris, Bodin's defense of indivisible and absolute sovereignty was a bold conceptual move, bolder than even he ever seemed to realize.⁶⁹ Bodin's concept of the Commonwealth stood as a powerful tool for re-establishing order and stability within France and other similar kingdoms. However, it raised a problem at a higher level. If each Commonwealth was characterized by indivisible sovereignty, and if each prince was thus the highest authority deciding upon all matters of the land, then how would one settle disagreements amongst Commonwealths? This was a critical question at a time when, following the Reformation and the collapse of the religiously united Latin West, the emerging sovereign state had all of the sudden achieved external sovereignty,⁷⁰ and as with the question of how to define sovereignty within the Holy Roman Empire, Bodin appears to have launched a seminal debate which he himself was not necessarily interested in. The issue of settling disagreements amongst Commonwealths is the main *problématique* underpinning DIB, and Gentili found little by means of an answer in Bodin's work.

Importantly, this question arose within a broader move towards the emancipation of the laws of war from the law at large and the gradual emergence of the *ius belli* as a

⁶⁹ Franklin, *Jean Bodin and the Rise of Absolutist Theory*.

⁷⁰ Lesaffer, "Alberico Gentili's *Ius Post Bellum* and Early Modern Peace Treaties," 216. More broadly, see Lesaffer, "The Classical Law of Nations (1500-1800)," 408–422.

new discipline.⁷¹ By the second half of the sixteenth century, ‘the genre of self-standing treatises [on the laws of war] imposed its own rules,’ which meant that authors could ‘isolate the relevant texts from the glossators, commentators, and humanist jurists on the laws of war and military discipline from the rest,’ leaving out ‘direct references to rules of private law from the Justinian and canon collections and the glosses thereon.’⁷² This is clear in the works of the two most famous sixteenth century jurists of war (prior to DIB)—Pierino Belli (1505-1575) and Balthazar Ayala (1548-1584), both Roman law specialists and military judges—who took important steps in that direction. Gentili, however, took ‘a second important step’⁷³ in also emancipating his treatise on the laws of war from non-legal considerations of the rules of military discipline. As such, DIB constituted the first treatise solely concerned with ‘the laws regulating warfare between independent bodies politic,’ marking a significant turning point in ‘the emergence of the *ius belli* as the hardcore of a future ‘*ius inter gentes*’,’⁷⁴ a law between independent, sovereign peoples.

In sum, while Bodin and the *politiques* were concerned with how best to ensure order in France, Gentili was actively trying to cope with the consequences of Bodin’s conceptual move for the international plane, and to develop a standalone set of rules for managing the conflicts that would inevitably arise between independent and absolutely sovereign polities.⁷⁵ Thus, while it is true that ‘what is evident from the outset of [DIB] is that [Gentili] departs—despite his admiration for Baldus and the *Corpus iuris civilis*—towards an innovative discussion of inter-state relations, which is clearly informed by the

⁷¹ Peter Haggemacher, “Il diritto della guerra et della pace di Alberico Gentili,” in *Atti del convegno quarta giornata gentiliana 21 Settembre 1991* (Milan: A. Giuffrè, 1995), 36–37.

⁷² Ibid.

⁷³ Lesaffer, “Alberico Gentili’s *Ius Post Bellum* and Early Modern Peace Treaties,” 216.

⁷⁴ Ibid.

⁷⁵ In fact, one of the main interpretations of the puzzling *De armis romanis* is that it is an attempt to justify the application of the *Corpus iuris* to inter-sovereign relations. Straumann, “The *Corpus Iuris* as a Source of Law Between Sovereigns in Alberico Gentili’s Thought,” 120–1. This interpretation is supported by Anthony Pagden, see Pagden, “Gentili, Vitoria, and the Fabrication of a ‘Natural Law of Nations,’” 340–341.

use of Bodin's *République*,⁷⁶ Bodin cannot have been Gentili's sole (or even main) source of inspiration for his considerations on inter-state relations. For this, he turned to reason of state writers who, by contrast with Bodin, had written extensively about the international.

III. Thinking the international: The influence of the *ragion di stato* tradition

The most famous treatise on *raison d'état*, Botero's *Della Ragion di Stato* was published just three years (1586) before Gentili's lectures on the laws of war, and Gentili was clearly influenced by this intellectual *courant*, particularly in DIB. Indeed, one of the most striking influences on Gentili in DIB is Guicciardini, whom he cites no less than sixty-three times, nearly twice as many times as Bodin (although the latter tends to be discussed more directly in the text). This extensive reliance on the Florentine author denotes Gentili's admiration, indirectly, for Machiavellian policies. The fact that Gentili relies much less on Machiavelli (1469-1527)—whom he does cite but only on three occasions, and referring neither to the *Prince* nor to the *Discorsi*—may well be a result of the stigma that was associated with Guicciardini's friend, and would be very much in line with the attitude adopted by later reason of state writers. As Burke explains, one of the primary problems for these writers was that while they strongly disliked Machiavelli—he was seen as the master of the devil's reason of state—they could not do without his ideas.⁷⁷ Guicciardini, who put forth a set of considerations similar to those of his Florentine friend, was a much more palatable authority to cite. Similarly, in DIB Gentili makes over fifty citations of the Roman historian Tacitus, whose revival was deeply intertwined with the

⁷⁶ Schröder, "Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations," 171.

⁷⁷ Peter Burke, "Tacitism, Scepticism, and Reason of State," in *The Cambridge History of Political Thought, 1450-1700*, ed. James H. Burns and Mark Goldie (Cambridge: Cambridge University Press, 1991), 483.

development of the *ragion di stato* literature, and who is sometimes said to have been a direct cover for references to Machiavelli.⁷⁸ Another possible explanation is that while Machiavelli was nearly obsessed with the Romans, Guicciardini drew much more on the contemporary world, particularly Florentine history, something which must have appealed greatly to Gentili, whom as we have seen relied on contemporary historians to an uncommon degree. In any case, beyond these mere numbers in terms of citation, it is quite obvious that Gentili thought about the *ragion di stato* writers—and particularly of Guicciardini—very highly. In fact, Gentili explicitly writes that Guicciardini is ‘not merely a great historian and a political philosopher, but a great jurist as well.’⁷⁹

It is true that Gentili only cites Guicciardini’s *Storia d’Italia* (History of Italy); there is no mention of his *Ricordi politici e civili*, his collection of maxims on political, social, and religious topics. However, it is clear that Gentili heavily draws on Guicciardini’s work for its matter-of-fact understanding of politics so central to the reason of state tradition, more so than as a source of purely illustrative historical anecdotes. For instance, he cites him to support the claim that sovereigns often cloak their dishonesty in religion,⁸⁰ to explain the rejection of Luther’s doctrines (they are ‘unfavourable to the power of princes’),⁸¹ to praise the policies of Lorenzo de Medici, ‘that wise man, friend of peace, and father of peace’ who ensured ‘that the balance of power should be maintained amongst the princes of Italy,’⁸² to suggest that princes will only come to the rescue of oppressed people if they are ‘led by a desire for personal gain,’⁸³ to point out—rather irreverently—that it is ‘characteristic of pontiffs not to keep their promises’ and

⁷⁸ Giuseppe Toffanin, *Machiavelli e il “tacitismo”: la “politica storica” al tempo della controriforma* (Padova: A. Draghi, 1921), 12.

⁷⁹ Gentili, *De iure belli*, Book II, Chapter 8, §167. Gentili reiterates this, calling him ‘the famous historian and eminent jurist,’ Ibid., Book III, Chapter II, §483.

⁸⁰ Gentili, *De iure belli*, Book I, Chapter 9, §63.

⁸¹ Ibid., Book I, Chapter 10, §43.

⁸² Ibid., Book I, Chapter 14, §105.

⁸³ Ibid., Book I, Chapter 15, §115.

that it is 'an established custom for the Church, regardless of contracts, promises, or receipt of favours, to renounce its obligations and even directly to oppose what the prelates had solemnly agreed upon,'⁸⁴ and the list goes on. On at least one occasion, a remark Gentili makes based on Guicciardini's historical writings virtually sounds like one of the latter's maxims: 'it is a grave error to consider what ought to be done, not what a man will do who has the power to act.'⁸⁵ In fact, when he elaborates this point and explains that 'every pledge is capable of being broken,' he cites Tacitus approvingly, claiming that 'the statement of Tacitus is always true, that enduring faith never exists between victors and vanquished.'⁸⁶ What is more, Gentili seems to disagree explicitly with Guicciardini on just one occasion, on the question of whether Kings should 'fight in single combat for the dominion to which both sides laid claim,'⁸⁷ a rather minor details in light of the extent to which Gentili draws on Guicciardini otherwise.

What, then, were the main insights of this reason of state tradition so extensively drawn on by Gentili? The remainder of this section lays out the core features of the reason of state literature, outlining the context in which it emerged, the basic tenets of the new strand of thought it ushered in, and the sources it turned to—particularly Tacitus, another key influence on Gentili's DIB. Most importantly, the reason of state writers developed a set of principles that could be applied not just domestically, but also—and explicitly—to relations between sovereigns. As I have briefly indicated earlier, there is no doubt that, for his part, Gentili was deeply concerned by the regulation of inter-sovereign relations and the specific problem of how to resolve conflicts between sovereigns, whom he saw as recognizing no superiors by definition.⁸⁸ During his eventual revival, he would in fact

⁸⁴ Ibid., Book III, Chapter 19, §403.

⁸⁵ Ibid., Book III, Chapter 13, §584.

⁸⁶ Ibid.

⁸⁷ Ibid., Book III, Chapter 15, §607.

⁸⁸ Ibid., Book I, Chapter 2, §18.

come to be celebrated notably for his remarkable advocacy of international arbitration, which he portrayed as an alternative to war, ‘the arbitrament of Mars.’⁸⁹ It is thus not entirely surprising that in light of the limitations of Bodin’s rather inward-looking text, Gentili turned to those writers who seemed most explicitly interested in addressing the issues raised by inter-sovereign relations.

At its core, the rise of reason of state thinking marked a transition from the Renaissance concept of politics as ‘the art of ruling a republic according to justice and reason’ (paraphrasing Latini’s famous definition of 1266) to a new understanding of politics as the means of preserving a state, or in other words, politics as the knowledge of the means of preserving domination over a people (paraphrasing Botero’s equally famous formulation of 1586).⁹⁰ The Renaissance concept of politics, sometimes also couched as the art of good government, had flourished in the age of Civic Humanism; its principles were rooted in traditions of political virtue, civil law and Aristotelianism,⁹¹ and the model it sought to follow was that of the Roman republic, as described by Cicero and Livy. Machiavelli and Guicciardini, although they were both symptomatic of a transitional epoch and in many ways remained anchored in the tradition of politics as the art of the republic, took some important steps in a different direction, which Guicciardini would, in the 1520s first term ‘reason of state.’ Their key contribution was to carve out a new space of morality, one that applied distinctly to the prince’s task of ‘maintaining the state’ (*mantenere lo stato*) and which could entail using certain means that would otherwise have been condemned as immoral.

Two elements are particularly important here. First, they argued that the prince should readily use force when in the interest of the state; second, they placed prudence—

⁸⁹ Ibid., Book I, Chapter 3, §32.

⁹⁰ Maurizio Viroli, *From Politics to Reason of State: The Acquisition and Transformation of the Language of Politics, 1250-1600* (Cambridge: Cambridge University Press, 1992), 2–3.

⁹¹ Ibid., 2.

rather than justice—as the heart of their system of princely virtues. In other words, although much of their approach was still grounded in the Florentine republican tradition, they put forward a revolutionary analysis of what should count as virtuous behavior for a prince, discarding the traditional approach based on personal virtue. They made, in modern terms, ‘a virtue of necessity,’ and they broke down the classical divide between violence and virtue, arguing—most famously in the case of Machiavelli—that because of the circumstances of reality, it was sometimes necessary to act in beastly ways, like the fox and the lion (turning Cicero’s classic quote on its head, that ‘[w]hile wrong may be done, then, in either of two ways, that is, by force or by fraud, both are bestial: fraud seems to belong to the cunning fox, force to the lion; both are wholly unworthy of man...’⁹²). Ultimately, these writers were advocates of pragmatic compromises and the use of sometimes ruthless methods to ensure the well-being of the state; as explained by Guicciardini, one simply could not govern a state according to conscience.’⁹³

In developing these ideas, Machiavelli, Guicciardini, and their contemporaries were responding to the challenges of their time. After years of flourishing republican government, Florence was torn between its republican antecedents and the rule of the Medici, changing governments four times between 1494 and 1530. In light of the atmosphere of considerable political instability—and not unlike the French *politiques* a few decades later—these writers became increasingly concerned with how to avoid, above all, the collapse of the state. In his quest for answers, Guicciardini, in particular, turned not to Livy and Cicero, who had written during the heydays of the Roman republic, but to Tacitus, whose *Annals*, most importantly, pertained to the unstable transitional period between the republic and the empire in the aftermath of Caesar’s assassination in

⁹² Marcus Tullius Cicero, *De officiis* (London: W. Heinemann, 1961), I, 41.

⁹³ Francesco Guicciardini, *Dialogue on the Government of Florence*, trans. Alison Brown (Cambridge: Cambridge University Press, 1994), 159.

44 BCE. Guicciardini's turn to this other classical historian was central to his ideology and eventually became widely popularized by Justus Lipsius, whose inauguration lecture at the university of Jena is 'one of the most dynamic applications of Tacitus to politics in the Renaissance.'⁹⁴ Although this particular lecture was not published until 1607, Lipsius (who is cited thirteen times in DIB) generally became the greatest Tacitus scholar and advocate of the crucial contemporary relevance of his work—seeing Livy's writings as 'sweet nothingness' in comparison⁹⁵—and inspired an entire generation of thinkers to investigate Tacitus' writings. Lipsius' new edition of Tacitus's works in 1574 became the first of a very long series of reeditions, a testimony to an explosion of interest in the thought of the Roman historian. The key turning point, however, was again with Bodin, who criticized Machiavelli, More, Patrizi, and others for not having drawn sufficiently on Tacitus, and who, in his case for monarchy as the most excellent form of government, argued that Tacitus was 'the most useful ancient historian for illustrating the principles upon which monarchies operate.'⁹⁶ His reevaluation of Tacitus as the go-to historian for political instruction on how to run a monarchical government was 'enlarged and refined by others' and this process was key to the eventual development of the reason of state tradition of the late sixteenth and seventeenth centuries.⁹⁷ Thus, although much can be written about the differences between these individuals and their respective works, the names of Tacitus, Machiavelli, and Guicciardini became intertwined and perceived as the ideological basis of the 'reason of state' movement.

The practices put forth by Machiavelli were hugely controversial, and he and Tacitus—now couched as a classical precursor to the Florentine writer—came to be seen

⁹⁴ Kenneth C. Schellhase, *Tacitus in Renaissance Political Thought* (London: University of Chicago Press, 1976), 118.

⁹⁵ Ibid.

⁹⁶ Ibid., 111.

⁹⁷ Ibid.

as advocates of a 'bad' reason of state, irreconcilable with Christian principles by the late sixteenth century. This was made especially clear from the late sixteenth century in the work of Botero and his contemporaries, and the distinction between 'good' and 'bad' reason of state became a classical trope of early seventeenth century thinking.⁹⁸ The challenge, ultimately, for writers such as Botero, was to reconcile the insights of Machiavelli—which were extremely perceptive and uncontestably valuable—with a more palatable normative framework. As Comparato explains, 'behind the façade of deference and virtue which [late sixteenth century] writers presented, contemporary politics continued to reflect Guicciardini's maxim that 'one cannot keep a state according to conscience'.⁹⁹ Crucially, in their attempt to respond to the unstable political atmosphere of their time, political thinkers continued to draw extensively on the analyses of historians such as Tacitus; not only did history provide princes with the 'experience' so central to the exercise of prudence,¹⁰⁰ but the work of historians, stripped of illusions, appeared far more useful than the preaching of moralists.¹⁰¹ One of their key concerns in searching these historical texts for advice was how to navigate what had become an explosive network of external relations between sovereigns. Lipsius had famously compared the Duke of Alba to Tiberius, the Roman emperor described as a notorious tyrant by Tacitus, and indeed, the conflict between Spain, England, and the Low Countries was squarely on the mind of both legal and political thinkers at the time.

⁹⁸ This distinction between good and bad reason of state gradually lost traction in the seventeenth century, most notably through the seminal work of Henri Duc de Rohan, *De l'intérêt des princes et des états de la chrétienté* (1638). See Christian Lazzeri's 1995 introduction to Henri de Rohan, *De l'intérêt des princes et des états de la chrétienté*, ed. Christian Lazzeri (Paris: Presses Universitaires de France, 1995).

⁹⁹ Vittor Ivo Comparato and Diego Quaglioni, "From Machiavellism to the End of the Seventeenth Century," in *European Political Thought, 1450-1700: Religion, Law and Philosophy*, ed. Howell A. Lloyd, Glenn Burgess, and Simon Hodson (London: Yale University Press, 2007), 78.

¹⁰⁰ *Ibid.*, 82.

¹⁰¹ *Ibid.*, 79.

Raison d'état writers thus had a keen interest in the question of how best to conduct external relations, a fact that did not escape Gentili in his own attempt to grapple with the issue of inter-sovereign relations. This shared interest was not surprising in light of the developments of the period: as the theoretical foundations of absolutism and reason of state in internal affairs became 'sufficiently comprehensive to provide ready-made justifications for the many measures... believed to be required by political necessity,'¹⁰² foreign policy became an even more pressing topic. This is not to say that full internal sovereignty was achieved before or faster than external sovereignty. If anything, the process went the other way around, with sovereigns suddenly achieving external sovereignty after the collapse of the unity of the Latin West, while internally, struggles for power continued well into the eighteenth and even the nineteenth century.¹⁰³ The point here is that in terms of legal rules, the basis for how the state would operate internally under an absolute sovereign was fairly clear, while by contrast, foreign policy 'was subject to no generally recognized principles, legal or moral,'¹⁰⁴ and thus required the development of some clear guidance for sovereigns.

In the broadest sense, raison d'état writers 'held it self-evident that the same principles and techniques that would ensure the strength of the prince's rule inside his realm would also be applicable in his external relations.'¹⁰⁵ Prudence, necessity, and the interests of the state were systematically at the heart of their recommendations. This meant that, for instance, they considered the use of frauds and ruses to be perfectly acceptable in the conduct of external relations, although they did try to establish some rules of decency in the use of such stratagems in an effort to demarcate themselves from

¹⁰² William F. Church, "The Decline of the French Jurists as Political Theorists, 1660-1789," *French Historical Studies* 5, no. 1 (1967): 37-38.

¹⁰³ Lesaffer, "The Classical Law of Nations (1500-1800)," 419.

¹⁰⁴ Church, "The Decline of the French Jurists as Political Theorists, 1660-1789," 37-38.

¹⁰⁵ Koskenniemi, "International Law and Raison D'état," 308.

the notoriously more permissive Machiavelli. It was possible, Justus Lipsius argued, for virtue to remain intact if prudence was mixed with trickery with a good end. Lipsius then developed this Procrustean doctrine in greater detail; he distinguished between light, medium, and great ruses and fraud, of which he only allowed the first two. Light ruses and frauds, generally to be blamed on the victim rather than the author, 'did not depart seriously from virtue and included deceit and dissimulation'; medium ruses and frauds, which included 'the corruption of another ruler's emissaries and agents, the sending of spies abroad, and the spreading of information' were 'mid-way between virtue and open vice'; and finally, great ruses and frauds, such as 'the willful breaking of treaties and other sworn agreements, and injustice contrary to the highest legal and moral principles,' were considered to break 'entirely with virtue and law, resulting in perfidy and injustice.'¹⁰⁶

Gentili could find plenty to draw on from reading these writers who, unlike Bodin, directly addressed the realm of the international. However, while the limits they posited involved a certain respect for legal agreements, notably treaties, as a whole, reason of state writers had little consideration for the role of the law of nations in regulating relations between states. Their language was not that of law, but that of political necessity, state interest, and, especially from the 1590s, balance of power.¹⁰⁷ In fact, the growing influence of their ideas in the seventeenth century—the development of what may be called 'baroque statecraft'—went hand in hand with the demise of lawyers as influential figures in the conduct of politics, and particularly the conduct of external relations.¹⁰⁸ For

¹⁰⁶ William F. Church, *Richelieu and Reason of State* (Princeton, NJ: Princeton University Press, 1972), 60–62.

¹⁰⁷ Richard Tuck, *Philosophy and Government, 1572-1651* (Cambridge: Cambridge University Press, 1993), 96.

¹⁰⁸ The French case is particularly illustrative here. While the writings of someone like Bodin could be of tremendous importance for matters of government in the late sixteenth century, jurists increasingly stepped away from matters of public law in the seventeenth century. On the decline of the importance of jurists with the rise of *raison d'état* thinking through Richelieu and Louis XIV in the French case, see Church, *Richelieu and Reason of State*; Church, "The Decline of the French Jurists as Political Theorists, 1660-1789." On the specific chasm between *raison d'état* and international law, see Church, *Richelieu and Reason of State*, 39.

a jurist like Gentili, this was bound to raise some issues. While he did deeply admire the reason of state tradition, one decisive factor made him stand out sharply from this group: unlike them, he saw law as a crucial ingredient for external relations.¹⁰⁹ In the final section, I will thus argue that DIB must be understood as a text that tries to adapt not only Bodinian absolutism but also—and crucially—the insights of the reason of state writers to a system of laws for regulating interactions between independent sovereigns.

IV. Between law and politics

In attempting to bridge the *ius gentium* and the reason of state tradition, Gentili was part of a long trend of trying to link political and legal thought together. In practice, lawyers had often been prominent figures in government, particularly in the critical context of Renaissance Italy.¹¹⁰ In other words, they were deeply involved in statecraft, and their professional work as lawyers often overlapped quite extensively with their careers as government officials. More broadly, prior to the development of the *raison d'état* literature, the rule of law culture had been essential in ‘the political governance of the late-medieval Italian polities where the law scholars and consultants of the *mos italicus* had thrived.’¹¹¹ The result of this close overlap between law and politics was a significant effort on the part of lawyers to engage with questions of politics, and they did so specifically by turning to history. Although this turn to history would become most apparent—and most systematic—in the works of Baudouin and Bodin¹¹² in the second

¹⁰⁹ Koskenniemi, “International Law and Raison D’état,” 308.

¹¹⁰ Lauro Martines, *Lawyers and Statecraft in Renaissance Florence* (Princeton, NJ: Princeton University Press, 1968).

¹¹¹ Wijffels, “From Perugia to Oxford,” 78. See also *Ibid.*, 63.

¹¹² See, generally, Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History*. On the specific role of François Baudouin in attempting to reconcile law and history, see also Donald R. Kelley, *Foundations of Modern Historical Scholarship: Language, Law, and History in the French Renaissance* (London: Columbia University Press, 1970), 116–148.

half of the sixteenth century, this inter-disciplinary engagement had a long pedigree, with Bartolus being one of the first legal thinkers to write not simply as a lawyer but also as a historian.

As mentioned earlier, Bodin's work marked a turning point in that Bodin tried to base his construction of a new system of law on universal history. Bodin's turn to history was very much in line with what Machiavelli had attempted earlier in the century (and indeed, Bodin praises Machiavelli's method on this front in the *Methodus*), and this overlap is very much connected to these thinkers' focus on the prince as the sovereign. Since the focus, both for Machiavelli in *The Prince* and for Bodin in his advocacy of absolutism, was on the person of the supreme sovereign, they found it essential to unearth the history of former princes and assess the actions they had taken. As suggested earlier, history was, after all, a treasure trove of 'experience' that would help princes (and their advisers) determine how best to act prudently.¹¹³ Yet, while Bodin and Machiavelli have often been juxtaposed as founders of a modern discipline of political science,¹¹⁴ Bodin's emphasis on legal thought meant that in terms of method the two writers were 'literally worlds apart.'¹¹⁵ Bodin, by virtue of his training and intellectual affinities—'worked in a much richer—and more inhibiting—context of legal, historical, and philosophical erudition' than Machiavelli, and he was 'unable to separate politics from its legal and social environment.'¹¹⁶ In this respect, Kelley points to the insightful remark of one of 'Bodin's most perceptive commentators,' Moireau-Reibel: 'the *Republic* is the work not so much of a great politique as of a great legist, the work of a successor not of Machiavelli

¹¹³ Comparato and Quaglioni, "From Machiavellism to the End of the Seventeenth Century," 82.

¹¹⁴ It is worth mentioning that Bodin had rather mixed opinions about Machiavelli. While he praised him for his methodological innovations, particularly in the *Methodus*, he depicted his ideas about the prince as devilish in *République*.

¹¹⁵ Kelley, *Foundations of Modern Historical Scholarship*, 146.

¹¹⁶ *Ibid.*, 145.

but of Beaumanoir and Bartolus.’¹¹⁷ In other words, what jurists such as Bodin and his followers were doing was distinct from the reason of state writers in that they considered law to be at the center of their intellectual endeavor and placed it in direct dialogue with politics and history.

Gentili, deeply influenced as he was by Bodin, was very much a follower of this approach, and notwithstanding his admiration for the reason of state writers, he made a sustained effort to ‘assert the authority of the law of nations’ that he was contributing to ‘formulate as a distinct and autonomous legal discipline.’¹¹⁸ This attempt to reconcile the two approaches, particularly once combined with the initial tensions raised by the application of Bodinian absolutism to a *ius gentium* framework, put Gentili in a slightly difficult position here. On the one hand, he was a key advocate of absolutism, and in justifying his position, he had made much of the medieval distinction between the ordinary and extraordinary powers of the prince in a domestic context, thus limiting the constraints imposed on the prince by public law to the realm of ordinary power.¹¹⁹ In other words, in the domestic context Gentili had tried to free the sovereign from the constraints of the law by expanding the scope of the prince’s extraordinary powers and thus the primacy of the prince’s discretion over the rule of law. In practice, sovereigns were indeed gradually shifting towards more absolutist forms of rule, and what had been ‘extraordinary’ powers in the Middle Ages were now increasingly become part of the ‘ordinary’ category. On the other hand, the autonomy of the law of nations which Gentili was seeking to establish in DIB¹²⁰ risked being strongly undermined by the rise of supreme sovereigns acting as the sole legitimate actors internationally and actively pursuing the interest of their polity according to the principles of reason of state. It was

¹¹⁷ Ibid.

¹¹⁸ Wijffels, “From Perugia to Oxford,” 78.

¹¹⁹ Ibid., 64.

¹²⁰ Ibid., 77.

thus key for Gentili to find a way to maintain the early-modern sovereign within the late-medieval Italian culture of accepting the constraints of the law. Gentili thus turned to a variety of sources—from those of his Perugian heritage to the work of Bodin—in order to try and adjust to early modern sovereignty the law of nations as conceived in the *mos italicus* that had been so central to the government of late-medieval Italian polities.¹²¹

As I have suggested earlier, by the time he wrote DIB, Gentili was not exactly a staunch follower of the *mos italicus* anymore and he may well have been following Bodin in cherry picking what he found most useful in both the Bartolist and the legal humanist traditions in his construction of a new legal framework.¹²² Bodin's work, in addition to the justification it provided of absolutism as discussed in part II, was indeed crucially important to Gentili on two further counts here. First, his systematic approach had been hailed—in Protestant countries, but also in Catholic ones despite the condemnation of his books by Roman Catholics—‘as a new model of scholarly teaching of public law.’¹²³ Indeed, Bodin's ‘hyper-rationalizing tendencies’¹²⁴ had led him to approach the law in a way that would prove enormously influential for later jurists interested in systematizing the law of nations. Second, his extensive considerations on sovereignty, his rigorous attempt to clarify what this concept meant in precise legal terms, and more broadly, his attempt to fuse the language about power and interests with the language of rights and authority¹²⁵ provided an essential resource for Gentili in trying to adapt the insights of *ragion di stato* to his legal framework.

¹²¹ Ibid., 77–78.

¹²² On Bodin's turn to practice, his admiration for the Bartolism on which the practice of law relied, his move away from (or rather beyond) legal humanism, and his attempt to combine the best of both the *mos gallicus* and the *mos italicus* and overcome their respective (as well as overlapping) limitations, see Donald R. Kelley, “The Development and Context of Bodin's Method,” in *Jean Bodin: Verhandlungen Der Internationalen Bodin-Tagung*, ed. Horst Denzer (Munich: C. H. Beck, 1973), 123–50.

¹²³ Quaglioni, “The Italian ‘Readers’ of Bodin,” 372.

¹²⁴ Kelley, “The Development and Context of Bodin's Method,” 144.

¹²⁵ Franklin, *Jean Bodin and the Rise of Absolutist Theory*.

The specific challenge Gentili faced, however, was to reconcile the law of nations both with reason of state thinking and with his ringing endorsement of absolutism. It is with respect to the latter that Gentili and the theologians can be seen as explicitly political rivals, as the theologians' natural law theories grew out of their anti-Machiavellian stance and became the basis for their broader anti-absolutism.¹²⁶ Indeed, they rejected 'not only autocratic forms of government but absolute monarchy altogether,' leading to a lengthy controversy over what exactly natural and divine law 'meant, enjoined, allowed, and restricted.'¹²⁷ Gentili's challenge on this point, then, was to find a way to reconcile natural law theories with his absolutist position, a rather difficult (if not seemingly contradictory) endeavor.¹²⁸ Ultimately, Gentili's DIB is thus peculiar in that it tries to bring together the implications of Bodin's writings—both on absolutism and on the use of universal history as a way to ground a new system of law—and the remarkably insightful but also—particularly for a jurist—deeply challenging ideas of the *raison d'état* writers about relationships amongst independent polities into a framework for the laws of war still anchored in the language of natural law.

Conclusion

The purpose of Gentili's masterpiece on the laws of war, *De iure belli*, has been a recurring source of disagreements, particularly within the recent wave of scholarship on the Italian jurist's work. In this chapter, I have sought to assess the broad features of DIB

¹²⁶ Gerhard Oestreich, *Neostoicism and the Early Modern State* (Cambridge: Cambridge University Press, 1982), 259.

¹²⁷ Ibid.

¹²⁸ As Alain Wijffels emphasizes, it seems *a priori* difficult to incorporate absolutism into a legal theory (generally speaking), as 'absolutism's defining feature is to be a political system where the ruler is ultimately not bound by human law.' In addition, Gentili's understanding of the concept of sovereignty was at odds with the realities of Italy that had inspired the Italian late-medieval doctrines he was now relying upon. Indeed, in addition to the important constraints placed by law on public authorities in that context, these doctrines 'took into account the—to some degree—concurrent political authorities of the Emperor, of the pope, and of a regional ruler or city-state.' Wijffels, "From Perugia to Oxford," 63–4.

through an analysis of Gentili's use of sources, which indeed reveals a considerable amount of information about the type of arguments Gentili was seeking to make (and those he was leaving aside). Part I began by situating Gentili as a 'moderate humanist' in the legal sense, namely a Bartolist strongly influenced by legal humanism, relying almost as heavily on Baldus as on Alciatus along with their respective predecessors and followers; I outlined the crucial methodological implications of this particular positioning in the debates of the time, most notably Gentili's affinity with a more historical approach to legal analysis. I also explained the significance of Gentili's situation as a Roman law expert within the common law tradition, and outlined the specificity of Gentili's rather unusual position on the status of Roman law. I then turned to two particularly noteworthy influences on Gentili's DIB: Bodin and the reason of state writers. Part II focused on Bodin and showed the striking way in which Gentili drew on the French writer in DIB, both in substance, with Gentili's commitment to absolutism, and in method, with Gentili's embrace of Bodin's deeply influential turn to comparative history. I ended this section by outlining the limits of Bodin's writings for Gentili's endeavor, particularly Bodin's domestic focus, and I highlighted the need for Gentili to turn to other writers who had thought more explicitly about the international. Part III thus focused on the reason of state writers, particularly Guicciardini, upon whom Gentili also draws heavily. I explained the specificity of this particular tradition of thought at the time and its significance for Gentili's attempt to develop a new system of laws for regulating inter-sovereign relations, but I also noted the challenge posed by the reason of state writers in their quasi-dismissal of law as a central component of international relations. Fourth and finally, I brought together these different elements and shed light on the tension between Gentili's embrace of absolutism and of reason of state ideas on the one hand, and his attempt to devise a system of international law on the other.

This focus on sources ultimately allow us to reevaluate the extent to which Gentili, in writing his famous DIB, was influenced by the tenets of what is sometimes termed Baroque statecraft. While absolutism and reason of state would of course flourish in the seventeenth century, the importance of these ideas for an England-based jurist of the late sixteenth century explicitly addressing inter-sovereign relations is remarkable. The relationship between natural law, reason of state, and absolutism would come to take various forms, particularly as different conceptions of the relationship between law and the emerging state were fleshed out. Gentili's DIB constitutes a fascinating early attempt at juggling these ideas and reconciling them within the context of the tense inter-sovereign relations of the period. In the following chapter, I examine Gentili's attempt to resolve the tensions he faced in elaborating his theory of the laws of war, analyzing his use of the concept of the enemy of mankind in this specific context.

Chapter 3.

Gentili's Enemies of Mankind: Grounding an Absolutist Theory of the Laws of War

Having embraced absolutism and the logic of *raison d'état*, Gentili's greatest challenge was to give supreme sovereign rulers an incentive to abide by a system of laws in resolving conflicts amongst themselves. While Gentili stands out for his rather prescient case for third party arbitration,¹ he also accepted that war would at times be inevitable. In order to avoid the ongoing carnage of the Wars of Religion, it was necessary, first, to develop a set of rules that would limit the extent of the devastation, and, second, to encourage states to actually follow these rules. While Gentili is well known regarding the first point,² the framework he developed regarding the second has rarely been addressed. And yet, in light of his own positions regarding absolutism and the value of the reason of state tradition—neither of which encouraged sovereigns to submit themselves to some higher law (apart, though not always, from those of God)—this was bound to be a crucial aspect of his argument. In this chapter, I argue that Gentili squared the circle by innovatively invoking the figure of the pirate as an enemy of mankind and placing it at the heart of his legal framework.

I first begin by giving a brief summary of the specific set of rules Gentili developed for the conduct of war, the content of which has given him the title of founding father of the classical laws of war.³ In much of the general literature on the history of international law, Gentili's DIB is indeed considered to have heralded a shift from the 'medieval' to the 'modern' conception of war. In the simplest terms, the argument is that

¹ Gentili, *De iure belli*, Book I, Chapter 3, §25.

² See *infra*, sections I.a. and I.b.

³ Grewe, *The Epochs of International Law*, 214.

he broke with the tradition of granting more rights to the ‘just’ belligerent and instead argued for placing all sides in a conflict on equal legal footing. The other important feature of his ‘modernity’ is that he declared war to be a public endeavor. These two features are well accepted in both the general and most of the more specialized literature, and I outline these points primarily because they provide the crucial immediate context of DIB within which Gentili’s use of the pirate as an enemy of mankind can be understood.

Second, I argue that in order to ‘sell’ his legal system to sovereigns, to give them an incentive to follow these rules, Gentili established a sharp binary between the honorable few who could play the game of war and those who were excluded from it. In his system, disagreeing sovereigns still ought to respect each other as legitimate enemies, while their true hatred ought to be kept for the common enemies of all mankind. Sovereigns have an incentive to respect these rules, because they assert their own powers—and particularly their right to wage war—while undermining those of all other parties that may otherwise claim similar powers. In other words, if Gentili’s system calls for sovereigns to accept some constraints on their behavior, it makes doing so appealing by reinforcing their power through that very system. I briefly outline Gentili’s sharp distinction between legitimate and illegitimate fighters, and I shed light on what he allowed legitimate belligerents to do against those who took up arms illegally.

Third, and finally, I address the key question that Gentili had to answer in establishing his binary between sovereigns who could wage war and all those who could not: who exactly qualifies as a sovereign? As we will see, these arguments were highly relevant within Gentili’s political context, amidst raging debates about the nature of sovereignty and the corresponding status of various polities. Crucially, within Gentili’s strict binary system, those who cannot claim to be sovereigns—or to be fighting on behalf

of one—become enemies of mankind when they take up arms. The flipside of the question, then, becomes: who falls into this unappealing category?

The following discussion will refer extensively to the text of DIB. As I mentioned in the previous chapter, Gentili did write another important text on war, *De armis romanis*. In this text, Gentili first presents a thirteen-chapter attack on Roman imperialism, accusing the Romans of unjust warfare, and then writes a chapter-by-chapter rebuttal of these accusations, thus presenting the two sides of the debate (a classical trope of Renaissance classroom humanism, in the rhetorical sense). The interpretation of *De armis romanis* has been a continuing source of dispute, particularly as regards its relationship to DIB.⁴ Since the main question it raises pertains to determining whether Gentili was a humanist or not, and since I have already addressed this debate in the previous chapter, and DIB is the text that is considered Gentili's masterpiece and his crucial contribution to the laws of war, I will focus exclusively on the latter in the present discussion. DIB is divided into three parts, which correspond to the contemporary way of compartmentalizing the laws of war. Using modern terminology: Book I pertains to the *ius ad bellum* (questions of justice in declaring war), Book II to the *ius in bello* (questions of justice within war), and Book III the *ius post bellum* (question of justice in the

⁴ See for instance, Diego Panizza, "Alberico Gentili's *De Armis Romanis*: The Roman Model of the Just Empire," in *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, ed. Benedict Kingsbury and Benjamin Straumann (Oxford: Oxford University Press, 2010), 53–84; David Lupher, "The *De armis romanis* and the Exemplum of Roman Imperialism," in *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, ed. Benedict Kingsbury and Benjamin Straumann (Oxford: Oxford University Press, 2010). Panizza argues that DAR was written in direct support of DIB (there is a 'fundamental continuity between the two works'), and that Gentili is clearly siding with the defender of Roman imperialism (the speaker in Book II), making DAR a statement of Gentili's staunch (civic) humanism. Lupher, the translator of DAR, is less sure about this interpretation, noting that, for instance, Gentili depicts the accuser of Book I in a way that sounds exactly like himself. Lupher, furthermore, finds the link between DAR and DIB much more tenuous: '...while there is some point in labelling the treatise on the Roman wars a 'satellite' treatise to the more ambitious and systematic treatise on the laws of war, it seems likely that it was 'attracted' into that work's 'orbit,' not carefully designed to service as 'a legitimating topos' that elaborates and justifies the grand system of DIB.'

aftermath of war). Book I also contains some introductory chapters on international law and on the nature of war.

I. Gentili's unusual framework

As we saw in the previous chapter, from the early sixteenth century and until the famous peace of Westphalia of 1648, the European continent was torn apart by devastating wars of religion. These wars brought to light the drawbacks of the existing rules of warfare, and raised broader questions about the configuration of the European order. One of the obvious causes of the carnage caused by the wars of religion was the reliance by most parties on the medieval notion of 'just war.' During the medieval period, the 'just' character of a war depended on the *iusta causa*, the justness of the cause promoted by the belligerent.⁵ According to this framework, the 'just' belligerent would stand as a morally legitimate attacker, while the opponent was considered to be a criminal. Francisco de Vitoria summed up this traditional approach in the following way: 'a prince who fights a just war becomes a judge of the enemy.'⁶ Under those circumstances, war was a punitive endeavor and there were few limits to what a 'just' belligerent was allowed to do to defeat the criminal enemy. Feudal war did comprehend a number of rules—notably the rules of chivalry—which would eventually become one of the most important sources of the early modern laws of war. Yet, despite the steadily growing current of legal and theological literature on war and its conduct, the High and Late Middle Ages were mired by

⁵ For succinct overviews of the concept of war and the laws of war in the Middle Ages, see Wilhelm Georg Grewe, "Part I, Chapter Seven: Law Enforcement: The Idea and Reality of the 'Just War,'" in *The Epochs of International Law* (Berlin: Walter de Gruyter, 2000), 105–18; Stephen C. Neff, "Part I: War as Law Enforcement (to 1600)," in *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005), 7–82. For a more detailed account, see Maurice Hugh Keen, *The Laws of War in the Late Middle Ages* (London: Routledge, 1965).

⁶ Francisco de Vitoria, *Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), 283.

devastating wars underpinned by religious missionary zeal and confessional fanaticism. The Wars of Religion (1524-1648), and particularly the Dutch Revolt (1568-1648) and the overlapping Thirty Years War (1618-1648), merely took this form of violence to a new level.

Against this backdrop, and during what is sometimes called the 'Spanish Age' of international law (1494-1648), a new set of writings on the laws of war emerged. The most famous is Hugo Grotius' (1583-1645) *De iure belli ac pacis* (1625), but there were some key landmarks before this classic text, most importantly Belli's (1502-1575) *De re militari et de bello* (1563), Balthazar de Ayala's (1548-1584) *De iure et officiis bellicis et disciplina militari* (1584), and Alberico Gentili's DIB of 1598. Belli's 1563 text was one of the most comprehensive treatments of military law and of the rules of war that had been written up to that time, and it considerably influenced Ayala and Gentili in their efforts to systematize the laws of war and turn this body of law into a standalone discipline.⁷ Along with these texts specifically on the laws of war, numerous other writers—from the theologians of the Second Scholastic to the French legal humanists—wrote about war and its laws, in a rather clear attempt to help control the devastating brutality they were witnessing all around them. As such, it is generally accepted that the writers of the period began to elaborate 'a law of war which was aimed, in the first instance, at containing the horrors and atrocities of war.'⁸ In this context, Gentili's writings, specifically, are considered to have been of central importance to the development of the modern institutions of both diplomacy and war,⁹ to have brought

⁷ See previous chapter, section II. Conceptualizing sovereignty: The influence of Bodin

⁸ Grewe, *The Epochs of International Law*, 219.

⁹ On the importance of Gentili's writings, and particularly *De Legationibus* (on embassies), for the development of the modern institution of diplomacy, and of international society more broadly, see e.g. Garrett Mattingly, *Renaissance Diplomacy* (Mineola, NY: Courier Corporation, 1955), part IV; Benedict Kingsbury, "Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment," *American Journal of International Law* 92, no. 4 (1998): 713–23; Bull, *The Anarchical Society*, 30.

about the secularization of the law of nations, and to have marked the defining turn towards a ‘modern’ conception of war. In this regard, Gentili is most importantly seen as having redefined what war meant within international society and what role the laws of war ought to play in ensuring the smooth operation of this necessary institution.

As we saw in the previous chapter, while Bodin had sought to do away with religious disputes as a factor undermining order at the domestic level, Gentili tried to stretch this attempt to the inter-sovereign realm. The relationship between sovereign polities was bound to be a difficult issue, as ‘the very nature of their sovereignty and their claim to it undermined the possibility of adopting the solution Bodin had offered for pacifying the conflicting parties within France,’¹⁰ namely having all parties rely on a higher, single authority to resolve disputes. It is unsurprising, then, that Gentili put such a strong emphasis on the importance of arbitration between sovereigns.¹¹ He emphasized that ‘differences among sovereigns [...] must be decided by the law of nations.’¹² Gentili, however, was conscious that conflicts between sovereigns could not always be solved politically, and that war between sovereigns could therefore not be avoided. He thus took some steps towards developing a new way of thinking about war, one that would take into account the inevitability of differences arising between states and that would turn war into a formal means for solving these differences should all other methods fail. Essentially, Gentili is considered to have made two major contributions in order develop his new framework: war must be public, and all legitimate belligerents must be placed on equal legal footing.

¹⁰ Schröder, “Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations,” 177.

¹¹ Gentili, *De iure belli*, Book I, Chapter 3, §25. For an analysis, see Van der Molen, *Alberico Gentili and the Development of International Law*, 116–117. Interestingly, there is actually no equivalent discussion of this issue in the first edition of Grotius’s *De iure belli ac pacis*, but Grotius then seems ‘subsequently to have appreciated the importance of this element of Gentili’s thought, and added a section on arbitration to later editions. On this point, see Kingsbury, “Confronting Difference,” 720.

¹² Gentili, *De iure belli*, Book I, Chapter 3, §25.

a. War is public

First, Gentili is (somewhat questionably)¹³ considered to have been the first jurist of his time to argue that war ‘on both sides must be public and official and there must be sovereigns on both sides to direct the war.’¹⁴ Gentili’s definition of war, *Bellum est publicorum armorum iusta contentio*¹⁵—war is a just contest of public arms (sometimes mistranslated ‘war is a just and public contest of arms’ instead)—is regularly cited as embodying the modern shift towards war as an exclusively public form of violence. Indeed, it is commonly considered—particularly amongst scholars of international relations—that war acquired its modern character once it became defined as a struggle of arms between two sovereigns or states,¹⁶ eschewing earlier conception that had considered other forms of violence to be ‘wars’ as well.¹⁷ At the time when Gentili wrote, his definition of war effectively entailed excluding from the legal realm of war a number of forms of violence which had been included within this category in the past and would continue to be included by someone as important as Grotius, such as private wars (between private actors) and, more importantly, ‘mixed wars’ (between a public and a private actor).

Private warfare, or feuds, had been on the decline for some time already; it had been banned in France in 1367, in 1495 in the Holy Roman Empire, and the practice slowly declined, with the last traditional feud organized in 1567.¹⁸ The case of mixed wars, however, was much more complex, as it necessarily involved at least one public

¹³ In fact, his contemporary Balthazar de Ayala made a similar claim a few years earlier—I return to this point in section 1c.

¹⁴ Gentili, *De iure belli*, Book I, Chapter 3, §23.

¹⁵ Ibid., Book 1, Chapter 2, §18.

¹⁶ On the turn from a ‘medieval’ to a ‘modern’ form of war, see for instance Holsti, *The State, War, and the State of War*, 1–2.

¹⁷ Whether Gentili’s—or any other jurist’s—definition actually had any impact in practice is a pretty obvious issue in this narrative.

¹⁸ Jeremy Black, *European Warfare, 1494-1660* (London: Routledge, 2002), 22.

actor on one side. Gentili undermined the status not only of private warfare¹⁹ but *also* of mixed wars by imposing a requirement that *both* sides be public entities for a conflict to be legally considered a war. According to Gentili, if the public component is missing on either side, the violence cannot be qualified as war, and the violence carried out by the non-public belligerent must instead be considered as an act of *brigandage*.²⁰ His reasoning is simple: only a war between sovereigns can be lawful because war is only justified by the absence of a jurisdiction capable of ruling upon a dispute and imposing its judgment.²¹ War is thus waged out of necessity, because only the ‘arbitrament of Mars’ can settle a dispute between two sovereigns with no higher jurisdiction.²²

b. Belligerents are equal

Second, since war was to be a mechanism for arbitrating disputes among those who recognize no superior, Gentili developed a new system of rules, based on the idea of war as a form of duel²³ between sovereigns, a deeply regulated—almost ritualized—process.²⁴ The cornerstone of this new system of rules was to place all legitimate (i.e. public) belligerents on equal legal footing in order to ensure mutual respect and reciprocity. And in turn, this move was made possible by what is perhaps Gentili’s single most famous contribution, that war can be just—not merely subjectively but also objectively—on both

¹⁹ Nézard, “Albericus Gentilis,” 90.

²⁰ Ibid., 49. This is in contrast to Grotius who in *De iure belli ac pacis* (1625) defines war as *Status per vim certantium* [the condition of those contending by force], thus continuing to place public war, private war, and dueling in the same category, against the ideas that would form the basis of the classical laws of war, see Ibid., 90. However, Haggénmacher emphasizes that Grotius’ definition merely stems from a different methodological standpoint reflecting a different approach to the laws of war, see Haggénmacher, “Grotius and Gentili: A Reassessment of Thomas E. Holland’s Inaugural Lecture,” 169. I compare Gentili and his more famous Dutch successor in greater detail in the following chapter.

²¹ Nézard, “Albericus Gentilis,” 50. See also Knutsen, *A History of International Relations Theory*, 70.

²² Gentili, *De iure belli*, Book I, Chapter 3, §32.

²³ Ibid., Book I, Chapter 2, §18. In Grewe’s classic work on the history of international law, the section on Gentili is actually entitled ‘Gentili: War as a Duel.’ Grewe, *The Epochs of International Law*, 209.

²⁴ Brownlie, *International Law and the Use of Force by States*, 12.

sides.²⁵ From this position, it followed that the laws of war had to apply equally to both sides, and that the belligerents' rights in war regarding matters such as prisoners and booty would be applied irrespective of the justness of their cause. The importance given to Gentili's position in the general literature on international law, war, and on international relations more broadly, as well as in some of the specialized literature on the Italian jurist, cannot be overstated. According to Diego Panizza, for instance, Gentili's position meant that he 'came to subvert the whole structure of the medieval doctrine, founded as it was on the basic assumption that the adversary's injustice, or *iniuria*, makes a war just and on the consequent assertion that one side must be in the wrong.'²⁶ Gentili's writings on war, Panizza continues in a language that echoes the work of Richard Tuck,²⁷ constituted a shift from a scholastic to a humanist approach to the laws of war, and marked 'the emergence of a specific and distinctly 'modern' paradigm.'²⁸ Hedley Bull, for his part, considers that '[a]ll of the early internationalists except Gentili have difficulty in coming to terms with the idea that is the foundation of later attempts to accept war between states as an institution of international society, that war may have a just cause on both sides, not merely 'subjectively' but objectively.'²⁹

In order to support his crucial statement, that war can be objectively just on both sides, and that the main criteria is for there to be public authorities on both sides, Gentili

²⁵ Gentili dedicates an entire chapter to this argument, 'Chapter VI: That War May be Waged Justly By Both Sides' (Gentili, *De iure belli*, Book I, Chapter 6.) The specificity of his position is consistently emphasized by scholars in the general literature and well as by some specialists of Gentili, see for instance Nussbaum, *A Concise History of the Law of Nations*, 97; Brownlie, *International Law and the Use of Force by States*, 12; Grewe, *The Epochs of International Law*, 211; Tuck, *The Rights of War and Peace*, 31–34. For an analysis of Gentili's reasoning behind this argument, see Panizza, "Political Theory and Jurisprudence in Gentili's *De Iure Belli*: The Great Debate between 'Theological' and 'Humanist' Perspectives from Vitoria to Grotius," 18–19.

²⁶ Panizza, "Political Theory and Jurisprudence in Gentili's *De Iure Belli*: The Great Debate between 'Theological' and 'Humanist' Perspectives from Vitoria to Grotius," 17.

²⁷ Tuck, *The Rights of War and Peace*.

²⁸ Panizza, "Political Theory and Jurisprudence in Gentili's *De Iure Belli*: The Great Debate between 'Theological' and 'Humanist' Perspectives from Vitoria to Grotius," 51.

²⁹ Bull, *The Anarchical Society*, 29.

cites a rather obscure figure, the jurist Raphael Fulgosius (1367-1427),³⁰ whom he refers to only three times in the entire text of DIB.³¹ As one might expect, though, Gentili was part of a longer development towards this ‘bilateral’³² conception of war, and his radical break with the medieval tradition might need to be somewhat relativized. It is true that Gentili was quite peculiar in adopting a fully relativistic position with respect to the just cause question within the context of a debate about whether war could be just on both sides. Yet, this was just one of the many different positions at the time that sought to challenge the traditional ‘just cause’ approach, and Gentili was not necessarily as extraordinary as we have retrospectively made him out to be. Three groups are worth mentioning here: the theologians of the School of Salamanca (most importantly Francisco de Vitoria), the French legal humanists, and the reason of state writers. All three groups made moves that undermined the just cause approach, and Gentili was very much embedded within these debates in developing his own position.

First,³³ the theologians of the School of Salamanca (or ‘Second Scholastic’), who still clung to the teachings of Augustine and Thomas Aquinas, had sought to circumvent the traditional theological perspective of war, which conceived war as unilateral act of justice, a punishment imposed on a wrongdoer. For all these theologians working within the Thomist tradition, justice could only lie on one side of the conflict, but they still found ways to accommodate some complexity in their approach. While as with virtually all ‘schools,’ there was quite a bit of variation in the views of Soto, Cano, Molina, Suárez

³⁰ Raphaël Fulgosius, “Just War Reduced to Public War,” in *The Ethics of War: Classic and Contemporary Readings*, ed. Gregory M. Reichberg, Henrik Syse, and Endre Begby (Oxford: Blackwell Publishing, 2006), 227–30. On Fulgosius’ influence, see Haggemacher, *Grotius et La Doctrine de La Guerre Juste*, 201–209. As Haggemacher explains, Fulgosius was completely out of line with Bartolist orthodoxy when he wrote, and, with his Roman-style advocacy of a purely procedural understanding of bilateral war, ‘demeura longtemps le témoin incompris d’une conception apparemment révolue.’ Ibid., 287.

³¹ Gentili, *De iure belli*, Book I, Chapter 6, §48 (in text only); Book I, Chapter 22, §174; Book III, Chapter 23, §695.

³² I borrow the term ‘bilateral’ in this context from Haggemacher.

³³ I thank Martti Koskennimi for his very helpful insights on the arguments of the Salamancans and the extent to which they actually tried to bracket out questions of conscience.

and the like, the Salamancans were all pupils and followers of Francisco de Vitoria, who had made some decisive advances on previous theologians, and so I will draw examples primarily from the latter in order to illustrate their thought in very broad lines.

The original Thomist doctrine had three components: just authority, just cause, and purity of heart (or good faith/good intentions);³⁴ importantly, these criteria already did not discriminate between religions.³⁵ Vitoria made a decisive move in establishing that the only just cause (other than cases of legitimate self-defense) was a response to a previous 'injury' [*inuria*], namely a violation of the law, thus heavily circumscribing Aquinas' original approach.³⁶ This shift from a fairly broadly defined 'just cause' to a narrow focus on 'injury' was applied to Aquinas' third requirement of 'purity of heart' as well. In effect, this requirement would now be limited to a mere effort at honesty in the assessment that a serious enough injury had indeed taken place,³⁷ as well as a commitment to responding proportionally to the injury (thus excluding a war of revenge or war based on a fake cause). Vitoria had thus bracketed the requirements of 'just cause' and 'purity of heart' into a mere question of whether there had been an 'injury' and whether the attacking party had identified such an injury in good faith.

Vitoria could not accept that war could be just on both sides, but he was willing to concede that in many conflicts, both sides would invoke the existence of an injury.

³⁴ 'In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged... Secondly, a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault... Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil...' Thomas Aquinas, *Summa Theologiae: Existence And Nature of God* (Cambridge: Cambridge University Press, 2015), II, Q.40, art. 1.

³⁵ And similarly, one could not wage war simply on the basis of religious difference. Vitoria reiterates this forcefully in *On the Law of War*, at the start of his discussion of 'What are the permissible reasons and causes of just war.' 'First,' he states, 'difference of religion cannot be a cause for war.' Vitoria, *Political Writings*, 302.

³⁶ Haggemacher, *Grotius et La Doctrine de La Guerre Juste*, 171. Vitoria states: 'the sole and only just cause for waging war is when harm has been inflicted.' Vitoria, *Political Writings*, 303.

³⁷ For indeed, Vitoria reminds us that 'not every or any injury gives sufficient ground for waging war.' Vitoria, *Political Writings*, 304.

Broadly speaking, he, along with his followers, put forward two ways of addressing this issue. First, they distinguished between, on the one hand, the prince and his advisors (those ‘invited to be heard in the public or royal council’³⁸), and on the other, common soldiers. Since the latter were not entitled to question the judgment of their superiors, for them, the war would have to be regarded as ‘just’ (it was crucial for the theologians to avoid lifting matters of conscience to public law because they feared it would encourage disobedience and rebellion).³⁹ As to the prince and his advisors, Vitoria considered that a prince could also be cleared from injustice if he went to war mistakenly convinced of the existence of an injury (what he famously refers to as ‘invincible ignorance’ or ‘invincible error’).⁴⁰ More broadly, since no one was entitled to question a prince’s judgment as to the justice of war anyway, this became essentially relegated to the realm of conscience, i.e. a question between the prince and God, who would ultimately be the only judge on this matter. Although the Salamancans still believed that war could never objectively be just on both sides, in practice the consequences were similar to those of a bilateral approach to war.

Second, during the same period, humanist jurists such as Alciatus and Budaeus had begun to emphasize the distinction between a just war based on ‘formal justice,’ i.e. justice as legality, and the notion of a just cause. Budaeus had contributed some important philological reflections, pointing out that for Roman lawyers *iustum* often referred to justice of a formal or procedural kind rather than a material or substantive one.⁴¹ Alciatus, more importantly, had taken stock of Fulgosius’ writings and developed an approach that

³⁸ Ibid., 308.

³⁹ ‘...lesser subjects who are not invited to be heard in the councils of the prince nor in public council are not required to examine the causes of war, but may lawfully go to war trusting the judgment of their superior’ (Ibid.)

⁴⁰ Ibid., 313. For a detailed discussion, see Haggenmacher, *Grotius et La Doctrine de La Guerre Juste*, 209–221.

⁴¹ Haggenmacher, *Grotius et La Doctrine de La Guerre Juste*, 299.

placed both sides on equal footing. However, whereas Fulgosius had faithfully followed the Roman approach and established that both sides were to be equal by virtue of their nature as sovereigns obeying no higher authority, Alciatus reintroduces considerations about the material justice of each sides' cause. Instead of embracing Fulgosius' purely formalistic approach, Alciatus bases the equality of belligerents on the difficulty of determining which side is in fact acting justly. It is not clear exactly where this uncertainty comes from, whether it is from each party's subjective understanding of their cause (coming close to the 'invincible ignorance' approach put forth by the theologians) or from the fact that certain situations are simply too complex to allow a clear-cut conclusion. In any case, if one side's cause does indeed turn out to be unjust, the belligerent—regardless of their sovereign status—goes back from being a *hostis* to a *latrunculus*, from an enemy to a brigand. Alciatus had thus moved fairly close to a bilateral conception of war, based on a formalistic understanding of the equality of belligerents, while maintaining a 'just cause' aspect to his reasoning.⁴²

Third, reason of state writers had also actively tried to undermine the just cause approach on their own terms. As an illustration of the reason of state position, Machiavelli (1492-1550) is often attributed the quote 'that war is just which is necessary,' with the correlative assumption that any prince may decide on the occasion for war.⁴³ This is perhaps too simplistic, and that particular quote is misleadingly taken out of its context.⁴⁴ Machiavelli did not think a capricious prince could simply do anything he wanted; rather, his approach to the justice of war was a profound challenge to the just war tradition

⁴² Ibid., 204–5.

⁴³ See for instance, Brownlie, *International Law and the Use of Force by States*, 11.

⁴⁴ In the original passage, which is in Machiavelli's chapter entitled 'An Exhortation to Liberate Italy from the Barbarians,' Machiavelli actually seems to be saying that this particular war—the liberation of Italy—is legitimate because it is a last resort: 'The justice of the cause is conspicuous; for that war is just which is necessary, and those arms are sacred from which we derive our only hope.' Niccolò Machiavelli, *The Prince*, ed. Angelo Codevilla (London: Yale University Press, 1997), Chapter 26.

because, as we saw in the previous chapter, it postulated a completely different moral scheme. What was ‘just’ was merely what was in the advantage of the state, and the prince would be the one deciding what exactly this entailed. As a result, Machiavelli for instance deemed expansion to be a perfectly legitimate cause of war, having described states as having a natural desire for conquest and placed this desire at the heart of his conception of the republic.⁴⁵ A prince could certainly do wrong by pursuing policies that were not in the interest of the state, but this had little to do with any traditional just war considerations (such as the requirement to go to war only to redress an injury). Importantly, though, Machiavelli and his later followers, most notably Guicciardini (1482-1540) and Botero (1540-1617), would all consider the judgment of the prince on what was ‘necessary’ for the state to be without any legitimate challengers, particularly not foreign sovereigns.

Gentili, if anything, seems to have been influenced by all three of these groups. As we saw in the previous chapter, he generally cites legal humanists and the reason of state writers quite frequently, and within the context of this particular debate, he also refers extensively to the Salamancans. The most relevant chapter here in DIB is Book I, Chapter 6, entitled ‘That War May Be Waged Justly by Both Sides.’ Within the first paragraph of the chapter, he claims that in arguing that war can be just on both sides, he is following Fulgosius, who has already been followed by Alciatus ‘in more than one place.’⁴⁶ He adds to this ‘the proviso that there may be reasonable doubt as to the justice of the cause,’ and agrees with ‘other jurists and our theologians’ that both sides may think they have a just cause due to ‘justifiable ignorance,’⁴⁷ this time citing Vitoria, Soto, and Covarruvias. Then, going back to Alciatus, he remarks that ‘[i]t is the nature of wars for both sides to maintain that they are supporting a just cause.’⁴⁸ Importantly, Gentili does

⁴⁵ Mikael Hörnqvist, *Machiavelli and Empire* (Cambridge: Cambridge University Press, 2004), Chapter 3.

⁴⁶ Gentili, *De iure belli*, Book I, Chapter 6, §48.

⁴⁷ Ibid.

⁴⁸ Gentili, *De iure belli*, Book, I, Chapter 6, §49.

not seem to grasp the important difference between Fulgosius' approach and that of Alciatus on the question of whether having a just cause matters or not. What if one side's cause is clearly unjust? Does he, like Fulgosius, dismiss it as irrelevant for the equal application of the law to both sides, or does he, like Alciatus, see it as taking us back to a unilateral form of war?

A few paragraphs later, Gentili comes to the crux of his argument and resolves this problem in a rather dubious manner. He begins by stating: '[o]f all our laws, however, that one seems to me the clearest which grants the rights of war to both contestants, makes what is taken on each side the property of the captors, and regards the prisoners of both parties as slaves.'⁴⁹ Going against Fulgosius on this point is 'pleasurable madness... as was demonstrated by Alciati, who also insists on that equality among enemies of which we made note before.'⁵⁰ It may be the case that war is 'just on one side, but on the other...still more just'⁵¹ (a rather original bit of analysis based on Piccolomini's writings on virtue), and more importantly 'it may sometimes happen...that injustice is clearly evident on one of the two sides.'⁵² The latter, however, does not really matter, 'for laws are not based upon rare instance and adapted to them; that is to say, on events which are rare in their own class, and which take place only occasionally, contrary to the general nature of the case.'⁵³ Gentili thus wiggles out of the cleavage between Fulgosius and Alciatus and concludes that 'this ought not to affect the general principle, and prevent the laws of war from applying to both parties.'⁵⁴ As Gentili erects bilaterality as his general

⁴⁹ Ibid., Book I, Chapter 6, §51.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid., Book I, Chapter 6, §52.

⁵³ Ibid.

⁵⁴ Ibid. In fact, Gentili contradicts himself on this point earlier in the chapter, when he states that 'we say that if it is evident that one party is contending without any adequate reason, that party is surely practicing brigandage and not waging war.' (Ibid., Book I, Chapter 6, §49.) This confusion, which is not entirely surprising considering Gentili is relying at once on Fulgosius, Alciatus, and the theologians, suggests that this was indeed a very thorny issue for him and that he very much struggled to resolve it entirely.

principle, the approach according to which a belligerent's rights depends on the justness of their cause thus seems virtually abandoned.

And yet, some may claim that Gentili must have thought that having a just cause mattered, since the majority of Book I (Chapters 8—20) is devoted to the discussion of what constitutes an appropriate cause for making war.⁵⁵ Indeed, Gentili does seem to suggest at one point that while sovereigns do not need a 'just cause' to go to war, they still have to present a 'plausible' claim.⁵⁶ He reiterates this point forcefully in Chapter 8, 'Of the Causes of War,' concluding after giving a brief overview of the problem that 'therefore there should be grounds for war, and they should not be trivial.'⁵⁷ In the ensuing discussion, he dismisses the traditional religious causes,⁵⁸ but allows for various other ones,⁵⁹ including the need to enforce one's right to navigate freely, a crucial issue at the time.⁶⁰ In this lengthy discussion of acceptable and non-acceptable causes, Gentili's focus seems to echo the usual concerns of theologians. There is, however, a catch in his presentation of the just and unjust causes of war, or the sort of claims that can constitute a plausible ground for resorting to war. Gentili does not provide a way for determining whether a claim is in fact 'plausible.' Crucially, he notes—in a remark that echoes the hard-headed pragmatism of the reason of state literature, although he does not cite any particular authority for it—that 'princes always allege some plausible reason for beginning their wars; although frequently they have no reason at all.'⁶¹ Gentili's attempt at solving this problem takes him further down the relativist path. In short, Gentili

⁵⁵ Gentili's discussion, while rather unsystematic, was strikingly innovative in his extensive reliance on historic examples, both ancient and contemporary.

⁵⁶ Gentili, *De iure belli*, Book I, Chapter 6, §50.

⁵⁷ Ibid., Book I, Chapter 8, §55.

⁵⁸ With the exception of war against atheists (more on this below). Ibid., Book I, Chapter 9, §65.

⁵⁹ For an analysis of Gentili's arguments about the appropriate causes for making war, see Van der Molen, *Alberico Gentili and the Development of International Law*, 121–129.

⁶⁰ Gentili, *De iure belli*, Book I, Chapter 19.

⁶¹ Ibid., Book I, Chapter 7, §54.

considers that since equal sovereigns have no jurisdiction over each other—they do not recognize a superior—no one can assess the legitimacy of a prince's claim or cause prior to the armed conflict. In doing so, Gentili extended his concept of war as a duel to the aspect concerning the 'cognition' of the law,⁶² thus rendering his own discussion of the just causes of war all but moot. Indeed, though one may write extensively about what constitutes a just cause, it becomes essentially irrelevant if no one is entitled to determine whether a prince's cause for waging war falls into the 'just' category or not.

The outcome of Gentili's somewhat muddled engagement with the different positions around him, and, ultimately, his indirect dismissal of just cause arguments, led him to rely—like Fulgosius and to a lesser extent Alciatus—on another criterion for establishing the 'just' character of a war, which I discussed earlier: the 'public' character of the conflict. The all-important concept of his approach is not the *iusta causa* but the *iustus hostis*—the 'just' or 'lawful' enemy. According to Gentili's approach—although he never says it in so many words—belligerents who have 'proper authority,' i.e. established sovereigns, are by definition conferred the status of *iustus hostis*, regardless of their cause for war: '*hostis* is a person with whom war is waged and who is the equal of his opponent.'⁶³ On the one hand, it implies the full equality of the belligerent powers, resting on the separation of what would later be termed the *ius ad bellum* from the *ius in bello*, a principle that would—in the late nineteenth century—become the cornerstone of the laws of war. On the other hand, it means that a sovereign could lawfully declare war under any pretext, a position that echoed the controversial *raison d'état* thinking a little

⁶² Panizza, "Political Theory and Jurisprudence in Gentili's *De Iure Belli*: The Great Debate between 'Theological' and 'Humanist' Perspectives from Vitoria to Grotius," 18.

⁶³ Gentili, *De iure belli*, Book I, Chapter 2, §18..

too closely for many of Gentili's contemporaries.⁶⁴ This was a fairly radical position to advance, but it was not entirely new.

c. The conspicuous absence of Ayala in Gentili's citations

Balthazar de Ayala, who died just a few years before Gentili published his first, shorter version of DIB (1588/89), is generally seen as Gentili's most important predecessor, and indeed, he had expressed a number of Gentili's most groundbreaking position before the Italian jurist. In some respects, Gentili's writings were in fact less definitive than Ayala's on some key points, but he has nonetheless been repeatedly identified as the figure who took the clearest step in the direction of a modern law of war. In any case, it is fair to say that their main respective treatise on war—Ayala's *De iure et officiis bellicis et disciplina militari* (1584), and Gentili's DIB (1598)—were the most important of the late sixteenth century.⁶⁵ What is rather puzzling in light of this, then, is that Gentili does not cite Ayala *at all* in DIB, a fact that seems to have escaped scholarly attention thus far. One hypothesis is that Gentili simply did not know Ayala's work at the time, even though he would come to cite him a few years later, in *Hispanica Advocatio*.⁶⁶ However, in light of its significance during the period, and since Ayala was Gentili's main intellectual rival within the specific area of the law of war,⁶⁷ this does seem rather unlikely. In this section, I want to briefly show the extent of the overlap between the two jurists, and then suggest

⁶⁴ Gentili would come under fire from Grotius for this position, as well as, later on, from Rousseau and Kant. Grotius made it clear that he was under no circumstances prepared to accept the concept of war as a duel on the basis that only victory will decide the legitimacy of the cause; Rousseau and Kant made similar criticisms and emphasized that Grotius had also failed to resolve this problem. For a brief overview of these critiques, see Schröder, "Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations," 185.

⁶⁵ Haggenmacher, *Grotius et La Doctrine de La Guerre Juste*, 48.

⁶⁶ Ayala's name appears both in the margins and in the text of *Hispanica Advocatio*, including in Gentili's original manuscript of 1605 (available at the Bodleian, MS. D'Orville number 608). It is hard to know when exactly Gentili first encountered the Spaniard's work—the collection of his personal papers held at the Bodleian do not seem to provide any clear indications on this front.

⁶⁷ Grotius would in fact cite them both as his most important predecessors in the Prolegomena of his *De iure belli ac pacis*.

a few reasons why Gentili may not have wanted to cite him, as this will provide some important insights into the nature of Gentili's project and the political context within which Gentili was developing his new theory of the laws of war.

Ayala is generally acknowledged to have been Gentili's key predecessor on two main fronts. First, within the 'secularization of international law narrative,' Ayala is commonly depicted as having been the first to begin formulating a juridical theory of the laws of war 'which had nothing to do with the arguments of moral theology,'⁶⁸ an argument which may raise some concerns but which I will not assess at length here. Second, and more importantly for our purposes, Ayala formulated a theory of the laws of war that made the public character of the belligerents the cornerstone of his system. Ayala, just like Gentili, was influenced by the work of Pierrino Belli and attempted to systematize the laws of war in a context of unbridled religious violence.⁶⁹ In doing so, he was strongly influenced by the same Fulgosius as Gentili, and in fact Ayala's approach is the only one that truly embraced Fulgosius' radical vision.⁷⁰ Crucially, Ayala was also profoundly influenced by Bodin,⁷¹ and he relied extensively on his concepts in *De iure et officiis bellicis et disciplina militari*, particularly Bodin's understanding of sovereignty. Combining Fulgosius' formal approach to the justice of war with Bodin's groundbreaking conception of sovereignty, Ayala put forth a new doctrine of war with far-reaching consequences.

More than anyone since Fulgosius, Ayala embraced the idea of the 'just' character of war being dependent not on the belligerent having a 'just cause' but on the war being declared and waged according to certain formal principles.⁷² A war is 'just,' in Ayala's

⁶⁸ Grewe, *The Epochs of International Law*, 208.

⁶⁹ Van der Molen, *Alberico Gentili and the Development of International Law*, 85.

⁷⁰ Haggemacher, *Grotius et La Doctrine de La Guerre Juste*, 298.

⁷¹ For Bodin's influence on Ayala, see *Ibid.*, 300.

⁷² See generally Balthazar Ayala, *De jure et officiis bellicis et disciplina militari libri tres* (Washington, DC: Carnegie institution of Washington, 1912), Book I, Chapter II.

sense, if it is waged according to a specific set of rules, regardless of the ‘cause’ at hand. In other words, a war may be considered ‘just’ even when it is not founded on a just cause⁷³ [*de acquitate causae*].⁷⁴ More specifically—and crucially for Ayala’s doctrine—the ‘justness’ or ‘legality’ of the war depends on it being ‘declared and undertaken under the authority [*auctoritas*] of a sovereign prince’ [*summus princeps*].⁷⁵ There is no other source of ‘justice’ for the war. In contrast to his predecessors, the bilateral application of the laws of war stems not from the possibility of flawed judgment in assessing the just character of each side’s cause. On this particular point, Ayala explicitly differs from Gentili: the fact that the cause of war is clearly unjust on one side is not dismissed as irrelevant to the general principle merely because it is rare. For Ayala, the justness of each side’s cause is simply and purely irrelevant. This implies that any war conducted by such a belligerent with proper authority is just [*iustus*], in the sense that no other authority can render a judgment upon its decision to resort to arms. Ultimately, the conclusion is the same as the one Gentili would later reach: Ayala concedes the legal status of *hostis* [*iustus hostis*]—‘just enemy’—to both belligerents in the war, putting them on equal legal footing. In doing so, Ayala is sometimes considered to have ‘created the doctrine of war which was significant for the classical European law of nations,’⁷⁶ and although classic histories of the laws of war paint him (rather ironically, in light of the citation situation) as a springboard for Gentili, some scholars have sought to reemphasize the importance of Ayala’s work for the development of the laws of war and of international law more broadly.⁷⁷

⁷³ For a more detailed discussion of Ayala’s position on this point, see Haggenmacher, *Grotius et La Doctrine de La Guerre Juste*, 298–300.

⁷⁴ Ayala, *De Jure et Officiis Bellicis et Disciplina Militari Libri Tres*, Book I, Chapter II, §33–34.

⁷⁵ *Ibid.*, Book I, Chapter II, §7.

⁷⁶ Grewe, *The Epochs of International Law*, 209.

⁷⁷ See especially Jaime Peralta, *Baltasar de Ayala y el derecho de la guerra* (Madrid: Ínsula, 1964).

In light of the proximity between Gentili's position in DIB and Ayala's earlier doctrine, how then can one understand the fact that Ayala's name is nowhere to be found in the Italian's masterpiece? One possible explanation is that within the greatest European conflict of the time—the revolt of the Protestant Dutch Provinces, supported by Protestant England, against their Roman Catholic Spanish ruler (1566/8-1648)—Ayala and Gentili stood on opposite sides of the battlefield. Gentili, a Protestant, had fled religious persecution in his native Italy and made Protestant England his home. Ayala, on the other hand, was a loyal subject of the Spanish king, a zealous Roman Catholic, and an intellectual spokesman for the Spanish legal position condemning the Dutch rebellion of the time.⁷⁸ Surely, drawing extensively on the man who had so fiercely sought to undermine the Dutch position, particularly for his arguments on what constituted a legal war, would have been rather uncomfortable for Gentili. In addition to his personal background, Gentili later dedicated his first main work, *De Legationibus* (1585), to his friend and benefactor Sir Philip Sidney, who had died the following year at the Battle of Zutphen, fighting for the Protestant cause against the Spanish.⁷⁹ When Gentili returned to England to take up the Regius Professorship at Oxford in 1587, he did so upon request by Queen Elizabeth herself, who since 1585 had made her country's support of the Dutch official. More tellingly still, when in 1605 he accepted, with the explicit approval of King James I, to serve as counsel to the Spanish delegation to England (1605)—a decision that 'provoked a great deal of public criticism'⁸⁰ and 'has been regarded by later commentators as one of the most surprising actions of his career'⁸¹—he wrote a lengthy

⁷⁸ Haggenmacher, *Grotius et La Doctrine de La Guerre Juste*, 138; Van der Molen, *Alberico Gentili and the Development of International Law*, 84.

⁷⁹ Alberico Gentili, *De Legationibus Libri Tres* (New York: Oxford University Press, 1924).

⁸⁰ Simmonds, "The Gentili Manuscripts," 536.

⁸¹ *Ibid.*, 539. As Simmonds explain, 'there is no evidence in his published works to explain this enigma, but this manuscript opinion helps us to understand Gentili's purpose and attitude.' England and Spain were on neutral terms by that point, and Gentili's conclusion, in the words of Simmonds, was the following: 'the Spanish commission was offered to him freely and without his seeking it and he intends to be a most diligent

justification of himself a few months later.⁸² In DIB, it was perhaps just simpler not to cite his controversial Spanish rival at all.

The overlap between their positions, though, should leave one preoccupied. Gentili, in essence, was adopting an approach very similar to that of the man who had sought to establish the legitimacy of crushing the most well known rebellion of the time simply in the name of sovereign authority. For Ayala, saying that the war had to be public on both sides meant it could be waged exclusively by princes, and he justified the Spanish use of force against the Netherlands based on their rebellion against their legitimate ruler rather than because of their defection from the true faith. More broadly, Ayala's approach has dramatic consequences for those deemed not to be sovereigns, which he explicitly discussed. The rules of war he laid out applied only to those who possessed the formal criterion of authority; in cases where one of the parties did not fulfill the criteria, the violence could not be called a war at all.⁸³ Ayala, as one might guess, makes this particularly clear in the case of rebels: '[n]ow, rebels ought not to be classed as enemies, the two being quite distinct, and so it is more correct to term the armed contention with rebel subjects execution of the legal process, or prosecution, and not war.'⁸⁴ Consequently, rebels were to be treated like robbers and pirates; they were not protected by the laws of war and they could be killed as enemies, enslaved as prisoners, their property could be confiscated as booty, and contractual engagements with them did not need to be observed.⁸⁵ In other words, they were to be treated not as enemies in a conflict,

advocate in the cases entrusted to him, so long as peace is maintained between England and Spain.' In other words, 'Gentili took his stand on the duty of an advocate to give his services, wherever sought, according to the traditions of his profession.' Simmonds sympathetically notes that this 'gives to the modern reader a courageous and convincing defence of his position' but also acknowledges that 'it can hardly have won over his adversaries.' Ibid., 540.

⁸² The unpublished piece, entitled *Responsio ad eos qui nobis vilio vertunt quod stamus pro Hispanis*, is available in the Bodleian's d'Orville manuscripts collection and has conveniently been typed up and reproduced as an annex to Simmonds, "The Gentili Manuscripts."

⁸³ Ayala, *De Jure et Officiis Bellicis et Disciplina Militari Libri Tres*, Book I, Chapter 2, §14.

⁸⁴ Ibid.

⁸⁵ Ibid., Book I, Chapter II, §14–15.

but as mere criminals, against whom all the means of war—and more—could be unleashed. In the remainder of the chapter, I outline the reason why Gentili might have been drawn to Ayala's approach, and I assess the extent to which Gentili's understanding of the line between legitimate and sovereigns and non-sovereigns—or legitimate and illegitimate belligerents—echoed that of his unmentionable Spanish rival.

II. Incentivizing sovereigns to follow the law

As I have noted earlier, Gentili lived in a period of mass turmoil, and DIB certainly denotes an effort to tame the sort of violence he was witnessing around Europe. As a result, scholars have repeatedly stressed the progressive character of Gentili's thinking on the laws of war, and they have interpreted his attempt to place both sides of the conflict on equal footing, which I have now discussed at length, as a key turning point in the history of the laws of war. In addition, he provided an in-depth examination of which means could be applied against an adversary in war and which were too cruel to be allowed, he expressed a fairly tolerant attitude towards barbarians,⁸⁶ and he denounced the practice of waging war on people simply because of their religion.⁸⁷ This has led modern historians to claim that Gentili's law of war 'was based on the idea of containing the horror of war and promoting chivalrous means of conducting war between the armed forces of belligerents,' and that his theory of war constitutes 'a first step towards the non-discriminatory concept of war which dominated the classical period of the law of

⁸⁶ Kingsbury, "Confronting Difference," 722.

⁸⁷ Gentili dedicates a whole chapter to 'Whether It Is Just to Wage War for the Sake of Religion' and makes his approval very clear: 'Now if religion is of such a nature that it ought to be forced upon no one against his will, and if a propaganda which exacts faith by blows is called a strange and unheard-of thing, it follows that force in connexion with religion is unjust' (Gentili, *De iure belli*, Book I, Chapter 9, §60. He also refers to a rule 'forbidding one to injure or press with the yoke those whom we can accuse of nothing more serious than that they are of a different race from our own' (Ibid., Book III, Chapter 9, §333.)

nations.’⁸⁸ More broadly, we are told that he was the ‘exponent of a progressive law of nations,’⁸⁹ and that his work paved the way for the development of a new, modern concept of war, based on a secular, formalized, and humanized approach to war that would form the basis of the classical laws of war.

Yet, as I concluded at the end of the previous chapter, in devising his system of law, Gentili had gotten himself in a rather awkward position. On the one hand, he considered sovereigns to recognize no superior and showed a certain admiration for the reason of state tradition that held the state’s interest as its guiding principle; on the other, he was trying to encourage all sovereigns to respect a system of laws in settling their armed disputes. Prior to the collapse of the Latin West, sovereigns had respected certain religious rationales (the just cause approach) along with arguments relating to the universal jurisdiction of the Pope or the Roman Emperor. Now, something else needed to ‘bind’ sovereigns, to give them an incentive to cooperate with each other in the absence of any higher authorities. That something else, I will argue, was the rather elusive and threatening figure of the ‘enemy of mankind,’ embodied first and foremost by the figure of the *latro*—the pirate/brigand⁹⁰—but also, as I will explain later, quite a range of other

⁸⁸ Grewe, *The Epochs of International Law*, 214.

⁸⁹ Alexandrowicz, “Introduction,” viii; Nézard, “Albericus Gentilis,” 38.

⁹⁰ *Latro* (plural *latrones*) is generally translated as brigand (as well as robber or thief) or pirate. Gentili uses *latro* as an umbrella term, but he also at times refers specifically to the pirate [*pirata*, plural *piratae*]. The figure of the pirate has been relied on very often throughout the modern period because it has allowed jurists to claim the existence of a certain continuity with the ancient practice of considering pirates to be enemies of all. The extent to which this continuity actually exists is however greatly debated today. What appears from the current debate on the subject is that ancient attitudes towards piracy were hardly clear-cut (see especially Heller-Roazen, *The Enemy of All*, Chapter 3.) and that much of the reliance on the figure of the pirate as the ultimate enemy of mankind against whom extreme violence may be unleashed stems from a mistake by Bartolus de Sassoferrato (1313-1357) in his understanding of Cicero. While Cicero merely wrote that promises and oaths to pirates need not be kept, with no mention of the famous term *hostis humani generis* (enemy of mankind), Sassoferrato argued in his *Apostilla* on the *Digest* that ‘enemies are not to be compared to pirates for the latter have renounced, by the law itself, the very principle of faith’ and, rewriting Cicero, he explained that these opponents were in fact ‘the enemies of the human species’ [*hostis humani generis*]. (Nussbaum, *A Concise History of the Law of Nations*, 214 note 73; Alfred P. Rubin and B. A. Boczek, “Private and Public History; Private and Public Law,” in *Proceedings of the Annual Meeting (American Society of International Law)*, 1988, 31. More broadly, see Gould, “Cicero’s Ghost.”) Daniel Edelstein, for his part, traces the emergence of the concept of the *hostis humani generis* to Christian ideas, see Daniel Edelstein, “Hostis Humani Generis: Devils, Natural Right, and Terror in the French Revolution,”

important groups. Panizza has suggested that Gentili's system of law is tied to the 'new/ancient notion of a 'natural society of mankind.'"⁹¹ This is plausible, but what I wish to do here is to focus on the negative flip side of this coin, namely Gentili's reliance on a constitutive 'other' against whom all have an incentive to unite and rally.

As Daniel Heller-Roazen has remarked, '[i]t has less often been observed that the very thinkers who conceived the doctrine of war as a formal duel between equal parties also elaborated a detailed theory of an antagonist too iniquitous to deserve the title of proper opponent.'⁹² Nussbaum does rightly note this in the case of the rather unsympathetic Ayala,⁹³ but this critical lens has rarely been applied to the work of Gentili. Yet, in attempting to give sovereigns an incentive to abide by his system, he too carved out a legal space in which cruel acts and unrestrained violence by sovereigns could be considered entirely legitimate. In simple terms, at a time where different groups were using force and claiming to do so legitimately, Gentili drew a very clear line between those who were indeed entitled to do so and those who were not. This was certainly appealing for those who found themselves on the correct side of the divide. But before I dive into the question of who ended up falling in which category, let me outline the purpose of Gentili's reliance on the 'enemy of mankind' concept, something which he

Telos 2007, no. 141 (2007): 57–81. For another possible non-religious source of the term *hostis humani generis*, see Emily Sohmer Tai, "Marking Water: Piracy and Property in the Pre-Modern West," in *Seascapes, Littoral Cultures, and Trans-Oceanic Exchanges (Perspectives on the Global Past)*, ed. Jerry H. Bentley, Renate Bridenthal, and Karen Wigen (Honolulu, HI: University of Hawaii Press, 2007), 205–20.

⁹¹ Panizza, "Political Theory and Jurisprudence in Gentili's *De Iure Belli*: The Great Debate between 'Theological' and 'Humanist' Perspectives from Vitoria to Grotius," 43. The notion of a 'natural society of mankind' is, however, not to be confused with the eighteenth century concept of 'Humanität' and any subsequent notion of 'human rights,' as in Theodor Meron, "Common Rights of Mankind in Gentili, Grotius and Suarez," *American Journal of International Law* 85, no. 1 (1991): 110–16. This notion was ancient in the sense that Gentili was referring to the Stoic notion of the 'natural society of mankind,' but new in that he was moving away from rationales centered on the Christian community. On the naturalization of international society in the early modern period, see Roshchin, "(Un) Natural and Contractual International Society."

⁹² Heller-Roazen, *The Enemy of All*, 115.

⁹³ Nussbaum, *A Concise History of the Law of Nations*, 92.

did not pioneer, strictly speaking, but which he certainly used much more forcefully than any of his predecessors, giving the figure a foundational role in his system of law.

I wish to build here on the scattered remarks that have been made by scholars regarding the ‘other side’ of Gentili’s writings on the laws of war.⁹⁴ In essence, Gentili placed the figure of the enemy of mankind [*hostis humani generis*] at the heart of his theory of the laws of war by relying on a concrete figure: the *latro* (pirate/brigand). Gentili’s approach, naturally, was not entirely new. Prior to him, the idea that certain individuals or groups required a particular legal status already had some traction. I therefore begin by outlining the type of arguments that were made prior to Gentili, particularly in the works of those generally considered to be his most direct and most influential predecessors, Belli, Bodin, and Ayala. I then turn to the work of Gentili himself, and I shed light on the leap that he took in his own approach. What is striking in Gentili’s theory of the laws of war is his enormous emphasis on the distinction between legitimate and illegitimate belligerents, which he may be said to have interpreted as a cornerstone of the law of nations.⁹⁵

In *De re militari et de bello* (1563), Pierino Belli had argued that since all were at war with brigands/pirates (*latrones*), one did not have to abide by the rule of making a declaration of war before starting hostilities. He also explicitly stated that ‘it should be permissible for anyone to attack them...even persons in private life may assault such outlaws—and to the point of killing them.’⁹⁶ These considerations were nothing more

⁹⁴ As far as I am aware, the only scholar who has written a full piece on this aspect of Gentili’s work is Ileana Porras, who did not publish her piece but kindly accepted to share it with me. The piece is entitled ‘Atheists, cannibals, rebels and pirates: Cementing the bonds of human society in Gentili’s *De iure belli*.’ She did present her work at NYU’s conference on Alberico Gentili in 2008, however, and her argument may have influenced Peter Schröder, who includes some similar claims in a more general piece entitled ‘Vitoria, Gentili, and Bodin: Sovereignty and the Law of Nations.’ He also touches on some of these points in his analysis of Carl Schmitt’s engagement with the works of Bodin, Hobbes, and Gentili in Schröder, “Carl Schmitt’s Appropriation of the Early Modern European Tradition of Political Thought on the State and Interstate Relations.”

⁹⁵ Rech, *Enemies of Mankind*, 55; Schröder, “Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations.”

⁹⁶ Belli, *De Re Militari Et Bello Tractatus*, Part II, Title XI.

than side notes in Belli's work, however. Much more importantly, these ideas feature prominently in the work of Bodin. The French jurist defines his famous concept of the *République* precisely by opposition to 'bands of thieves and pirates.'⁹⁷ Furthermore, Bodin actually uses these figures to clarify his concept of the enemy:

*Quand ie dy [dis] ennemi, j'entens qui a denoncé, ou bien auquel on a denoncé la guerre autrement de parole ou de faict, quant aux autres, ils sont estimés voleurs ou pirates, avec lesquels le droit des gens ne doit avoir aucun lieu.*⁹⁸

Bodin was of course concerned primarily with the French domestic situation, and he does not develop this position in greater detail. Nonetheless, his ideas were key both in terms of understanding sovereigns as equals in the context of war, and considering others as outlaws. Applying the label of 'thieves' or 'pirates' to a group of fighters, following Bodin's approach, could mean stripping them of the protection of the law altogether.⁹⁹

Ayala is the one who first took stock of Bodin's seminal opposition and developed it within the juridical realm. Crucially, in light of his personal stakes in the Spanish attempt to crush the Dutch Revolt, Ayala added 'rebels' alongside Bodin's initial figure of the thieves/pirates in his category of those who could not legitimately wage a war. As I have suggested earlier, Ayala argued that rebels and pirates/brigands, although armed

⁹⁷ '*République est un droit gouvernement de plusieurs ménages, et de ce qui eut est commun, avec puissance souveraine. [...] Nous avons dit en premier lieu, droit gouvernement, pour la difference qu'il y a entre les Republiques, & les troupes de voleurs & pirates, avec lesquels on ne doit avoir part, ni commerce, ni alliance: comme il a esté en toute Republique bien ordonner, quand il a esté question de donner la foy, traiter la paix, denoncer la guerre [...] & decider les differences entre les Princes & Seigneurs souverains...*' [A Commonwealth may be defined as the rightly ordered government of a number of families, and of those things which are their common concern, by a sovereign power. [...] We say in the first place right ordering to distinguish a commonwealth from a band of thieves or pirates. With them one should have neither intercourse, commerce, nor alliance. Care has always been taken in well-ordered commonwealths not to include robber-chiefs and their followers in any agreements in which honour is pledged, peace treated, war declared, ...or the disputes of princes and sovereign lords submitted to arbitration...] (Translation from Jean Bodin, *Six Books of the Commonwealth*, trans. Michael J. Tooley (Oxford: Blackwell's Political Texts, 1955).) Bodin, *Les Six Livres de La République*, 1.

⁹⁸ Bodin, *Les Six Livres de La République*, 76. ['When I say enemy, I mean the one who has declared war, or to whom war has been declared either in words or in facts, as for the others, they are considered thieves or pirates, to whom the law of nations cannot apply.' This is my translation, as the abridged translation of Tooley (1955) does not appear to contain this passage.]

⁹⁹ Schröder, "Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations," 178.

fighters, did not fall under the category of enemies, and that the action taken against them would therefore constitute not war but the mere ‘execution of legal process, or prosecution.’¹⁰⁰ In addition to losing all the regular rights afforded to belligerents, this meant that they could legitimately be attacked using all the lawful means of battle, and with greater intensity than against public opponents, ‘for the rebel and the robber merit severer reprobation than an enemy who is carrying on a regular and just war and their condition ought not to be better than his.’¹⁰¹ As Arthur Nussbaum notes, in these cases the controversial Ayala presented the possibility of using ‘even tenets of extreme cruelty or perversion in a cool and logically disciplined manner.’¹⁰² Though this has almost entirely escaped scholarly attention, Gentili would develop these ideas into a much more elaborate position.

The opening chapters of Gentili’s *De iure belli* make it clear that his theory of the laws of war gives considerable weight to the distinction between legal and illegal belligerent. Scholars generally tend to focus on the first three chapters of Book I of *De iure belli*: ‘International Law as Applied to War’ (Chapter 1), ‘The Definition of War’ (Chapter 2), and ‘War is Waged by Sovereigns’ (Chapter 3)—or more accurately, war is waged by princes [*Principes bellum gerunt*]¹⁰³—in which one finds the famous ‘*bellum est publicorum armorum iusta contentio*’ [war is a just contest of public arms]. Yet, if Gentili’s definition of war as a public form of violence is underpinned by a clear statement of who may wage it—*principes*—it also relies on an equally clear statement of those who may not. Hence, Chapter 4 is entitled ‘Brigands Do Not Wage War,’ [*latrones bellum non gerunt*] and it explicitly sets out a category for illegitimate fighters who may be killed mercilessly by those who do have the right to wage violence.

¹⁰⁰ Ayala, *De Jure et Officiis Bellicis et Disciplina Militari Libri Tres*, Book I, Chapter 2, §14.

¹⁰¹ Ibid., Book I, Chapter II, §15. For brief analyses of this position, see Gould, “Cicero’s Ghost,” 31.

¹⁰² Nussbaum, *A Concise History of the Law of Nations*, 92.

In Chapter 4, Gentili does not use the famous term '*hostis humani generis*.' He does however state '*piratae omnium mortalium hostes sunt communes*,' literally 'pirates are the common enemy of all mankind,' and the text that precedes and follows this utterance leaves no doubt as to Gentili's indirect reliance on the '*hostis humani generis*' phrase, which was by now widely (although mistakenly)¹⁰³ attributed to Cicero.¹⁰⁴ It seems that for a period, the exact legal category that was being created fluctuated between the *hostis omnium* [enemy of all], the *hostis humani generis*, and the *latro* (appearing in translation and sometimes in Gentili's own work as a pirate, a bandit, a brigand, or a thief). The specific figure of the pirate, however, would consistently appear as the go-to example in creating Gentili's concept of the enemy of mankind.¹⁰⁵ Importantly, while the figure of the pirate had generally enjoyed a rather sulfurous reputation, Gentili was 'the first writer of lasting eminence to convert the confusions of the time to legal principle, to argue that the label 'pirate' carries with it the meaning of outlawry and that what 'pirates'

¹⁰³ See *supra*, note 90.

¹⁰⁴ Gentili, *De iure belli*, Book I, Chapter 4, §§35–36. The full section indeed reads: 'A state of war cannot exist with pirates and robbers. [...] There is also another reason why such men do not come under the law of war; namely, because that law is derived from the law of nations, and malefactors do not enjoy the privileges of a law to which they are foes. How can the law, which is nothing but an agreement and a compact, extend to those who have withdrawn from the agreement and broken the treaty of the human race. Pirates are the common enemies of all mankind and therefore Cicero says that the laws of war cannot apply to them.'

¹⁰⁵ On the use of the figure of the pirate in order to claim continuity with ancient practices, see *supra* note 90. The figure of the pirate may also have acquired particular importance in Gentili's writing in light of the political conflicts of his time. Indeed, in the early modern period, Gentili and Grotius were 'the two key writers elaborating new approaches to the law of the sea,' and they were both responding to the maritime conflicts of their time, particularly those of the first decade of the seventeenth century (Lauren Benton, "Sovereignty at Sea: Jurisdiction, Piracy, and the Origins of Ocean Regionalism," in *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge University Press, 2009), 124.) While they were both influenced by contemporary inter-imperial politics, they stood on opposite sides of the conflict between Spain and the rebellious United Provinces.' Very importantly, the central role played by maritime violence in the Dutch revolt, particularly through the Beggars of the Sea (Van der Molen, *Alberico Gentili and the Development of International Law*, 169.) and the 'pervasive practices of privateering and piracy' that accompanied the conflict with Spain had a tremendous influence on the two jurists (Benton, "Sovereignty at Sea: Jurisdiction, Piracy, and the Origins of Ocean Regionalism," 122). It is thus unsurprising to note that the development of the laws of war and of the laws of the sea were deeply intertwined and, consequently, that 'the outlines of Gentili's approach to the law of the sea are readily apparent in his writings on the law of war' (Ibid., 125.) This helps further explain why, in addition to the historical lineage it allowed him to invoke, Gentili's ideas about the right of war focused so heavily on the figure of the pirate.

do is forbidden by international law.¹⁰⁶ In other words, it is Gentili who first harnessed the powerful image of the pirate in order to frame his system of international law. Enemies of mankind, with the pirate as the standard example, would be the ones systematically excluded from the ambit of this new legal framework.¹⁰⁷

There are three steps within Gentili's theory of the laws of war in this regard. The first is to establish that those not entitled to wage war cannot be protected by the laws of war. The second is to establish what those who are, by contrast, entitled to wage war, may do so against them. The third—and most critical one, to which I will turn in section III—is to determine who falls in the category of those who may not legitimately wage war, and who are to be considered criminals when they do use force. The interesting twist is that since those who are allowed to wage war may only call it so when the violence is waged against another *iustus hostis*, the violence they wage against illegitimate belligerents falls into another category altogether, equivalent to Ayala's 'execution of legal process, or prosecution.' I analyze these three steps in turn, focusing on the three most relevant chapters in *De iure belli*, namely Chapter 4 of Book I on 'Brigands do not

¹⁰⁶ Rubin, *The Law of Piracy*, 28.

¹⁰⁷ Gentili had already hinted in that direction in *De Legationibus* (1585), though without developing it as much as in DIB. In a way reminiscent of his immediate predecessors, he states that pirates and brigands cannot receive the protection of international law in a chapter entitled 'the right of embassy does not hold in the case of brigands.' The section read: 'Neither brigands nor pirates are entitled to the privileges of international law [*ius gentium*], since they themselves have utterly spurned all intercourse with their fellowmen and, so far as in them lies, endeavor to drag back the world to the savagery of primitive times. In that age, as you know, men passed their lives in the manner of wild beasts, and each one carried off what fortune offered to him as prey, trained to use his strength in accordance with his own impulses and to live for himself alone. In those days, as Thucydides observes, to be a robber was an honor rather than a disgrace.' Gentili, *De Legationibus Libri Tres*, Book II, Chapter VIII, §86. Warren interestingly suggests that 'Gentili's denial of rights for brigands and pirates is especially pertinent for Hobbes.' Christopher Norton Warren, *Literature and the Law of Nations, 1580-1680* (Oxford: Oxford University Press, 2015), 142. In this chapter, Gentili also mentions—without elaborating—the idea that 'we must pay heed to Cicero who... says that the rights of war are not operative in the case of those who are the enemies of all.' Gentili also hints towards his early distaste for rebels in *De legationibus*, dedicating a whole chapter to the question of 'have rebels the right of embassy,' and explaining that '[r]ebels, that is persons who secede from those under whose authority they are, should not dare to send any embassies to those against whom they have revolted. An example of quite recent date is furnished by the Spanish king's action towards the Belgian ambassadors.' He concludes the chapter rather forcefully by stating: 'Subject peoples... can not acquire [the right of embassy] by revolt, because rights are not acquired by offenses.' Gentili, *De Legationibus Libri Tres*, Book II, Chapter 8, §§83–85.

Wage War,' the closing chapter of Book I, Chapter 25, on 'An Honourable Cause for Waging War,' Chapter 23 of Book III 'On Ratification, Private Citizens, Pirates, Exiles, and Adherents,' as well as a few other scattered passages where Gentili further develops some of his ideas.

The first step is made eminently clear in Gentili's prose. He opens his chapter on 'Brigands Do Not Wage War' with the following statement: 'A state of war cannot exist with pirates and robbers' [*cum piratis & latrunculis bellum non est*] and he gives two reasons for this, and specifically for 'why such men do not come under the law of war.'¹⁰⁸ First, he argues that these individuals have not, through their misconduct, emancipated themselves from the jurisdiction of their superior (meaning there is a higher authority above them and they therefore have no reason to resort to arms); second, he claims that '[the law of war] is derived from the law of nations, and malefactors do not enjoy the privileges of a law to which they are foes.'¹⁰⁹ On this second point, Gentili asks most emphatically: '[h]ow can the law, which is nothing but an agreement and a compact, extend to those who have withdrawn from the agreement and broken the treaty of the human race.'¹¹⁰ Gentili then builds on Sassoferato's misreading of Cicero and asserts that '[p]irates are the common enemies of all mankind and therefore Cicero says that the laws of war cannot apply to them.'¹¹¹ Further on, he reiterates that 'with pirates and brigands, who violate all laws, no laws remain in force.'¹¹²

The second step is also quite clear from the text, and it is fair to say that in practical terms, Gentili's approach had 'far-reaching moral and juridical consequences' for those who could be illegal belligerents, which were 'immediately felt in concrete political

¹⁰⁸ Gentili, *De iure belli*, Book I, Chapter 4, §35.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Gentili, *De iure belli*, Book I, Chapter 4, §35.

¹¹² Ibid., Book I, Chapter 4, §38.

terms.’¹¹³ Gentili imagined ‘an unrestricted right’¹¹⁴ to punish these individuals in all senses of the term. In essence, Gentili argued that it was necessary to wage violence against these inferior opponents, but that in doing so, the legitimate belligerents did not have to respect any of the laws of war. Gentili gave a number of concrete examples of what this entailed, naturally citing the classic Ciceronian assertion that one need not keep one’s word to them, even if it has been given on oath,¹¹⁵ but also establishing some much more extreme rules. For instance, Gentili argues that ‘the righteous craft that is employed against brigands is of a different kind from that which is used against the enemy,’ making it lawful to use normally prohibited stratagems against brigands.¹¹⁶ Similarly, it was ‘lawful, even under the conditions of peace as of the truce, to be hostile to pirates, and everywhere to shatter the lair of pirates,’¹¹⁷ and no treaty would be violated by the slaying of pirates, as ‘once justly said to the Scotch by the English.’¹¹⁸ Going ever further, Gentili appears to disagree with Solyman, King of the Turks, who ‘thought it unjust that the Venetians pursued pirates even to the port of Dyrrhachium and then fired on the citizens with artillery because they protected the pirates, and even laid waste their lands.’¹¹⁹ ‘But enough of this also,’ he tells us, and indeed, a few lines earlier, he explained that if the Scots relied on pirates, they became violators of the law as well.¹²⁰

Gentili then dedicates the entire closing chapter of Book I to the struggle these ‘violators of the law of nature and of common law’ and ‘monsters of lewdness’¹²¹ and the sort of violence that may legitimately be waged against them. The chapter, entitled ‘An

¹¹³ Schröder, “Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations,” 176.

¹¹⁴ Benton, “Sovereignty at Sea: Jurisdiction, Piracy, and the Origins of Ocean Regionalism,” 136.

¹¹⁵ Gentili, *De iure belli*, Book I, Chapter 4, §35.

¹¹⁶ *Ibid.*, Book II, Chapter 3, §232. And indeed, Gentili reminds us repeatedly that against the likes of pirates, brigands, runaway slaves, and rebels no laws remain in force (*Ibid.*, Book I, Chapter 4, §§35, 36, 38.)

¹¹⁷ Gentili, *De iure belli*, Book III, Chapter 23, §698.

¹¹⁸ *Ibid.*, Book III, Chapter 23, §697. See also *Ibid.*, Book II, Chapter 3, §232.

¹¹⁹ Gentili, *De iure belli*, Book III, Chapter 23, §698.

¹²⁰ *Ibid.*, Book III, Chapter 23, §697.

¹²¹ *Ibid.*, Book I, Chapter 25, §201.

Honourable Cause for Waging War,' is on the legitimacy of waging a war 'which is undertaken for no private reason of our own, but for the common interest and on behalf of others.' He then clarifies what he means, with a rather pressing tone: '[l]ook you, if men clearly sin against the laws of nature and of mankind, I believe that any one whatsoever may check such men by force of arms.'¹²² Against the latter, all is permitted, and no jurisdiction is necessary to justify a punitive war.¹²³ They must merely be annihilated, through an exterminatory form of violence, in order to enforce some basic standards of justice at the level of mankind.¹²⁴ It is worth noting that Gentili uses an erroneous example from the ancient world to do away with the question of prior injury, arguing that the Romans 'justly took up arms against the Illyrians, Balearans, and Cilicians, even though those people had touched nothing belonging to the Romans, to their allies, or to anyone connected with them; for they had violated the common law of nations.'¹²⁵ The Romans were in fact acting based upon prior injuries,¹²⁶ but Gentili's mistakes about Roman beliefs and practices became starting points and commonplaces for jurists and scholars after him (and up to this day).

Interestingly, Gentili seems to suggest in a passing comment that individuals can wage war against pirates and the like, whether they are sovereign or not: '[t]herefore since we may also be injured as individuals by those violators of nature, war will be made against them by individuals.'¹²⁷ As Pagden notes, this is strange, as 'it would seem to contradict his definition of war as a 'public contest' and his insistence that 'war on both

¹²² Ibid., Book I, Chapter 25, §198.

¹²³ Grotius would come to make a strikingly similar argument to Gentili, albeit 'characteristically without acknowledgment.' Panizza, "Political Theory and Jurisprudence in Gentili's *De Iure Belli*: The Great Debate between 'Theological' and 'Humanist' Perspectives from Vitoria to Grotius," 43.

¹²⁴ Gentili, *De iure belli*, Book I, Chapter 25. Gentili talks about 'the generally recognized kinship of all men with their fellows.' (Ibid., Book I, Chapter 16, §120.)

¹²⁵ Gentili, *De iure belli*, Book I, Chapter 25, §202.

¹²⁶ Gould, "Cicero's Ghost," 31.

¹²⁷ Gentili, *De iure belli*, Book I, Chapter 25, 202.

sides must be public and official, and there must be sovereigns on both sides to direct the war.’’¹²⁸ However, Pagden explains that Gentili clearly does not—contra Grotius and later Hobbes—‘allow to every person in the state of nature to punish.’¹²⁹ Instead, ‘[f]or Gentili, a violation of the law of nature (and thus the law of nations) would seem to transform warfare, which between civil beings would have been a resolution of differences following an initial attempt at a solution through dialogue, into a struggle for survival.’¹³⁰ This thus seems to be one of Gentili’s rather original and unclear positions, rather than a statement undermining the broader thrust of his theory.

Ultimately, it is quite clear that if Gentili is indeed trying to create some sort of ‘community of mankind’ upon which to ground his system of law, and within which sovereigns might see themselves as having a stake, he is doing so through the construction of a constitutive other. In his analysis of Gentili’s attempt to sketch a ‘common law of mankind,’¹³¹ Panizza indeed notes that what is striking in Gentili’s theorization of the ‘honourable’ offensive war is that ‘the moral principles common to all men, beyond religious and cultural diversity, which Gentili indicates expressly in that chapter, are sparsely mentioned.’¹³² Gentili thus sketches out these principles and the community of men they underpin not by positively asserting what these principles are, but by negatively pointing to those who violate them as the ultimate enemy. In light of this, it is unsurprising to note that while Gentili picks up the idea of the pirates and the thieves from Bodin, he adds ‘a reminder of the state of nature scenario which will become so notorious in

¹²⁸ Pagden, “Gentili, Vitoria, and the Fabrication of a ‘Natural Law of Nations,’” 357.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Panizza, “Political Theory and Jurisprudence in Gentili’s *De Iure Belli*: The Great Debate between ‘Theological’ and ‘Humanist’ Perspectives from Vitoria to Grotius,” 43. For a broader analysis of Gentili’s argument on the legitimacy of waging war on behalf of human society, see Tuck, *The Rights of War and Peace*, 34–47.

¹³² Panizza, “Political Theory and Jurisprudence in Gentili’s *De Iure Belli*: The Great Debate between ‘Theological’ and ‘Humanist’ Perspectives from Vitoria to Grotius,” 43.

Hobbes.¹³³ Indeed, Gentili discusses at length through *De iure belli* the fact that pirates are a threat to a world organized into sovereign polities interacting with each other according to the rule of law. In doing so, Gentili ultimately distinguishes two state-of-nature scenarios. The first is the ‘partially civilized condition, in which states engage like great men in a duel, following a code of conduct and even accepting arbitration,’¹³⁴ whereas the other is the complete chaos that occurs when actors who do not have the right to wage war nonetheless resort to force in order to pursue their goals.¹³⁵ It is this dichotomous vision that ultimately leads Gentili to lay out two radically different modes of belligerent engagement, with only one of them centered on the equal enemy, the *iustus hostis*, and deemed to deserve the legal status of ‘war.’ In the final section, I will address the burning question raised by Gentili’s binary system: who is it that can claim to have the proper *auctoritas*? If ‘War is Waged by Sovereigns,’ then who exactly qualifies as one?

III. Who is a sovereign?

Having established that the laws of war do not apply to those who may not wage it, and what may be done to those who resort to arms illegitimately, Gentili then makes a number

¹³³ Schröder, “Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations,” 174.

¹³⁴ Schröder, “Carl Schmitt’s Appropriation of the Early Modern European Tradition of Political Thought on the State and Interstate Relations,” 363. Schröder, picking up on Carl Schmitt’s original interpretation, suggests that the other scenario is ‘one beyond the lines drawn up by Europeans to divide the free space, which was lawless like the wild west.’ Yet, in light of the extent to which the debates in Gentili’s time also pertained to intra-state struggles, the dichotomy between the space divided by European and that beyond it seems somewhat unhelpful.

¹³⁵ Something striking here is the juxtaposition in his theory of a pluralist approach to war, granting all sovereigns the same rights and aiming to moderate the damage caused by ‘the arbitrament of Mars,’ alongside a much more solidarist vision of war, considering war (by another name) as a way to safeguard mankind from its enemies and allowing the virtually unrestrained use of violence to achieve this aim. The fact that both elements are fundamentally intertwined in his theory of the laws of war suggest that pluralism and solidarism may be less dichotomous than what is commonly suggested. In fact, a similar argument has been made in the case of Vattel’s writings, see Andrew Hurrell, “Vattel: The Limits of Pluralism,” in *Classical Theories of International Relations*, ed. Ian Clark and Iver B. Neumann (London: Macmillan, 1996), 233–55. For a detailed discussion of the concept of the enemy of mankind in *Le Droit des Gens*, see also Rech, *Enemies of Mankind*.

of statements regarding who actually falls into that category. In settling the question of who should be considered a ‘public’ actor possessing the ‘proper authority’ to wage war, Gentili is not exactly at his clearest. In the past, he has sometimes been seen as approaching ‘the modern notion that only public authorities are entitled to wage war and that only states can be considered such authorities,’¹³⁶ thus sketching ‘a distinctly modern outline of interstate relations as an anarchical society.’¹³⁷ Here I wish to delve into Gentili’s text in some more detail, building on a handful of existing remarks from the literature and taking stock of Gentili’s absolutist leanings discussed at length in the previous chapter.

While the figures of the pirate and the robber are Gentili’s starting point in establishing his category of enemies of mankind—or more simply, illegitimate belligerents—Gentili then proceeds to expand this category and to establish some further criteria, in a way that is rather problematic. What makes Gentili’s argument surprising within narratives that emphasize the progressive character of his work is the fact that those who are considered outlaws in his DIB are ‘not only those robbing others in absolute defiance of the notions of law, customs, and property.’¹³⁸ Indeed, Gentili applies the category of the outlaw or enemy of mankind not only to pirates and brigands, but also to Indians, whom he considers to be ‘cannibals,’ to atheists, to the Turks, and to one further, and crucial category—to which I will return later—that of the rebel.¹³⁹ Atheists, for instance, are ‘living rather like beasts than men’ and ‘such men, being the foes of all

¹³⁶ Knutsen, *A History of International Relations Theory*, 71. As Kingsbury points out though, Gentili ‘does not have a very precise concept of state—he discusses many different types of political entities without much distinction,’ and in addition, ‘the whole concept of sovereignty is not clearly development, and the sovereignty of rulers and the people is not systematically separated from the sovereignty of the state as a legal entity, although Gentili does see this as an issue.’ Kingsbury, “Confronting Difference,” 714–715.

¹³⁷ Knutsen, *A History of International Relations Theory*, 72.

¹³⁸ Schröder, “Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations,” 179.

¹³⁹ My attention was initially brought to these specific categories by Ileana Porras’ unpublished manuscript. Her points are echoed by Schröder, who also discusses the case of the Turks. Schröder, “Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations.”

mankind, as pirates are, ought to be assailed in war and forced to adapt to the usages of humanity.¹⁴⁰ Similarly, Indians should be treated as enemies of mankind because they ‘practiced abominable lewdness even with beasts, and... ate human flesh.’¹⁴¹ The Turks, in their case, are deemed too untrustworthy to be considered equal enemies.¹⁴² In this discussion, Gentili is thus already seen to be oscillating between considerations of having the right *auctoritas* and the more substantive idea that some groups fall outside of the protection of the laws of war because they violate the common law of nations.¹⁴³

Apart from these somewhat *ad hoc* remarks, and more importantly for our purposes, Gentili spends a considerable amount of energy excluding certain well-organized groups of fighters from the right to wage war. On this point, Gentili explicitly distances himself from all the sources he cites, seemingly spearheading a new approach. Gentili argues against all of his predecessors who sought to rehabilitate certain pirates on the ground that they could successfully challenge the Romans: Cicero is ‘in error,’ ‘[s]o too Augustine,’ and ‘[t]hus even Alciati is misled.’¹⁴⁴ He develops a similar position with regards to brigands: ‘we must beware,’ Gentili warns, ‘of confounding a brigand with a military commander, and brigandage with war.’¹⁴⁵ Again, he claims that this blunder has been made by numerous authors before him: ‘Justin speaking of Aristonicus, Frontinus of Viriathus, Appian of that same Spartacus and the pirates, of a certain

¹⁴⁰ Gentili, *De iure belli*, Book I, Chapter 9, §65.

¹⁴¹ Ibid., Book I, Chapter 25, §199.

¹⁴² ‘Yet it is almost natural for us to war with the Turks, just as it is was for the Greeks to contend with the barbarians. With the Saracens (who are Turks) who have an irreconcilable war. With other foreign peoples we have commercial relations, but certainly not war.’ Ibid., Book I, Chapter 12, §92. Gentili develops the part of his argument on the untrustworthiness of Turks at more length in *De Legationibus*. For a brief analysis of this aspect, see Schröder, “Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations,” 181. For a more detailed analysis of Gentili’s broader engagement with the Ottomans, see Malcolm, “Alberico Gentili and the Ottomans.”

¹⁴³ On the fact that Gentili falls back onto more substantive and arguably religious arguments in his discussion of relations with the Turks, see Malcolm, “Alberico Gentili and the Ottomans.”

¹⁴⁴ Gentili, *De iure belli*, Book I, Chapter 4, §39.

¹⁴⁵ Ibid.

Apuleius who was proscribed, and of Sextus Pompeius.’¹⁴⁶ No matter how large or well-organized the group is, no matter how well they can actually challenge the ‘legitimate’ power, and how scrupulously they might actually respect the laws of war,¹⁴⁷ these groups can never be seen as anything but illegal fighters that ought to be mercilessly destroyed.

At this point, Gentili then comes to the clearest formulation of what distinguishes a legitimate enemy from a mere criminal: ‘[t]he claim to the title of general will be justified not so much by the command of a regular army or by the capture of cities, as those writers and other historians seem to think, as by the assumption of a public cause [*adeptio publicae causae*].’¹⁴⁸ Without such a public cause, the fighters constitute a mere bellicose collectivity. Gentili stresses that the words *hostis* [enemy] implies equality, like the word ‘war,’ and that while it has sometimes been wrongly extended to ‘those who are not equal, namely, to pirates, proscribed persons, and rebels’ because ‘names are general and include several varieties,’ this can under no circumstances ‘confer the rights due to enemies, properly so called, and the privileges of regular warfare.’¹⁴⁹ And in fact, Gentili further emphasizes elsewhere that ‘[b]ecause the jurist seems to have put the enemy and brigands on a par in his treatment, it must not be understood that the same craft is lawful against the enemy which is proper against brigands. For against subjects and violators of every law far more is allowed than against equals and observers of the same law.’¹⁵⁰ Here Gentili cites the unavoidable Bodin, *République* I, i., presumably referring to Bodin’s seminal opposition between the Commonwealth and the ‘bands of thieves and pirates.’ Jurists have made mistakes in the past and forgotten how important it is to maintain a

¹⁴⁶ Ibid., Book I, Chapter 4, §40.

¹⁴⁷ Ibid., Book I, Chapter 4, §41.

¹⁴⁸ Ibid., Book I, Chapter 4, §§39–40.

¹⁴⁹ Ibid., Book I, Chapter 4, §41.

¹⁵⁰ Ibid., Book II, Chapter 3, §231.

different treatment for the enemy on the one hand and the brigand on the other, and Gentili is going to rectify this for us.

But what, then, is necessary for this element of ‘public cause,’ so central to Gentili’s theory of the laws of war, to obtain? Gentili does not give an explicit definition of what he means, but it can be deduced from the examples he gives of who may or may not qualify as a proper enemy. Put simply, what seems to make the difference is whether a group of fighters have the license of an established sovereign. Gentili discusses various examples at the end of Chapter 4, ruling out large groups of well-organized fighters (with ‘leaders, camps, and standards’) to be proper enemies and suggesting that this is because they have ‘no motive for war.’¹⁵¹ More specifically, what the key groups he dismisses as illegitimate fighters—Spartacus and his men as well as Charles Martel’s ‘Saracens’—are lacking, and what the Frenchmen in the closing anecdote of the chapter manages to produce, is a license from an established sovereign.¹⁵² ‘But history itself proves that they [the Frenchmen] were not pirates,’ Gentili explains, ‘and I say this because of no argument derived from the number and quality of the men and the ships, but from letters of their king which they exhibited.’¹⁵³ It is thus this license—the letter of marque in Gentili’s time—which enables a belligerent to be an equal enemy protected by the laws of war. Those who lack such a license, in Gentili’s approach, fall under a different category.

¹⁵¹ Ibid., Book I, Chapter 4, §41.

¹⁵² Ibid., Book I, Chapter 4, §§41–42. For this interpretation, I follow Rubin, *The Law of Piracy*, 29; Heller-Roazen, *The Enemy of All*, 108. It is worth noting that Gentili advances a different position in *Hispanica Advocatio*, this time suddenly condemning the granting of letters of war as a reprehensible custom of war, most likely because this was better suited to defending the interests of his client, the Spanish Crown. For an analysis of this shift, see Van der Molen, *Alberico Gentili and the Development of International Law*, 174–176; Rech, *Enemies of Mankind*, 54–65. This sudden and obviously instrumental shift in position may well have contributed to limiting the direct impact of Gentili’s work on later jurists.

¹⁵³ Gentili, *De iure belli*, Book I, Chapter 4, §36.

One will note that Gentili does not delve into a debate over where sovereignty might lie, nor over whether either the people or their representatives might be legally entitled to contest the authority of an established sovereign. Gentili's solution is simply to assert that only established sovereigns have a right to wage war. Anyone else who does automatically falls into the category of enemies of mankind. This is clearly an approach that is heavily in favor of the status quo, and that tremendously reinforces the dominance of those already in power. In many ways, it is strikingly reminiscent of Ayala's own doctrine. And in fact, Gentili crucially rejects Hotman's attempt to bring rebels under the protection of the laws of war. Beginning his discussion by arguing contra Hotman that the laws of war do not apply to runaway slaves and brigands, 'for inasmuch as such men are the enemies of all mankind and spare absolutely no one...they cannot...enjoy the common law of all,'¹⁵⁴ he then also rejects Hotman's claim that the laws of war can be 'extended to those who have revolted.'¹⁵⁵

Gentili's most detailed reflections about rebels comes in a chapter on the destruction and sacking of cities,¹⁵⁶ and starts off from some specific considerations about individuals who rebel against their occupier after defeat. In this context, Gentili concludes that rebellion constitutes the chief incentive to cruelty, that it cannot be excused, and he agrees with Josephus that '[h]e who has once been subjected and rebels again appears rather like an incorrigible slave than a lover of liberty.'¹⁵⁷ This is admittedly a discussion of rebellion in the immediate aftermath of defeat, but Gentili then delves into what appears to be a discussion of broader principle, taking as an example the rebellion of the Jews against the Roman Empire in the days of Titus. 'The Jews,' Gentili explains, 'were

¹⁵⁴ Ibid., Book I, Chapter 4, §36.

¹⁵⁵ Ibid. Gentili reiterates his claim that rebels are akin to pirates and thus cannot be considered proper 'enemies' in Ibid., Book I, Chapter 4, §41. I discuss this point in greater details below.

¹⁵⁶ Ibid., Book III, Chapter 8.

¹⁵⁷ Ibid., Book III, Chapter 8, §521.

under the sway of Rome from the days of Pompey and therefore their subsequent rebellion was a wicked one.' He then states the following definition: '[r]ebels are those who although subjects, oppose the command or act of their superior; or at any rate those who resist a sovereign or an official of his in matters affecting the condition of the empire.'¹⁵⁸ Giving a concrete example, he explains: 'When I was asked whether those cities were rebels which became enemies of Henry the Fourth of France because they did not think that he was lawfully their king... I replied that they were guilty as it were by the fault of their origin, since at birth they became legally subject to him.'¹⁵⁹

There is nonetheless one passage in the text in which Gentili seems to be going in a completely different direction, contradicting himself on nearly everything else he has put forward in DIB regarding the nature of sovereignty, the right to war, and the legitimacy of rebellion. This, unsurprisingly, is his chapter entitled 'Defending the Subjects of Another Against Their Sovereigns,'¹⁶⁰ which would have been directly relevant to the question of whether it was legal for the English to support Dutch subjects in their rebellion against the Spanish. If anything, what this chapter does is illustrate the extent to which Gentili's new framework for the laws of war put him in an awkward position vis-à-vis his own allegiances. Due to his circumstances, it was unthinkable for Gentili to dismiss the Dutch fighters as mere enemies of mankind in DIB, even if this meant contradicting himself quite extensively. He could perhaps have vested authority in England to authorize the Dutch rebels, but this could have raised some issues in light of the fact that the Dutch were nonetheless rebelling against their own sovereign. Instead, he appears to suddenly adopt a new vision of sovereignty, stating:

I say that a dispute concerns the commonwealth, when the number of subjects who are aroused to war is so great and of such a character, that

¹⁵⁸ Ibid., Book III, Chapter 8, §522.

¹⁵⁹ Ibid.

¹⁶⁰ Gentili, *De iure belli*, Book I, Chapter 16.

since they defend themselves by arms, it is necessary to make war against them. For those who have so much power share as it were in the sovereignty; they are public characters and on an equality with the sovereign, just as one sovereign is said to be on an equality with another when he is able to resist the other in an offer of violence.¹⁶¹

While the first part of the citation is completely at odds with Bodinian understandings of sovereignty (most obviously on indivisibility), the last clause, for which Gentili cites Cephalus, directly contradicts his earlier repudiation of all the arguments that considered very large groups of well-organized fighters and seafarers who challenged Roman authority to be proper enemies rather than mere pirates, as well as his condemnation of the Jews who rebelled against the Roman empire. Gentili goes on to defend at length the legitimacy of intervening on behalf of foreign subjects struggling against their sovereign, pushing the argument rather far and arguing that this is legal even if the subjects' cause is unjust, as '[w]e are right in protecting even unjust sons against the cruelty of a father.'¹⁶² In a remarkable move that clearly demonstrates the intrusion of reason of state considerations into the late sixteenth century jurist's positions, he closes the chapter by explicitly legitimizing the defence of the 'Belgians,'¹⁶³ quoting Justus Lipsius's 'wise words' that 'if that bulwark of Europe... should be broken down by the Spaniards, nothing would be left as a bar against their violence,'¹⁶⁴ an argument which ultimately seems to have more to do with balance of power considerations than with any deep sympathy for the Dutch cause. Ultimately, this chapter is fascinating because its content was so directly relevant to the main conflict of Gentili's time, and it neatly illustrates the tension between the framework Gentili was trying to develop and the political realities he had to personally navigate. It is hard to see how Gentili could have argued anything

¹⁶¹ Ibid., Book I, Chapter 16, §120.

¹⁶² Ibid., Book I, Chapter 16, §123.

¹⁶³ Belgians is the translation of *belgici*, which in modern Latin designates the Dutch.

¹⁶⁴ Gentili, *De iure belli*, Book I, Chapter 16, §127.

else on this particular topic. Obviously, claiming that in waging war, the Dutch did not have the license of an established sovereign and were thus violators of the law of nation (and therefore enemies of mankind) was simply not an option. Gentili thus had to perform an incongruous intellectual *pirouette* and quietly contradict himself for the sake of political *bienséance*.

This would not be the last time Gentili was left in an uncomfortable position because of his very stark legal doctrine on war and sovereignty; as a lawyer in admiralty courts, he would end up contradicting himself numerous times on the distinction between pirates and privateers depending on his clients, something which has contributed to later explanations of the neglect of his work in favor of that of Grotius.¹⁶⁵ More importantly, he would end up at even greater pains to justify the legitimacy of the Dutch revolt in his later tract in defense of absolutism, awkwardly and rather unconvincingly trying to paint the issue as irrelevant.¹⁶⁶ Ultimately, these difficulties merely highlight the extent to which the broader approach he developed in DIB was premised on an understanding of sovereignty and of the right to war that undermined the legitimacy of popular revolts and, correspondingly, cemented the power of established sovereigns.

¹⁶⁵ While Gentili is often seen as a jurist of lesser importance for having had a less systematic method (see Nézard, "Albericus Gentilis."), he is also considered to have been 'too much of a polemist and too much of an advocate,' (Nussbaum, *A Concise History of the Law of Nations*, 101.) and to have contradict himself to suit the needs of his clients (although this is arguably what lawyers do). Grotius himself also made various derogatory and partly unfair remarks about Gentili's work, despite in fact owing much to the Italian jurist (Ibid., 100.) As Schröder points out, in the first lines of *De iure belli* Gentili claims to be the first to make readily available the laws which can regulate the relations between different and potentially hostile states, and Grotius would be at pain to circumvent this assertion in light of his own desire to claim the merit of developing the first systematic theory of inter-state relations. Schröder, "Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations," 171.

¹⁶⁶ Van der Molen, *Alberico Gentili and the Development of International Law*, 237.

Conclusion

To sum up, I have argued that in DIB, Gentili used the figure of the enemy of mankind to develop and legitimize an absolutist theory of the laws of war. In doing so, he found a way to reconcile his absolutist leanings, his admiration for reason of state ideas, and his desire to make the law of nations an essential component of inter-sovereign relations. His construction of a constitutive other through the figure of the enemy of mankind enabled him to give supreme sovereigns seeking to serve the interests of their own state an incentive to buy into his legal framework and bind themselves to a certain degree. Crucially, he posited that only established sovereigns could be legitimate belligerents, and in a move strikingly reminiscent of Ayala, he placed rebels in the same category as pirates and brigands, making them enemies of mankind as well.

In doing so, Gentili erected at the heart of his system of laws a very sharp distinction between war proper—a contest between two established sovereigns—and the type of violence that would occur between sovereigns and non-sovereigns. In the latter case, the violence would not be considered a ‘war’ legally speaking, and the laws of war would not protect the ‘illegitimate’ belligerent. In fact, Gentili explicitly justified the use of extreme (and usually forbidden) measures by sovereigns against these types of fighters. In his legal framework, Gentili thus legitimized a type of international violence that was not bilateral, but instead that served a purpose of punishment and pacification (or law enforcement, more broadly), obeying principles reminiscent of the medieval logic of the just war. Gentili’s theory of the laws of war really presents two sides: the first establishes war as a legal institution rather than a punitive endeavor, giving equal rights to belligerents on both sides and putting forth a number of clear rules; the second creates a space in which violence can be waged against certain opponents stripped of their rights in the name of defending some form of human community. In other words, Gentili’s work

is as much about the moderation and the 'humanization' of war as it is about entrenching a dehumanizing process legitimizing ruthless international violence beyond the narrow sphere of 'war,' unleashed against those who dare to take up arms when they are not already established sovereigns.

Gentili's dichotomous system, grounded in drawing a sharp line between *princeps* and *latrones*, between 'war' and this other, murkier sphere of international violence, was not exactly congenial to the realities of his time. The Holy Roman Empire, with its patchwork of overlapping sovereignties, occupied the heart of Europe; the Wars of Religion, and particularly the Dutch Revolt had given rise to numerous debates about the nature of sovereignty and the legitimacy of resistance; and the years following the publication of DIB would witness the creation of the East India Company (1600) and its Dutch counterpart, the Vereenigde Oost-Indische Compagnie (1602), powerful mercantile companies that operated private armies and raised further questions regarding sovereignty and the use of force. This may explain why Gentili's ideas fell into near oblivion following his death before being revived by a group of lawyers in the late nineteenth century, a matter to which I turn in the next chapter.

Before I do so, however, it is worth pausing and taking stock of this virtually forgotten side of Gentili's approach. Gentili is celebrated today for his pioneering attempt to separate the *ius ad bellum* (questions of justice in declaring war) from the *ius in bello* (questions of justice within war) by eschewing questions of just cause and giving all legitimate belligerents the same rights in war. The separation of these two spheres is central to the contemporary laws of war; one might even say it has become one of its most sacred principles. And yet, Gentili's framework suggests that this type of approach may have had some serious costs—including in terms of the attempt to 'humanize' war—which Gentili himself was willing to pay because they were in line with his own absolutist

stance. In light of these compromises, how well did Gentili's views fit with those of his contemporaries, and why did they eventually attract the late nineteenth century lawyers who revived his work amidst attempts to codify the laws of war?

PART II.

FROM CONTEXT TO CONTEXTS: THREE RECEPTIONS OF

GENTILI

Chapter 4.

An Unforeseen Posterity: The Initial Reception and the Revival of Gentili

This chapter focuses on the reception of Gentili's *De iure belli*, first upon its initial publication in 1598, and then upon its reedition in 1877. I first assess the reception of *De iure belli* at the time of Gentili's writing, notably examining the extent to which Gentili's seminal work on war was displaced by Grotius' 1625 landmark *De iure belli ac pacis*. I then turn to the reception of Gentili's work in its 'second context,' following T.E. Holland's inaugural lecture reclaiming Gentili as the other father of international law in 1874. In line with my dual methodology, I examine the role played by Gentili's ideas nearly three centuries after his death, when his work—and particularly *De iure belli*—was given a second life. Specifically, I shed light on the amount of overlap that existed between those who promoted the revival of Gentili and a number of individuals who were at the heart of the efforts to turn international law into a scientific discipline, who worked on contemporary issues relating to the laws of war and their codification, and who were involved in the legislative architecture of imperial conquest. I point to the way in which legal scholars used Gentili's work on war to support their own positions, particularly with respect to ideas about war and sovereignty, and in light of the broader efforts to justify certain forms of exclusion in the development of the laws of war.

I. The initial reception of Gentili's writings in the seventeenth century

Surprisingly for someone meant to be such an important figure in international law, relatively little is known about the reception of Gentili's works in his own time, including

his treatise on the laws of war.¹ What transpires is essentially that his work was cited in passing within the context of international law during the seventeenth century, that he also attracted some attention in the 1640s in light of his stark defense of absolutism, and that his influence waned from the early eighteenth century onward.

The publication trajectory of *De iure belli* is, to some extent, revealing in itself. The treatise was first published in 1589 in short form, based on Gentili's lectures on the laws of war. The fully developed version, now considered Gentili's masterpiece, was published in 1598 as *De iure belli libri tres*, by Guilielmus Antonius at Hannover. All of Gentili's works were placed on the *Index librorum prohibitorum* [the List of Prohibited Books] from 1603 onwards, an unsurprising feat considering *De iure belli* in particular was 'full of anti-Spanish sentiment,' including 'the ultimate ignominy' of associating Spain, a fervently Catholic power rising into a position of hegemony in Europe, with Christianity's arch enemy, the Turks.² Nonetheless, a second and third edition of DIB, which are 'very much like the first,'³ were published at Hannover by the successors of Antonius in 1604 and 1612 respectively. Efforts to republish Gentili's treatise on the laws of war then stopped for a century and a half, until a fourth edition of *De iure belli libri tres* was published within an incomplete and seldom mentioned 1770 edition of the 'Opera Omnia' of Alberico Gentili.⁴ The fifth, and most influential, republication of DIB happened in the late nineteenth century, to which I will turn in the next section.

¹ Gesina van der Molen's seminal monograph on Gentili merely mentions his revival in the late nineteenth century, without addressing the question of his earlier reception. The one piece that addresses the early reception of Gentili—and specifically of his DIB—is a piece about Gentili's three references to the Hanseatic League in DIB, which essentially constitutes a side note within a broader research project on the legal aspects of the Anglo-Hanseatic controversies during the 16th century. Alain Wijffels, "Alberico Gentili and the Hanse: The Early Reception of *De Iure Belli* (1598)," in *The Roots of International Law/les fondements du droit international: Liber amicorum Peter Haggenmacher*, ed. Pierre-Marie Dupuy, Vincent Chetail, and Peter Haggenmacher (Leiden: Martinus Nijhoff, 2013), 181–209.

² Koskenniemi, "International Law and Raison D'état," 300.

³ Van der Molen, *Alberico Gentili and the Development of International Law*, 54.

⁴ The publication was interrupted after two volumes due to the editor's death.

Despite these gaps, and in light of the breadth of Gentili's various writings on the *ius naturae et gentium*, his name was 'respectfully mentioned' over the seventeenth century by the likes of Abraham De Wicquefort (1606-1682), Samuel von Pufendorf (1632-1694), Anthony Wood (1632-1695), Pierre Bayle (1647-1706), and Cornelis van Bijnkershoek (1673-1743).⁵ In fact, as Haggemacher notes, his reputation was sufficiently established for Pierre Bayle to include an article about Gentili in his famous *Dictionnaire*.⁶ The article in question, however, is not particularly laudatory. Bayle informs us that Gentili's various works made him well known [*lui acquirent beaucoup de réputation*], but then merely notes that his three volumes on the laws of war 'were not useless to Grotius,' and that he 'also did three *De Legationibus*.' He then highlights 'his disputations on the power of kings, and on the union of the kingdoms of Great Britain, and on the inherent injustice of resistance against kings' and notes that they 'show even more clearly that he was not in favor of republican maxims' than the ten disputations he asked his son to dedicate to the Earl of Pembroke in 1607.⁷

Bayle's comment points to an aforementioned aspect of Gentili's work that acquired him a certain notoriety: his defense of absolutism. In England, Gentili was very much going against the grain in putting forward such a defense, as 'the early Stuart political nation was held together by an *anti-absolutist* consensus.'⁸ In this context, Burgess reminds us that if anything, 'the few who openly challenged that consensus were mainly of importance for the way in which they enabled everyone else to unite in

⁵ Van der Molen, *Alberico Gentili and the Development of International Law*, 61.

⁶ Haggemacher, "Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture," 134.

⁷ Pierre Bayle, *Dictionnaire historique et critique*. (Paris: Desoer, 1820), vols. vii, 66. 'Il a fait trois livres de *Jure Belli*, qui n'ont pas été inutiles à Grotius. Il en a fait aussi trois *de Legationibus*. Ses disputes sur le pouvoir absolu des rois, et sur l'union des royaumes de la Grande-Bretagne, et sur l'injustice inséparable de la résistance aux rois, *de vi civium in regem semper injustâ*, marquaient encore plus clairement qu'il n'était pas pour les maximes républicains, que les dix disputes dont il fit présent à son fils, afin qu'il les dédiât, en l'an 1607, au comte de Pembroke, son patron.'

⁸ Burgess, *Absolute Monarchy and the Stuart Constitution*, 18.

disagreement against them.’⁹ Importantly, and ‘with the possible exception of Dr. John Cowell’s¹⁰ *Interpreter* (1608),’ Gentili’s defense did not raise much interest until the 1640s, when ‘it was used to reveal the real kernel of royalist belief in an anonymous parliamentary tract of 1644.’¹¹ The pamphleteer claimed that Gentili ‘had encouraged both James I and Charles I to advance the total prerogative at the expense of the people’s liberty and to lead the country into civil war.’¹² Even then, however, the revived Gentili did not attract much attention—no one responded to the anonymous parliamentarian’s tract.¹³ Ultimately, the actual impact of Gentili’s defense of absolutism on English legal and political debates in the first half of the seventeenth century is questionable,¹⁴ but what is clear is that his reputation—at least from the 1640s onwards—was somewhat tainted, particularly in England, and sufficiently so to affect Bayle’s remarks in his *Dictionnaire*.

More broadly, Gentili’s reputation in the seventeenth century was deeply affected by the meteoric rise of the man who would come to completely overshadow him after his death, Hugo Grotius. The ‘miracle of Holland’ drew extensively from Gentili’s writings—particularly from DIB in drafting his own *De iure belli ac pacis*—while not giving the Italian much credit.¹⁵ Peter Haggenmacher has examined the respective position of the two authors in the emergence of international law as a legal discipline at

⁹ Ibid.

¹⁰ Ibid., 78. See also Levack, *The Civil Lawyers in England, 1603-1641*, 4.

¹¹ Burgess, *Absolute Monarchy and the Stuart Constitution*, 78. See also Sharp, “Alberico Gentili’s Obscure Resurrection as a Royalist in 1644,” 288–289. Cowell was the Regius Professor of Civil Law at Cambridge.

¹² Levack, *The Civil Lawyers in England, 1603-1641*, 4. The tract is entitled ‘*England’s monarch, or a conviction and regutation by the common law of those false principles and insinuating flatteries of Albericus, delivered by way of Disputation, and after published, and dedicated to our dread Sovereigne King JAMES, in which he laboureth to prove by the Civill Law, our Prince to be an absolute Monarch; and to have a free and Arbitrary power over the lives and estates of his people.*’

¹³ Sharp, “Alberico Gentili’s Obscure Resurrection as a Royalist in 1644,” 299.

¹⁴ For an in-depth discussion, see Burgess, *Absolute Monarchy and the Stuart Constitution*, 78–90. For his part, Diego Panizza argues that Gentili’s arguments actually had an impact on Hobbes, who would have heard them during his time in Oxford and then transformed them into his *Leviathan*. Diego Panizza, “Il pensiero politico di Alberico Gentili: religione, virtù e ragion di stato,” in *Alberico Gentili: politica e religione nell’età delle guerre di religione: atti del Convegno, seconda Giornata Gentiliana, San Ginesio, 17 Maggio 1987* (Milano: A. Giuffrè, 2002), 212–3.

¹⁵ On Grotius’ relationship to Gentili, see notably Kenneth R. Simmonds, “Hugo Grotius and Alberico Gentili,” *German Yearbook of International Law* 8 (1959): 85–100.

some length, with a particular emphasis on Gentili's influence on Grotius and an explicit analysis of their treatises on the laws of war, and I will not repeat his detailed analysis here.¹⁶ The main point is that neither Gentili nor Grotius would have thought of themselves as the prophets of a new legal order or as 'fathers' of international law—instead, 'all they had in mind was a reformulation of the traditional *ius belli*.'¹⁷ Precursorism, or what Quentin Skinner has called 'the mythology of prolepsis,'¹⁸ i.e. the endless search for 'antecedents' or 'origins' of ideas or practices, has led scholars to regard Gentili as having been at least as modern as Grotius when measured up against the classical international law of the eighteenth century, notably the treatises of Moser and Vattel. This is very much anachronistic, and of little help in determining why Grotius' work dethroned Gentili's in the seventeenth century. Essentially, Haggenmacher's suggestion is merely that 'the philosophical substance and "geometrical" construction of *De iure belli ac pacis* appealed more to the age of system-builders like Pufendorf, Spinoza, Leibniz, and Wolff than did the "plain empirical approach of Gentili.'"¹⁹

A century after his death, discussions of Gentili's work began to wane altogether. Specifically, his reputation 'suffered a severe set-back during the period following the Peace of Utrecht' of 1713.²⁰ Of course, his name 'did not vanish altogether,'²¹ and one can trace a thin but steady stream of superficial citations of his works, as thin as this thread may sometimes have been, from the early eighteenth to the mid-nineteenth century, the period during which Grotius was considered the sole founding father of the *ius naturae et gentium*. In the eighteenth century, these citations include a separate

¹⁶ Haggenmacher, "Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture." On their respective treatises on the laws of war, see *Ibid.*, 156–67.

¹⁷ *Ibid.*, 173–4.

¹⁸ Skinner, "Meaning and Understanding in the History of Ideas," 73.

¹⁹ Haggenmacher, "Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture," 174.

²⁰ *Ibid.*, 134.

²¹ *Ibid.*

paragraph on Gentili in Glafey's *Geschichte des Rechts der Vernunft* of 1723, a mention by Martens in one of his early works, the claim that Gentili is 'the first scholar to have earned himself some merit in the promotion of the science of the Law of Nations' in Ompteda's *Litteratur* of 1785, and a mention in Ward's famous *Enquiry* of 1795 as the one 'who bore the palm from all the jurists before Grotius.'²² In the first half of the nineteenth century, he is notably mentioned in Hallam's *Introduction to the Literature of Europe* of 1839 as well as in Wheaton's *History of the Law of Nations* of 1841.²³ These references to Gentili generally consist of a paragraph at most, and often of a mere few words. The only known exceptions, apart from the incomplete 1770 *Opera Omnia* of Gentili's works, are the 1750 monograph of T. Begnigni, an antiquary from San Gineso, Gentili's birthplace, and W. A. Reiger's doctoral thesis of 1867, to which I will return. Kaltenborn has also been deemed to have been 'one of the first, if not the first, of scholars outside Italy to acquire a proper understanding of Gentili's work in relation to that of Grotius' in his *Die Vorläufer des Hugo Grotius* 1848, but it is also acknowledged that his work is 'not usually listed in bibliographies relating to Gentili.'²⁴ Ultimately, Gentili's writings would only start generating proper interest in the 1870s, to which I now turn.

²² Adam Friedrich Glafey, *Vollständige Geschichte des Rechts der Vernunft* (Leipzig: Neudruck der Ausgabe, 1739), Book III, §4, 58; Georg Friedrich von Martens, *Primae lineae iuris gentium europaearum practici in usum auditorum adumbratae* (Gottingen: Dietrich, 1785), Prolegomena, §7, 6; Dietrich Heinrich Ludwig von Ompteda, *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts* (Regensburg: Johann Leopold Montags Erben, 1785), §49, 168–9; Robert Plumer Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe: From the Time of the Greeks and Romans, to the Age of Grotius* (London: J. Butterworth Fleet-Street, 1795), vol ii, chap. 18, 608; but see also 612. All cited in Haggenmacher, "Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture," notes 6–12. For an exhaustive bibliography of the works that cite Alberico Gentili (including the ones mentioned by Haggenmacher), see Ermelinda Armigero Gazzera, *Alberico Gentili: Bibliografia* (Tolentino: F. Filelfo, 1917).

²³ Henry Hallam, *Introduction to the Literature of Europe in the Fifteenth, Sixteenth, and Seventeenth Centuries*. (Paris: John Murray, 1839), vol ii., chap. 4, §§90–2, 153–5; Henry Wheaton, *Histoire des progrès du droit des gens en Europe et en Amérique: depuis la paix de Westphalie jusqu'à nos jours*, third edition (Leipzig: F.A. Brockhaus, 1853), vol i., 49–53. Citing in Haggenmacher, "Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture," notes 13–14.

²⁴ G. Del Vecchio, 'The posthumous fate of Alberico Gentili,' *American Journal of International Law*, 50/3 (July 1956), 664–5.

II. The revival of Gentili in the late nineteenth century

Gentili's works truly reemerged in the late nineteenth century, through a major international revival generally considered to have been spurred by Thomas Erskine Holland (1835-1926) in England. An International Committee was created to revive the Italian jurist and his work, made up of three distinct sub-committees: an Italian one, an English one, and a Dutch one, each endowed with its share of eminent jurists and high-profile figures. Many of the individuals involved were or would become important members of the epoch-making *Institut du Droit International*, founded in 1873. An example amongst many, Pasquale Mancini (1817-1888), the first President of the *Institut*, was also the President of the Italian Sub-Committee for the revival of Gentili. The members of the *Institut* would famously found the discipline of international law as we know it today, in a great effort to turn law into a true science and to professionalize the field, mirroring developments in economics and in the social sciences.²⁵

This momentous revival is rather remarkable, and one might indeed wonder why Alberico Gentili and his *De iure belli* suddenly benefited from such considerable attention on the part of scholars and jurists. Koskenniemi, emphasizing the substantial discontinuities between pre and post-1870 international law, suggests that '[n]ineteenth-century international lawyers imagined a history to what they were doing because that was the habit of a historical age.'²⁶ Indeed, it is well established that 'one of the outstanding features of 19th century international legal thought was the emergence of a

²⁵ Koskenniemi, *Gentle Civilizer*, 17.

²⁶ Koskenniemi, "International Law and Raison d'État," 298. Koskenniemi continues: 'What we have, instead, is a literature on the government of modern states that occasionally deals with the external aspects of that government—war, treaties, and diplomacy. But these are not understood as a legal 'system' somewhere outside statehood, with the point of limiting the negative effects of state policy. Instead, they are part of a functional notion of territorial rule the purpose of which varied over time from 'conservation' of the realm to the 'perfection' of its people.'

consciousness of his own historical character.’²⁷ Yet, this tells us little about why these international lawyers turned specifically to Gentili, nor about what they emphasized in his work in trying to construct the history of their own endeavor. Furthermore, the case of Gentili is particularly interesting because, while the pantheon of ‘the founders of international law’ would gradually widen over the late nineteenth and the early twentieth century—notably with the celebration of Vitoria by James Brown Scott (1866-1943) and with Scott’s broader efforts to establish a history to the discipline of international law²⁸—the revival of Gentili constituted ‘the first real challenge to Grotius’ undisputed reputation as the founder of international law.’²⁹ Reviving Gentili and establishing him as the first real competitor of Grotius was thus a remarkable move that certainly deserves an explanation.

Two contextual elements are of fundamental importance here, and frame the analysis that follows. First, Luigi Lacchè, whose work on the revival of Gentili constitutes my starting point, reminds us that ‘[i]nternational law became a “science” not only through the renewal of methods, concepts, purposes but also... through *the invention of traditions*, centered around precursors, founders and followers.’³⁰ It is thus essential to replace the revival of Gentili within this invention of tradition, within the conscious

²⁷ Matthew Craven, “The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law,” in *Constructing International Law: The Birth of a Discipline*, ed. Luigi Nuzzo and Miloš Vec (Frankfurt am Main: Vittorio Klostermann, 2012), 364. Of course, as Craven notes, this ‘is not to say... that prior to this time, international lawyers were unaware of historical precedents or of the contribution made by earlier scholars... Rather it is to reflect upon the fact that it was only from... the late 18th century that international lawyers begin to envisage their project in distinctively historical terms. Here, for the first time, one was to find accounts of the history of international law as a discipline, and from this point onwards the now, almost compulsory ‘historical introduction’ in textbooks were to start to make their appearance’ (364-365).

²⁸ On this subject, see notably the doctoral research of Paolo Amorosa at the University of Helsinki, *The American Project and the Politics of History: James Brown Scott and the Origins of International Law*, esp. Chapter 4: The Spanish Origin of International Law. See also, e.g., Christopher R. Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (Alphen aan den Rijn: Kluwer, 1998).

²⁹ Haggenmacher, “Grotius and Gentili: A Reassessment of Thomas E. Holland’s Inaugural Lecture,” 133.

³⁰ Luigi Lacchè, “Monuments of International Law: Albericus Gentilis and Hugo Grotius in Constructing a Discipline (1875–1886),” in *Constructing International Law: The Birth of a Discipline*, ed. Luigi Nuzzo and Miloš Vec (Frankfurt am Main: Vittorio Klostermann, 2012), 147. [emphasis in original]

development of a historical pedigree for the arising ‘science’ of international law in order to understand the sudden surge of interest in the long-dead jurist’s work during the 1870s. As Lacchè suggests, the Alberico Gentili that emerged in the late nineteenth century was ‘of course far from his historical world, but perfectly functional on the building-site of the new international law.’³¹ The task, then, is to evaluate what shape this new Alberico Gentili took, in what became, in a way, his second context.

Second, and relatedly, in order to understand the international revival of Gentili and the shape the jurist came to take in the late nineteenth century, it is fundamental to keep in mind the broader political context within which international law was being turned into a professional discipline. The period 1873-1885 is at the very heart of the development of modern international law, emerging out of a decade of political turmoil. Following various developments in the 1860s—notably the first attempts to codify the laws of war (Lieber Code of 1863, Geneva Convention of 1864, St Petersburg Declaration of 1869) and the foundation of the *Revue de droit international et de législation comparée* (1868), the first scientific legal journal on an international basis—the *Institut de droit international*, which ushered in the rise of international law as we know it today, was founded on 8 September 1873.³² Its purpose, broadly speaking, was to turn international law into a widely recognized science and a professional field of its own. But more specifically, the creation of the *Institut* was intimately linked to the conflicts of the time, and particularly to the Franco-Prussian war of 1870-1. Indeed, it was the failure of both sides in the Franco-Prussian war to abide by the terms of the 1864 Geneva Convention that gave Gustave Rolin-Jacquemyns (1835-1902) and Gustave Moynier (1826-1910), with the encouragements of Francis Lieber (1800-1872, the author of the famous Lieber

³¹ Ibid., 208.

³² The eleven founding members of the *Institut* were: Pierantoni, Laveleye, Bluntschli, Moynier, Dudley Field Ier, Asser, Calvo, Rolin-Jacquemyns, Lorimer, Mancini, and Besobrassof.

Code of 1863), the impetus to create a conference and eventually a permanent institution or an academy of international law.³³

The key issue in the Franco-Prussian war had been the participation in the hostilities of French militias, the *francs-tireurs*; they were not formally part of the army but were eventually placed under the orders of generals in the field, and were executed by the Germans as irregular, armed non-combatants. The status of these fighters raised vital questions in terms of the application of the emerging laws of war—being citizens carrying arms but not formally affiliated with the centralized French army, were they to be considered as combatants or non-combatants? This question of the status of combatants had arisen in Francis Lieber’s context as well, the American Civil War of 1861-1865. With the Confederates not constituting a formal state, various issues had emerged regarding the application of the law of neutrality, notably vis-à-vis Confederate ships (the crux of the landmark *Alabama* arbitration case of 1872). This was a somewhat different set of issues, however, to the extent that it pertained to what was essentially a civil war rather than a foreign invasion and occupation, and in that context, lawyers attempted to develop and refine the concepts of quasi-insurgency and quasi-belligerency to find ways to somehow adapt the laws of war to certain conflicts that did not involve two clear state entities when a context of civil war made it absolutely necessary.³⁴ The broader issue of determining the status of insurgents in the context of invasion and occupation, however, remained, and dragged on endlessly;³⁵ T. E. Holland would

³³ Koskenniemi, *Gentle Civilizer*, 158–159.

³⁴ Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005), 258–273.

³⁵ The status of insurgents led to explosive debates amongst jurists during the 1874, 1899, 1907 conferences, as discussed extensively in Nabulsi, *Traditions of War*. Some important legal distinctions existed, for instance between unorganized ‘spontaneous’ insurgencies, which were considered illegal, and organized partisan warfare, in which the fighters wore military uniforms, carried arms openly, and abided by the laws of war. The latter, which formed militia and voluntary corps, were considered legitimate combatants alongside armies; see Best, *Humanity in Warfare*, 196–199. Moreover, insurgency was ruled out against an occupier, but some form of it was allowed against an invader; *Ibid.*, 199. However, these clauses still left most insurgents – particularly civilians taking up arms against occupying forces – unprotected by the laws

eventually describe the controversy over the question of a distinction between lawful and unlawful combatant as the reef that had shipwrecked the Brussels conference of 1874,³⁶ and it would lead to fierce debates at the Hague in 1899 and 1907.

This debate, and the issues that were emerging from the conflicts of the time, was part of a broader and profoundly important set of developments. Mainly, many of these problems were arising as a result of the attempt to formally limit the legal definition of war to sovereigns,³⁷ a highly significant move in the late nineteenth century that occurred within a broader narrowing down of the concept of sovereignty. As David Kennedy explains, ‘over the course of the nineteenth-century, legal scholars placed the authority of sovereigns at the center of a reimagined legal order replete with formal distinctions,’³⁸ what had long been a sort of spectrum was increasingly turned into a stark binary—sovereign or non-sovereign. The numerous European ‘semi-sovereign states’ or ‘demi-sovereign states’ gradually disappeared as subjects of international law over the course of the nineteenth century, mercantile companies lost their sovereign-like characteristics—with the Dutch VOC becoming nationalized in 1800 and the English East India Company ending its rule in India in 1858, replaced by direct control by the British Crown—and the centuries-old practice of privateering, which had often stretched the limits of sovereign control and authority beyond practical use, was formally abolished by the 1856 Treaty of Paris. In terms of warfare, this meant that from now on, ‘there would be one sovereign, one military.’³⁹ A new vision of warfare emerged over the period, gradually eliminating

of war. These issues led to fierce debates at Brussels (1874) and The Hague (1899, 1907), with serious attempts to create laws that would be less favorable to occupying forces, but ultimately “although [these debates] were passionate and long, they made little mark on the ‘status of belligerent’ part of the texts originally before the conferences... between the Brussels Code [1874] and the Hague Regulation in their final, 1907, form, that crucial definition of the lawful belligerent, given double emphasis by being moved up from ninth to first place, remained adamantly almost the same;” *Ibid.*, 199–200.

³⁶ Holland, *Lectures*, 5. Cited in Nabulsi, *Traditions of War*, 8, note 18.

³⁷ See notably Rotem Giladi, “Francis Lieber on Public War,” *Goettingen Journal of International Law* 4 (2012): 447–77.

³⁸ David Kennedy, *Of War and Law* (Princeton, NJ: Princeton University Press, 2009), 61.

³⁹ *Ibid.*

‘[th]e private modes of warfare associated with the old regime.’⁴⁰ Privateering, for instance, was simply ‘incompatible with new legal conceptions of sovereignty that stressed its legal status as a unitary public authority exercising a monopoly of military force.’⁴¹ Legally, this meant that war was to become an exclusively ‘public’ affair, as Francis Lieber would argue in his seminal Code of 1863,⁴² a document upon which those codifying the laws of war would draw heavily. Though Lieber was not the first to draw a distinction between public and private war, ‘his treatment of modern war as exclusively public... became, in time, a foundational concept of the 19th Century effort to modernize and humanize the laws of war.’⁴³

It is within this context that one can better understand the form Gentili’s revival took in England and on the international scene from 1874 onwards. In the remainder of the chapter, I will argue if Gentili’s definition of war as a just contest of public arms had seemed at odds with the realities of his own time, its emphasis on the publicity of war was perfectly in line with the framework which late nineteenth century lawyers were trying to develop, and they latched onto his credentials and historical pedigree in order to legitimize their contemporary move. However, I will also highlight the extent to which the process of the revival was, beyond the purely political aspect of it, moved by personal, sociological, and institutional interests as well. More often than not, the reception of Gentili developed in an idiosyncratic way, with Gentili being pulled back from the dead almost accidentally. The motives for reviving him were neither clear nor homogenous from the start, and the reasons behind the success of the revival and the form it took have much to do with a very specific set of circumstances. The fact that Gentili had been a

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Giladi, “Francis Lieber on Public War.”

⁴³ Ibid., 448.

Professor at Oxford—giving him some particularly attractive credentials for those wishing to invoke his authority on international legal matters—and that a number of very influential international lawyers were based there in the 1870s and keen to add another jewel to the crown of their institution, is just one of the coincidences that made the celebration of the long dead Italian jurist possible on such a large scale. Before examining the dynamics of the revival in England, however, I first outline Luigi Lacchè's work on the revival of Gentili in Italy, highlighting its main insights as well as its limitations in accounting for the shape the Italian jurist's revival took on the international stage.

a. The view from Italy: Sbarbaro and Gentili as the father of international arbitration

Luigi Lacchè has, precisely, sought to account for what he describes as the explosion of a 'real *Gentilis cult*' or a '*Gentilis-mania*' in 1875,⁴⁴ tying the resurgence of Gentili to the 'very singular and eccentric personality of Sbarbaro... and his relationship with Mancini'⁴⁵ and to the intellectual, political, and religious movements of the time. Pietro Sbarbaro (1838-1893), upon whose life and writings Lacchè grounds his analysis, became a professor at the University of Macerata in 1874, where, the following year, he began pressing for the erection of a monument to Gentili. But beyond his position as a professor, Sbarbaro was a man deeply involved in the debates of his time, 'an eclectic scholar of political economy and philosophy of law, journalist, polemicist, [who] taught in various universities in Italy and was eternally at loggerheads with almost all of the ministers of education until he, in 1883, was dismissed,'⁴⁶ as well as a 'monarchist and Mason, anticlerical, and a profoundly religious man, liberal conservative, [who] dedicated his life

⁴⁴ Lacchè, "Monuments of International Law," 153. [emphasis in original].

⁴⁵ Ibid., 156.

⁴⁶ Ibid., 157.

to the development of proletariat mutualism and international pacifism.’⁴⁷ As Valentina Vadi remarks, Italian scholars of the nineteenth century rediscovered the works of Gentili—‘in parallel to [T. E.] Holland’—within the crucial context of the political movement of the *Risorgimento* (Resurgence) that eventually led to the unification of Italy and the conquest of Rome in 1871.⁴⁸ More specifically, through Sbarbaro, Lacchè places the sudden enthusiasm for a monument to Gentili within the context of Italian nationalism and Unitarianism, as well as masonic pacifism, with the latter deemed ‘all too present in the trajectories of the Gentilis affairs, at an Italian and international level.’⁴⁹ The ‘*most profound reasons*’ of the surge of interest in Gentili, Lacchè reiterates, are to be found in the ‘cultural history of the Gentilis myth, made up of Risorgimento patriotism, anticlericalism, Mason *esprit*, nation building.’⁵⁰ Put simply, Gentili became a remarkably popular figure as a son of the emerging nation, a name to brandish to remind Italians of the glorious achievements of their common ancestors. Lacchè also suggests that the revival of Gentili was directly intertwined with the successful advocacy efforts in favor of international arbitration.

Lacchè’s analysis and dual conclusion is based on the papers of Sbarbaro, who was indeed deeply involved in international arbitration efforts, and it provides an important piece of the puzzle for understanding the shape that Gentili took in his second context. Lacchè focuses his analysis on the period during which Sbarbaro was most active in establishing an International Committee for the revival of Gentili and ensuring that a monument in his honor would be erected, i.e. 1874-1875. With his appointment at

⁴⁷ Ibid.

⁴⁸ Valentina Vadi, “Alberico Gentili on Roman Imperialism: Dialectic Antinomies,” *Journal of the History of International Law* 16, no. 2 (2014): 142. On the *Risorgimento*, see e.g., Lucy Riall, *The Italian Risorgimento: State, Society and National Unification* (London: Routledge, 1994); Silvana Patriarca and Lucy Riall, *The Risorgimento Revisited: Nationalism and Culture in Nineteenth Century Italy* (Basingstoke: Palgrave Macmillan, 2012).

⁴⁹ Lacchè, “Monuments of International Law,” 161.

⁵⁰ Ibid., 156.

Macerata, Sbarbaro brought with him the issue of arbitration, as well as his network of high-profile figures working on the issue around Europe, and particularly, in Italy, the all-important Mancini. Clearly, Sbarbaro explicitly tried to make Gentili the ‘father of international arbitration,’ composing the first element of the new narrative about the long-dead jurist.

Lacchè’s analysis stems from ‘a clue which has never been taken up until now,’⁵¹ to be found in the initial 1875 proposal of the University of Macerata (the ‘Macerata Proposal’) encouraging the university to commit itself to erecting a monument to Gentili in one of the towns of the Marche region. In this proposal, Gentili is depicted as being the forefather of the principle of international arbitration, a move that is ‘certainly the work of Sbarbaro.’⁵² Sbarbaro had been agitating in favor of arbitration, and it is unsurprising to find him trying to link Gentili to one of the hot topics of his day. Just a month after his appointment at Macerata, on July 11th 1874, Sbarbaro had published an anonymous article on the *Alabama* ruling and the broader topic of peace and arbitration, emphasizing the crucial importance of this mechanism and the noble role played by Richard Cobden (1804-1865) in England, who had been derided when he first presented his proposal for International Arbitration before the House of Commons.⁵³ England, Sbarbaro noted, had with the *Alabama* ruling now ‘accepted the utopia of Arbitration,’⁵⁴ and this mechanism was moving forward in great strides. Sir Henry Richards (1812-1899) picked up the mantle of Richard Cobden as one of England’s most prominent advocates for arbitration, and Lacchè emphasizes that ‘we have no trace [of him] in the little Gentilis Panthéon, and yet his is a presence not to be ignored.’ Lacchè makes very clear the close links between four figures in the movement for the promotion of international arbitration: Sbarbaro,

⁵¹ Ibid., 157–158.

⁵² Ibid.

⁵³ Ibid., 158.

⁵⁴ Ibid., 159.

Richards, Mancini—who would eventually champion the question of arbitration in the Italian Parliament, pushing the so-called ‘Mancini motion’—and Count Sclopis (1798-1878), the president of the *Alabama* arbitration college. He also provides some elements directly linking the work of this group with the initial efforts to revive Gentili, beyond the mere overlap in the names of the characters involved.

The most obvious set of evidence comes from Sbarbaro’s own writings, and from what emerged from the University of Macerata through his efforts. Lacchè finds a brief mention of Gentili in a speech of praise Sbarbaro wrote for the Emperor of Russia, who had received members of the Peace Congress during his visit in London in June 1874. More importantly, the resolution of the council of the Macerata law faculty of 23rd March 1875—Lacchè’s original clue—recognizes Gentili ‘unanimously as restorer and founder of modern international law;’ ‘founder of the true school of international law and forerunner of Grotius, as well as of the modern principle of international arbitration.’⁵⁵ In a strikingly lyrical 1886 pamphlet dedicated to Socino (1536-1604) and Mazzini (1805-1872),⁵⁶ Sbarbaro makes his point in the clearest possible way. Placing his work within ‘the century of great resurrections,’ he outlines the purpose of ‘a curious generation,’ ‘very avid to rebuild the past, to remake the history of great men and great things using more impartial criteria’ and a ‘scientific method,’ a generation whose ‘unique intent and religion is the discovery of all truth.’⁵⁷ ‘Never before,’ he explains, ‘did buried men and institutions...present themselves to posterity in order to demand new examination, to implore...a more just sentence on their character...on the part played in carrying out

⁵⁵ Ibid., 181.

⁵⁶ Pietro Sbarbaro, *Da Socino a Mazzini* (Roma: Edoardo Perino, 1886). Cited in Lacchè, “Monuments of International Law,” 186. Sbarbaro appears to have been the only one to link the two men in his rather obscure work, *Da Socino a Mazzini*. Fausto Socino was a sixteenth century theologian, founder of Socinianism, and an occasionally noted figure of Unitarianism.

⁵⁷ Sbarbaro, *Da Socino a Mazzini*. Lacchè’s translation.

human destinies and in the course of human history.’⁵⁸ Gentili, Sbarbaro makes clear, is one of these great, buried men, with the institution of arbitration buried alongside him, and Italy has made this double resurrection possible. Though ‘thirsting for justice and peace among its various nations’ Europe would never have traveled this road alone, were it not for ‘the Geneva Arbitration [the *Alabama* ruling] where Italy appears as peace-maker between two great nations by the sole mastery of pen and unarmed reason;’⁵⁹ Italy needed to recount ‘to civilised Europe, the practical possibility of substituting war with that knowledge of peaceful Arbitration, which Gentilis, since the 16th century, invoked from God and greeted on the far away horizon of the future of mankind.’⁶⁰ Gentili was revived at this particular moment, then, Sbarbaro explains, because as Quinet (1803-1875) writes, ‘the dead only return when they have something to teach the living.’⁶¹

Sbarbaro’s ideas, of course, spilt beyond his own writings. In both his efforts to promote international arbitration and his attempt to revive and glorify Gentili, Sbarbaro was drawing extensively on his Italian and international networks, amongst which were numerous international pacifists, including Emilio Castelar (1832-1899), Edouard de Laboulaye, François Laurent (1810-1887), Henry Richards, and Charles Lemonnier (1860-1930).⁶² These individuals, probably thrilled to tie their endeavor to this rediscovered father of international law, were quick to adopt Sbarbaro’s narrative. The letters he received from Richards, as well as from Charles Lemonnier and Armand Goegg (1820-1897), both representatives of the Central Committee of the International League for Peace and Freedom, all underline ‘the universal character of the message of Gentilis, to be collocated in the *Panthéon* of the founders of international law and of the fathers of

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Lacchè, “Monuments of International Law,” 185–186.

⁶² Ibid., 196.

Peace.’⁶³ And indeed, the papers of T. E. Holland contain letters from the American Thomas Willing Balch (1866-1927), who would come to be known as the ‘father of arbitration,’ where Balch explains to Holland that he is attempting to raise the profile of Gentili across the Atlantic.⁶⁴ In addition, by what strikes even Lacchè as a ‘truly singular coincidence,’ Count Sclopis, who presided the *Alabama* arbitration, had actually been studying the work of Gentili himself, a fact which certainly facilitated the development of links between the two endeavors.⁶⁵ Finally, one particular piece of evidence makes it clear that this enthusiasm for arbitration was directly imported into the broader revival of Gentili, beyond the individual writings of Sbarbaro. The International Committee for the revival of Gentili opened its subscriptions for financing the Gentilis monument on 14th September 1875, the anniversary of the third Geneva arbitration judgment.⁶⁶

As such, Lacchè explains, from 1875 ‘the picture of a Gentilis, apostle of Peace and announcer of a future international law which was desired to become the present, emerged very strongly.’⁶⁷ For him, there is ‘no doubt’ that ‘peace and arbitration since the beginning represent the main *moving* force that directs the protagonist of the Gentilis rebirth.’⁶⁸ This is absolutely plausible, but there is a question that arises: to what extent was this initial narrative of Gentili as the father of international arbitration maintained as the revival movement spread to England and to the broader international scene? Did this remain the focus of the narrative that emerged about him in his new context?

While enlightening in a number of ways, Lacchè’s analysis focuses specifically on the part of Gentili’s revival that led to the erection of a statue in his honor in San Ginesio in 1908. As a result, although he pays close attention to the links between Holland

⁶³ Ibid., 195.

⁶⁴ Thomas Balch, “Letter from Thomas Balch to Thomas Erskine Holland,” October 27, 1911.

⁶⁵ Lacchè, “Monuments of International Law,” 183.

⁶⁶ Ibid., 194.

⁶⁷ Ibid., 183.

⁶⁸ Ibid., 194.

and Sbarbaro, his archival excavations reveal a tremendous amount about why Gentili became so remarkably popular in Italy, but less about why his name and works became so important beyond his homeland. His main insights regarding the international popularity of Gentili concern the importance of the jurist for the international arbitration movement that Sbarbaro was deeply involved in. Indeed, Lacchè argues that '[i]t is only by being conscious of the work carried out by Sbarbaro at the beginning of the [1870s] in the movement for peace and international arbitration that the reasons for the Gentilis *renaissance* can be understood,' with Sbarbaro constituting 'the *trait d'union*' between Sir Henry Richard—the secretary of the Peace Society—and Mancini.⁶⁹ Yet, it appears that the revival of Gentili took on a life of its own beyond Sbarbaro, beyond Italy, and beyond the specific issue of arbitration.

Gentili's perceived vanguardism could indeed be used for a variety of purposes. In a letter to local newspapers in April of 1875, Mancini had explained that Gentili's 'life and teachings three hundred years ago foresaw the cult of the two greatest ideas of our century: *freedom of conscience* against theocratic despotism; *Justice and Peace among Nations* against the barbarities of war.'⁷⁰ The latter could of course encompass the principle of international arbitration, but it could also stand, for instance, for the burgeoning attempts to regulate war. More broadly, the sort of anachronisms associated with the application of Gentili's ideas to the late nineteenth century made it easy to harness his work to different projects, although the many titles now bestowed upon the Italian jurist did occasionally raise some eyebrows.

These points are noted in a particularly perceptive way by Gustave Rolin-Jaequemyns in an 1875 piece for the *Revue* on the revival of Gentili.⁷¹ First, Rolin-

⁶⁹ Ibid., 170.

⁷⁰ Lacchè's translation, Ibid., 155. Emphasis in original

⁷¹ Gustave Rolin-Jaequemyns, "Albéric Gentil. Hommages à a mémoire," *Revue de Droit International et de Législation Comparée* VIII (1875): 141–44.

Jaequemyns is fairly skeptical of Sbarbaro's ideas about the 'posthumous rehabilitation' of great thinkers, and particularly about the anachronistic attribution of titles to these long-dead figures. For instance, he explains regarding Gentili that 'we doubt... that it is rigorously accurate to represent the wise lawyer of the Spanish embassy as a sort of inspired apostle of peace,' and more generally, he suggests that 'to drape a great jurist from three centuries ago into such ultra-modern garments is not a good example for the artist who will be in charge of his statue.'⁷² Second, Rolin-Jaequemyns explicitly points to the space that exists for varying interpretations of the jurist's work and its contemporary relevance, and the fact that they have already taken different directions. He notes that the International Committee is made up of at least twenty Vice-Presidents, that Sbarbaro, the Secretary, has no least than eight Vice-Secretaries, and that the Italian sub-committee is composed of about two hundred members,⁷³ making the adoption of a single narrative about the importance of Gentili rather improbable. More importantly, he explicitly underlines the fact that Holland and Sbarbaro have adopted different approaches in their efforts to revive the Italian jurist, seeing the differences between the English and the Italian approaches as 'characteristic.'⁷⁴ He makes it clear that he prefers the English approach, for its 'effectiveness and... greater level of attention paid to scientific profile' over the 'Italian rhetorical celebration.'⁷⁵

While this might come across as a somewhat caricatured comparison, it is true that the English sub-committee, unencumbered by the nationalist baggage involved in the Italian revival of Gentili, turned to a more substantive excavation of the works of the jurist. While the assessment of Gentili's importance drew on previous studies of his work in the early days of the revival, the republication of *De iure belli* in 1877, edited by T. E.

⁷² Ibid., 142. [My translation]

⁷³ Ibid.

⁷⁴ Ibid., 142, and again at 143.

⁷⁵ Lacchè, "Monuments of International Law," 199.

Holland, unleashed a new phase in the revival of Gentili's work. The discussion that follows focuses the work of the English sub-committee and the revival of Gentili's work within the Anglophone sphere. Accordingly, instead of relying primarily on the papers of Sbarbaro, as Lacchè does, it mainly relies on the archives of the English sub-committee, and particularly the papers of T. E. Holland, which have attracted virtually no scholarly attention thus far. More broadly, I investigate what the most important voices of the international legal scene had to say about Gentili, and specifically what narrative they developed about the importance of his work vis à vis their own endeavor, particularly his DIB.

A note before I turn to the English Committee's work: while the British and the Italian committees were regularly in touch and collaborated smoothly, especially Holland and Sbarbaro, determining who it is that truly revived the Italian jurist has generated some controversy. According to conventional accounts of the resurgence of Gentili,⁷⁶ his revival began on 7th November 1874, with the inaugural lecture given by Holland in his capacity as the newly appointed Chichele Professor of International Law at All Souls College, University of Oxford. Holland's lecture would then have been published by MacMillan (a traditional procedure), then sent by Sir Travers Twiss (1809-1897) to Mancini, who would then have passed it on to Sbarbaro. This is in line with both Holland's and Twiss' own recounting of the story. Twiss indeed explains that Sbarbaro decided, upon reading a copy of Holland's lecture, to meet with his colleagues, and that together they decided to 'form an International Committee to do fitting honour to the memory of their great countryman,'⁷⁷ while Holland claims that '[a] copy of the lecture was sent by Sir Travers Twiss in the February following, to Mancini, then Professor of

⁷⁶ See for instance Van der Molen's seminal biography of Gentili: Van der Molen, *Alberico Gentili and the Development of International Law*, 61.

⁷⁷ Travers Twiss, "Albericus Gentilis on the Right of War," *The Law Magazine and Review* 3, no. 5 (1878): 145.

International Law at Rome, who, much interested, communicated it to Professor Sbarbaro of Macerata.⁷⁸ However, Lacchè questions the validity of this timeline, pointing out that Sbarbaro had already begun agitating for the revival of Gentili in June 1874, ‘well before Holland’s inaugural lecture.’⁷⁹ He suggests that Sbarbaro merely used Holland’s famous lecture as the ‘occasion’ upon which he could draw momentum for his plans concerning Gentili, and that as such (and somewhat qualifying his statement), it was not ‘the inaugural lecture *alone* which rendered the birth of that real *Gentilis cult*... possible.’⁸⁰

Whether this is true or not, Holland would certainly have been fairly offended by such an affirmation; a letter from Coleman Phillipson (1875-1958) responding to what was apparently a rather angry letter from Holland suggests that the latter was indeed very attached to his status as the great reviver of Gentili. ‘I deeply regret the impression my article gave you,’ Coleman explains, referring to the draft of what would become his classic piece on Albericus Gentilis in ‘The Great Jurists of the World’ series. ‘It was far from my intention to belittle your work in connection with the Gentilis revival,’⁸¹ he continues, noting in particular that he absolutely did not mean to place Henry Nézard, who wrote another key piece about Gentili in *Les fondateurs du droits international*,⁸² on equal footing with Holland. ‘When the contributions to the ‘Great Jurists’ series come to be collected, I shall gladly—and gratefully—avail myself of the opportunity to add such information as is wanting in my present paper.’⁸³ This exchange is interesting in what it tells us about the personal dynamics behind Gentili’s revival and the stakes involved in claiming the credit of reviving his work. Lacchè briefly notes that in 1867, Groningen

⁷⁸ Holland also puts forward this narrative in various places, notably in the preface he wrote to Ermelinda Armigero-Gazzera’s *Bibliografia*. Thomas Erskine Holland, “Preface,” in *Alberico Gentili: Bibliografia*, by Ermelinda Armigero Gazzera (Tolentino: F. Filelfo, 1917), 12.

⁷⁹ Lacchè, “Monuments of International Law,” 169.

⁸⁰ *Ibid.*, 153. [Emphasis in original]

⁸¹ Coleman Phillipson, “Letter from Coleman Phillipson to Thomas Erskine Holland,” October 3, 1911.

⁸² Nézard, “Albericus Gentilis.”

⁸³ Phillipson, “Letter from Coleman Phillipson to Thomas Erskine Holland.”

University had used, as the subject of one of its selection exams, ‘who between Gentilis and Grotius, should be held up as the founder of international law?’ The winner of the exam, Wijbrand Adriaan Reiger (1842-1910), whose 1867 dissertation entitled *Commentatio de Alberico Gentili, Grotio ad condendam juris gentium disciplinam via praeunte* constituted the first ‘more profound study’ of the Italian jurist and his work,⁸⁴ would later be nominated Knight of the Order of the Crown of Italy, an honor bestowed ‘as a sign of the gratitude owed to you by our country for that which you have done to claim the glory of Albericus.’⁸⁵ There is little explanation for this obscure fact, which suggests that Gentili may indeed have been lingering in the background of international legal history more conspicuously than is generally assumed. In any case, this suggests that pinning the revival of Gentili onto a single person may well be as fraught with risk as pinning the origins of international law onto a single jurist.

b. The English sub-committee for the revival of Alberico Gentili

The English sub-committee was founded a few months after the Italian one, in November 1875. As Travers Twiss, himself a member of the English sub-committee, explains: ‘[t]he admirers of Gentilis in this country were unwilling to be left behind in making public a similar expression of their feeling towards one, who had brought honor upon England.’⁸⁶ Importantly, while Gentili became seen as a national hero in Italy, with great emphasis placed on the erection of monuments in his honor, the Oxford-based English sub-committee had at its disposal many of the writings of the former Oxford Professor, and its task became one of more substantive excavation. This keen interest in the work of

⁸⁴ Van der Molen, *Alberico Gentili and the Development of International Law*, 61.

⁸⁵ Lacchè, “Monuments of International Law,” 204–205. Lacchè suggests that ‘[t]he fact that a Dutchman rectified, with impartiality, the pretended wrongs towards the ‘apostle of peace’—Albericus Gentilis—offered great support to the Gentilis movement which came about in Italy in 1875.’

⁸⁶ Twiss, “Albericus Gentilis on the Right of War,” 145.

Gentili was certainly characterized by more than a touch of institutional pride, with Holland ending his inaugural lecture by emphasizing the remarkable achievements of ‘the adopted son of Oxford’⁸⁷.

While the Italian Committee benefitted from the Honorary Presidency of the eldest son of Victor Emmanuel (1820-1878), King of Italy—Prince Humbert (1844-1900, future King of Italy himself)—as well as the leadership of Mancini, who was a remarkably important jurist at the time (‘one of the most authoritative internationalists’ enjoying ‘world renown’⁸⁸), the English sub-committee had Prince Leopold (1853-1884)—the youngest son of Queen Victoria—as its own prestigious Honorary President, and as a whole, it was composed of a wider and more influential range of jurists than its Italian counterpart in the world of late nineteenth century international law. It was also based in Oxford, which was a widely respected intellectual center ‘therefore at the heart of the international debate.’⁸⁹ One should note that a third sub-committee was founded in the Netherlands, but in a rather comical turn of fate, its ultimate achievement was to erect a statue to Grotius, so it is safe to say that it remained a fairly peripheral endeavor in the revival of the Italian jurist.⁹⁰

The list of the members on the English sub-committee—fifteen members in total, excluding the honorary president—points to the high profile character of the revival as well as to the link between this endeavor and the development of international law as a professional discipline. The Sub-Committee consisted of ‘the Professors of the Oxford

⁸⁷ Thomas Erskine Holland, *An Inaugural Lecture on Albericus Gentilis, Delivered at All Souls College, November 7, 1874* (London: MacMillan, 1874).

⁸⁸ Lacchè, “Monuments of International Law,” 171.

⁸⁹ *Ibid.*, 153.

⁹⁰ The work of the Dutch Sub-Committee was apparently undermined by a mysterious lawyer called Levy. According to Holland, the ‘Dutch Committee was ‘attacked by one Levy, too exclusive in his admiration of the Dutchman Grotius.’ Levy’s argument were then presumably ‘refuted by Asser in the columns of the *Algemeen Handelsblad*.’ Holland, “Preface,” 15. See also Rolin-Jaequemyns, “Quelques mots sur les hommages projetés à la mémoire de Grotius et d’Albéric Gentil, et sur les dernières publications y relatives,” 690. However, the existence of a controversy between Asser and Levy has still not been solidly established, see Van der Molen, *Alberico Gentili and the Development of International Law*, 282, n. 27.

Faculty of Law, together with the surviving Oxford members of the (suppressed) College of Advocates practicing in the admiralty and ecclesiastical courts.⁹¹ Four of the five⁹² most notable members of the Sub-Committee either already were or would become prominent members of the *Institut*: J. R. Phillimore (1810-1885, the chairman of the Committee),⁹³ Travers Twiss,⁹⁴ Mountague Bernard (1820-1882),⁹⁵ and T.E. Holland.⁹⁶ Travers Twiss had taught at King's College London from 1852 to 1855 before moving to Oxford to hold the *Regius* chair of civil law in Oxford (the same chair as Gentili), a position he would keep until 1870.⁹⁷ Mountague Bernard had been the first to occupy the newly founded Chichele Chair of International Law and Diplomacy (1859), which was, crucially, the first professorship in international law to be established in England at the time⁹⁸ and T. E. Holland was now his successor. On the Dutch side, although the endeavor ultimately capsized, the Sub-Committee was constituted and presided by Tobias Asser (1838-1913), one of the founders of the precursor to the *Institut*, the *Revue de droit international et legislation comparée* (1868), with W. A. Reiger, the winner of the 1867 Groningen exam, as the secretary.⁹⁹

T.E. Holland's seminal lecture occurred just a year after the founding of the *Institut*, and it is striking to note that the various steps initially taken to revive Gentili's

⁹¹ Holland, "Preface," 16.

⁹² The fifth, Henry Sumner Maine, was not a member of the *Institut*.

⁹³ Honorary member of the *Institut* 1883-5. For membership records, see generally Macalister-Smith, "Bio-Bibliographical Key to the Membership of the Institut de Droit International, 1873-2001," *Journal of the History of International Law* 5, no. 1 (2003): 77-160.

⁹⁴ Member of the *Institut* 1874-1891, honorary member 1891-1897.

⁹⁵ Member of the *Institut* 1873-1882.

⁹⁶ Associate of the *Institut* 1875-8, member from 1878 onwards

⁹⁷ Koskeniemi, *Gentle Civilizer*, 33.

⁹⁸ Ibid. In addition to the Chichele Chairs at Oxbridge, James Lorimer (1818-1890) held the Chair in the Law of Nature and Nations in Edinburgh, a position that had been established as early as 1707.

⁹⁹ Lacchè, "Monuments of International Law," 205. The other founders were Gustave Rolin-Jaequemyns, John Weslake, and Pasquale Mancini. As Koskeniemi explain, '[e]stablishing professional journals was one means whereby the mid-Victorian generation institutionalized the various scientific disciplines—including economics and social sciences.' Koskeniemi, *Gentle Civilizer*, 17. The *Revue* was a crucial step in the professionalization of international law and its coronation as a proper 'science,' and it became an organ of the *Institut de droit international* in 1875.

work occurred within the exact same timeframe as the period so crucial for the development of international law: Holland's lecture in 1874, the creation of the International Committee in 1875, the republication of *De iure belli* in 1877. In fact, Holland even gave his speech on Gentili again at the *Institut*'s meeting in The Hague in 1877, and invited the *Institut* to meet in Oxford in 1880.¹⁰⁰ Since the 'men of 1873',¹⁰¹ essentially ushered in the modern international legal profession, one inevitably wonders why they concentrated a considerable chunk of their time and efforts trying to revive the works of a long dead sixteenth century jurist. Why, in other words, did prominent international lawyers in England 'care very much for the memory of Gentilis'?¹⁰²

One possible link stands out conspicuously: Gentili could be hailed as the founder of this newly established 'science.' With this in mind, the immediate purpose of the English sub-committee was the establishment of a memorial for Gentili in St Helen's Church in London and the republication of *De iure belli*. The urgency of the English memorial stemmed from the fact that in his research about the Italian jurist, Holland had discovered the actual date of his death as well as his place of burial—the graveyard of St Helen's Church; the Committee thus sought to place a 'memorial tablet in the north aisle of St. Helen's, as near as possible to the spot indicated,'¹⁰³ which it eventually did during a ceremony attended by Prince Leopold, Robert Phillimore, T.E. Holland, the ambassador of Italy, and various other public figures.¹⁰⁴ The republication of DIB appears to have originally been suggested by another well known jurist, Edouard Laboulaye (1811-

¹⁰⁰ Holland rather amusingly notes that in his account of his impressions of Oxford during the *Institut*'s meeting, Bluntschli commends the quality of All Souls' bier. Thomas Erskine Holland, *A Valedictory Retrospect (1874-1910): Being a Lecture Delivered at All Souls College, June 17, 1910* (Oxford: Clarendon Press, 1910), 16, n. 2.

¹⁰¹ I borrow this phrase from Koskenniemi, *Gentle Civilizer*.

¹⁰² T. E. Holland letter to P. Sbarbaro expressing the enthusiasm of himself and his colleague (Phillimore, Twiss, Deane, etc.), London 28th July 1875, cited in Lacchè, "Monuments of International Law," 201 n. 157.

¹⁰³ Holland, "Preface," 16.

¹⁰⁴ "Inauguration de la table commémorative d'Albéric Gentil," *Revue de Droit International et de Législation Comparée* IX (1877): 293.

1883),¹⁰⁵ who, in a letter to Angelo Valdarnini (1847-1930)¹⁰⁶ written 25 April 1875, specifically emphasized how great it would be to have a new edition of DIB, a suggestion next to which Holland put a note.¹⁰⁷ More importantly though, the official explanatory booklet of the Committee states that its purpose was to ‘commemorate the services rendered by Albericus Gentili to International Law; of which science he was, in the opinion of many, the true founder.’¹⁰⁸

This qualification, ‘in the opinion of many,’ is an obvious reference to the fact that Grotius had long been considered the founder of international law. Positions regarding the hierarchy between the two great jurists varied; the most common argument was that Grotius’ writings were more impressive, but that Gentili was the one who had opened the way for these writings to arise in the first place. As such, Holland concluded his inaugural lecture of November 1874 by explaining that he was ‘by no means concerned to place Gentilis on a level with his undeniably greater follower; or to say that his writings do not exhibit, in some degree, the faults with which they have been charged,’ but that he wanted to remind his audience that ‘the first step towards making International Law what it is, was taken, not by Grotius, but by the Perugian refugee, the adopted son of Oxford, Albericus Gentili.’¹⁰⁹ With this lecture, which made a great splash at the time,¹¹⁰ a profound challenge had thus been made to the orthodox understanding of

¹⁰⁵ Although Laboulaye is now more commonly remembered for his involvement in France’s gift to the United States of the statue of liberty.

¹⁰⁶ Valdarnini was an early Gentili scholar during the revival phase, publishing his main work on the jurist in 1875. Angelo Valdarnini, *Alberico Gentile, fondatore del diritto internazionale* (Tipografia e Litografia Di G. Carnesecchi E Figli: Firenze, 1875).

¹⁰⁷ Angelo Valdarnini, *Alberico Gentili Fondatore Del Diritto Internazionale [Con Una Lettera Di E. Laboulaye]* (Firenze: Tipografia e Litografia Di G. Carnesecchi E Figli, 1875).

¹⁰⁸ “Informational Booklet of the English Sub-Committee,” 1875, L.Ital.A55d2, Bodleian Law Library.

¹⁰⁹ These are the final words of the inaugural lecture. Holland, *Inaugural Lecture*, 35. Earlier on, Holland also explains: ‘It was left for Gentilis, starting from the doctrine of Natural Law as thus elaborated, to give it a practical application to the development of a Law of nations. In the path thus opening up, Grotius followed; and after him have come the whole series of writers on International Law.’ Ibid, 31.

¹¹⁰ Rolin-Jaequemyns notes that Holland’s inaugural lecture ‘a fait sensation.’ Rolin-Jaequemyns, “Albéric Gentil. Hommages à sa mémoire,” 142.

international law's origins, and Travers Twiss expressed genuine concern at the risk of controversy developing over whether Gentili or Grotius was the greatest.¹¹¹ Twiss concluded his article diplomatically, suggesting that the republished work of Gentili, 'without any pretense to rival the moral philosophic treatise of Grotius,' would 'contribute materially to enlarge the statesman's knowledge of the foundations, upon which the complicated system of the Public Law of Europe has been gradually built up.'¹¹² Similarly, and in rather more flowery language, Gustave Rolin-Jacquemyns—again, one of the most important figures of the period as a founder of the *Revue* and co-founder of the *Institut*—concluded that 'Gentilis and Grotius are not, must not be two glories jealous of one another: they are two stars each endowed with a light of its own or rather which it borrows from a common center, that of eternal justice and truth.'¹¹³

Yet, the challenge persisted, not so much over the 'greatness' of the jurists' works but over the title of 'father of international law.' Admirers of Gentili—in Italy, as one might expect, but also in England and in the US—echoed the words of Holland and emphasized the primacy of Gentili over Grotius on this front. One of the clearest manifestations of this position would eventually be found in the writings of Coleman Phillipson, the man whom Holland would rebuke for not granting him sufficient credit for the revival the Italian jurist. Phillipson was a barrister of the Inner Temple who published a few books on war and its laws, edited the fifth edition of Wheaton's *Elements of International Law*, and crucially, wrote the influential introduction to the famous 1933 republication and English translation of DIB. In his 1911 piece first published in the

¹¹¹ Twiss, "Albericus Gentilis on the Right of War," 159–60.

¹¹² *Ibid.*, 161.

¹¹³ Rolin-Jacquemyns, "Quelques mots sur les hommages projetés à la mémoire de Grotius et d'Albéric Gentil, et sur les dernières publications y relatives," 694. Rolin-Jacquemyns' assessment is cited again in Thomas Willing Balch, "Albericus Gentilis," *The American Journal of International Law* 5, no. 3 (1911): 665–79.

Journal of the Society of Comparative Legislation,¹¹⁴ then published in 1914 as part of a book on ‘The Great Jurists of the World,’¹¹⁵ and eventually expanded into the 1933 introduction, Phillipson explained that Gentili was ‘first great writer of *modern*’¹¹⁶ international law’ [emphasis in original], and that ‘for this reason,’ it could ‘justifiably be claimed that—as the precursor of Grotius, and as the one who substantially prepared the way for him and greatly influenced his and all succeeding work—Gentilis is the real ‘father’ of the modern law of nations.’¹¹⁷ Earlier on, around the time of the republication of DIB (1877), various reviews of the work expressed similar attitudes, such as an anonymous piece from the *Saturday Review* of 30 August 1879 which argues that ‘[i]f any man can claim the honourable title of founder of international law, the name must be held to belong rather to Alberigo [*sic*] Gentili, the adopted son of Oxford, than to any of the later luminaries of the science.’¹¹⁸ Furthermore, it was sometimes claimed that Gentili’s work was, in its substance, in fact equal to that of Grotius, or on certain points, perhaps even greater.

What was it, one may wonder, that made Gentili so great in the eyes of these jurists and commentators? His work appears to have been revived with various purposes in mind. The first, peace and international arbitration, has been analyzed at length by

¹¹⁴ Coleman Phillipson, “Albericus Gentilis,” *Journal of the Society of Comparative Legislation* 12 (1911): 52.

¹¹⁵ Coleman Phillipson, “Albericus Gentilis,” in *Great Jurists of the World*, ed. John Macdonell and Edward Manson (Boston: Little, Brown, and Company, 1914), 109–43.

¹¹⁶ The claim that Gentili was more ‘modern’ than Grotius can also be found, for example, in the work of the main francophone Gentili expert of the period, Henry Nézard. Nézard indeed claims that Gentili’s work was in fact more modern than Grotius in some respects, as Gentili wrote extensively about the political events of his time—the struggle between François Ier and Charles Quint, the conflict between Spain and Holland, the Italian wars—instead of confining himself to classical examples. Nézard, “Albericus Gentilis,” 90.

¹¹⁷ Phillipson, “Albericus Gentilis,” 1911, 5.

¹¹⁸ *Saturday Review*, 30 August 1879, available in the *Papers of Sir Thomas Erskine Holland*, Bodleian library manuscripts, shelf mark MSS. Eng. Misc. c. 125-6; Ital. c. 20.

Lacchè based on Sbarbaro's papers. The second, defining and regulating war, has remained virtually unexplored, and I now examine it at some length.

c. Reading *De iure belli* in the late nineteenth century

Though the rest of his writings would later be published as well, DIB was seen as his masterpiece, and indeed, in his inaugural lecture, Holland had emphasized the importance of the latter over Gentili's other two most famous texts, *De legationibus* and *Hispanica Advocatio*.¹¹⁹ Following the republication of DIB and the discussion that ensued amongst many of the most well known lawyers of the period, the analysis of Gentili's relevance to the late nineteenth century thus became centered in large part on his writings on the laws of war, an unsurprising feat in light of the codification efforts happening over the same period. What was it then, that caught the eye of late nineteenth century international lawyers in the sixteenth century treatise on the laws of war and brought them to celebrate Gentili as a key foundational figure for their own endeavor?

Late nineteenth century lawyers put forward two—sometimes three—broad reasons why DIB was so groundbreaking, which have become commonplaces about Gentili's work to this day. These are summed up in a statement by Holland from his 1879 lecture entitled the 'The Early Literature on the Law of War.'¹²⁰ Gentili's 'achievement was threefold. He got rid of question of tactics and of the discipline of armies; he reduced to reasonable dimensions the topic of private warfare; and he placed his subject upon a non-theological basis.'¹²¹ The first point, the emancipation of the laws of war from other

¹¹⁹ Holland, *Inaugural Lecture*, 33.

¹²⁰ Thomas Erskine Holland, "The Early Literature on the Law of War," in *Studies in International Law* (Oxford: Clarendon Press, 1879).

¹²¹ *Ibid.*, 57.

military considerations, although an important issue, was less often mentioned by Holland's contemporaries, and so I will focus on the other two.

The first of the remaining claims these international lawyers made about Gentili—and about DIB in particular—was that the Italian jurist had freed the science of international law from theology. This reading of Gentili's importance acquired a certain recognition with time and became a standard argument in favor of the Italian jurist. In his 1879 lecture, Holland reiterates the epoch-making break constituted by DIB, pointing to the theological focus of his predecessors: '[u]p to this point the subject had been in the hands of Italians and Spaniards, who had always treated it with distinct reference to the doctrines of the Catholic Church.'¹²² Placing the Italian jurist at the heart of the shift away from theology, he drew the line between the literature on the laws of war that 'took its rise in the thirteenth century, at Bologna' and 'the literature which superseded it,' dating 'from the sixteenth century, more specifically from the year 1588' and having first seen 'the light in the University of Oxford,' a clear reference to Gentili's original draft of *De iure belli*, the lectures of 1588/9, and in passing, another indication of the institutional pride involved in Gentili's revival.¹²³ This idea about the importance of Gentili as a secularizer of the laws of war and of international law more broadly was popular across the board. For instance, in his lectures at the Athenaeum of Turin, Mancini had drawn a striking parallel and explained that Gentili was 'entitled at the hands of the Italian nation to a special recognition of his merits as having achieved for the Science of International Law a similar service to that, which Machiavelli had accomplished for the Science of Politics, but emancipating it from the trammels of theological casuistry.'¹²⁴

¹²² Ibid., 55.

¹²³ Ibid., 57–58.

¹²⁴ Cited in Twiss, "Albericus Gentilis on the Right of War," 143. This chronology about the early modern secularization of international law is essentially a nineteenth century myth.

Coleman Phillipson would once again enshrine these ideas most forcefully in his 1911 piece foreshadowing the 1933 introduction to the translated version of DIB. Phillipson argues that ‘[n]otwithstanding various shortcomings—indeed, inevitable at the time he wrote—the entire work of Gentilis is manifestly superior to all previous productions, such as, for example, those of Ayala, Victoria, Soto, Belli, or Suarez,’ citing as the most important mark of Gentili’s superiority the fact that all these earlier works had a theological basis.¹²⁵ Gentili, he later sums up, ‘did more than any other writer to free international law from the besetting theological importations and the incubus of scholastic casuistry.’¹²⁶ Interestingly, in his conclusion, he reiterates that Gentili ‘clearly marked out the respective spheres of the international jurist and the theologian,’ but he also suggest that ‘he carefully differentiated between the work of the international lawyers and that of the civilian,’ and that on this front, Gentili is definitely superior to his Dutch rival as Gentili ‘is not given to the fallacious presumptions of analogy between the civil law and the law of nations—presumptions which govern the fundamental classification of the work of Grotius.’¹²⁷

This narrative about a shift away from theological concerns was well in line with contemporary understandings about the watershed quality of the 1648 Peace of Westphalia.¹²⁸ And in fact, an article from the *Revue* of 1908 informs us that at the inauguration of the monument for Gentili in his native town of St Ginesio that year, the Italian minister of public education had given a speech emphasizing Gentili’s influence on his time, and the great progress that had been made less than half a century after his

¹²⁵ Phillipson, “Albericus Gentilis,” 1911, 5–6. Phillipson 1911, 5–6.

¹²⁶ Ibid, 29.

¹²⁷ Phillipson, “Introduction,” 29.

¹²⁸ For some examples, see notably Christophe de Koch, *Histoire abrégée des traités de paix, entre les puissances de l’Europe, depuis la paix de Westphalie* (Paris: Chez Gide fils, 1817); Arnold Hermann Ludwig Heeren, *A Manual of the History of the Political System of Europe and Its Colonies: From Its Formation at the Close of the Fifteenth Century, to Its Re-Establishment upon the Fall of Napoleon* (Oxford: DA Talboys, 1834).

death, epitomized by the achievements of the Peace of Westphalia.¹²⁹ While it is unlikely that Gentili actually had an impact on the 1648 agreements, the fact that these connections were made highlight the attempt to develop a convincing and consistent historical narrative of the development of the ‘science of International Law’ and its progressive impact over time.

The second—and for our purposes, more important—claim that these lawyers made about Gentili pertained to what he had to say about war. The specific attention paid to Gentili’s writings on war is far from surprising. Indeed, as I noted earlier, the codification of the laws of war was at the heart of the *Institut*’s efforts, and as Koskenniemi puts it, ‘...the laws of war have perhaps never before nor since the period between 1870 and 1914 been studied with as much enthusiasm.’¹³⁰ The revival of Gentili and the republication of DIB occurred at the same time as the *Institut*’s early attempts to codify the laws of war, which culminated in the so-called ‘Oxford Manual’ of 1880. In fact, the Manual acquired that name because the *Institut* met in Oxford that year upon an invitation by T. E. Holland himself.¹³¹ More broadly, and crucially, many of the people driving the revival of Gentili—both within and beyond the English sub-committee—were involved in the efforts to codify the laws of war. The debates they had over Gentili’s famous treatise, as well as parallels they drew between his writings and their own efforts, shed important light on what it was that made them so keen to revive the long-dead Italian writer, and to what use they sought to put his work.

¹²⁹ Ernest Nys, “L’inauguration Du Monument d’Albéric Gentil à San Gineso,” *Revue de Droit International et de Législation Comparée* Series 2, Vol. X (1908): 645–47. For the actual speech: Luigi Rava (Ministro Della Istruzione Pubblica), Alberico Gentili: Discorso pronunciato all’ inaugurazione del monumento in Sangineso, 26 Settembre 1908 (Roma, 1908).

¹³⁰ Koskenniemi, *Gentle Civilizer*, 87.

¹³¹ Holland held a ‘prominent role’ in the *Institut*. Michael Lobban, “English Approaches to International Law in the Nineteenth Century,” in *Time, History and International Law*, ed. Matthew C. R. Craven, M. Fitzmaurice, and Maria Vogiatzi (Leiden: Martinus Nijhoff, 2007), 65.

A very important contextual element here is that in the second half of the nineteenth century, ‘international lawyers often played a significant role in public affairs, sitting on royal commissions which considered questions of international law, and advising government on international questions.’¹³² This was a particularly remarkable development in the British context, where a series of reforms marked the end of a separate body of civilian lawyers in 1865.¹³³ As a result, international law shifted from being the preserve of a specialist branch of the profession, to becoming the preserve of a group of academic jurists, who were less concerned with the litigation of waning admiralty courts than with the political issues of their time.¹³⁴ This new approach to international law was developed first and foremost between Oxford and Cambridge, around the likes of Travers Twiss, Mountague Bernard, and T.E. Holland at Oxford, and William Whewell (1794-1866), William Harcourt (1827-1904), Henry Maine (1822-1888), and John Westlake (1828-1913) at Cambridge.¹³⁵

In this context, the various actors of the Gentili revival would come to weigh in on policy in a number of areas. The main one pertained to war and its laws, the initial impetus behind the *Institut*. Another key area of interest for many of these lawyers was the expansion of the legal scaffolding of colonialism. The link between the two has not been systematically explored,¹³⁶ and a thorough analysis of it is beyond the scope of this project. I will therefore limit myself to highlighting its centrality amongst the international lawyers of the period and turn to some insights it might provide at the end

¹³² Ibid., 72. On the broader context of British liberal internationalism and of the role of lawyers, see Casper Sylvest, *British Liberal Internationalism, 1880-1930: Making Progress?* (Manchester: Manchester University Press, 2009), 61–91.

¹³³ This was the end of the Doctors Common.

¹³⁴ Lobban, “English Approaches to International Law in the Nineteenth Century,” 69–70.

¹³⁵ Ibid., 70–71.

¹³⁶ One particularly interesting piece is Frédéric Mégret, “From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other,’” in *International Law and Its Others*, ed. Anne Orford (Cambridge: Cambridge University Press, 2006). However, the literature on the links between the development of the laws of war and the development of the legal architecture of empire and colonialism remains surprisingly thin.

of the chapter, while focusing most of the discussion here on the immediate context of the codification of the laws of war. In what follows, I begin by providing some biographical details about the men involved in the Gentili revival to give a sense of how deeply involved these international lawyers were in the affairs of their time, and what type of links existed between their academic interests and their involvement in practice.

Two of the most prominent and most active figures on the English sub-committee, T. E. Holland and Travers Twiss, were particularly involved in the political affairs of their day, notably with regards to war and its laws. T. E. Holland would become very well known as a legal scholar from 1880, with the publication of *Elements of Jurisprudence* that eventually underwent thirteen editions and became ‘widely regarded as the most successful book on jurisprudence ever written’ during his lifetime.¹³⁷ Additionally, he was one of the founders of the *Law Quarterly Review*, the legal periodical that became the model for legal journals around the world, after which he became one of the original fellows of the British Academy and took silk (became a Queen’s Counsel) in 1901.¹³⁸ In the 1870s, however, and specifically in the field of international law, he was known less for his academic work than for being an active publicist and a prolific government consultant, which would continue over the entire course of his academic career. Holland became well known to the wider public through his regular letters to *The Times* on contemporary topics of international legal controversy, particularly regarding the laws of war.¹³⁹ He also worked remarkably closely with the admiralty and the war office, and would come to publish numerous pieces on the laws of

¹³⁷ Although the influence of this work declined rapidly after Holland’s death in 1926. Holland revised the thirteenth and final edition in 1924, at age eighty-nine. Richard A. Cosgrove, “Holland, Sir Thomas Erskine (1835-1926),” in *Oxford Dictionary of National Biographies*, by H. C. G. Matthew and Brian Harrison (Oxford: Oxford University Press, 2004), 699.

¹³⁸ Ibid.

¹³⁹ Ibid., 700. These letters were eventually collected and published as *Letters to The Times on War and Neutrality* and underwent three editions (1909, 1914, 1921), the third of which covers the period 1881–1920.

war both on land and at sea. Most notably, the war office eventually commissioned him to ‘prepare a Handbook, such as had been issued by authority in other countries, of “the Laws and Customs of War on Land,” thousands of copies of which were issued to the army in 1904.’¹⁴⁰ Following the Geneva Convention of 1906—which Holland attended as one of the British plenipotentiaries—and The Hague Conventions of 1907, he was instructed to bring this book, as well as the chapter on the subject in the *Manual of Military Law* also known as the ‘Red Book,’ up to date.¹⁴¹ These handbooks for soldiers were one of the key requirements emerging out of the conferences on the codification of the laws of war. All countries had to transpose these laws into domestic legislation and issue clear instructions for those fighting on the ground to ensure these laws were being applied in practice.¹⁴² Holland’s hand in drafting the British manual neatly underlines his direct impact beyond the walls of the university. Holland was also, expectedly, one of the

¹⁴⁰ Holland, *A Valedictory Retrospect (1874-1910)*, 13.

¹⁴¹ Ibid., 14. This, however, seems to have been somewhat compromised. Holland explains that ‘[t]he work was...while in course of execution, taken out of my hands by certain military persons’ but he notes—not without apparent satisfaction—that this was ‘[n]ot, however, till an edition of the ‘Red Book’ containing my entirely re-written chapter, had been issued by the Office in 1907), who were desirous of doing it in their own way, but have apparently found it necessary to obtain assistance outside of the War Office, and have not yet brought their labours to a conclusion.’ Ibid, 14.

¹⁴² Thomas Erskine Holland, “Lecture XIX: War. Measures of: Operations by Dolus,,” in *Lectures on International Law*, ed. Thomas Alfred Walker and Wyndham Legh Walker (London: Sweet & Maxwell, 1933), 290–291. Holland discusses these at some length, providing details on the manuals that had been published at the time: ‘These usages, growing out of sentiments of humanity, as also of personal honours, reinforced by considerations of general convenience, have till recently been preserved, for the most part, only by military tradition. Within the last forty years or so, however, such of these usages as commended themselves to the various Governments have been, not uncommonly, embodied in ‘Manuals,’ differing in many respects one from the other, issued by the authority of the several Governments, for the guidance of their respective armies.’ He cites manuals by the following countries: The United States (Lieber), 1863 (reissued 1898); The Netherlands (a text-book for officers), 1871; Russia (a catechism), 1877 (republished); Serbia (A Manual), 1878; France (a Manual), by M. Billot, 1878; Spain, 1882; Portugal, 1890; Italy, 1896. ‘Great Britain,’ Holland explains, ‘long hesitated to publish such a Manual, relying rather on ‘the good sense of the British officer.’ A chapter in the *Manual of Military Law*, first published in 1883, has no official authority, and expresses only the opinion of the compiler (Lord Thring); it is, moreover, now much out of date, and was struck out in the new edition completed in 1908.’ In light of the limitations of these endeavors, ‘[t]he task was then taken up by private effort [following Brussels 1874], and the labours of some years resulted in the publication, in 1880, at its Oxford meeting, by the Institut de Droit International, of its *Manuel des lois et coutumes de la guerre sur terre* [the ‘Oxford Manual’]—which was translated into most languages (including Chinese)—and adopted in Argentina for the instruction of the army. It was supplemented, at Cambridge in 1895, by resolutions on penalties for breach of the Geneva Convention [of 1864].’ Eventually, these manuals would be made a binding requirement with the Hague injunction that signatories ‘issue instructions to their armed land forces which shall be in conformity with the Regulations.’ (Hague Convention IV, 1907, article 1).

commission members in charge of the drafting of the earlier *Oxford Manual* in 1880, alongside the likes of Johann Caspar Bluntschli (1808-1881), Feodor Fedorovich de Martens (1845-1909), and Gustave Moynier.

Similarly, Sir Travers Twiss was both a renowned scholar and an active participant in the politics of his day, both in matters of war and in colonial affairs. By contrast with Holland, his most important work was actually in the field of international law. His most famous publication, *The Law of Nations Considered as Independent Political Communities*, was published in two parts in 1861-63, and the translation by his friend Alphonse Rivier (1835-1898) became ‘a standard work on the continent.’¹⁴³ In typical fashion for the period, half of the treatise concerned ‘the rights and duties of nations in time of war,’ while the other half focused on peace, and it is unsurprising that the former received more attention (with an earlier re-edition, for instance), as in the words of Rivier, it was ‘characteristic of the time for the necessity to reprint the volume regarding war to have been felt first’ in light of the ongoing conflicts, most notably the American civil war and the Franco-Prussian war.¹⁴⁴ On a practical front, he was involved in various domestic legal affairs, notably sitting on a range of royal commissions, but more importantly for our purposes, he ‘was engaged in most of the prize cases which arose from captures made during the Crimean War,’¹⁴⁵ and was appointed advocate-general to the Admiralty in succession to Sir Robert Joseph Phillimore—the President of the English sub-committee. He would eventually succeed the latter again as queen's advocate-general on 23rd August 1867, shortly before being knighted.¹⁴⁶ He was well

¹⁴³ Michael Lobban, “Twiss, Sir Travers (1809–1897),” in *Oxford Dictionary of National Biographies*, ed. H. C. G. Matthew and Brian Harrison (Oxford: Oxford University Press, 2004), 737.

¹⁴⁴ Alphonse Rivier, “Review: The Law of Nations Considered as Independent Political Communities. On the Rights and Duties of Nations in Times of War,” *Revue de Droit International et de Législation Comparée* VII (1875): 699.

¹⁴⁵ Lobban, “Twiss, Sir Travers (1809–1897),” 738.

¹⁴⁶ *Ibid.*

connected internationally, serving as a Foreign Office consultant,¹⁴⁷ and rather remarkably, enjoyed being ‘on familiar terms’ with Prince Metternich.¹⁴⁸ After a significant amount of personal drama in 1872 that irremediably damaged his reputation in England,¹⁴⁹ Twiss resigned all offices and turned almost exclusively to international law circles.¹⁵⁰ He became a prominent member of the *Institut* (he served as its vice-president thrice), and grew increasingly involved in the crucial debate over the management of Congo. His article ‘La libre navigation du Congo,’ which called for an international protectorate to be established over the area, caught the attention of King Leopold of Belgium,¹⁵¹ who hired Twiss as a legal counsel.¹⁵² During the famous Berlin Conference of 1884-85, which sought to set out clear standards for colonial governance, Twiss was also asked to act as unofficial adviser to the British delegation, and along with Lord Selborne (1812-1895) and Sir Julian Pauncefoot (1828-1902), Twiss ‘largely determined the legal aspects of British policy at Berlin.’¹⁵³ Eventually, Twiss ‘drafted the constitution of the Congo Free State for Leopold, and in 1887 was made grand commander of the order of Leopold.’¹⁵⁴

Three further figures who took part in the debates over the revival of Gentili are worth mentioning here: Sir Robert Joseph Phillimore, the president of the English sub-committee; Gustave Rolin-Jaequemyns, whose comments I have already noted; and John Westlake. Robert Phillimore was a very famous legal figure at the time and a close friend of Prime Minister William Gladstone (1809-1898). Amongst international legal circles,

¹⁴⁷ Koskenniemi, *Gentle Civilizer*, 33.

¹⁴⁸ Lobban, “Twiss, Sir Travers (1809–1897),” 737.

¹⁴⁹ His wife, who was supposed to be the orphaned daughter of a major-general in the Polish army, was outed as a prostitute by one of her lovers, who also pointed out she had been Twiss’ mistress for three years prior to their marriage, a rather scandalous set of circumstances in Victorian England.

¹⁵⁰ He also carried out a brief but catastrophic stunt in legal history, a field he then entirely abandoned to focus exclusively on international law.

¹⁵¹ Lobban, “Twiss, Sir Travers (1809–1897),” 738.

¹⁵² Koskenniemi, *Gentle Civilizer*, 133.

¹⁵³ Lobban, “Twiss, Sir Travers (1809–1897),” 738–739.

¹⁵⁴ *Ibid.*, 739.

he was known notably for his four-volume *Commentaries upon International Law*, and for holding the presidency of the *Association for the Reformation and Codification of the Laws of Nations*, where he gave the inaugural lecture at its annual conference in 1879.¹⁵⁵ Though not usually associated specifically with the codification of the laws of war, this was an area of international law that formed an important part of his work. His initial interest in the discipline, which eventually led to the *Commentaries*, sprung from his time as a law officer during the American Civil War, while one of the most remarkable features of his *Commentaries* is ‘a striking analysis of the nature of the Ottoman empire's relationship to the Concert of Europe which was much used during the various phases of the Eastern Question in the 1870s.’¹⁵⁶

For his part, in addition to being a founder of the *Revue* and a co-founder as well as the first secretary of the *Institut* under Mancini, Rolin-Jaequemyns was one of the key movers behind the codification of the laws of war, along with the three most notable architects of the codification, Johann Caspar Bluntschli, Francis Lieber, and Feodor Fedorovich de Martens.¹⁵⁷ The latter had come to replace the French jurist Edouard Laboulaye from 1870—the one who would suggest the republication of DIB. Like many other members of the *Institut*, from the mid-1870s, Rolin-Jaequemyns also became increasingly interested in the issue of the Congo, and King Leopold eventually appointed him member of the High Council for the independent state of the Congo Free State in 1889.

John Westlake, finally, commented more peripherally (he was not on the sub-committee) but nonetheless influentially on the Gentili revival, as we will see in the final

¹⁵⁵ Travers Twiss, “Les travaux de l’association pour la réforme et la codification du droit des gens pendant sa session du mois d’août 1879,” *Revue de Droit International et de Législation Comparée* XI (1879): 440.

¹⁵⁶ Norman Doe, “Phillimore, Sir Robert Joseph, Baronet (1810–1885),” in *Oxford Dictionary of National Biographies*, by H. C. G. Matthew and Brian Harrison (Oxford: Oxford University Press, 2004), 79.

¹⁵⁷ Nabulsi, *Traditions of War*, 158–159.

section. Initially famous amongst international jurists for *A Treatise on Private International Law* (1858), he was part of the original trio behind the idea of the *Revue*,¹⁵⁸ became the Whewell Chair of International Law at Cambridge (1888), where he published his two most renowned works in public international law—*Chapters on the Principles of International Law* (1894), and *International Law, Part 1: Peace* (1904), and *Part 2: War* (1907)—and he eventually presided the *Institut* (1895).¹⁵⁹ Westlake's writings on the laws of war and peace would become crucial resources for generations of scholars, particularly at a time where the laws of war were emerging out of a series of sometimes nebulous conferences. Westlake was also '[t]he most frequent commentator on the colonial process among members of the *Institut*,'¹⁶⁰ and against some of his contemporaries, his views were sharply against extending any sort of sovereignty—'a purely European notion'—to natives.¹⁶¹ His *Chapters on the Principles of International Law* (1894) directly addresses many of the issues raised at the Berlin Conference around colonialism and sovereignty, and is 'acutely sensitive to the theoretical and methodological challenges that appeared to confront all international lawyers at the time.'¹⁶²

These prominent international lawyers of the late nineteenth century were of course often involved in matters relating to international arbitration as well, as this was one of the most significant developments of the period. For instance, John Westlake was one of the British members of the International Court of Arbitration under the Hague Convention between 1900 and 1906. Yet, in the eyes of many, including Holland

¹⁵⁸ Though he ultimately declined to assume a principal role in the project, Koskenniemi, *Gentle Civilizer*, 13. The other two were Rolin-Jaequemyns and Asser.

¹⁵⁹ Nathan Wells, "Westlake, John (1828–1913)," in *Oxford Dictionary of National Biographies*, by Henri Colin Gray Matthew and Brian Harrison, vol. 58 (Oxford: Oxford University Press, 2004), 274–275.

¹⁶⁰ Koskenniemi, *Gentle Civilizer*, 127.

¹⁶¹ Ibid.

¹⁶² Craven, "Invention of a Tradition," 369.

(probably by contrast with Sbarbaro) the codification of international law—and specifically of the laws of war—was even more important than the development of international arbitration. In a lecture looking back on his years at Oxford and the developments of international law during the period, he first talks about the progress made by international arbitration at some length, and then concludes: ‘[b]ut by far the most notable fact in the history of the science, since I became its official representative here [at Oxford], has been the movement towards the substitution of written rules for the unwritten customs which previously constituted International Law.’¹⁶³ Specifically, he explains, this ‘process of quasi-legislation has been effected by means of Conferences... [which] except in so far as they have endeavoured, by the means just described, to encourage the peaceful settlement of disputes, [have] been concerned with an elaboration and formulation of the laws of war.’¹⁶⁴ Holland outlines the key developments of the period on this front: the 1856 Treaty of Paris abolishing privateering, the 1864 Geneva Convention, the 1868 St Petersburg Declaration, the 1899 Geneva Convention, and the Conventions established at the Hague in 1906-7 and in London in 1908-9.¹⁶⁵ Together, he explains these ‘may collectively be described as ‘the Hague Code of War on Land,’¹⁶⁶ a name he actually coined himself in *The Laws of War on Land*.¹⁶⁷ In the most basic sense, war and neutrality became ‘the most elaborately detailed parts of the whole of international law.’¹⁶⁸

¹⁶³ Holland, *A Valedictory Retrospect (1874-1910)*, 9.

¹⁶⁴ Ibid. This is not to say that Holland was not deeply interested in international arbitration as well. In fact, the two endeavors—international arbitration and the regulation of warfare—were very much linked, and in Holland’s copy of the 1899 Hague Conference documents, he has underlined numerous passages about the modalities of third party mediation and arbitration between dissenting states.

¹⁶⁵ Ibid., 9–10.

¹⁶⁶ Ibid., 10.

¹⁶⁷ Thomas Erskine Holland, *The Laws of War on Land (written and Unwritten)* (Oxford: Clarendon Press, 1908).

¹⁶⁸ Neff, *War and the Law of Nations*.

These considerations about the laws of war were thus front and center in these lawyers' work, and there is no doubt that late nineteenth century international lawyers saw some direct echoes between their mission and Gentili's. They drew explicit parallels between the writings of the Italian jurist and their own efforts to codify the laws of war, sometimes pointing to the similarities between the wars of religion of the sixteenth and seventeenth centuries and the wars of their own lifetime. Twiss, for instance, explained that DIB had 'been reclaimed from oblivion at an opportune moment, when Eastern Europe is involved in a war, which, as regards its motives and its possible results, is hardly second in importance to the Great War, which desolated Central Europe in the early part of the seventeenth century.'¹⁶⁹ In his letter to Valdarnini, Edouard Laboulaye somewhat ghoulishly asked 'if Gentili could come out of his tomb, wouldn't he be proud to think that we still remember his efforts to moralize war? And have we ever faced a more pressing need to return to this terrible subject, when today an entire school predicates law on victory and success?'¹⁷⁰ And in fact, in the first part of his 1898 *Studies on International Law* dedicated to the laws of war, Holland would seamlessly group his inaugural lecture on Gentili and additional research he had completed on the jurist with various pieces on contemporary codification efforts, as if they were merely two sides of the same coin.¹⁷¹

The most explicit tying up of Gentili to contemporary events is perhaps to be found in a now rarely mentioned 1917 book by Ermelinda Armigero Gazzera, which remained for long the standard bibliography listing both Gentili's writings and the works that had cited him. As T. E. Holland notes in the preface, Gazzera's book contains two

¹⁶⁹ Twiss, "Albericus Gentilis on the Right of War," 137.

¹⁷⁰ Valdarnini, *Alberico Gentili Fondatore Del Diritto Internazionale [Con Una Lettera Di E. Laboulaye]*, 9. Si Gentili pouvait sortir de sa tombe, ne serait-il pas fier de penser qu'on se souvient encore de ce qu'il a tenté pour moraliser la guerre? Et avons-nous jamais eu plus grand besoin de revenir sur ce terrible sujet qu'aujourd'hui où toute une école fait de la victoire et du succès la source du droit?

¹⁷¹ Thomas Erskine Holland, *Studies in International Law* (Oxford: Clarendon Press, 1898).

preliminary chapters in addition to the bibliography, one of which ‘deals with the relation of Gentili’s views to the events of the present day.’¹⁷² Gazzera’s chapter is extremely lyrical, and rather remarkable in the explicit links it draws between Gentili and the First World War. The chapter opens with a quote by Sidney Sonino (1847-1922), the nineteenth prime minister of Italy and minister of foreign affairs during the First World War, as well as Italy’s eventual representative at the Paris Peace Conference in 1919: ‘Italy has entered the war in order to maintain its legitimate right after the breach of the treaty of the Triple Alliance, whose spirit was essentially one of peace and defense.’¹⁷³ Gazzera rather convolutedly argues that the 1908 monument to Gentili erected in San Ginesio has ‘acquired great importance both for today’s titanic struggle... and for our civilization on the security and the honor of the glorious Italy that asserts the human law upon which Alberico Gentili built the origins of his works on the rights of men and the rights of war.’¹⁷⁴ Faced with the brutality of the Great War, she further explains that ‘we are witnesses, after having gone through an entire period of civilization, of a return to acts of barbarity, of ferocious premeditated acts; we are obliged by sacred duty to avenge through blood the blood of innocents and to fight for a real cause/necessity (a condition admitted by Alberico Gentili), a new war.’¹⁷⁵ In an ultimate linking of Gentili and her world, she ends her chapter on the following words, speaking of those who will fight nobly: ‘Quick... in honorable rest [after the war], they will gladly turn to Alberico Gentili

¹⁷² Holland, “Preface,” 9.

¹⁷³ Armigero Gazzera, *Alberico Gentili*, 27. ‘L’Italia è entrata in Guerra a sostegno del suo buon diritto, dopo la violazione del trattato della Triplice alleanza, il cui spirito era essenzialmente di pace e di difesa.’ [my translation]

¹⁷⁴ *Ibid.*, 27–28. ‘Monumento, che - col ricordo della solenne cerimonia inaugurale del 26 settembre 1908, acquista oggi una importanza maggiore sia per l’odierna lotta titanica... sia per la nostra civiltà per la sicurezza e l’onore dell’Italia gloriosa, affermata del diritto umano da cui Alberico Gentili trasse le origini delle sue opere sul Diritto delle Genti e sul Diritto della guerra.’ [my translation]

¹⁷⁵ *Ibid.*, 32. ‘Eppure eccoci testimoni dopo, percorso tutto il periodo dell’incivilimento—atti di rinascita barbarie, di azioni feroci premeditate e cinicamente compiute, eccoci costretti per un sacro dovere a vendicare col sangue, il sangue innocente ed a combattere per necessità vera (condizione ammessa da Alberico Gentili) una nuova guerra...’ [my translation]

when we will study and again follow the formula of the new science and the new phase of juridical progress and of civilization that Italy stamped on behalf of Humanity through the pen of the Great Italian.¹⁷⁶ While the piece may seem slightly dubious in its assertions, it neatly highlights the extent to which Gentili was explicitly brought back from the dead to address contemporary conflicts.

Most importantly, in addition to couching Gentili as the founder of international law and tying his work to contemporary events, some jurists argued that he was also ‘the true father of the Science of the Right of War’ (with DIB) and ‘of the Right of Peace’ (with *De legationibus* and—though this may be counterintuitive—*De armis romanis*).¹⁷⁷ More specifically, his definition of war was seen as groundbreaking, and potentially more advanced than that of his great competitor, Grotius. As noted earlier, in his inaugural lecture Holland claimed that DIB constituted a crucial move forward in part because it ‘reduced to reasonable dimensions the topic of private warfare.’¹⁷⁸ Gentili’s exclusion of both private and mixed wars from the ambit of ‘war’ legally defined was indeed a very bold move at the time, as I have discussed at some length in the previous chapter.¹⁷⁹ Putting forward this definition of war in the late sixteenth century had left Gentili’s DIB disconnected from the political realities of his epoch, but in the nineteenth century, this definition was now well-suited to the political environment, and Gentili’s approach was hailed as prescient.

David Kennedy sharply contrasts the nineteenth century turn towards placing the authority of the sovereign at the center of the legal order with early authors ‘from Grotius

¹⁷⁶ Ibid. ‘Presto... nell’onorato riposo, felici torneranno ad Alberico Gentili, al tempo in cui si studierà e si seguirà nuovamente la formula della scienza nuova e la nuova fase del progresso giuridico e della civiltà che l’Italia poté segnare all’Umanità con la penna del Grande Italiano.’ [my translation]

¹⁷⁷ This interpretation of Gentili’s work is most explicit in the work of Emerico Amari (1810-1870), cited by Travers Twiss alongside Mancini’s comparison of Gentili and Machiavelli. Twiss, “Albericus Gentilis on the Right of War,” 143. For a brief discussion of *De armis romanis*, see *supra*, Chapter 2, section I.

¹⁷⁸ Holland, *Inaugural Lecture*.

¹⁷⁹ See *supra*, Chapter 3, section Ia.

to Vattel' who 'rarely spoke of "sovereigns" at all.'¹⁸⁰ 'For them,' he continues, '[a]ll sorts of entities had rights—rulers of many different kinds, individuals, citizens, pirates, merchants... The key elements in the system were *rights* and *wrongs*, not sovereigns.'¹⁸¹ As we saw in the Part I, this was not the case of all early modern thinkers, and indeed, Gentili did place the sovereign squarely at the heart of his system for regulating war. Kennedy's depiction of late nineteenth century international lawyers who '*begin* their analysis with the sovereign act' [emphasis in original] is in fact quite reminiscent of Gentili's position, as well as of course, those of Fulgosius and Ayala: '[i]n such a world, it was easy to suggest that all wars publicly declared by a sovereign were just; the point was to discover if this was the sovereign, and if the war was the product of his public act.'¹⁸² Or again, '[p]rivate armies, mercenaries, privateers—all these were outmoded, not only because they were part of an aristocratic past, but because they did not fit with the new, exclusively *public* nature of sovereign war.'¹⁸³ Of course, Gentili had made space in his own theory for privateers and other private actors fighting on behalf of a public authority, a sovereign. But the changing meaning of the concept of 'public' did not affect the enthusiasm of those who read DIB centuries after its original publication, and the emphasis was on the fact that he had deemed war to be an exclusively public endeavor.

The claim that Gentili was indeed the precursor of this all-important view placing the public sovereign at the heart of the laws of war was once again enshrined most explicitly by Coleman Phillipson in his 1911 text on Gentili for the collection on *The Great Jurists of the World*. Phillipson claims that Gentili's definition of war, *bellum est*

¹⁸⁰ Kennedy, *Of War and Law*, 61–62.

¹⁸¹ Ibid.

¹⁸² Ibid., 62.

¹⁸³ Ibid., 64.

publicorum armorum iusta contentio, is ‘the most precise that has ever been enunciated’ and that his ‘grasp of the matter is here firmer than that of the Dutch jurist [Grotius]’ whose definition of war [parties maintaining a contest by force] ‘is too wide and indefinite, and may also imply conflicts like private or intestine war or single combats.’¹⁸⁴ Phillipson further explains that Gentili’s definition contains ‘the three essential elements: (1) a public contest between sovereigns... (2) by force of arms... (3) begun and conducted in a just and regular manner, in conformity with the law generally established and adopted by both belligerents,’¹⁸⁵ drawing a direct line between Gentili’s writings and the principles of his own epoch. He notes, specifically, that this final condition means that ‘irregular hostilities’ are excluded from the definition, as the belligerents do not constitute ‘regular enemies, *iusti hostes*,’¹⁸⁶ and that a *iustum bellum* is ‘not required against pirates and brigands or rebels, who, willfully withdrawing from the human community and from the institutions of human law, have forfeited all rights guaranteed thereby,’¹⁸⁷ without lingering on the rather brutal implications this could entail. This was echoed in the US around the same time by the aforementioned Thomas Willing Balch, who noted, in his piece on Alberico Gentili meant to elevate the jurist’s profile across the Atlantic, that Gentili defines war as ‘a just contention of the public force’ (citing the usual latin) and that ‘he maintains that while pirates may imitate the usages of war and not those of assassins, nevertheless that does not make them enemies in the real meaning of the word.’¹⁸⁸ In the 1933 version of his piece, Phillipson would entrench this point and

¹⁸⁴ Phillipson, “Albericus Gentilis,” 1911, 19. Henry Nézard makes a similar assessment, pointing out that by defining war as *Status per vim certantium*, Grotius problematically continues to place public war, private war, and dueling in the same category, against the ideas that would form the basis of the classical laws of war, see Nézard, “Albericus Gentilis,” 90.

¹⁸⁵ Phillipson, “Albericus Gentilis,” 1911, 19.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Balch, “Albericus Gentilis,” 672–673.

reaffirm Gentili's superiority on this front. Indeed, to his former criticism of Grotius' definition as being 'too wide and indefinite,' he adds, very importantly:

Grotius observes, no doubt having in mind the words of Gentili, that he (Grotius) does not say war is a state of just contention, because the very point to examine is whether there be a just war and what war is just. Gentili, however, does not use the word 'just' as a question-begging epithet in regard to the justice of the cause, but rather in order to distinguish warfare that is regular (i.e. begun and prosecuted according to rules by the sovereign authority) from the acts of marauders, pirates, &c., or insurgents. The Italian jurist's grasp of the matter is here firmer than that of the Dutch jurist.¹⁸⁹

Some of these arguments could be found in the early days of the revival as well, and even before Holland's inaugural lecture. For instance, in the first edition (1854) of his *Commentaries upon International Law*, hailed by Holland as 'one of the most important books on international law,'¹⁹⁰ Robert Phillimore had drawn on Gentili for his definition of war. In terms reminiscent of the Italian jurist, he explained that to fall into the category of war, violence must combine certain characteristics, the first of which is the following: '[it] must be waged by the public authority of the State, and carried on through the agency of those who have been duly commissioned for that purpose by that authority.'¹⁹¹ 'A war between private individuals who are members of a society,' he continues, 'cannot exist'. The use of force in such a case is a trespass or violation of Municipal Law, and punishable as such, and not war.'¹⁹² Then he explicitly and approvingly cites the jurist: 'According to an early but very sound definition offered by *Albericus Gentilis*, the precursor of Grotius, "Bellum est publicorum armorum iusta

¹⁸⁹ Phillipson, "Introduction." Note the repetition between 1911 and 1933 of the idea that Gentili is more advanced than Grotius on this point.

¹⁹⁰ Thomas Erskine Holland, "Review: *Commentaries upon International Law*, by Sir Robert Phillimore," *Revue de Droit International et de Législation Comparée* XII (1880): 246. ['l'ouvrage du savant juge de la cour d'amirauté a pris dès longtemps sa place parmi les livres les plus importants sur le droit international.']

¹⁹¹ Robert Phillimore, *Commentaries upon International Law*, First edition (London: W. Benning, 1854), 100.

¹⁹² Ibid.

contentio.”¹⁹³ The other two conditions, which are discussed much more briefly, pertain to the appropriate object of war (one option is the classic reparation of injury) and the fact that the means must be in ‘strict conformity’ with the said object.¹⁹⁴ Having grounded this concept of war in Gentili’s famous definition, Phillimore then gives it a much more contemporary twist, according that ‘[w]ar is the conflict of *societies*, that is of corporate bodies recognising and governed by law in all their actions.’¹⁹⁵ He then echoes Gentili’s language again, explaining that war is a necessity due to ‘this absence of a common tribunal, this want of a common International Judge,’ and that the ‘cardinal principle of the law of War’ is to differentiate between the honest warrior and the guilty murderer and establish that ‘everything is *not* lawful against an enemy,’¹⁹⁶ interestingly citing Bodin ‘with pleasure’¹⁹⁷ on this point.

This section around the definition of war and the application of its laws remained identical in the later editions of Phillimore’s *Commentaries* (1871, 1885), through the remarkable revival of Alberico Gentili. However, in light of the various efforts to assert the nature of Gentili’s rediscovered importance, the argument about the prescient character of his definition of war acquired new traction. In his later lectures on international law, T. E. Holland, in the section on war, would similarly look first to Gentili, and then juxtapose Grotius’ definition in a seemingly unsatisfactory way: ‘[d]efinitions throw some light on the character of War. War is defined by Gentilis as *Publicorum armorum iusta contentio*. For Grotius it is *Status per vim certantium* [the state of those who fight through the force of arms]. His definition is more general than

¹⁹³ Ibid. [emphasis in original]

¹⁹⁴ Ibid.

¹⁹⁵ Ibid., 101.

¹⁹⁶ Ibid., 102–103.

¹⁹⁷ Ibid., 103.

that of Gentili, omitting therefrom ‘*publicorum*’ and ‘*iusta*.’¹⁹⁸ Although Haggemacher has explained that Grotius’ definition merely stems from a different methodological standpoint, reflecting a different approach to the laws of war,¹⁹⁹ the notion that Gentili was ‘more advanced’ in defining war stuck with the lawyers of the time, and as I will discuss in the next chapter, with their successors. As we saw in the previous chapter, however, Gentili was not the first to have put forward this definition of war, narrowing it to a contest between sovereigns, and to have made the application of the laws of war virtually entirely dependent on the criteria of authority.²⁰⁰ And in fact, in the years around the republication of DIB, a fascinating debate unfolded: was Ayala not more ‘advanced’ than Gentili in his definition of war?

Ayala’s name begun floating around the revival of Gentili from a fairly early point. For instance, in his brief review in the *Revue* of Holland’s 1874 lecture, Alphonse Rivier—Rolin-Jaequemyns’ close friend and collaborator, who took over as Secretary-General of the *Institut* while the latter was the Belgian Home Secretary during 1878-1884²⁰¹—points that while Grotius is the father of international law, others contributed to opening the way for his own work. The two names he mentions are Ayala, who ‘in his own country, is not duly appreciated,’ and ‘especially Gentili, to whom the Italians are currently erecting a statue.’²⁰² More importantly though, a debate emerged about the

¹⁹⁸ These lectures and the research Holland had completed for them were collected in a posthumous volume, according to his will. Thomas Erskine Holland, “Lecture XVIII: War: Definition of and Effects Of, in Lectures on International Law,” in *Lectures on International Law*, ed. Thomas Alfred Walker and Wyndham Legh Walker (London: Sweet & Maxwell, 1933), 263.

¹⁹⁹ Haggemacher, “Grotius and Gentili: A Reassessment of Thomas E. Holland’s Inaugural Lecture,” 169. See also Haggemacher, *Grotius et La Doctrine de La Guerre Juste*, 462, n. 94. Grotius’ definition of war is merely more abstract, ‘accentuating its general and philosophical aspect.’

²⁰⁰ See *supra*, Chapter 3, sections Ia and Ib.

²⁰¹ Koskenniemi, *Gentle Civilizer*, 53.

²⁰² ‘Tel fut l’Anversois Ayala, qui, dans sa patrie, n’est pas estimé à sa juste valeur. Tel fut surtout Alberigo Gentili, auquel les Italiens érigent en ce moment une statue.’ Alphonse Rivier, “Review: An Inaugural Lecture on Albericus Gentilis. Delivered at All Souls College, by Thomas Erskine Holland,” *Revue de Droit International et de Législation Comparée* VII (1875): 321.

relative importance of Ayala and Gentili, and specifically about their definition of war and their rationale for how to apply its laws.

In his 1878 review of the republished DIB, John Westlake emphasized Ayala's superiority on this point quite forcefully.²⁰³ After noting the evolution of Gentili's definition from the rather vague *Bellum est contentio armata* (1588/9) to the famous *Bellum est publicorum armorum iusta contentio* (1598), he remarks that Ayala's own treatise was published around the same time and points out that '[i]t is interesting to compare the two writers on the cardinal question of the reason why the laws of war, which both admit to depend on its being a *justum bellum*, apply equally to both sides in a given contest.' He explains (somewhat inaccurately) that Gentili understands *justum* in the 'popular sense' and that he 'finds the reason in the fact that there is generally a show of justice on each side,' while Ayala 'repudiates the popular sense' and considers that 'a war is technically just if undertaken by the proper authority.' Westlake is very clear about where he stands: '[w]e hold with Ayala. The other theory is pregnant with a license to the stronger power,' further noting that '[w]hen we follow Gentilis into details, we find striking proofs of the ferocity with which war might then be conducted without exciting at least universal reprobation.'²⁰⁴ This preference for Ayala's definition over Gentili's is not entirely surprising; as I discussed in the previous chapter, Ayala is indeed the jurist who came closest to a fully procedural reason for the equality of belligerents, making sovereignty—in a strict, Bodinian sense—the ultimate prerequisite for possessing the right to war. Thus, although Westlake concedes that the 1877 edition of DIB is 'a very handsome reprint of what is perhaps the earliest regular treatise on any branch of

²⁰³ John Westlake, "Review: De iure belli libri tres," *The Academy*, January 5, 1878.

²⁰⁴ The full quote reads: 'We hold with Ayala. The other theory is pregnant with a license to the stronger power—if it believes the cause of the weaker to be wholly unjust, or will say that it so believes—not only to violate the laws of war, but, what is almost as bad for mankind, to exact under the name of a penalty conditions of peace so hard as to make the renewal of war only a question of time.'

international law,²⁰⁵ a remark in line with the idea of Gentili as the founder of the ‘science of international law,’ his noted preference for Ayala’s definition of war suggests that this question was indeed central to what was being described as the foundations of late nineteenth century international law. It is worth noting here that, with the above comment on the ferocity that underpins Gentili’s approach, John Westlake seems to have been the only jurist to have pointed to the possibilities for ruthless violence inherent in Gentili’s DIB. It would naturally have been highly uncomfortable for the Men of 1873, who saw themselves as the apostles of a more peaceful world, to have claimed as their intellectual ancestor a man who had legitimized extreme forms of violence. The subject-matter thus appears not to have been raised on any other occasion.

However, in terms of the rivalry with Ayala—who was no less ruthless but whose propensity to legitimize the brutal eradication of the Dutch rebellion was equally ignored—Travers Twiss’ own defence of Gentili’s superiority over Ayala in that same year (1878) suggests that there might well have been an explicit debate on the matter within the English sub-committee. Indeed, he explains that ‘the Executive body has exercised, in our opinion, a judicious discretion in selecting the treatise of Gentilis ‘*De Jure Belli Libri tres*’ for republication at the Oxford Press. It is a work far in advance of the treatise of Balthazar Ayala.’²⁰⁶ However, on this initial point, Twiss avoids discussing the competing definitions of war and merely states that Ayala ‘had a more limited object in view, than was before the eyes of the Oxford professor,’ and that his work ‘was intended for the lettered soldier rather than for the learned jurist or the philosophic statesman,’²⁰⁷ echoing Westlake’s praise of DIB as ‘perhaps the earliest regular treatise on any branch of international law.’ Twiss nonetheless does later on note the competing

²⁰⁵ Westlake, “Review: *De iure belli libri tres*.”

²⁰⁶ Twiss, “Albericus Gentilis on the Right of War,” 154.

²⁰⁷ Ibid.

claims that have been made on behalf of Ayala, with specific respect to how these authors conceptualize the relationship between war and its laws:

While some writers... are disposed to consider the treatise of Balthasar Ayala...to be the first work that reduced systematically the practice of Nations in the conduct of warfare to juridical rules, other have deferred the commencement of the new epoch to the teaching of Albericus Gentili at Oxford, and to the appearance of [DIB] in 1598.²⁰⁸

Twiss manages to shake off this challenge to Gentili's predominance by pointing to the existence of other writers who were also notable precursors to Gentili, thus making space for other important thinkers before the cherished 'adopted son of Oxford.' Mancini, Twiss notes, 'has with commendable equality pointed out that Albericus Gentili did not lead the way, but was preceded by Pierino Bello of Alba in Piedmont, a name almost unknown to jurists North of the Alps,'²⁰⁹ although he himself is reluctant to put Belli on too high a pedestal in light of the works of Vitoria and Soto before him. He nonetheless concludes that he is 'of accord with Professor Mancini in assigning to Pierino Bello... a place amongst the earliest writers who have treated systematically of the Right of War,'²¹⁰ thus placing Belli alongside Ayala in a narrative where they are mere precursors to the greater Gentili.

The main international law manuals of the late nineteenth century would further enshrine these ideas, as well as the centrality of Gentili. For instance, Thomas Alfred Walker's (1862-1935) massive *A History of the Law of Nations* of 1899 gives Gentili pride of place and presents him as Grotius' most important rival, extensively describing both of their works on the laws of war. After spending about ten pages on medieval writers, a dozen on 'moral theologians'—including Vitoria, merely described as a 'worthy forerunner of Grotius'—and another dozen on 'politicians and political

²⁰⁸ Ibid., 138.

²⁰⁹ Ibid.

²¹⁰ Ibid., 139.

philosophers,’ Walker begins a separate section on the ‘forerunners’ of international law proper, in which he gives a page to Conradus Brunus, two pages to Francisco Vasquez, a mere three pages to Ayala, and a whooping thirty pages to Gentili, before turning to the last and classic ‘forerunner,’ Grotius, for a solid sixty pages of description.²¹¹ More importantly still, Bonfils and Fauchille’s much used²¹² *Manuel de droit international public* of 1898 begins its second volume—on war and neutrality—with a long discussion of the necessity of war between states who face no superior, as well as on the distinction between public and private war. The first author cited by Bonfils and Fauchille is Gentili, who is seen as having identified the present issue ‘more than three centuries ago.’²¹³ The authors then emphasize the distinction between two conceptions of war; the first, ‘by authors such as Grotius,’ encompasses ‘private wars, wars between individuals, and struggles between states;’ the second, adopted ‘in general [by] all the moderns [*les modernes*],’ only includes as ‘war, as a matter of international law’ the ‘armed struggled between states, between international political entities.’²¹⁴ And to illustrate their point, the authors cite various definitions, including the ‘mediocre’ one of Grotius only reproduced here ‘due to the fame of its author,’ as well as Gentili’s now famous definition, alongside Vattel’s, Bynkershoek’s, and Massé’s, as a token of what the ‘modern’ conception of war entails.²¹⁵

Ultimately, these debates suggest that within the English context, Gentili was seen as a jurist of great importance in large part because of the fact that he had made war an exclusively public matter, limited to sovereigns alone, as evidenced in his celebrated

²¹¹ Thomas Alfred Walker, *A History of the Law of Nations* (Cambridge: Cambridge University Press, 1899), 203–336.

²¹² Koskenniemi, *Gentle Civilizer*, 73.

²¹³ Paul Fauchille, *Traité de droit international public*, ed. Henri Bonfils, Second edition (Paris: Rousseau, 1898), vols. 2, 1.

²¹⁴ *Ibid.*, 1–2.

²¹⁵ *Ibid.*, 2.

definition of war. There is little in the writings of Holland, Twiss, or other members of the English sub-committee or its direct interlocutors on the importance of Gentili as the father of international arbitration. In the English context, it seems, Gentili was celebrated primarily in light of his writings on war, and particularly because his writings appeared to have foreshadowed some developments that were central to the thinking of those who revived his work, who were all involved in contemporary efforts to codify the laws of war.

With the definition of war as an exclusively public affair, war acquired a new standing, reaching ‘its pinnacle of legal prestige, when it attained the exalted statute of an ‘institution of international law,’ a well-regulated mechanism of state interaction.’²¹⁶ This language on the nature of war was enshrined in various treatises in a way that became directly reminiscent of Gentili’s own terms: war was ‘a duel,’ a ‘prosecution of public quarrel,’²¹⁷ a ‘a legal dispute amongst nations,’²¹⁸ a ritualistic contest enabling states ‘to settle disagreement by rolling the dice of Mars,’ and the laws of war ‘came to refer exclusively to the regulation of the *conduct* of hostilities,’ leading to a near-exclusive focus on *ius in bello* at the cost of *ius ad bellum*, which ‘shriveled into virtual nothing.’²¹⁹ Indeed, the codification of what we know as the modern laws of war rested on a sharp separation of the *ius in bello* from the *ius ad bellum* and a complete exclusion of the latter,²²⁰ though this would long remain a debated point amongst both international lawyers and political philosophers.²²¹ This division was directly grounded in the principle

²¹⁶ Neff, *War and the Law of Nations*, 161.

²¹⁷ John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University press, 1894), vols. 2, 81. Citing in Koskenniemi, *Gentle Civilizer*, 85.

²¹⁸ ‘Le litige entre nations constitue la guerre.’ Thomas Erskine Holland, “Les débats diplomatiques récents dans leurs rapports avec le système du droit international,” *Revue de Droit International et de Législation Comparée* X (1878): 177.

²¹⁹ Neff, *War and the Law of Nations*, 163.

²²⁰ Nabulsi, *Traditions of War*, 4.

²²¹ This debate arose particularly fiercely in the twentieth century, notably regarding the United Nations. See Neff, *War and the Law of Nations*, Chapter 9, particularly 342–343. See also Nabulsi, *Traditions of War*, Conclusion.

of the publicity of war, which, as Giladi notes, ‘remains embedded, albeit implicit, in contemporary international humanitarian law and its paradigmatic interstate war outlook.’²²²

This idea of war as a necessarily public endeavor was developed within the European context, but it also appears to have had an underappreciated impact in the colonial one. It is often assumed that if war was a duel, ‘[t]he rules of such dueling, it goes almost without saying, appl[ied] only to combat between the civilized.’²²³ One may suppose that this was merely a result of the idea that international law only applied to the so-called ‘family of civilized nations.’ Yet, the picture was more complicated.²²⁴ As Koskenniemi explains, ‘if the distinction between the civilized and the uncivilized did structure colonial international law at the end of the nineteenth century, it did so accompanied by considerable doubts about its adequacy.’²²⁵ Importantly, the lawyers of the time, faced with the new international order of the second half of the nineteenth century, sought to root international law in ‘facts, not speculation.’²²⁶ In 1875, the *Institut* had thus explicitly attempted to clarify the issue by launching a study under the chairmanship of the same Travers Twiss ‘on the possibility of applying customary (European) international law ‘in the Orient.’’²²⁷ The lengthy summary of the Commission’s work²²⁸ published in the *Revue* illustrates the extent to which this issue raised thorny questions for international lawyers. Discussing the existing treaties between countries such as the United States and ‘organized states and semi-organized tribes,’ such

²²² Giladi, “Francis Lieber on Public War,” 448.

²²³ Koskenniemi, *Gentle Civilizer*, 86. See also Frédéric Mégret, “From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other.’”

²²⁴ Within Western Europe for instance, Belgium was ‘civilized’ but formally neutralized and hence not fully sovereign. Indeed, Belgium ‘always tended to regard neutralization as an unjustified limitation on its sovereignty imposed as a condition of its independence.’ Cyril E. Black, *Neutralization and World Politics* (Princeton, NJ: Princeton University Press, 1968), 25.

²²⁵ Koskenniemi, *Gentle Civilizer*, 131.

²²⁶ Lobban, “English Approaches to International Law in the Nineteenth Century,” 88.

²²⁷ Koskenniemi, *Gentle Civilizer*, 132.

²²⁸ Its members were Asser, Field, De Holtzendorff, Lorimer, Martens, Rivier, and Twiss.

as Turkey, China, Japan, Persia, Siam, Madagascar, Borneo, Muscat, Lew Chew, Morocco, Algiers, Tripoli, and Tunis, the commission notes that '[t]his state of things raises a good number of serious questions and creates much confusion.'²²⁹

Under these circumstances, the concept of civilization thus obviously did a significant amount of work, but its potency for separating those to whom the laws of war applied from those to whom they did not was not quite as clear-cut as is sometimes made out to be. Or more precisely, it was not necessarily obvious who fell on either side of the civilized/uncivilized border; clearly, the line was not merely one between Europeans and non-Europeans. China, Mexico, Japan, Persia, Siam, and Turkey all sent delegates to the 1899 Hague Conference, joined by the Argentine Republic, Bolivia, the United States of Brazil, Chile, Colombia, Cuba, the Dominican Republic, Ecuador, Guatemala, Haiti, Nicaragua, Panama, Paraguay, Peru, Salvador, Uruguay, and the United States of Venezuela in 1907.²³⁰ Thus, while the 1912 Manual for British Officers states that 'the rules of International Law apply only to warfare between civilized nations, where both parties understand them and are prepared to carry them out' and that they 'do not apply in wars with uncivilized States and tribes, where their place is taken by the discretion of the commander and such rules of justice and humanity as recommend themselves in the particular circumstances of the case,'²³¹ the determination of which states were civilized and which were not was a notoriously murky matter.²³² As a result, in addition to the classic dimension of status (civilized/uncivilized), the question of adequate authority, the

²²⁹ Dudley Field, "De la possibilité d'appliquer le droit international européen aux nations orientales," *Revue de Droit International et de Législation Comparée* VII (1875): 663.

²³⁰ On the ambiguous status associated with post-independent Latin American states, see notably Louise Fawcett, "Between West and Non-West: Latin American Contributions to International Thought," *The International History Review* 34, no. 4 (2012): 679–704.

²³¹ James E. Edmonds, *Land Warfare: An Exposition of the Laws and Usages of War on Land, for the Guidance of Officers of His Majesty's Army* (London: HM Stationery Office, 1912), 14.

²³² See the literature on the 'standard of civilization,' notably Gerrit Gong, *The Standard of Civilization in International Society* (Oxford: Clarendon Press, 1984).

ability to demonstrate one was truly ‘sovereign’ and thus entitled to wage war and to be protected by the laws of war became an essential part of the picture.²³³ In this context, the notion that war was the prerogative of sovereign states, and that the laws of war would only apply to those fighting on behalf of such states—i.e. a language directly reminiscent of Gentili’s—became increasingly prominent. These questions about sovereignty and about the ‘public’ character of actors taking part in warfare thus appear to have also played an important role in the colonial context, within which many of the men reviving Gentili were also deeply involved. The exact way in which debates over the nature of sovereignty and the right to war interacted with attempts to operationalize the concept of civilization for legal purposes is an issue to be explored separately, but the existing evidence—and notably the extent to which it was the same group of individuals who was involved in both sets of issues—suggests that this may indeed be a fertile avenue for further research.

In the end, this is not to say that Gentili, though he was himself a clear proponent of empire,²³⁴ foresaw any of these nineteenth century developments, nor that nineteenth century lawyers specifically turned to his work for answers. Ultimately, what I have sought to show here is not that the international lawyers of the late nineteenth century drew their arguments directly from Gentili, nor that they explicitly needed his work in order to justify their approach. They had plenty of resources available, and could probably have done without Gentili entirely. Yet, Gentili’s revival occurred at a timely juncture,

²³³ This had in fact already been a source of debate in the seventeenth and eighteenth centuries concerning the case of the Barbary corsairs. See Rech, *Enemies of Mankind*, 49–104. For a seminal piece on the relationship between international law, positivism, sovereignty, and civilization, see Antony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law,” *Harvard International Law Journal* 40, no. 1 (1999): 1–80. For a typology of the different forms of social stratification characterizing the international order of the nineteenth century, see Edward Keene, “The Standard of ‘Civilisation’, the Expansion Thesis and the 19th-Century International Social Space,” *Millennium-Journal of International Studies* 42, no. 3 (2014): 651–73.

²³⁴ Anthony Pagden, “‘Making Barbarians into Gentle Peoples’: Alberico Gentili on the Legitimacy of Empire,” in *The Burdens of Empire: 1539 to the Present* (New York: Cambridge University Press, 2015), 75–96.

and the account that emerged about his importance, the shape his figure took in its second context, should be understood within the world of these late nineteenth century lawyers and their preoccupations, particularly regarding war and its laws. Harking their way of thinking about war back to the work of Gentili gave it a certain historical pedigree; it was a form of mythopoeic historical genealogy that helped legitimize one of the most important political and legal projects of the period. They could, by pointing to the writings of this great jurist, further enshrine the credibility of their own ideas.

In the Italian context, and at the very beginning of the revival, Gentili's name and his newly glorified reputation were harnessed to the cause of international arbitration, as an additional motor to push forward an increasingly successful endeavor. Once the revival acquired traction in England, where the Committee was focusing more precisely on the excavation and republication of Gentili's writings, Gentili was not only pulled out of the context of the Italian *Risorgimento* and placed within a more universal framework characteristic of the period, he also became harnessed to a different international cause, that of the codification of the laws of war. This is unsurprising, as the core members of the English sub-committee were all involved in the matter and in the question of its application both within and beyond Europe.²³⁵ Gentili's famous definition of war and his dichotomous approach to the application of its laws could provide a legitimizing anchor for their own arguments. As we will see in the next chapter, the repetition of this particular story about Gentili gradually established him in conventional narratives as the father of the classical laws of war, as the first instigator of a remarkable development that had only truly materialized in the late nineteenth century.

²³⁵ One notable debate in this regard was whether the ban on dum dum bullets should apply to warfare with 'savages.' Edward M. Spiers, "The Use of the Dum Dum Bullet in Colonial Warfare," *The Journal of Imperial and Commonwealth History* 4, no. 1 (1975): 3–14.

Conclusion

As this chapter suggests, Gentili's posterity had a rather remarkable trajectory. The reception of his works in the first decades after their original publication was mixed, with Gentili achieving some renown amongst jurists of the *ius naturae et gentium*, while attracting a certain degree of controversy in light of his absolutist writings. His reputation as a 'father' of international law, and as Grotius' first potential rival for what was initially an exclusive title, only emerged in the late nineteenth century, centuries after Gentili's death. This second reception of his work can actually more accurately be described as a process of receptions, with the Italian revival and the English revival differing quite sharply in their nature (not to mention what was essentially a non-revival in The Netherlands).

In addition to the personal and institutional factors that shaped the revival of Gentili, the form that his receptions took has to be understood in light of the political factors that made harnessing Gentili's name more or less useful based on the story that could be crafted about the Italian jurist. If the Italian context saw Gentili couched as a national hero in light of the *Risorgimento* and as the 'father of international arbitration' by the advocative Sbarbaro, the work of the English Committee, which would ultimately have a much greater influence on the memorialization of Gentili, took a different turn. The revival of Gentili in England, driven by a group of men who were heavily involved in the codification of the laws of war and in the legislation of empire, came to echo their own concerns, and became centered on Gentili's definition of war. In the context of the broader move towards excluding all non-state actors—or those not recognized as properly 'sovereign'—from the right to wage war and from the protection of the laws of war, Gentili's definition provided a convenient way for international lawyers to legitimize their approach. The strict limitation of war, as a legal concept, to sovereigns could now

be associated with the ‘modernity’ that had presumably given us Westphalia and the states-system, a core shift that Grotius was perceived as having somehow completely missed. This narrative about Gentili, war, the state, and modernity, would be further strengthened in the twentieth century, to which I now turn.

Chapter 5.

A Contemporary Presence: Carl Schmitt's Gentili and the History of Modern War

Gentili's revival in the 1870s was followed by the establishment of a broad canon of 'founders of international law,' enshrined in the twenty-two-volume 'Classics of International Law' collection, published between 1911 and 1950 by the Carnegie Endowment for International Peace under the general editorship of James Brown Scott.¹ Within this broadening of the international law pantheon, however, Gentili, the original challenger of Grotius' unquestioned supremacy, remained seen as a particularly important figure, especially within the realm of the laws of war. Gentili has also been regularly invoked as a key thinker of international relations, and even celebrated as 'the founder of modern thought about international relations.'² While neither Gentili—nor Grotius for that matter—would ever have thought of himself in this way,³ the 'mythical origin of modern international law is often found in Alberico Gentili's...famous diatribe against the theologians—*silete theologi in munere alieno*—in his *De iure belli*.'⁴

There have been various reasons for this contemporary Gentili enthusiasm, much of it building off the narratives that were developed about his 'greatness' during his late nineteenth century revival. Yet, one particular twentieth century scholar stands out in how

¹ For a detailed analysis, see Amorosa, "The American Project and the Politics of History."

² Murray Greensmith Forsyth, Maurice H. A. Keens-Soper, and Peter Savigear, *The Theory of International Relations: Selected Texts from Gentili to Treitschke* (London: Allen & Unwin, 1970), 15. The Forsyth, Keens-Soper, and Savigear volume is 'heavily indebted' to the Classics of International Law series (Ibid., 11). Their assessment of Gentili is telling: 'Gentili's position as the founder of modern thought about international relations rests on his determination to examine the subject from a secular rather than a theological standpoint. His celebrated cry '*Silete theology in munere alieno*'—Let theologians keep silence about matters outside their province!—marks Gentili sharply off from his scholastic predecessors and expresses the advent of a new era. [...] Gentili exercised a considerable influence on Grotius, as Grotius himself acknowledged... But it is wrong to see Gentili merely as a forerunner of the Dutch writer. In several respects Gentili is both clearer and more 'modern' than Grotius' (Ibid., 16).

³ Haggemacher, "Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture," 174.

⁴ Koskenniemi, "International Law and Raison d'État," 297.

influential he was in ensuring Gentili's position as a key protagonist in the history of international law: Carl Schmitt (1888-1985), the 'most controversial German legal and political thinker of the twentieth century.'⁵ His *Der Nomos der Erde* initially had a significant (if unspoken) impact⁶ on the works of two German post-war historians of international law, Karl-Heinz Ziegler (*Völkerrechtsgeschichte*, 1996) and more importantly, Wilhelm Grewe (*Epochen der Völkerrechts*, written during World War Two but first published in 1984), whose *Epochs of International Law* remains to this day the main work on the matter, 'with no successor being in sight.'⁷ The history of international law garnered little interest in the English-speaking academy until the 1990s,⁸ but when the field eventually took off, both Grewe's and Schmitt's *magna opera* were translated into English—in 2001 and 2003, respectively⁹—and came to form the foundations of the discipline. Schmitt's influence on Grewe is unmistakable, to the point where it can be said that the 'most widely used textbook on the history of international law, Wilhelm

⁵ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (London: University of Chicago Press, 2005), xi. The main work on Schmitt's thought in English is still Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London: Verso, 2000). For a critique, see Benno Teschke, "Decisions and Indecisions: Political and Intellectual Receptions of Carl Schmitt," *New Left Review*, no. 67 (2011): 61–95. For an earlier critique of critical theorists' turn to Schmitt, see Mark Neocleous, "Friend or Enemy: Reading Schmitt Politically," *Radical Philosophy* 79 (1996): 13–23.

⁶ Martti Koskeniemi, "International Law as Political Theology: How to Read *Nomos Der Erde*?," *Constellations* 11, no. 4 (2004): §6.

⁷ Bardo Fassbender, "Stories of War and Peace: On Writing the History of International Law in the Third Reich and After," *European Journal of International Law* 13, no. 2 (2002): 480.

⁸ The main text until then was Arthur Nussbaum's *Concise History of the Law of Nations*. He, too, emphasizes the importance of Gentili, though not quite as much as Schmitt. He explains: 'Gentili's work on international law covers, for the first time, practically all pertinent problems of the period.' On the laws of war, 'His treatment is far more comprehensive than that of the scholastics, including Suarez, who came after him' (Ibid., 95).

⁹ This period also saw the establishment of the *Journal of the History of International Law* (1999).

Grewe's *The Epochs of International Law*, is a Schmittian book.'¹⁰ In fact, Grewe's 'book reads almost like a commentary, or expansion, of Schmitt's *Der Nomos der Erde*.'¹¹

Beyond the recent interest in the history of international law, Schmitt's influence has also been felt widely in the discipline of International Relations. This is unsurprising, as beyond his critiques of liberalism, his *Nomos*, specifically, is a history not just of international law, but of international relations more broadly.¹² This influence can be felt in two main respects. First, it has been pointed out that through the work of Hans Morgenthau, Schmitt's ideas became 'absolutely central' for the development of 'Realism' in International Relations.¹³ Second, while the translation of *The Concept of the Political* unleashed a first wave of 'Schmittiana' in the 1980s, focused on Schmitt's critique of liberalism and anchored in the field of political theory (arguably epitomized by the work of Chantal Mouffe), the publication of an English version of the *Nomos* in 2003 gave rise to a second wave of Schmitt-related studies, stemming this time from international law¹⁴ and International Relations.¹⁵ In particular, critical theorists in

¹⁰ Martti Koskeniemi, "Carl Schmitt and International Law," in *The Oxford Handbook of Carl Schmitt*, ed. Jens Meierhenrich and Oliver Simons (Oxford: Oxford University Press, 2017), 593. See also Fassbender, "Stories of War and Peace: On Writing the History of International Law in the Third Reich and After." As Fassbender notes, 'Carl Schmitt is one of the most frequently (and usually approvingly) quoted authors in the *Epochen*' (Ibid., 504). Nonetheless, Fassbender is less categorical than Koskeniemi in his assessment of Schmitt's influence on Grewe in terms of the latter's 'analysis of specific developments and events in the history of international law but also the general concept of his book' (Ibid., 504).

¹¹ Koskeniemi, "The Epochs of International Law."

¹² Koskeniemi, "International Law as Political Theology," §6.

¹³ See most notably Martti Koskeniemi, "Out of Europe: Carl Schmitt, Hans Morgenthau, and the Turn to 'International Relations,'" in *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001), 413–509. Koskeniemi explains that '[f]ailing to address [Schmitt's] critiques, however, and continuing to construct their normative systems through the thinnest sociological generalizations, international lawyers have been compelled to witness the growth of a neighboring discipline—'international relations'—that has incorporated Schmittian insights as parts of its professional identity (424). More broadly, 'the story of realism in the US is in part the story of the importation of German traditions of political thinking into an American academic context,' notably through emigrés such as Morgenthau and Herz. See Duncan Bell, "Political Realism and International Relations," *Philosophy Compass* 12, no. 2 (2017): n. 5.

¹⁴ As Koskeniemi notes, 'The book was published in Germany only in 1984, but as soon as the English translation came out in 2000 it ascended to the status of leading general treatment of its topic.' Koskeniemi, "Carl Schmitt and International Law," 593.

¹⁵ David Chandler, "The Revival of Carl Schmitt in International Relations: The Last Refuge of Critical Theorists?," *Millennium* 37, no. 1 (2008): 27–48. For a critical response to Chandler assessment of the revival's value in IR, see Louiza Odysseos and Fabio Petito, "Vagaries of Interpretation: A Rejoinder to

International Relations have made much of the power of Schmitt's historical analysis, going as far as suggesting that Schmitt should be one of the household names in the IR canon.¹⁶ The *Nomos*, we are told, 'offers perhaps the most compelling history of the development of international law from the ashes of the Middle Ages to the beginning of the Cold War' and constitutes 'a fully fledged alternative historical account of international relations, of the genesis, achievements and demise of 'international society,' often referred to as the 'Westphalian system' in the field of IR.'¹⁷

In the narrative put forward in the *Nomos*, Schmitt is categorical about Gentili's importance for international law and international relations: he considers him, and his less famous Oxford successor and intellectual follower—Richard Zouch (1590-1660)—to be 'the true founders of European international law,'¹⁸ remarkably bracketing Grotius out. Schmitt's central claim in this regard is reminiscent of the nineteenth century narrative about Gentili: the Italian jurist, he tells us, ushered in the 'modern' concept of war, which would constitute one of the pillars of the European *nomos* until the First World War. By contrast, Schmitt criticizes Grotius' 'line of argument' on these same matters as 'unsteady and uncertain.'¹⁹ He remarks that for Grotius 'a private war was still war in the sense of international law,' but that despite this fact he 'is commonly thought to be the true founder of "modern international law,"' a title Schmitt clearly disapproves of.²⁰ Reiterating his criticism, he explains that Grotius 'seriously confuses the concepts of "war in form" and just war,' and that by contrast with Gentili and Ayala, Grotius' arguments are '[s]till

David Chandler's Reductionist Reading of Carl Schmitt," *Millennium* 37, no. 2 (2008): 463–75. See also the special issue of *South Atlantic Quarterly* on 'World Order: Confronting Carl Schmitt's The Nomos of the Earth,' 104:2 (2005).

¹⁶ Odysseos and Petito, *The International Political Thought of Carl Schmitt*, 1; Fabio Petito and Louiza Odysseos, "Carl Schmitt," in *Critical Theorists and International Relations*, ed. Jenny Edkins and Nick Vaughan-Williams (London: Routledge, 2009), 305–16; Hooker, *Carl Schmitt's International Thought*, 3.

¹⁷ Odysseos and Petito, *The International Political Thought of Carl Schmitt*, 1.

¹⁸ Koskeniemi, "International Law as Political Theology," 309.

¹⁹ *Ibid.*, 160.

²⁰ Schmitt, *Nomos of the Earth*, 160.

completely in line with traditional theological expressions of the Middle Ages.’²¹ To clarify the incoherent character of Grotius’ claims, he explains, ‘we need examine only how Gentili dealt with this matter in practical terms, as in booty and prize law.’²²

Schmitt thus positions himself very starkly within the debate on determining the ‘true founder of international law,’ emphatically choosing Gentili over Grotius on the basis of his supposedly superior definition of war, as some late nineteenth century jurists had done.²³ Ultimately, Schmitt’s *Nomos* and Grewe’s heavily Schmitt-indebted *Epochs of International Law* associate Gentili with a key shift from medieval warfare to a more humane form of ‘modern’ war. As a result, Gentili has continued to occupy this space in histories of the laws of war in the twentieth century and up to this day as a way to legitimize certain ideas about war and sovereignty, most importantly the idea that limiting war to states is what has enabled the ‘moderation’ and the ‘humanization’ of war, a development seen as characteristic of the ‘modern’ era.

Yet, Gentili’s influence on Schmitt has attracted remarkably little attention,²⁴ particularly when compared with the extensive analyses of Schmitt’s use of Bodin and Hobbes. Apart from one monograph on Schmitt which notes in passing that in arguing against the concept of just war ‘Schmitt’s stance is resonant of Alberico Gentili, whom Schmitt often mentions with admiration,’²⁵ the one exception is a piece by Peter Schröder that examines the influence of Bodin, Hobbes, and Gentili on Schmitt. In this piece, Schröder argues that while Schmitt certainly appropriates Bodin and Hobbes’ theories of

²¹ Ibid., 161.

²² Ibid.

²³ Schmitt was naturally aware of the nineteenth century revival of Gentili, celebrating it as ‘a shining example of the history of great thinkers in international law.’ Ibid., 158.

²⁴ Peter Schröder’s article on Schmitt’s appropriation of Bodin, Hobbes, and Gentili’s thought currently constitutes the only exception to this gap, apart from a few passing remarks in Gabriella Slomp, *Carl Schmitt and the Politics of Hostility, Violence and Terror* (Basingstoke: Palgrave Macmillan, 2009), especially pp. 99 and 105. See Schröder, “Carl Schmitt’s Appropriation of the Early Modern European Tradition of Political Thought on the State and Interstate Relations.” Schröder notably argues that Slomp’s analysis is ‘blurred by a somewhat misleading understanding of the historical context.’ Ibid., 367, n. 75.

²⁵ Slomp, *Carl Schmitt and the Politics of Hostility, Violence and Terror*, 99.

sovereignty, Gentili is in fact 'pivotal' for his argument once he turns to the consequences of these theories for international law.²⁶ This raises a number of questions. Why did Schmitt turn to Gentili so enthusiastically? How did he use him in developing his influential historical narrative, particularly regarding war? Which elements of Gentili's theory did he perceive as critical, which ones did he leave out, and why? How should we approach the claims about Gentili's importance that we have inherited from his broader narrative?

This chapter argues that Schmitt's influential emphasis on Gentili is not simply a mere inheritance of nineteenth century narratives. Rather, Schmitt places Gentili at the heart of his history of the development of international law and the evolution of the concept of war in a move that must be understood as part of his broader attempt to defend the project of National Socialism, both in its authoritarianism and in its controversial expansionist policies. In particular, I argue that placing so much emphasis on Gentili provided Schmitt with a way to make absolutist forms of rule seem normatively desirable. Schmitt came to associate absolutism with the humanization and the rationalization of warfare, not through an analysis of historical facts (which would have made the endeavor difficult) but through a partial interpretation of the works of some 'great' thinkers, most importantly Gentili's treatise on war. As such, I show that Gentili was once again brought to center stage in order to defend a particular political project, to legitimize it through the construction of a story of historical continuity.

²⁶ Schröder, "Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations," 349.

I. Reading the Nomos

While the *Nomos* is occasionally described as Schmitt's 'most idiosyncratic book,'²⁷ it is more commonly considered to be a broad history of international law and international relations²⁸ that provides 'the missing substance historical-juridical backbone' of *The Concept of the Political*.²⁹ Written between 1943 and 1945, it 'distills over twenty years of Schmitt's thinking on international law,'³⁰ and comes across first and foremost as 'an elegy on the passing of the Eurocentric world order associated with the sixteenth-century conquest of the New World and the seventeenth-century development of the European territorial nation-state system,' in other words, of the so-called Westphalian order.³¹

At its core, and in a way reminiscent of most international law textbooks, Schmitt's narrative describes the development of international law in three stages: the medieval *Respublica Christiana*, the rise of the territorial state, and the age of discoveries. The *Respublica Christiana* is the foil against which the 'modern,' 'secular' international order arises. The rise of the territorial states marks the sharp break from Church authorities, the separation between religion and secular jurisdiction, and the rise of the *Ius publicum Europeaum* to regulate the relationship between states, replacing papal authority. Finally, the great discoveries are depicted as the event that fostered the consolidation of the *Ius publicum Europeaum* by enabling unlimited land-taking overseas and thus acting as a stabilizing mechanism for Europe internally. For Schmitt, 'the great

²⁷ Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (London: Yale University Press, 2003), 88.

²⁸ Koskeniemi, "International Law as Political Theology," §6.

²⁹ Benno Gerhard Teschke, "Fatal Attraction: A Critique of Carl Schmitt's International Political and Legal Theory," *International Theory* 3, no. 2 (2011): 180.

³⁰ William Rasch, "Introduction: Carl Schmitt and the New World Order," *South Atlantic Quarterly* 104, no. 2 (2005): 179.

³¹ *Ibid.*

merit... of this system lay in the manner it was able to limit inter-European warfare by conceiving it as a public law status between formally equal sovereigns.’³²

One cannot overemphasize the importance of war and its laws for Schmitt's ideas. Though the first revival of his works focused on his critique of liberalism, giving his writings on war, i.e. ‘what must count as the neuralgic center of Schmitt's thought, especially in midcareer,’³³ little explicit attention, the publication of English translations of the *Nomos* (1950/2003) and the *Theory of the Partisan* (1975/2007)³⁴ have placed war back at the center of Schmitt studies. This unleashed a new series of translations of some of his lesser known tracts: *Forms of Modern Imperialism in International Law* (1933/2011), *The Turn to the Discriminatory Concept of War* (1937/2011), *The Großraum in International Law with a Ban on Intervention for Spatially Foreign Powers* (1939/2011), *Großraum versus Universalism: The International Legal Struggle over the Monroe Doctrine, The International Crime of Aggression and the Principle ‘Nullum crimen, nulla poena sine lege’*³⁵ (1945/2011), and more recently *The Changing Structure of International Law* (1943/2016), in which Schmitt first explains the concept of the *nomos*, beginning with the statement ‘[w]ar has become global: its meaning and purpose are nothing less than the *nomos* of our planet.’³⁶

In light of this, it is critical to note what Schmitt understands to be the key shift in

³² Koskenniemi, “International Law as Political Theology,” §8.

³³ Benno Teschke, “Carl Schmitt's Concepts of War: A Categorical Failure,” in *The Oxford Handbook of Carl Schmitt*, ed. Jens Meierhenrich and Oliver Simons (Oxford: Oxford University Press, 2014).

³⁴ Carl Schmitt, *Theory of the Partisan: Intermediate Commentary on the Concept of the Political* (New York: Telos Press, 2007).

³⁵ Carl Schmitt, “Forms of Modern Imperialism in International Law,” in *Spatiality, Sovereignty and Carl Schmitt: Geographies of the Nomos*, ed. Stephen Legg (Abingdon: Routledge, 2011), 29–45; Carl Schmitt, “The Turn to the Discriminating Concept of War,” in *Writings on War*, ed. Timothy Nunan (Cambridge: Polity Press, 2011), 30–74; Carl Schmitt, “The Großraum in International Law with a Ban on Intervention for Spatially Foreign Powers,” in *Writings on War*, ed. Timothy Nunan (Cambridge: Polity Press, 2011), 75–124; Carl Schmitt, “Großraum versus Universalism: The International Legal Struggle over the Monroe Doctrine, The International Crime of Aggression and the Principle ‘Nullum crimen, nulla poena sine lege,’” in *Spatiality, Sovereignty and Carl Schmitt: Geographies of the Nomos*, ed. Stephen Legg (Abingdon: Routledge, 2011), 46–54.

³⁶ Carl Schmitt, “The Changing Structure of International Law,” *Journal for Cultural Research* 20, no. 3 (2016): 310.

the regulation of war in his history of international law and international relations. Put simply, the turning point, for him, was the replacement of the medieval just cause approach with a new, formal concept of war, the just enemy (*justis hostis*), which placed all legitimate belligerents on equal footing and turned war into a form of ‘duel,’ i.e. ‘a regulated procedure for resolving inter-European rivalries.’³⁷ According to Schmitt, this move came to underpin the entire system of warfare during the absolutist age, which he depicts as Europe’s golden era, and opposes to the liberal way of war, which he sees as emerging with the rise of Britain and the US (1890-1918) and a sea-based and economy driven Anglo-American universalism.³⁸ It is in this context that his reliance on Gentili becomes quite remarkable.

II. Schmitt’s story about Gentili

a. Gentili as the key thinker of the modern world

Essentially, Schmitt categorically establishes Gentili as the originator of this all-important system. According to him,

[i]t was Gentili who succeeded in creating a new concept of war based on the sovereign state—on the *aequalitas* of the *justis hostes*—rather than on the justice or injustice of the reasons for war offered by either side. This was the decisive turning point, at least in the thinking of the intellectual vanguard at that time.³⁹

Schmitt does note the similarities between Gentili and Ayala, sometimes seemingly veering towards presenting Ayala as the more important jurist. He oscillates somewhat awkwardly on this point throughout his discussion of Gentili’s Spanish contemporary. Schmitt finds both Ayala and Gentili to be particularly noteworthy because of their

³⁷ Koskeniemi, “International Law as Political Theology,” §8.

³⁸ Koskeniemi, *Gentle Civilizer*, 416.

³⁹ Schmitt, *Nomos of the Earth*, 158–9.

reliance on Bodin. He considers that in their writings on war, they built on a number of ideas that were already present in late medieval doctrine, but that they gave these ideas 'groundbreaking and world-historical power in international law' through their reliance on Bodin's concept of state sovereignty.⁴⁰ 'Many medieval authors,' he tells us, had promoted the idea that war must be 'public,' and must be conducted by a 'prince or emperor.'⁴¹ But they still designated private war as war.' By contrast, he explains, 'when Ayala and Gentili said that 'war must be public on both sides,' this meant that it must be between states.'⁴² As a result of this move, Schmitt boldly seeks to reappraise the importance of Ayala and Gentili relative to Grotius and Pufendorf, 'the two most celebrated and influential teachers of 17th century international law.'⁴³ He is categorical on this point: 'By no means were [the latter] pioneers of the new international law among states, least of all the new concept of war. This honor goes to... Ayala and Gentili.'⁴⁴ Surprisingly in light of the conventional celebration of Grotius for his groundbreaking method, Schmitt claims that he was 'no trailblazer' and considers his method to be 'a scientific regression' in comparison with 'Bodin's conceptual clarity.'⁴⁵ Compared to Bodin, Ayala, Gentili, and Zouch, 'Grotius had a strong general pathos for justice, but no juridical and scientific awareness of the problem.'⁴⁶ In fact, Schmitt suggests, '[t]his may explain his irrepressible popularity' since '[f]rom the standpoint of propaganda, this served a practical purpose for him, which we do not wish to dispute.'⁴⁷

He then hesitates in his assessment of the Spaniard vis-à-vis the Italian. He tells us that 'John Westlake has asserted that Ayala is more a teacher than a thinker' and that

⁴⁰ Ibid., 154.

⁴¹ Ibid., 158.

⁴² Ibid.

⁴³ Ibid., 134.

⁴⁴ Ibid.

⁴⁵ Ibid., 134–5.

⁴⁶ Ibid., 135.

⁴⁷ Ibid.

‘[g]enerally this is true,’⁴⁸ suggesting that Ayala is primarily useful in revealing ‘the transparent effect of Bodin’s legal expertise in general and of his new, state-centered concept of sovereignty in particular.’⁴⁹ He then seems to veer in a different direction, emphasizing that Ayala sometimes does show himself to be a real thinker as well, and even calling him, on one occasion, ‘the founder of the new international law among states’ in his discussion of Ayala’s reliance on the humanistic jurists Alciatus and Budaeus.⁵⁰ Elsewhere, he again designates Ayala, Gentili, and Zouch as ‘the juridical founders of modern interstate international law,’ singling them out for having ‘divorced the question of *bellum justum* proper from that of *justa causa belli*, and made war into a mutual relations between sovereign states.’⁵¹ As I discussed in Chapter III,⁵² the overlaps between Gentili and Ayala are indeed striking, with Ayala having defended a position that actually came much closer to the sort of ‘war in form’ that Schmitt has in mind here.

Ultimately, though, Schmitt dismisses the challenge to Gentili’s primacy constituted by Ayala, arguing that Gentili’s formulations ‘were much more determined and deliberate than were Ayala’s, and had far greater juridical power of form, given their convinced humanistic rationalism and their striking linguistic style.’⁵³ He adds that ‘Gentili also presented these formulations in an exceedingly lively manner, with numerous examples from classical antiquity, the Old Testament, and contemporary history,’⁵⁴ and that ‘Henry Nézard was right in saying that Gentili was the first to designate private war as non-war, even though Ayala did so almost simultaneously.’⁵⁵ As

⁴⁸ Ibid., 152.

⁴⁹ Ibid.

⁵⁰ Ibid., 153.

⁵¹ Ibid., 124.

⁵² See *supra*, Chapter 3, section Ic.

⁵³ Schmitt, *Nomos of the Earth*, 159.

⁵⁴ Ibid.

⁵⁵ Ibid.

such, Schmitt singles out Gentili as the most important protagonist in his story, and notes in passing that 'the great historical interest in Gentili is completely understandable.'⁵⁶

Through this association of Gentili with a new concept of war, Schmitt attributes two crucial developments to the Italian jurist. First, he essentially singles him out for secularizing both the concept of war and international law more broadly. Here, Schmitt refers to what is perhaps Gentili's most famous quote along with his definition of war: *Silete theologi in munere alieno!* Schmitt tells us that Gentili utters this exclamation 'in order to remove theologians from discussion of the concept of war and to rescue a non-discriminatory concept of war,' a contestable statement to say the least.⁵⁷ He cites this formulation again elsewhere, rather lyrically explaining that '[a] true jurist of this transitional period, Gentili, formulated the battle cry and coined what may be considered to be the slogan of the epoch in terms of the sociology of knowledge: *Silete theologi in munere alieno!*'⁵⁸ And again, serving as the brief introduction to Schmitt's crucial third chapter on land-appropriation in Part II on 'The Land Appropriation of a New World': 'The new European international law began with Gentili's entreaty that theologians should remain silent with respect to the question of just war: *Silete theologi in munere alieno!*'⁵⁹

Echoing some contemporary narratives, Schmitt thus draws a very sharp line between the 'theologians' and the 'humanists,' and correspondingly between medieval and modern international law, warning that '[b]y no means should [Vitoria] be associated

⁵⁶ Ibid.

⁵⁷ As Noel Malcolm rightly notes, Gentili's exclamation pertains to a specific issue and by no means entails that theologians should not be concerned about politics at all: 'In this context, the phrase does not really bear all the significance that later interpreters of Gentili have tried to give it; 'in munere alieno' here does not mean the whole business of political theory or just war theory, but refers rather to the sort of political knowledge, about the true nature of Ottoman behaviour and Ottoman policy—which, one properly taken into account, would show up the inadequacy of one particular set of claims that the theologians made.' Malcolm, "Alberico Gentili and the Ottomans," 138.

⁵⁸ Schmitt, *Nomos of the Earth*, 121.

⁵⁹ Ibid., 126.

intellectually with the likes of Balthazar Ayala, Alberico Gentili, or Richard Zouch, all of whom, being jurists of international law, eschewed theological arguments.⁶⁰ As we have seen earlier,⁶¹ this is hardly true, as Gentili still relied on a variety of religious sources, if to a lesser extent than Vitoria. More broadly, as Haggemacher reminds us, the idea of the sudden secularization of international law by Protestant jurists is very much a nineteenth century myth.⁶² Schmitt's treatment of Grotius vis-à-vis Gentili on this front is once again instructive. Gentili is a 'primarily true jurist' who 'refers frequently to Vitoria without appropriating his arguments in any systematic way.'⁶³ Schmitt reiterates the cleavage: '[i]n contradistinction to the theologians, Gentili is too much the secular jurist.'⁶⁴ Grotius, however, 'is a different matter.'⁶⁵ Indeed, Schmitt tells us, '[h]e also distinguished himself from theologians, but he was inclined to use their arguments,'⁶⁶ thus leaving him, for Schmitt, with a foot in the Middle Ages.⁶⁷

Second, and relatedly, Schmitt associates the new, secular concept of war to the emergence of the concept of the state in a particularly striking way. He is adamant about the very close link between the two, and even makes the shift in the concept of war appears as the more important of the two developments: 'It must be remembered that the historical significance of the modern state consists in its having ended the whole struggle

⁶⁰ Ibid., 110.

⁶¹ See *supra*, Chapter 2, section I.

⁶² More broadly, as Haggemacher reminds us, 'Gentili's position is Protestant especially through its lack of precision: it deliberately identifies *ius gentium* with *ius naturale*, both being in turn an expression of divine will—which, incidentally, makes it a rather unfortunate choice as a 'secular' conception, despite Gentili's often quoted sentence reminding theologians to stay within their bounds.' The idea of an 'enlightened and secularized natural law theories of Protestant jurists, in opposition to the scholastic and obscurantist 'casuistry' of Catholic theologians' is very much an 'all too simple nineteenth-century cliché.' Haggemacher, "Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture," 170.

⁶³ Schmitt, *Nomos of the Earth*, 116.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Schmitt approvingly cites a certain Paulo Manual Merea, 'who rightly says that Grotius (*volens, nolens*) remains within the tradition of the scholastic Middle Ages.' Ibid., 160, note 13.

over *justa causa*.⁶⁸ The ‘historical and intellectual accomplishment of the sovereign decision,’ according to Schmitt, was to designate an entity that could ‘decide authoritatively on all the obvious, but impenetrable questions of fact and law pertinent to the question of *justa causa*.’⁶⁹ Tying this to the secular turn, Schmitt tells us that ‘[t]he state was established as the new, rational order, as the historical agency of detheologization and rationalization’ and that ‘[t]he first stage of its juridical self-consciousness was attained in the thinking of two jurists: Bodin and Gentili.’⁷⁰

The importance Schmitt assigns to Gentili is remarkable, as are the analytical approximations and presentist back-projections that characterize his argument. He insists that what Gentili and Ayala—‘humanist jurists’ according to him—meant when they stated that war on both sides must be conducted by ‘princes’ was that ‘it must be fought by sovereign territorial states.’⁷¹ This is quite obviously anachronistic, as the concept of the ‘sovereign state’ in the modern sense did not emerge until at least half a century later,⁷² as did its modern territorial conceptualization.⁷³ Yet Schmitt attempts to drive the point home in a very forceful manner:

Everything that can be said about the legitimacy of state wars lay in this new concept of ‘state,’ a non-public war is a non-state war. Not only was it illegitimate; it was no longer war in the sense of the new international law. It could be anything else—rebellion, mutiny, breach of the peace, barbarism, and piracy—but not war in the sense of the new European international law.⁷⁴

Schmitt thus seamlessly weaves together a remarkably coherent and seductively simple story about the emergence of the concept of non-discriminatory war, of the sovereign

⁶⁸ Ibid., 157.

⁶⁹ Ibid.

⁷⁰ Ibid., 159. Schmitt thus casts Ayala aside entirely.

⁷¹ Ibid., 158.

⁷² Hobbes being conventionally considered as the turning point in thinking about ‘the state’ in the abstract terms that underpin the concept of the ‘sovereign state.’

⁷³ See notably Jordan Branch, *The Cartographic State: Maps, Territory and the Origins of Sovereignty* (Cambridge: Cambridge University Press, 2014).

⁷⁴ Schmitt, *Nomos of the Earth*, 158.

territorial state, and of a secular European international law. Our modern world, we are nearly tempted to believe, sprung almost entirely formed from the fertile mind of a Bodinian Gentili.

There is also a strong normative element to Schmitt's narrative about this key shift towards modernity. Compared to the 'wars of annihilation' of the past, 'wherein the enemy is treated as a criminal and a pirate,' the new, modern and European form of war 'signified the strongest possible rationalization and humanization of war.'⁷⁵ In other words, a 'bracketing'⁷⁶ of war 'was achieved for 200 years.'⁷⁷ This, for Schmitt, was the great moral achievement of the state: 'All definitions that glorify the state, and today no longer generally are understood, hark back to this great accomplishment, whether or not they later were misused and now appear to have been displaced.'⁷⁸

b. Glossing over the Pandora's box of the pirate

As Schröder points out, what is particularly striking in Schmitt's use of Gentili in the *Nomos* is that while Schmitt extolled the qualities of Gentili's concept of war, he 'flatly denied and deliberately ignored' the 'crucial ambiguity of Gentili's notion of the pirate.'⁷⁹ In *Nomos*, Schmitt barely mentions Gentili's use of the concept of the enemy of mankind nor his reliance on the figure of the pirate. This is surprising for three reasons. First, Schmitt talks about the political use of the figure of the pirate on a number of occasions in the *Nomos*, particularly to denounce the fact that Britain and the US are treating their legitimate enemies like pirates and thus undermining the entire system of 'war in form.'⁸⁰

⁷⁵ Ibid., 142.

⁷⁶ Schröder, "Carl Schmitt's Appropriation of the Early Modern European Tradition of Political Thought on the State and Interstate Relations," 359, n.40.

⁷⁷ Schmitt, *Nomos of the Earth*, 120–121.

⁷⁸ Ibid., 142.

⁷⁹ Schröder, "Carl Schmitt's Appropriation of the Early Modern European Tradition of Political Thought on the State and Interstate Relations," 367.

⁸⁰ See for instance Schmitt, *Nomos of the Earth*, 43–44, 65, 122, 124, 153, 174, 309.

Second, by the time he was writing the *Nomos*, Schmitt had already engaged in a written debate with Hersch Lauterpacht on the malleability of the concept of piracy,⁸¹ and on its political use by the Allies to treat German submarine operators as criminals.⁸² Third, he would come to discuss the figure of the pirate extensively in some of his other works, most notably in his *Theory of the Partisan*. In fact, since 9/11 and the beginning of the War on Terror, there has been a surge of interest in the concept of the enemy of mankind embodied by the figure of the pirate and much of it draws directly on Schmitt's writings.⁸³

As I argued in Chapter III, not only is the notion of the pirate 'an incredibly charged political tool' for Gentili,⁸⁴ it is in fact one of the two pillars of the way he elaborates his famous concept of war, the other being, of course, the limitation of the right to war to 'princes.' Schmitt's silence on this front is thus doubly striking. He does note that pirates were not always considered 'enemies of mankind' in the ancient world,⁸⁵ and in the case of Ayala, he mentions that 'war' was now opposed to a broad sphere of violence that did not only pertain to pirates and brigands: 'Everything else was criminal prosecution and suppression of robbers, rebels, and pirates.'⁸⁶ Schmitt does not pick up at all, here, on what the considerable political implications of making rebels 'enemies of mankind' would have been at the time, which was in fact precisely Ayala's intention.⁸⁷ He mentions this idea again in his discussion of Zouch: 'Traitors and rebels who pursue war against their princes or their state, and pirates on the high sea have no *jura belli*,'⁸⁸

⁸¹ Schmitt, "The Concept of Piracy (1937)."

⁸² Walter Rech, "Rightless Enemies: Schmitt and Lauterpacht on Political Piracy," *Oxford Journal of Legal Studies* 32, no. 2 (2012): 235–63.

⁸³ See notably Danilo Zolo, *Invoking Humanity: War, Law and Global Order* (London: Bloomsbury, 2002); Heller-Roazen, *The Enemy of All*; Amedeo Policante, *The Pirate Myth: Genealogies of an Imperial Concept* (Abingdon: Routledge, 2015). Daniel Heller-Roazen is one of the translators into English of the work of Giorgio Agamben, who has heavily contributed to the revival of Schmitt's writings across disciplines.

⁸⁴ Schröder, "Carl Schmitt's Appropriation of the Early Modern European Tradition of Political Thought on the State and Interstate Relations," 367.

⁸⁵ Schmitt, *Nomos of the Earth*, 44.

⁸⁶ *Ibid.*, 153.

⁸⁷ See *supra*, Chapter 3, section Ic.

⁸⁸ Schmitt, *Nomos of the Earth*, 164.

once again leaving it at that, with no consideration of the implications this would have had at the time. Oddly, he makes no similar comment in his discussion of Gentili, despite the fact that it is he who dedicates an entire chapter to ‘brigands do not wage war.’

Essentially, Schmitt leaves little room for any discussion of the instrumentalization of the figure of the pirate and the concept of the ‘enemy of mankind’ at the time, making it seem as if determining who fell into that dreaded category was not a matter of debate. The juxtaposition of this ellipsis with his extensive engagement with the instrumentalization of that figure in his own time is remarkable. Why would an otherwise well-informed Schmitt say nothing about the importance that these debates on the status of pirates and rebels took in the context of that period, particularly in light of the Dutch Revolt? Why make no reference to Gentili’s discussion of the matter, including his adoption of Ayala’s stance on rebels, as well as his inclusion of Indians, Turks, and atheists in his ‘enemy of mankind’ category?

It may be that Schmitt was simply not aware of these debates or of Gentili’s chapter on the matter. However, this does seem unlikely in light of how prominent this discussion is in DIB, which Schmitt cites in both its Latin and its English editions.⁸⁹ In addition, it is hard to believe that Schmitt could have written so extensively about the period without any idea of the debates about sovereignty within which Bodin had published what is considered his masterpiece, debates which became ever more pressing with the escalation of the Dutch Revolt. As a result, I wish to submit here that Schmitt intentionally omitted to discuss this point in order not to endanger his broader narrative. In doing so, I follow Schröder in supposing that Schmitt ‘deliberately misrepresented and

⁸⁹ Ibid., 158–159, notes 10 and 12.

simplified the political and philosophical complexities of the early modern discourse on inter-state relations.’⁹⁰

Schmitt's story of the limitation, humanization, and rationalization of war is questionable in a number of respects. A compelling case has been made for why European state warfare was far from 'limited' in the absolutist age, in the sense that its 'magnitude, frequency, duration, intensity, and costs' were magnified over the period.⁹¹ Schmitt's analysis, in other words, 'is not based on a concrete analysis of European societies in 1599-1900, and even less on the reality of European warfare during that time.'⁹² The case I wish to make here, however, is that Schmitt also deliberately obscured the extent to which the division between 'war' and 'everything else' was established to legitimize wars of annihilation, not only against uncontroversial criminals but also against inconvenient political enemies. Schmitt may well have found this palatable in itself, but in his celebration of the 'golden age' of Europe and its 'bracketing' of war, and particularly in his praise of Gentili, he does not delve into the issue at all, letting us believe that the 'bracketing' of war came at no cost, simply taking away the rights of those who essentially did not deserve them in the first place.

What makes Schmitt's silence particularly interesting is its juxtaposition with the extensive discussion of the figure of the enemy of mankind as a political tool in his critique of liberal warfare. Indeed, one of Schmitt's key goals in the *Nomos* was to draw 'attention to a silent transformation in the concept of war, inaugurated by the war guilt clause in the Versailles treaty,'⁹³ or what he called the 'discriminatory concept of war.'

⁹⁰ Schröder, "Carl Schmitt's Appropriation of the Early Modern European Tradition of Political Thought on the State and Interstate Relations," 371.

⁹¹ Teschke, "Carl Schmitt's Concepts of War," 18. This is a different claim from that of eighteenth century warfare being a form of trial with a lawful verdict, achieved through the victory of one of the sides; see James Q. Whitman, *The Verdict of Battle: The Law of Victory and the Making of Modern War* (London: Harvard University Press, 2012).

⁹² Koskeniemi, "International Law as Political Theology," §10.

⁹³ Koskeniemi, *Gentle Civilizer*, 418.

Schmitt decried the tendency of the latter to ‘bring into existence—in fact allow only the existence of—wars on behalf of humanity, wars in which enemies would enjoy no protection, wars that would necessarily be total.’⁹⁴ In this context, the fact that he decided to remain entirely silent on the politics that animated the struggle over the concept of war in the early modern period would seem rather puzzling.

Ultimately, in placing Gentili at the heart of his narrative about the humanization of war, the emergence of the state, and the secularization of international law, Schmitt ignored the explicitly exclusionary purpose of Gentili’s move, and the controversial violence that his restrictive definition of war sought to legitimize. This omission made his story of the humanization of war in the early modern period both compellingly simple and evidently misleading. However, it appears to have fitted very well with the story he was trying to tell in support of his ideological views, and in light of this proximity, its continued popularity should give us pause for thought.

III. Deciphering Schmitt’s instrumentalization of Gentili

Schmitt’s intentional effort to shape concepts and traditions as part of his political struggle is no secret. In a famous speech of 1933, he explained:

In the political struggle, concepts and conceptual words are anything but empty sound. They are an expression of sharp and precise elaborate opposites and friend-enemy constellations. Thus understood, the content of world history accessible to our consciousness has always been a struggle for words and concepts. These are, of course, not empty, but energetic words and concepts and often very sharp weapons.⁹⁵

⁹⁴ Ibid., 419. The reference is to Schmitt, *Nomos of the Earth*, 298–299.

⁹⁵ This was his inaugural speech at the University of Cologne, see Carl Schmitt, “Reich—Staat—Bund. Antrittsvorlesung, Gehalten an Der Kölner Universität Am 20. Juni 1933,” in *Positionen Und Begriffe: Im Kampf Mit Weimar - Genf - Versailles 1923-1939* (Berlin: Duncker & Humblot, 1994), 190–98. The original German reads: ‘Im politischen Kampf sind Begriffe und begrifflich gewordene Worte alles andere als leerer Schall. Sie sind Ausdruck scharf und präzis herausgearbeiteter Gegensätze und Freund-Feind-Konstellationen. So verstanden, ist der unserem Bewusstsein zugängliche Inhalt der Weltgeschichte zu

It is thus, as Schröder suggests, ‘particularly important to clarify Schmitt’s use and instrumentalization of these concepts and traditions.’⁹⁶ Why, then, would Schmitt have placed so much importance on Gentili while purposely ignoring central aspects of his thought?

I would like to suggest that Schmitt’s use of Gentili must be understood as part of what, some have argued, was an attempt by Schmitt to legitimize Hitler’s regime and its policies. As Teschke—who has offered the most elaborate analysis of this move—argues:

Schmitt’s reinterpretation of the history of international law during the 1930s and 1940s is bound to the concrete situation of the intellectual and political crisis of legitimacy generated by Hitler’s spatial revolution, for which Schmitt offered the most incisive and comprehensive politico-jurisprudential justification, grounded in concrete-order-thinking.⁹⁷

Schmitt’s turn to the history of international law and international relations must be understood in the context of his broader works. Importantly, it followed a long period focused on constitutional law, peaking with his involvement in the debates over Article 48 of the Weimar Constitution on executive government by emergency decrees. In his engagement with the issue of constitutional crises, Schmitt developed his political decisionism, according to which such a crisis required ‘an extra legal and eminently political decision by a single authority for the reassertion of order, grounded in the state’s right to self-preservation.’⁹⁸ His political decisionism was a fierce attack on legal positivism, which he considered grounded in norms that applied only under normal circumstances and were thus incapable of dealing with situations of emergency. However, in the 1930s, Schmitt switched strategy. He turned to international law and international

allen Zeiten ein Kampf um Worte und Begriffe gewesen. Das sind natürlich keine leeren, sondern energiegeladene Worte und Begriffe und oft sehr scharfe Waffen.’

⁹⁶ Schröder, “Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations,” 371.

⁹⁷ Teschke, “Fatal Attraction,” 187.

⁹⁸ Teschke, “Carl Schmitt’s Concepts of War,” 377.

history in an attempt ‘to rewrite the history of international law as an antiliberal and antinormative tract.’⁹⁹

Schmitt’s *Nomos* is a fascinating case of the attempt to build a picture of history based largely on thinkers, cherry-picking their works to achieve the desired result. While Teschke emphasizes the extent to which Schmitt developed his story to justify Hitler’s spatial revolution and the Nazi wars of conquest—notably by grounding his reinterpretation of Europe’s geopolitical history in the practice of land appropriations—I would like to focus here on Schmitt’s equally important attempt to legitimize authoritarianism and to shed light on his use of Gentili within that context.

The *Nomos*, it is clear, ‘is not at all derived from what takes place in the international social world.’¹⁰⁰ As I noted earlier, Schmitt’s narrative about the evolution of the concept of war has little to do with the real world. His story gives pride of place to ‘an imaginary period somewhere before the Revolution when wars were supposedly waged as ‘cabinet wars’ in a restrained way between adversaries that regarded each other as *iustus hostes*.’¹⁰¹ Schmitt is nostalgic of what he depicts as a period of absolutism that constituted Europe’s golden age, but in order to tell its story, he would have been unable to merely turn to the historical facts.¹⁰² He could, however, proceed ‘at the level of a de-contextualized interpretation of a selection of political theorists, eclectically mobilized to construct an ideal-type of absolutism and the attendant *ius publicum*.’¹⁰³ This ode to Europe’s absolutist age, however, was not merely meant to celebrate a past that was

⁹⁹ Ibid., 378.

¹⁰⁰ Koskenniemi, “International Law as Political Theology,” §22.

¹⁰¹ Koskenniemi, “The Epochs of International Law,” 749.

¹⁰² On the issues with his conceptualization of absolutism, see Teschke, “Carl Schmitt’s Concepts of War,” 385–388. Teschke rightly notes that ‘the argument for the de-absolutisation of absolutism is not restricted to contemporary revisionist historians but was already widely proposed in the German literature in the interwar period and thus was available to Schmitt,’ and that in his earlier works ‘Schmitt... himself qualified the decisionistic character of absolutism by noting that the king had to pay heed to the aristocracy, the bureaucracy, customary law, and natural law.’ Ibid., 400, note 4.

¹⁰³ Teschke, “Fatal Attraction,” 197.

putting the present to shame; it could also help legitimize an absolutist form of government within Schmitt's contemporary context. The *Nomos* is thus grounded in 'a political theology conceived in support of domestic absolutism.'¹⁰⁴ Schmitt relies on the notion of the *nomos* to give 'the impression of describing a 'concrete order'' when in fact 'he is simply describing the logical corollaries of a theory of domestic absolutism.'¹⁰⁵

Bodin and Hobbes provided useful sources of course, particularly once Schmitt had stripped their arguments of the elements that did not suit him.¹⁰⁶ In the case of Hobbes, for instance, Schmitt draws on the figure of the Leviathan, the strong sovereign able to counteract the inherently crooked tendencies of man, but he conspicuously ignores the foundational importance that Hobbes attaches to the social contract as a source of legitimacy for state power.¹⁰⁷ He interprets Hobbes merely as a decisionist, a precursor to his own approach, even though Hobbes' insistence on the importance of the contract—and thus of the individual as a bearer of rights—in fact 'supplies a premise for any liberal political theory.'¹⁰⁸ Sir Robert Filmer, one of the most prominent defenders of absolutism who drew heavily on Bodin for his theories, had in fact strongly criticized Hobbes for his contractual approach, which he saw as a way to undermine both divine right and secular royal absolutism.¹⁰⁹ Schröder suggests that Schmitt could co-opt Filmer's criticism, but that he 'knew that absolute authority could no longer reasonably be argued for by

¹⁰⁴ Koskenniemi, "International Law as Political Theology," §22.

¹⁰⁵ Ibid., §10. This is in line with Schmitt's 1922 dictum that '[a]ll significant concepts of the modern theory of the state are secularized theological concepts.' Schmitt, *Political Theology*, 36.

¹⁰⁶ On Hobbes, see especially Schröder, "Carl Schmitt's Appropriation of the Early Modern European Tradition of Political Thought on the State and Interstate Relations," 350–359.

¹⁰⁷ Ibid., 351–352.

¹⁰⁸ Ibid., 355.

¹⁰⁹ Ibid. As Schröder notes, 'in contrast to Filmer, who identifies and exposes it, Schmitt deliberately ignored the individualistic and liberal potential of Hobbes's theory when commenting upon and using it.' Ultimately, Schröder continues, 'Schmitt polarized the debate and took Hobbes fully in his own camp against the liberal tradition' (Ibid., 356). In light of Schmitt's influence on the development of IR through Morgenthau and other German refugees, one might wonder whether this is at all related to IR's tendency to equate Hobbes with 'realism' as opposed to 'liberalism.' Filmer would eventually become one of Locke's main targets in the first *Treatise*.

reference to thinkers like Filmer or Bossuet.¹¹⁰ It is thus not entirely surprising that in his eventual turn to international law and international relations, and in his attempt to tell the story of the changing concept of war, Schmitt ended up turning to Gentili, a key precursor of Filmer,¹¹¹ who, unlike Hobbes and Bodin, had helpfully written explicitly both about the laws of war and about the great virtues of absolutism.

Whether or not Schmitt had actually encountered Gentili's *Regales disputationes*,¹¹² his DIB is sufficiently anchored in absolutist principles for Schmitt to have been resolutely drawn to him, and to have chosen Gentili as the greatest figure of international law.¹¹³ As I discussed in Chapters II and III, Gentili was one of the fiercest proponents of absolutism in late sixteenth century England, and in his DIB, he had drawn heavily on Bodin and sought to organize the European international realm in a way that gave pride of place to an absolutist conception of sovereignty. Crucially, his conception of war allowed nearly no exceptions to the indivisible character of sovereignty as put forward by Bodin, and it made no compromises in favor of those who rebelled against their sovereign. Rebels, like pirates and brigands—as Schmitt notes in the case of both Ayala and Zouch without further comment—were enemies of mankind too. Schmitt was quick to link to his own political vision an approach to war that made the justice of the cause dependent entirely on the sovereign's will: empowered by Bodin's concept of

¹¹⁰ Ibid., 358. Bossuet wrote one of the classic texts of divine-right absolutism in the late 1670s, *Politics Drawn from the Very Words of Holy Scripture*.

¹¹¹ In the sense that Gentili, along with John Conwell, was 'chiefly responsible for importing Continental ideas of sovereignty into English constitutional thought.' Lee, *Popular Sovereignty in Early Modern Constitutional Thought*, 275. It may also be said that Gentili started a trend of distorting Bodin's ideas within the English debates: like Gentili, 'Rober Filmer, too, used Bodin in a very one-sided way to emphasize an absolutism far more vulgar than anything Bodin had ever formulated.' Straumann, *Crisis and Constitutionalism*, 293. For a broader discussion on the use of Bodin by English royalist writers, see Glenn Burgess, "Bodin in the English Revolution," in *The Reception of Bodin*, ed. Howell A. Lloyd (Leiden: Brill, 2013), 387–408.

¹¹² One may at least guess that he knew about them, since he cites Gesina Van der Molen's seminal biography of Gentili, which discusses Gentili's famous defense of absolutism at length.

¹¹³ The same can be said of Schmitt's admiration of Ayala, who also privileged an absolutist approach to war and its laws. See *supra*, Chapter 3, section Ic.

sovereignty, he explains, 'any true jurist' would dismiss relativistic claims about the just cause and confront it 'with a *decisionist* formulation' [emphasis in original] seeking to establish where the authority to decide lies.¹¹⁴ In a way, Gentili's ideas were as ill-suited for their time and place as they were useful for what Schmitt was trying to achieve: attaching normative value to domestic absolutism, by couching it as a form of government that had historically ensured the humanization of warfare.

IV. The legacy of Schmitt's celebration of Gentili's ideas

Schmitt narrative about the development of international law did not materialize out of thin air. It is the product of the political realism that was characteristic of Schmitt's place and time, a worldview centered on the immense value of statehood and the desirability of a calculated form of internal and external state-led brutality. One finds various iterations of these ideas in the works of Weber, Schmitt, Grewe, and of course, in IR, Morgenthau.¹¹⁵ Schmitt's history of international law and international relations, however, stands out in terms of the impact it continues to have today—particularly through its influence on Grewe and since the translation of the *Nomos*—not only on conventional understanding of the development of the modern state system and of international law, but also on narratives about the evolution of war and its laws.

At the time Schmitt wrote, the elaboration of grand narratives about the history of modern international relations was not new, nor was it new for the form of these narratives to be driven by political motives. The idea of a 'states-system' constituted of mutually independent states that recognized each other's territorial sovereignty had been 'developed by late eighteenth and early nineteenth-century conservative historians'

¹¹⁴ Schmitt, *Nomos of the Earth*, 156.

¹¹⁵ Koskenniemi, "The Epochs of International Law," 747.

seeking to ‘present a picture of European public order that would legitimize their efforts to contain the French Revolution and undermine the Napoleonic imperial system.’¹¹⁶ These historians, the ‘Göttingen’ or ‘German historical school,’ plastered this narrative onto the sixteenth and seventeenth century without much respect for the historical facts, nonetheless inventing a history of the shift from the ‘medieval’ to the ‘modern’ world that has remained prevalent today in IR and beyond.¹¹⁷

Schmitt’s story recycled various elements from the Göttingen narrative but gave them a new twist, in line with his ultimate goal of critiquing Anglo-American liberalism, particularly regarding its impact on the conduct of warfare. As I have mentioned earlier, the Schmittian claim about the demise of a ‘bracketed’ way of war, with Gentili as its most celebrated intellectual architect, hinges on a misrepresentation of history, a myth debunked by various scholars. It was nonetheless picked up almost unaltered and expanded by Grewe, who merely brought more nuance to the section of the story on the nineteenth century, which despite Schmitt’s best attempt, clearly could not be presented as a mere continuation of ‘bracketed’ warfare. Like Schmitt, Grewe praises Gentili lavishly as the originator of the idea of ‘war as a duel.’¹¹⁸ Grewe’s history of international law has rightly been criticized as a blatant piece of propaganda, a ‘problematic, even disturbing book.’¹¹⁹ Unlike Schmitt, he had the chance to add an epilogue to it when it was published in 1984, covering the period 1944-present. A notable detail highlighting

¹¹⁶ Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*, 14. As Keene notes, this is not to say that the entire narrative was false: ‘Like all good propaganda, the historical concept of the states-system contained a substantial kernel of truth, but presented in a distorted way’ (Ibid., 16).

¹¹⁷ A number of studies have notably undermined the assumption that there was a shift towards a stark form of absolutism, especially in France, during the early modern period. See for instance Nicholas Henshall, *The Myth of Absolutism: Change and Continuity in Early Modern European Monarchy* (London: Longman, 1992).

¹¹⁸ Grewe, *The Epochs of International Law*, 210–3.

¹¹⁹ Koskeniemi, “The Epochs of International Law,” 746.

the rather tendentious character of the narrative: his brief discussion of the Second World War makes no mention of the Holocaust, 'not even euphemistically.'¹²⁰

Schmitt's influential narrative, as echoed and expanded by Grewe, has certainly forced 'political realism into a moral nostalgia about an imaginary period somewhere before the Revolution when wars were supposedly waged as "cabinet wars" in a restrained way between adversaries that regarded each other as *justus hostis*.'¹²¹ Even more importantly, though, it now seems to thrive amidst the theorizing about the 'old wars' and the 'new wars,'¹²² which has nonetheless been heavily criticized from a historical standpoint.¹²³ Determining the extent to which Schmitt's writings effectively came to underpin the development of the News Wars theory is beyond the scope of this project, but it would indeed be an interested avenue to explore.¹²⁴ Schmitt's narrative has also been accepted rather uncritically by those who seek to use it as an attack on liberal warfare, particularly in the discipline of IR.¹²⁵ If anything, the controversial celebration of Schmitt's *Nomos* in IR has indirectly given Gentili's thought yet a new context in which to thrive.

¹²⁰ Ibid., 748.

¹²¹ Ibid., 749.

¹²² See most notably Mary Kaldor, *New and Old Wars: Organised Violence in a Global Era* (Cambridge: Polity Press, 1999).

¹²³ See for instance Mats Berdal, "The 'New Wars' Thesis Revisited," in *The Changing Character of War*, ed. Hew Strachan and Sibylle Scheipers (Oxford: Oxford University Press, 2011), 109–33; Edward Newman, "The 'New Wars' Debate: A Historical Perspective Is Needed," *Security Dialogue* 35, no. 2 (2004): 173–89; Heuser, "Misleading Paradigms of War."

¹²⁴ Teschke notes that Herfried Münkler's 1992 piece, 'Gewalt und Ordnung,' constituted an exception in being perhaps the only work that examined Schmitt's war writings during the first Schmittiana wave, and that although this first piece 'is restricted to a summary of Schmitt's argument,' Münkler's later work 'which introduces the distinction between Old Wars and New Wars, relies on Schmitt's conception of early modern wars as classical state-to-state affairs.' Teschke, "Carl Schmitt's Concepts of War," n. 1. Teschke is referring to Herfried Münkler, *Die Neuen Kriege* (Reinbek: Rowohlt, 2002), 68, 114. Münkler's work, translated into English as *The New Wars*, forms one of the pillars of the New Wars approach, along with Mary Kaldor's *Old and New Wars*, and Martin van Creveld's *The Transformation of War*. Herfried Münkler, *The New Wars* (Cambridge: Polity Press, 2005); Martin Van Creveld, *The Transformation of War* (London: Free Press, 1991).

¹²⁵ Teschke, "Carl Schmitt's Concepts of War," 368.

Despite the wave of studies on the figure of the pirate and the concept of the enemy of mankind today,¹²⁶ and despite the studies that explicitly examine the history of the figure and concept through a Schmittian lens,¹²⁷ few scholars have ventured to question Schmitt's interpretation of Gentili. Ultimately, though, the fact that in his influential narrative, Schmitt placed so much emphasis on Gentili's conceptualization of war without addressing his seminal use of the concept of the enemy of mankind may well be linked to the broader disjuncture between the study of this concept's history and the study of the history of war and its laws. Yet, a critical engagement with what Schmitt was attempting to do in crowning Gentili as the originator of his all-important 'modern' international legal system suggests this historiography might be in need of reassessment.

Conclusion

While Gentili was revived in the 1870s, his reputation gradually solidifying amidst a growing pantheon of 'founders of international law' over the late nineteenth and the early twentieth century, his importance in the narrative about the development of modern international law and modern international relations was most clearly enshrined in Carl Schmitt's deeply influential *The Nomos of the Earth*. This chapter has shed light on Carl Schmitt's remarkable reliance on Gentili, on his crowning of the Italian jurist as one of the—if not *the*—greatest thinkers of the modern states-system, and on the extent to which Schmitt squeezed Gentili's thought into a frame of his own making in order to support a politically motivated historical narrative.

¹²⁶ Robert Alfert, "Hostes Humani Generis: An Expanded Notion of US Counterterrorist Legislation," *Emory International Law Review* 6 (1992): 171; Burgess Jr, "Hostis Humani Generi"; Sévane Garibian, "Hostes humani generis: Les pirates vus par le droit," *Critique*, no. 6 (2008): 470–79; Jody Greene, "Hostis Humani Generis," *Critical Inquiry* 34, no. 4 (2008): 683–705; Thorup, "Enemy of Humanity"; Kai Ambos, "The New Enemy of Mankind: The Jurisdiction of the ICC over Members of 'Islamic State,'" *EJIL: Talk!*, November 26, 2015.

¹²⁷ See notably Zolo, *Invoking Humanity*; Heller-Roazen, *The Enemy of All*; Policante, *The Pirate Myth*.

This final incursion into the reception of Gentili's thought, and particularly of his *De iure belli* and of the definition of war he develops within the treatise based on his reliance on the concept of the enemy of mankind, demonstrates the extent to which his canonization and his continued prominence need to be understood in light of the political context that drove the receptions of his work. More specifically, it is not just the fact of his canonization that needs to be critically examined, but also the form that his canonization took, and the reasons why some parts of his thinking may have been highlighted whereas others were explicitly omitted. In Schmitt's case, Gentili's pedigree was used to strengthen a popular but historically questionable narrative about the development of the modern states-system and the so-called 'bracketing' of war. Enshrining the idea that war became more 'limited' once the right to wage war was only granted to states precluded emphasizing the fact that Gentili's approach to war opened up a space of unrestrained violence against those deemed not to have the right to wage war, now considered enemies of all mankind. In Schmitt's narrative, 'discriminatory war' only emerged with liberalism, following a long period of 'limited war;' but this is without counting the fact that Schmitt's champion of the concept of limited war merely displaced unlimited violence to a realm falling outside a now narrowed-down definition of war.

Conclusion

The thesis began by highlighting the tension between, on the one hand, the conventional narrative about the importance of Gentili as the founder of the classical laws of war and as a great humanizer of warfare, and on the other hand, the less well known but rather surprising story about Gentili being the first jurist to have brought the exclusionary concept of the enemy of mankind into international law. The thesis set out to make sense of this puzzling dissonance, having emphasized the three sets of issues which this incursion into Gentili's thought and into the history of his reception directly addresses: the question of how to take into account a great thinker's reception over time when engaging with his or her ideas; the history of international law; and the recent call to problematize the ontology of war.

Putting forward a new interpretation of *De iure belli*, I have made a two-fold argument. First, I have claimed that Gentili's famous treatise on the laws of war must be understood as the work of an absolutist, deeply influenced both by Bodin and by the reason of state tradition, who was attempting to elaborate, popularize, and defend a controversial approach to war and its laws. Gentili's pioneering use of the concept of the enemy of mankind, I further argued, must be understood as part of the absolutism that underpins *De iure belli* and that seeks to limit the right to wage war to a narrow group of sovereigns. Gentili dedicates a significant portion of his most important work on war, *De iure belli*, to those who cannot wage war and to how they ought to be dealt with by sovereigns if they attempt to do so. He claims that a conflict between an established sovereign and a group of individuals that cannot claim—or are actively denied—the same status is not a 'war' proper. In this case, considerations of 'just cause,' presumably irrelevant in his approach to the laws of war, come back under a new guise. Instead of

raising questions about which party to the conflict has moral superiority on its side, the ‘just cause’ systematically rests with the established sovereign as the only legitimate belligerent in the conflict. Gentili applies this exclusionary logic to a heterogeneous set of groups: pirates, brigands, atheists, the Turks, and, crucially, rebels. He argues that these groups fall under what he (wrongly) considers to be a well-established legal category with a traceable legacy in Roman law and a clear set of implications: that of enemies of mankind (*hostis humani generis*). In making this argument, Gentili creates a space for a type of international violence that is not bilateral, but that instead serves a purpose of punishment and law enforcement, obeying principles reminiscent of the medieval, discriminatory logic of just war that was supposedly left behind with the advent of the modern states-system. The idea is not merely present in his theory of the laws of war—it is one of its very foundations.

Second, I have shown that the conventional narrative about Gentili as the father of the classical laws of war and as an avant-garde humanitarian only emerged in the late nineteenth century and turned the Italian jurist into a cipher for a particular view of international law and modernity that would eventually come to be enshrined in Carl Schmitt’s deeply influential *The Nomos of the Earth*. Specifically, I have shed light on the context that shaped Gentili’s revival, emphasizing the importance of political circumstances—particularly the conflicts occurring at the time—as well as the more sociological and personal elements that characterized the reception process. Contrasting the British reception with its less influential Italian counterpart, I argue that the focus on *De iure belli* and specifically on Gentili’s definition of war was well suited to the broader late nineteenth century attempt to limit the right to wage war only to states. The flipside of Gentili’s theory of the laws of war, the exclusionary side that justified the extermination of certain groups, was not discussed at any length during the revival, an omission which

I suggest may well have stemmed from its incompatibility with the humanitarian discourse of late nineteenth century international lawyers. Ultimately, I claim that these lawyers came to celebrate Gentili's restrictive definition of war in order to anchor their own arguments in the past and to legitimize their approach with the weight of historical tradition. Gentili's name became a convenient way to refer to a particular conception of the right to war, one which had been deeply controversial in Gentili's own time but that now seemed much more in line with the *zeitgeist*.

Finally, I have argued that this understanding of Gentili's importance was picked up, accentuated, and ultimately almost reshaped by Carl Schmitt, who turned to Gentili with an agenda of his own. Schmitt's remarkable celebration of Gentili as the most important early modern thinker, alongside Bodin, of the modern-state system, has not attracted much attention, and yet, it is absolutely central to a broader narrative about the development of war, the modern state, sovereignty, and international law that remains deeply influential to this day. The final chapter emphasized the historical inaccuracies of Schmitt's narrative, and highlighted the fact that, in order to fit his story about the undesirable return of discriminatory war through the rise of liberal powers, Schmitt had to gloss over the discriminatory side of Gentili's treatise on the laws of war and its implications, despite his own extensive engagement with the political usages of the figure of the pirate as an enemy of mankind in other contexts. Ultimately, with this overarching, two-fold argument, the present project makes three main contributions, which I outline in turn.

I. A new approach to the study of 'great thinkers'

First, the explicit methodological reflection that anchors the project makes a direct contribution to the study of 'great thinkers,' emphasizing the importance of studying them

in what can be described as their various contexts. Systematically applying this methodology in IR will allow for a better understanding of what ‘great thinkers’ actually intended to express in their original context, and of what type of interests shaped their legacies and gave us our contemporary interpretations of their works in the discipline. This is important for two reasons. To begin with, much of our current understanding of figures such as Grotius, Hobbes, or Locke is not based on a rigorous analysis of their writings but on the way nineteenth and twentieth century scholars interpreted their work, based on their own personal, social, and especially political agendas.¹ As long as we simply accept these narratives, we are bound to remain the slaves of these past agendas and to have little understanding of what insights these ‘great thinkers’ can actually provide us with. A much more thorough engagement with these classic works in their original context is thus in order, particularly if we are to develop a better understanding of the international dimension of some of these works within the broader turn towards the history of international political thought.

More importantly still, the methodology I develop provides the tools for investigating the processes of instrumentalization—or even mere unintentional misreading—of famous texts by practitioners (lawyers, diplomats...) and to assess the impact of this phenomenon on international relations. In doing so, this methodology provides a way to study how ideas actually come to have an impact in practice, by focusing on the intermediaries who select them and seek to use them in particular ways and for particular purposes. Though some scholars have sought to account for the reception of certain authors in IR, there has been little explicit methodological reflection on what these types of studies entail. My contribution here is to dissect the different

¹ Hutchings et al., “Critical Exchange: Foundations of Modern International Theory,” 389; Bell, “What Is Liberalism?”

elements involved, drawing on reception theory to highlight the most significant methodological insights to keep in mind if one is to examine processes of reception rigorously and systematically. Additionally, I make an original case for the importance of first examining an author in their initial context in order to acquire a benchmark against which the characteristics of the reception process can be measured. This is in contrast to current approaches to intellectual history that focus either on analyzing an author's thought within her original context, or on examining the reception of the author at various points in time, without explicitly linking the two. The dual contextualization I propose may be done within a single work, as in the case of this project, which examines primary sources in both the original context of the author and in the context of his reception. Alternatively, a study seeking to focus more heavily on the reception process may establish this benchmark by drawing on the more classically contextual (i.e. Cambridge School, broadly speaking) secondary literature to acquire a sufficient sense of what the author's original intentions were, if these are already relatively well established.

Ultimately, it is worth noting that while processes of reception have received quite a bit of attention in the case of the rediscovery of classical authors between the Middle Ages and the early modern period, the same cannot be said for the reception of early modern authors in the nineteenth and twentieth century. My methodological approach will be particularly relevant for future studies that seek to account for these understudied, more recent processes, and its precepts can be applied to authors beyond the specific field of international political thought.

II. Reinterpreting the history of international law

Second, the thesis challenges some conventional tenets of the history of international law. In the most obvious sense, the thesis offers a new interpretation of *De iure belli*, a key

historical text in both International Relations and international law. Beyond its exegetical value, this new interpretation is important in that it makes a much broader point about the need to break down the division between the history of political thought and the history of international legal thought. It is often assumed that early modern thinkers, who gave us so many of the distinctions our contemporary world is based on—sovereignty, the state, territorial boundaries, reason of state, the balance of power—were split between those who thought about domestic political matters and those who thought explicitly about international ones, including international law. A handful of short pieces have now emerged that seek to go beyond this divide, notably within the (re)turn towards early modern international legal thought.² A particularly interesting text, for instance, is a brief piece on Hobbes by Christopher Warren, who argues that Hobbes' translation of Thucydides, published as *Eight Bookes of the Peloponnesian Warres*, should be understood not as a move within the debate about absolutism and domestic sovereignty, but as one within debates about the law of nations and about the place of law in the colonial world.³

My own work on Gentili's *De iure belli*, which seeks to move the debate away from the traditional focus on Gentili's disagreements with the theologians who wrote on the law of nations and focus instead on the extent to which Gentili was engaging with Bodin and with the reason of state writers, points in a similar direction. It highlights the need to reassess the overlap between the different problems these early modern thinkers were confronted with, and to investigate the possible connections between their thought on, on the one hand, sovereignty and the internal politics of the state, and, on the other

² See notably the chapters on Niccolò Machiavelli and Jean Bodin in Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit, *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (Oxford: Oxford University Press, 2017).

³ Christopher Warren, "Hobbes's Thucydides and the Colonial Law of Nations," *The Seventeenth Century* 24, no. 2 (2013): 260–86.

hand, the law of nations, conflicts between sovereigns, and relations with the new world.⁴ The turn in history and IR towards the history of international political thought provides an ideal framework to explore these links and move beyond the somewhat presentist domestic/international divide that has at times encouraged an overly siloed approach to early modern political and international legal thought. The present project is amongst the first moves in that direction, and opens the way for more extensive works on these underestimated links.⁵

Additionally, the thesis makes an important contribution to the disciplinary history of international law, and particularly to the recent efforts to map out the development of a historical narrative about the discipline's past in the late nineteenth and early twentieth century. The actual historical continuity between international law before and after 1870 has been effectively thrown into question,⁶ but the construction of this sense of continuity, and the way it shaped and has continued to shape the professional identity of international lawyers from the late nineteenth century onwards, is a phenomenon that has attracted much attention. In addition to Koskenniemi's landmark *The Gentle Civilizer of Nations*, which notably explores in minute detail the emergence of the key institutions of the discipline of international law (including the *Revue* and the *Institut*) as well as the main understandings of international law that shaped the development of the discipline in its first decades, works are beginning to emerge specifically on the creation of international law's disciplinary canon, focusing on the American context and the efforts of Elihu Root and James Brown Scott in the first decades of the twentieth century.⁷ The present project tells a different part of this story of canon

⁴ I briefly develop this idea in Vergerio, "Alberico Gentili's *De Iure Belli*."

⁵ Martti Koskenniemi's current research on the development of thinking about the role of law in the international political world in 1300-1800 is likely to provide a significant advance on this front.

⁶ See notably Koskenniemi, *Gentle Civilizer*; Koskenniemi, "International Law and *Raison d'État*."

⁷ Rossi, *Broken Chain of Being*; Orford, *What Is the Place of Anachronism in International Legal Thinking*; Amorosa, "The American Project and the Politics of History." On the rise of the American Institute of

creation, focusing on the early days of the *Institut* and on the developments that occurred in England, three decades before the take off of American international law, with the foundation of the American Journal of International Law (1907), of the Carnegie Endowment for International Peace (1910)—of which Elihu Root was the president and James Brown Scott the secretary—and of the American Institute for International Law (1912), co-founded by the same James Brown Scott.

While James Brown Scott, through his work as the general editor of the Carnegie Series on the *Classics of International Law*, obviously played a crucial role in the construction of international law's disciplinary canon, my project provides the missing, earlier part of the story in the specific case of Gentili. I show how Gentili came to be considered as a key figure to include in that series, and how the narrative about his importance regarding the laws of war developed, before being finally enshrined in 1933 in Coleman Philipson's introduction to the Carnegie series reedition and translation of *De iure belli*. In doing so, my work provides a case study of an 'invented tradition,' shedding light on the process through which an author comes to be canonized, and, crucially, accounting for the shape this author comes to take in his canonized form. This study thus contributes to the recent attempts to shed light on the scaffolding behind disciplinary canons in International Relations, political theory, and international law. In helping deconstruct the edifice, it accounts for the motives—personal, social, political—that underpin what is often taken for granted, and it provides the means for reflexivity and critique.

International Law and the links between the development of American international law and imperialism in Latin America, see Juan Pablo Scarfi, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (Oxford: Oxford University Press, 2017).

III. Historicizing the contested ontology of war

Third, and finally, this project ultimately makes a broader claim about the need to examine debates about the ontology of war in historical perspective. There has been a recent move in the emerging field of Critical War Studies towards problematizing the ontology of war,⁸ grounded on the observation that countless forms of violence are ignored from the study of war in international relations because they do not fit the conventional definition of what ‘war’ is.⁹ This is an important point, but these scholars treat the concept of war as an analytical category that can be molded according to their needs rather than as a historical category that has developed contingently to serve specific purposes. What my project demonstrates is precisely the importance of examining the changing definition of war in historical perspective, and particularly its evolution in legal terms. Debates about the legal definition of war have been essential, because in the simplest terms, the outcome of these debates determined who had a legal right to wage war and who could be protected by its laws, two consequences that had a very concrete impact on the ground.¹⁰ ‘Law,’ Nathaniel Berman reminds us, ‘has long been directly

⁸ See most notably Barkawi, “Decolonising War.” See also Balibar, “What’s in a War?”; Barkawi and Brighton, “Conclusion: Absent War Studies? War, Knowledge and Critique”; Barkawi and Brighton, “Powers of War”; Sylvester, “War Experiences/war Practices/war Theory”; Holmqvist, “Undoing War”; Nordin and Öberg, “Targeting the Ontology of War.” Even the Economist has picked up on this issue of ontology: “What Makes It a War?,” *The Economist*, November 9, 2013, <http://www.economist.com/news/briefing/21589432-some-say-killing-25-people-year-enough-others-suggest-1000-what-makes-it-war>.

⁹ This problematization of the ontology of war has also begun to emerge among historians and political scientists. For instance, Beatrice Heuser has argued for the concept of war to be adjusted in order to “include the mass-killing of non-combatants [including by their own state] and to put more emphasis on civil wars and insurgencies,” while Wimmer and Min argue that the change in the institutional form of states—from empire to nation-state—is a major cause of war, and that this is overlooked by the existing quantitative literature on war because the latter ‘takes the independent nation-state as the self evident unit of analysis and largely excludes other political types from consideration.’ Heuser, “Misleading Paradigms of War,” 4; Andreas Wimmer and Brian Min, “From Empire to Nation-State: Explaining Wars in the Modern World, 1816–2001,” *American Sociological Review* 71, no. 6 (2006): 867.

¹⁰ On the debates over the legal status of different types of combatants (as legitimate and protected by the laws of war or illegitimate and consequently excluded from these protections), see Nabulsi, *Traditions of War*.

involved in *the construction of war*.¹¹ A brief incursion into history makes it clear that the legal concept of war has hardly been static: ‘the forms of this legal construction of war are highly contingent, both in the sense of having varied historically and in the sense of having been contested within each period.’¹² Gentili’s use of the concept of the enemy of mankind was clearly a move within the debate of what legally constituted a ‘war,’ an attempt to limit the right to war only to a small group of narrowly-defined sovereigns, just as his revival in the late nineteenth century was part of a broader effort to limit the right to war to recognized states. These moves within debates about what constitutes a war shed light on one of the fundamental features of international order, the question of who is entitled to wage war and to be protected by the laws of war.

More specifically, the thesis contributes to highlighting the inadequacy of two distinct binaries. The first is the dichotomy between war and peace. Gentili’s definition of war, once evaluated in light of its exclusionary counterpart, reveals itself as constitutive of a space of international violence outside of the strict category of war, carried out against those who take up arms illegitimately and are thus categorized as criminals and enemies of mankind. In other words, his restriction of ‘war’ to what sovereigns do amongst each other creates a space for a form of ‘peacetime violence’ to be fought by sovereigns against non-sovereigns, outside the bounds of the laws of war. The celebration of Gentili’s definition of war in the nineteenth century, amidst the broader restriction of the right to war to states, suggests the importance of taking greater stock of the ‘peacetime violence’ that was generated at the time and into the twentieth century.

International forms of ‘peacetime violence’—international violence falling outside the legal category of war—have been surprisingly understudied in International

¹¹ Emphasis in original, Nathaniel Berman, “Privileging Combat: Contemporary Conflict and the Legal Construction of War,” *Columbia Journal of Transnational Law* 43 (2004): 43.

¹² Ibid.

Relations, despite the importance they have had on the development of the modern international system. In addition to inter-state out-of-war conflicts, such as the ‘quasi-war’ that took place between France and the US in 1797-1801 or the battle of Navarino of 1827,¹³ which ‘have yet to receive the systematic study that they deserve,’¹⁴ there is another, more important type of conflict that falls within the ‘peacetime violence’ category and requires much more attention in studies of violence in IR. I am speaking here of what the Correlates of War have called ‘extra-state wars,’ and define as conflicts ‘between a territorial state and a non-sovereign entity outside the borders of the state,’¹⁵ the non-sovereign status of the second opponent often being the result of a mere lack of recognition by the first. These conflicts became particularly prevalent during the long nineteenth century, during which they became known as small wars (*petite guerre*, *Kleinkrieg*).¹⁶ Examples include a number of conflicts within the European context, most famously the *Guerrilla* in Spain (1808-1814), but their numbers truly skyrocketed with the ‘new imperialism’ unleashed in the 1870s, notably in light of the numerous conflicts waged against native populations during the Scramble for Africa. Thus, while the

¹³ The practice of states using armed force against each other outside of the legal realm of war flourished in the nineteenth century under the label ‘measures short of war,’ and it reached its pinnacle during the so-called “Manchurian crisis” of the interwar years. In the latter, Japan and China agreed to carefully circumvent the label of war and thus the application of the laws of war despite heavy military clashes and considerable casualties on both sides. See Philip C. Jessup, “Should International Law Recognize an Intermediate Status Between Peace and War?,” *American Journal of International Law* 48, no. 1 (1954): 98–103. Neff, *War and the Law of Nations*, 215–250.

¹⁴ Neff notes that ‘measures short of war,’ which peaked in the nineteenth century, ‘have yet to receive the systematic study that they deserve.’ Neff, *War and the Law of Nations*, 216.

¹⁵ “Meredith Reid Sarkees, Frank Whelon Wayman, and J. David Singer, “Inter-State, Intra-State, and Extra-State Wars: A Comprehensive Look at Their Distribution over Time, 1816–1997,” *International Studies Quarterly* 47, no. 1 (2003): 59. However, the Correlates of War data only lists the occurrence of these types of wars outside of Europe, dividing them into wars that occurred mainly when a colony tried to rebel to become independent, i.e. ‘colonial wars,’ and wars that occurred primarily when a state attempted to colonize a previously independent geographic area, i.e. ‘imperial war.’

¹⁶ The term ‘small war’ existed prior to the late eighteenth century, but it referred to a specific war tactic within conflicts between professional armies. Benjamin Deruelle, “The Sixteenth-Century Antecedents of Special Operations ‘small War,’” *Small Wars & Insurgencies* 25, no. 4 (2014): 754–66; Bertrand Fonck and George Satterfield, “The Essence of War: French Armies and Small War in the Low Countries (1672–1697),” *Small Wars & Insurgencies* 25, no. 4 (2014): 767–83.

literature on *petite guerre* initially pertained to the European context,¹⁷ it became increasingly associated with colonial warfare.¹⁸ According to the Correlates of War authors, while inter-state wars and civil wars have been thoroughly studied, conflicts within this ‘extra-state wars’ category—and particularly colonial conflicts—have received remarkably little attention,¹⁹ even though they ‘have been associated with one of the most important cyclical transformations of the modern international system—first the spread of imperialism, and then the emergence of independent new nations.’²⁰ ‘We are concerned,’ they explain, ‘that a broader understanding of war has been hampered by the common failure to examine extra-state wars.’²¹ These conflicts have indeed often been sidelined—not only within IR²² but also by military historians²³ and legal scholars²⁴—to

¹⁷ See notably Christopher Daase and James W. Davis, eds., *Clausewitz on Small War* (Oxford: Oxford University Press, 2015). For an insightful analysis, see Beatrice Heuser, “Small Wars in the Age of Clausewitz: The Watershed Between Partisan War and People’s War,” *The Journal of Strategic Studies* 33, no. 1 (2010): 139–62.

¹⁸ The most famous work is Charles Edward Callwell, *Small Wars: Their Principles and Practice* (London: HM Stationery Office, 1903). On colonial small wars, see particularly Daniel Whittingham, “‘Savage Warfare’: CE Callwell, the Roots of Counter-Insurgency, and the Nineteenth Century Context,” *Small Wars & Insurgencies* 23, no. 4–5 (2012): 591–607. See also, for instance, Tim R. Moreman, “‘Small Wars’ and ‘Imperial Policing’: The British Army and the Theory and Practice of Colonial Warfare in the British Empire, 1919–1939,” *The Journal of Strategic Studies* 19, no. 4 (1996): 105–31. On the French side, the main manual became Albert Ditté, *Observations sur la guerre dans les colonies* (Whitefish, MT: Kessinger Publishing, 1905).

¹⁹ In fact, Amitav Acharya reminds us that the COW’s inclusion of extra-state (or extra-systemic) wars is itself a recent addition: ‘the “Correlates of War” (COW) project, when it was founded at the University of Michigan in 1963, coded wars since 1816 but neglected “extra-state” wars, that is, imperial and colonial wars. It was criticized for reflecting a “historical legacy of Western imperialism and racism that simply did not regard non-Western groups as civilized or as human beings equal to whites” and thus “did not bother to record in any systematic way the fatalities sustained by non-national groupings in imperial wars of conquest or pacification” (Vasquez 1993:27). The COW database later added 129 extra-state wars, with the help of revised methodology and new historical research (COW 2006: News & Notes), but “there is probably still an undercount” (Diehl 2014).’ Amitav Acharya, “Global International Relations (IR) and Regional Worlds,” *International Studies Quarterly* 58, no. 4 (2014): 647.

²⁰ Sarkees, Wayman, and Singer, “Inter-State, Intra-State, and Extra-State Wars,” 56.

²¹ Ibid.

²² Ibid.

²³ ‘Apart from those interested in the origins of British counter-insurgency methods, colonial campaigns have attracted little attention from historians.’ Moreman, “‘Small Wars’ and ‘imperial Policing,’” 106. The *Understanding Insurgencies: Resonances from the Colonial Past* network based at the University of Exeter’s Center for the Study of War, State and Society constitutes an important, recent initiative to try to begin filling this gap.

²⁴ Certain legal scholars occasionally remark that the current debates about classifying conflicts may reflect a longstanding weakness in the categorization of armed conflict, noting the heavy focus on state-obligation and pointing to nineteenth century ‘small wars’ as an example of conflict that already did not fit into the categories of international humanitarian law. See for instance Kenneth Watkin, “21st Century Conflict and International Humanitarian Law: Status Quo or Change?,” in *International Law and Armed Conflict*:

the benefit of inter-state wars mostly involving European powers, and surprisingly little is known about the role which law—domestic, colonial, international—played in regulating them. By highlighting the eminently political process through which the definition of what constitutes a ‘war’—particularly in legal terms—unfolds, the project calls for a much more critical engagement with the history of these debates, a more systematic problematization of what was in effect considered a ‘war’ at a particular point in time, and a thorough reflection on how this has affected our analysis of war and peace over the modern period.

The second dichotomy is that between just war and regular war, or as Schmitt most famously put it, discriminatory and non-discriminatory war. There is still a widely accepted narrative about the shift from the first to the second during the early modern period, with the shift often pinned down on Gentili as the crucial thinker to have first made this move. According to this narrative, the concept of war underwent a deep change between the late medieval and the early modern period. This shift is summarized in a brief piece by Gregory Reichberg entitled ‘Just War and Regular War: Two Competing Paradigms.’²⁵ Directly echoing the usual narratives about Gentili’s contribution, Reichberg explains that the just war paradigm, which was traditionally based on the requirement of a just cause and the idea that the just belligerent had greater rights than its unjust counterpart, was gradually displaced by the regular war paradigm, which came to form the basis of the modern laws of war (as later codified in The Hague and Geneva

Exploring the Faultlines: Essays in Honour of Yoram Dinstein, ed. Michael Schmitt and Jelena Pejic (Leiden: Martinus Nijhoff, 2007), 272.

²⁵ Gregory Reichberg, “Just War and Regular War: Competing Paradigms,” in *Just and Unjust Warriors: The Legal and Moral Status of Soldiers*, by Henry Shue and David Rodin (Oxford: Oxford University Press, 2008), 193–213. Reichberg chooses to speak of ‘paradigms’ rather than the more usual ‘traditions’ because these ideas coexisted in parallel from the fifteenth to the eighteenth century, including within the writings of single authors. His distinction between Just War and Regular War follows the classic works of Haggenmacher, particularly Haggenmacher, *Grotius et La Doctrine de La Guerre Juste*; Peter Haggenmacher, “Just War and Regular War in Sixteenth Century Spanish Doctrine,” *International Review of the Red Cross* 32, no. 290 (1992): 434–45.

Conventions). He outlines the two classic presuppositions of the regular war paradigm, (a) that belligerent equality is a prerogative of sovereign states alone, and (b) that states are free to wage war at their own discretion, without having to be held accountable for the justice of their cause.²⁶ More broadly, the regular war paradigm was premised on the idea that both belligerents had the same rights and duties in war, regardless of their cause.

While this understanding of the regular war paradigm and its rise to prominence in the early modern period is a cornerstone of the conventional story of the history of the laws of war, analyses of the just war paradigm are somewhat less homogenous. Reichberg's insights on it are confined to a brief overview of Aquinas' position and a discussion of fifteenth and sixteenth century arguments about the just war. In his account, the traditional just war paradigm and its associated rules thus appear by his account to have been of little relevance in the modern era. This is to be contrasted with a number of scholars—from, most famously, Carl Schmitt, to more recent and less polemical authors, such as Wouter Werner and Stephen Neff—who see the just war paradigm as reemerging in the twentieth century, with considerations of morality returning to the realm of war—for better or for worse—through the League of Nations Covenant, the Kellogg-Briand Pact, and the UN Charter for instance.²⁷ What this project begins to suggest, however, is that the basic principles of the 'just war' approach, understood as discriminatory warfare, never disappeared in the modern period. Against what is alternatively referred to as regular war, non-discriminatory war, bilateral war, limited war, normal war, legal war or yet still, war in due form, another form of violence—though not necessarily defined as

²⁶ This obviously changed in 1945 with Article 2(4) of the UN Charter, which states "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." I examine this development in greater detail below.

²⁷ Schmitt, *Nomos of the Earth*, 259–277; Wouter G. Werner, "From Justus Hostis to Rogue State the Concept of the Enemy in International Legal Thinking," *International Journal for the Semiotics of Law* 17, no. 2 (2004): 155–68; Neff, *War and the Law of Nations*, 277–394.

‘war’ in legal terms—was always present, even though it has not been conceptualized as a ‘competing paradigm’ outside of the context of the presumed reemergence of ‘just war’ in the twentieth century. This type of violence, falling outside the legal definition of war and the application of the laws of war may be seen to encompass a variety of conflicts that have often been marginalized in IR, most notably the ‘small wars’ or ‘extra-state wars’ pitting sovereigns against non-sovereigns. In most cases, the broad tenets of a ‘just war’ approach were characteristic of these conflicts, most notably the sense that one side regarded itself as the morally superior belligerent and considered that extreme measures were warranted to ensure the defeat of the inferior antagonist, still variously described as a criminal, a sub-human, or an enemy of all. The prevalence of these often overlooked forms of warfare, particularly prior to the twentieth century, ultimately suggests a final avenue for further research: the need to radically revise the Schmittian narrative about Gentili, the demise of just war approaches, and the ‘bracketing’ of war over the development of the modern period.

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