At the Dawn of International Law: Alberico Gentili

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All the universe, which you see, in which things divine and human are included, is one . . . the whole world is one body, . . . all men [and women] are members of that body, [and] . . . the world is their home . . . And this union of ours is like an arch of stones, which will fall unless the stones ... hold one another up.

Albericus Gentilis, *De iure belli libri tres*, book 1, chapter XV [67]

I. Introduction

What are the origins of international law? Who shaped this field of study? When did international law coalesce in its current form? In addressing these questions, the history of international law has come to the fore.[1] Once the domain of elitist scholars,[2] it

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[1] *See* Martti Koskenniemi, *Histories of International Law: Significance and Problems for a Critical View*, 27 TEMP. INT'L AND COMP. L.J. 215, 215–16 (2013) (providing statistics on recent scholarly publications). *See generally* THE ROOTS OF

has attracted the growing attention of scholars, practitioners, and other interested audiences.

This article contributes to the current debates on the origins of international law, focusing on the work of the sixteenth century Italian émigré, legal scholar and practicing lawyer, Alberico Gentili.[3] A protestant who lived in exile, and Regius Professor of Civil Law at the University of Oxford, Gentili was a leading scholar and contributed substantially to the development of international law.[4] As European powers expanded overseas, Gentili and other early modern international law scholars addressed questions about the law applicable among empires, the concept of just war, and jurisdiction, among others.[5] However, despite the remarkable success of Gentili during his lifetime, his work was long neglected and has attracted the attention of scholars

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INTERNATIONAL LAW: LIBER AMICORUM PETER HAGGENMACHER (Pierre-Marie Dupuy & Vincent Chetail eds., 2013) (describing the linkage between history and international law) [hereinafter THE ROOTS OF INTERNATIONAL LAW]; Randall H. Lesaffer, *International Law and its History: The Story of an Unrequited Love, in* TIME, HISTORY AND INTERNATIONAL LAW 27 (Matthew Craven, Malgosia Fitzmaurice & Maria Vogiatzi eds., 2007) (pinpointing the late 1990s as the beginning of the discipline's recent growth); Philip Allott, *International Law and the Idea of History*, 1 J. HIST. INT'L L. 1 (1999) (discussing the waxing and waning of competing schools of thought in the discipline); David J. Bederman, *untitled* 105 AM. J. INT'L L. 839 (2011) (reviewing ALBERICO GENTILI, THE WARS OF THE ROMANS: A CRITICAL EDITION AND TRANSLATION OF DE ARMIS ROMANIS (Benedict Kingsbury & Benjamin Straumann eds., David Lupher trans., 2011)); THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS: ALBERICO GENTILI AND THE JUSTICE OF EMPIRE (Benedict Kingsbury & Benjamin Straumann eds., 2010) [hereinafter THE ROMAN FOUNDATION OF THE LAW OF NATIONS] (describing a "renaissance of interest" in the discipline); Ingo Hueck, *The Discipline of History of International Law – New Trends and Methods on the History of International Law*, 3 J. HIST. INT'L L. 194, 214–17 (2001) (describing interdisciplinary and other new types of scholarship within the field).

2 BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE 46 n.25 (2003) (noting "the statist, elitist, colonialist, eurocentric . . . foundations of international law").

3 THE ROMAN FOUNDATION OF THE LAW OF NATIONS, *supra* note 1.

4 *See* Ingo Hueck, *The Discipline of History of International Law – New Trends and Methods on the History of International Law*, 3 J. HIST. INT'L L. 194, 214–17 (2001) (describing interdisciplinary and other new types of scholarship within the field).

5 *See, e.g.*, MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS 98–178 (2001) (chronicling international law's origins in colonialism); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 13–28, (2005); Brett Bowden, *The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization*, 7 J. HIST. INT'L L. 13, 13–23 (2005).

and practitioners only relatively recently.[6]

Why was Gentili's work neglected for so long? Gentili constantly borrowed concepts from Roman law and applied the old learning to new questions posed by modern international relations.[7] This method helped shape his arguments in a sophisticated and analytical way.[8] Yet, his way of writing could be challenging and obscure even to his contemporaries. Furthermore, his fame was overshadowed by that of Hugo Grotius, a Dutch scholar who is often regarded as the father of international law.[9] Whether Grotius borrowed some concepts from Gentili's work is an open question which deserves further scrutiny.[10]

Today, several factors have prompted the renewed interest in Gentili's work. First, many of the international law concepts used today derive from his work. For instance, his conceptualizations of just war, preemptive war and the separation between theology and law are not only of historical significance, but also of current

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[6] *See generally, e.g.*, Thomas E. Holland, address at All Souls College (Nov. 7, 1874) *as* AN INAUGURAL LECTURE ON ALBERICUS GENTILIS (1874) (exemplifying seminal scholarship on Gentili and his work); Antonio Fiorini, *Del diritto di guerra di Alberigo Gentile* (F. Vigo, Livorno 1877) (same); GESINA VAN DER MOLEN, ALBERICO GENTILI AND THE DEVELOPMENT OF INTERNATIONAL LAW: HIS LIFE, WORK AND TIMES (2d ed. 1968) (same); THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1 (investigating Roman law's various influences on the origins and evolution of international law's European conceptualization).

[7] *See, e.g.*, 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, *supra* note 1, at 101, 112–13 (arguing that Cicero's *On Duties* provided a template for Gentili's and later legal thinkers' conceptions of a modern nation acquiring legal sovereignty over new territory); Martti Koskenniemi, *International Law and Raison d'état: Rethinking the Prehistory of International Law*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 297, 303 (discussing Gentili's ABSOLUTE POWER OF THE KING, which combined the Romans' concepts of "*Princeps legibus solutus est*" and "*Quod Principi placuit, legis habet vigorem*" with the recent theories of Jean Bodin).

[8] *See* Andreas Wagner, *Lessons of Imperialism and of the Law of Nations: Alberico Gentili's Early Modern Appeal to Roman Law*, 23 EUR. J. INT'L L. 873, 875 (2012).

[9] *See, e.g.*, Peter Haggenmacher, *Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture*, *in* HUGO GROTIUS AND INTERNATIONAL RELATIONS 133, 136–37 (Hedley Bull, Benedict Kingsbury & Adam Roberts eds., 1990) ("Whereas the influence of the theologians and jurists of Spain's Golden Century on Grotius has . . . been widely studied . . . there has been a tendency to neglect his relation to Gentili.").

[10] *See* Holland, *supra* note 6, at 2; *see also* Haggenmacher, *supra* note 9, at 133–37.

concern as the discussion over just war remains unsettled.[11] By tracing the intellectual origins of these concepts, one can gain a better understanding of the same.[12] Second, while Gentili lived in dangerous times, he succeeded in transforming challenges into opportunities.[13] His life experience is interesting because his legal expertise offered him a passport for safety, religious freedom and, ultimately, a successful academic life.[14] Arguably, the adventurous vicissitudes of his life made him a cosmopolitan scholar, sharpened his thought, and shaped his way of thinking. Third, while Gentili has contributed to the making of international law, as a Renaissance man he was skilled in other disciplines such as poetry.[15] The influence of these additional skills on his legal writings and pleadings make his scholarship appealing to a broad audience, including classicists, law historians, and international law scholars.[16] Finally, as Gentili's writings are characterized by ambiguity, complexity, and controversy, the identification of new methodologies to scrutinize his work becomes compelling.[17]

Against that background, this article aims to develop a solid understanding of, and position on, Alberico Gentili's figure and work. Focusing on the historical figure of Alberico Gentili and his work is both timely and important. Gentili's work has been neglected for centuries; yet, his thoughts on a variety of international law topics amounted to a Copernican revolution in his day.[18] Furthermore, not only is his work important for historical record, but it is also useful for a better understanding of contemporary issues and ongoing debates on piracy, just war, unlawful expropriation, religious freedom, and the so-called clash of civilizations. As Gentili's work has been characterized by some ambiguities, this article proposes a new methodology for approaching Gentili's work. The proposed method relies on socio-

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11 *See infra* Part III.B.

12 *Id.*

13 *See, e.g.*, VAN DER MOLEN, *supra* note 6, at 41–42 (describing Gentili's flight from the Inquisition and subsequent success in Protestant England).

14 *Id.*

15 *See* J.W. Binns, *Alberico Gentili in Defense of Poetry and Acting*, 19 STUD. IN THE RENAISSANCE 224, 225 (1972) (Gentili mounted "a lively and eloquent defense of poetry.").

16 *See infra* Part IV.

17 *See id.*

18 *See infra* Part III.

historical and hermeneutical approaches to law, contextualizing Gentili's work in the period and social milieu in which he lived. While this article cannot offer an exhaustive overview of Gentili's life and work due to space limits, it aims to contribute to the current debate by shedding some light on this enigmatic scholar, briefly exploring his enduring legacy and identifying new hermeneutical approaches to his work.

This article proceeds as follows. First, it briefly highlights the main features of Alberico Gentili's biography.[19] Second, it examines Gentili's contributions to the theory of international law.[20] Third, it proposes new hermeneutical tools for overcoming Gentili's renowned obscurity, analyzing and critically assessing Gentili's work.[21] Finally, conclusions are drawn.[22]

II. The Adventurous Life of Alberico Gentili

The life of Alberico Gentili is a compelling story of success with all of the themes of a great narrative: faith, ambition, adventure, and a voyage into unknown lands for new knowledge, as well as conflicts, contradiction, and paradox. Alberico Gentili (1552–1608) was born into a noble family in the Italian town of Castello di San Ginesio, in Macerata.[23] After being tutored at home by both parents,[24] he studied law and graduated with a doctorate from the University of Perugia.[25] Because of his Protestant beliefs, and in order to escape the Inquisition, he abandoned his hometown and fled to England,[26] transitioning from

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19 *See infra* Part II.

20 *See infra* Part III.

21 *See infra* Part V.

22 *See infra* Part VI.

23 Artemis Gause, *Gentili, Alberico*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004), *available at* http://www.oxforddnb.com/view/printable/10522; *see also* VAN DER MOLEN, *supra* note 6, at 36 ("Not only were the Gentili family distinguished citizens of San Ginesio, they were also of considerable substance.").

24 VAN DER MOLEN, *supra* note 6, at 37.

25 Gause, *supra* note 23.

26 *Id.* ("Several male members of [his] family narrowly escaped imprisonment, while the Inquisition issued life sentences to the 'heretics' *in absentia* and confiscated their property . . . . Alberico's name[] w[as] struck from the town register . . . ."); *see also* Martti Koskenniemi, *International Law and Raison d'état: Rethinking the Prehistory of International Law*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 297–98 (explaining persecution via the *Index librorum prohibitorum*, *i.e.*, the Index of forbidden books); *see also* VAN DER MOLEN, *supra* note 6, at 42

a world of peril and fear to one of adventure and fame.

By 1580 he had moved to England[27] and reached Oxford, where his lectures on Roman law soon became famous.[28] In 1587 he was appointed as the Regius Professor of Law,[29] a chair that had been established by Henry VIII at the All Souls College. While he published extensively on a number of different topics, he made an extraordinary contribution to international law.

In 1584, the government consulted him as to the proper course to be pursued with the Spanish ambassador, who had plotted against Elizabeth I.[30] Gentili recommended that the ambassador be expelled rather than criminally punished.[31] Gentili expanded that analysis into *De legationibus libri tres* (On Embassies) the following year.[32] In 1588, he published the *De iuri belli commentatio prima* (The Laws of War).[33] A second and a third part were published later, and the three were expanded and republished in 1598 as *De iure belli libri tres*.[34] *De armis Romanis* (The Wars of the Romans) was written in the 1590s.[35] Because of the fame from these works, Gentili became more and more engaged in legal practice in London. In 1600 he was admitted to the Gray's Inn, a professional society.[36] In 1605, he was appointed as counsel to the King of Spain before the High Court of Admiralty in London, with regard to disputes relating to the law of the sea and piracy.[37] He died on June 19, 1608, and was buried in the churchyard of St. Helen in Bishopsgate, London.[38] His work

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(Gentili's legal code "was published without mentioning the name of the author.").

27 VAN DER MOLEN, *supra* note 6, at 44 (describing first months in London as "full of difficulties").

28 *Id.* at 46.

29 Gause, *supra* note 23.

30 *Id.*

31 *Id.*

32 *Id.*; *see also* ALBERICO GENTILI, *DE LEGATIONIBUS LIBRI TRES* (Gordon J. Laing trans., Oxford Univ. Press 1924) (1582).

33 Gause, *supra* note 23.

34 *Id.*; *see also* ALBERICO GENTILI, *DE IURE BELLI LIBRI TRES* (ON THE LAW OF WAR) (John C. Rolfe trans., Clarendon Press 1933) (1612).

35 Gause, *supra* note 23; *see also* GENTILI, THE WARS OF THE ROMANS, *supra* note 1.

36 Gause, *supra* note 23.

37 *See id.*

38 *Id.*; *see also* Christopher Howse, *In the Shadow of the Gherkin*, THE TELEGRAPH

on the cases in which he was engaged for the Spaniards was published posthumously in 1613 as *Hispanicae advocationis libri duo*.[39]

While earlier authors had addressed various international questions relying almost exclusively on the positions of the Roman Catholic Church, Gentili examined international relations from a different standpoint, namely general principles completely independent of the authority of Rome.[40] On the one hand, he used the reasoning of civil law; on the other, he combined such reasoning with the *Jus Naturae* or natural law, by which he meant the consent of the majority of nations.[41] In this regard he greatly improved upon his predecessors despite his wordy and sometimes obscure style.[42]

Despite his success during his lifetime, Gentili's fame was eclipsed by the publication of Hugo Grotius' *De iure belli ac pacis* in 1625.[43] Yet Gentili's works deeply influenced later international law scholars including Grotius himself.[44] A

(London), August 24, 2012, *available at* http://www.telegraph.co.uk/news/religion/9498333/In-the-shadow-of-the-Gherkin.html (depicting the old gothic church as a medieval rock now surrounded by a number of modern buildings and skyscrapers); VAN DER MOLEN, *supra* note 6, at 61 (recounting Italian authorities unsuccessful request, in the late 19th Century, that Gentili's remains be repatriated to bury them in Florence's Basilica di Santa Croce where other prominent personalities lie: St. Helen's vicar asserted that the grave could not be located with precision); Giorgio del Vecchio, *The Posthumous Fate of Alberico Gentili*, 50 AM. J. INT'L L. 664, 664–66 (1956) (describing various attempts to locate the gravesite and otherwise memorialize Gentili).

39 *See* ALBERICO GENTILI, *HISPANICAE ADVOCATIONIS LIBRI DUO* (Frank Frost Abbott trans., 1921) (1613).

40 *See, e.g.*, DANIEL THÜRER, INTERNATIONAL HUMANITARIAN LAW: THEORY, PRACTICE, CONTEXT 228 (2011) (discussing Gentili in the context of Protestant influence on legal thought); DAVID BEDERMAN, THE SPIRIT OF INTERNATIONAL LAW 5 (2006) (discussing Gentili as a forefather of positivist thought in international law).

41 *See* Daniel R. Coquillette, *Legal Ideology and Incorporation I: The English Civilian Writers, 1523-1607*, 61 B.U. L. REV. 1, 61 (1981).

42 *See, e.g.*, David Lupher, *Translator's Note on* GENTILI, THE WARS OF THE ROMANS, *supra* note 1 (discussing Gentili's "vague" use of pronouns and frequent sentences with no explicit subject); Andreas Wagner, *Lessons of Imperialism and of the Law of Nations: Alberico Gentili's Early Modern Appeal to Roman Law*, 23 EUR. J. INT'L L. 873, 875 (2012) ("As a matter of his elaborate style, Gentili used irony and sarcasm, rhetorical questions, and all sorts of other devices amply.").

43 VAN DER MOLEN, *supra* note 6, at 61.

44 *See* Haggenmacher, *supra* note 9, at 156–57 ("[W]hatever other sources Grotius may have used—some of them no less important—little doubt is left as to Gentili's

comparison of Gentili's *De iure belli libri tres* (1598) and Grotius' *De iure belli ac pacis* (1625) reveals the latter's indebtedness to Gentili for methodology, structure, and argumentative patterns.[45] Only in the 19th Century was interest in Gentili revived, as Sir Thomas Erskine Holland (1835–1926) devoted his 1874 inaugural lecture as Chichele Professor of Public International Law and Diplomacy in Oxford to him.[46] In parallel, Italian scholars of the 19th Century rediscovered Gentili's writings in the light of the *Risorgimento* (Resurgence), the political movement which led to the unification of the country and eventually the conquest of Rome in 1871.[47] Since then, a number of monographs and articles about Gentili and his work were published.[48]

Why is Gentili's life and work so interesting in our times? Gentili's life represents a history of success in the face of tremendous challenges. His cultural and religious diversity promoted rather than impeded his successful career in a period which has been described as the "Iron Century."[49] Gentili was a cosmopolitan scholar; trained at the University of Perugia, he became Regius Professor at the University of Oxford.[50] His wife,

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central place."); *see also* Christopher Warren, *Hobbes's Thucydides and the Colonial Law of Nations*, 24 THE SEVENTEENTH CENTURY 260, 270–71 (2009) (discussing Gentili's and Grotius' similar uses of Thucydides's work).

45 *Id.*

46 VAN DER MOLEN, *supra* note 6, at 61; *see also* Gause, *supra* note 23 ("Holland's reappraisal was crucial to the gradual acknowledgment of Gentili as a major legal thinker."); Merio Scattola, *Alberico Gentili (1552–1608), in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 1092, 1093 (Bardo Fassbender & Anne Peters eds., Oxford Univ. Press 2012) ("Since [1874] he has been regarded as a 'father of the international law,' although this is probably better expressed as a 'father of the law of nations.'").

47 *See, e.g.*, LUCY RIALL, THE ITALIAN *RISORGIMENTO*: STATE, SOCIETY AND NATIONAL UNIFICATION (Routledge 1994) (describing unification-era scholars' renewed interest in earlier Italian scholarship).

48 *See, e.g.*, IUS GENTIUM, IUS COMMUNICATIONIS, IUS BELLI: ALBERICO GENTILI E GLI ORIZZONTI DELLA MODERNITÀ: ATTI DEL CONVEGNO DI MACERATA IN OCCASIONE DELLE CELEBRAZIONI DEL QUARTO CENTENARIO DELLA MORTE DI ALBERICO GENTILI (1552–1608), MACERATA, 6–7 DICEMBRE 2007 (Luigi Lacchè ed., 2009) (providing a detailed account of Gentili's life and works); Peter Haggenmacher, *supra* note 9 (same); ALESSANDRO DE GIORGIO, DELLA VITA E DELLE OPERE DI ALBERICO GENTILI (2010).

49 *See* HENRY KAMEN, THE IRON CENTURY: SOCIAL CHANGE IN EUROPE 1550–1660 (Praeger 1971).

50 *See, e.g.*, Coquillette, *supra* note 41, at 61 (discussing Gentili's international

Hester de Peigne, was a religious refugee from France.[51] Throughout his life, Gentili kept in contact with his younger brother, Scipio,[52] who was a Professor at Tübingen University in what is today southwest Germany.[53] Not only was the main scope of his inquiries of international character, but he often published abroad, and he always wrote in Latin.[54] Latin was the lingua franca of the time,[55] comparable to English today.

Gentili's approach to religious tolerance and cultural diversity as well as his political pragmatism, which derived from an in depth knowledge of Florentine authors such as Niccolò Machiavelli and Francesco Guicciardini, constitute the principal reasons for the continuing interest in his work.[56] Gentili lived in extraordinarily difficult times of religious wars and political persecution, where political absolutism was coupled with religious intolerance.[57] The current dilemmas posed by the so-called "clash of civilizations" – that is, the theory that cultural and religious difference would be the primary source of conflict in the aftermath of the Cold War[58] – make Gentili's "legacy" timelier than ever.

III. Gentili's Legacy

Gentili's legacy is "important and distinctive."[59] Although Grotius is often claimed to be the father of international law, as Phillipson stated more than a century ago, "the way was prepared

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connections as helping to form him as a scholar of international law).

51 Gause, *supra* note 23.

52 Coquillette, *supra* note 41, at 61.

53 *See* Gause, *supra* note 23 (describing the circumstances of Scipio's arrival in Tübingen).

54 Coquillette, *supra* note 41, at 61.

55 VAN DER MOLEN, *supra* note 6, at 46 ("Latin was the language of the educated people, and consequently [Gentili] could talk with his equals, wherever he came, without any difficulty, and was also certain that he would be understood by the students at the University.").

56 *See infra* Part III.B.

57 *See* Daniel Philpott, *The Religious Roots of Modern International Relations*, 52 WORLD POLITICS 206, 206 (2000) (deeming the Protestant Reformation as "a crucial spring of modern international relations.").

58 SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 13–6 (1996).

59 Kingsbury & Straumann, *Introduction* to THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 18.

for him by others."[60] For instance, as Benedict Kingsbury points out, "'the key features of [the] idea of international society' which is central to Grotius' *De iure belli ac pacis* 'are all present in Gentili's work, and Grotius adds little to Gentili's account.'"[61] Gentili's "works and the enduring problems they addressed [warrant] serious study in their own right."[62] This section briefly highlights the main tenets of the "Gentilian system." It is not possible to do full justice to the conceptual richness of this author and his scholarship. Due to space limits, this section does not purport to be exhaustive; rather, it aims at providing a roadmap for future studies in the field.

A. Gentili and the Law of Nations

Who is the founder of international law? While "Gentili was certainly one of the most eminent professors of law at Oxford" and was highly regarded by his contemporaries, for long "no one had seriously challenged Hugo Grotius's reputation as the founder of international law."[63] Yet, since the rediscovery of Gentili by Professor Holland, now for some time, authors have debated the question as to whether Gentili can be regarded as "the founder" of or a "pioneer" in "public international law."[64] Most scholars would agree with Theodor Meron that Gentili was "an original, enlightened . . . and eloquent writer who has not been given as much credit as his works clearly deserve."[65]

The question, however, is misplaced.[66] On the one hand,

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60 Coleman Phillipson, *Albericus Gentilis*, 12 J. SOC'Y OF COMP. LEGIS. 52, 52 (1911).

61 Peter Schroeder, *Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 163, 183 (agreeing with Kingsbury's assertion).

62 Kingsbury & Straumann, *Introduction* to THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 18.

63 Gause, *supra* note 23, at 7.

64 Boudewijn Sirks, *Gentili, Alberico*, *in* THE NEW OXFORD COMPANION TO LAW 496, 497 (Peter Cane & Joanne Conaghan eds., 2008) ("These books [those published by Gentili] established him as the founder of the modern concepts of international law and of international relations."); Coquillette, *supra* note 41, at 55 ("Gentili became a pioneer in the modern 'factual' treatment of . . . customary law between nations, which is now called the 'public international law.'").

65 Theodor Meron, *Common Rights of Mankind in Gentili, Grotius and Suarez*, 85 AM. J. INT'L L. 110, 116 (1991).

66 *See* J. L. Holzgrefe, *The Origins of Modern International Relations Theory*, 15

eminent scholars have referred to the sixteenth century as the *prehistory* or *mythical origin* of international law, thus suggesting that international law developed at a later stage.[67] On the other hand, other scholars have pinpointed that the coalescence of international law has been a cumulative process, which traces its origins in ancient times.[68] Therefore, the question as to whether there is a founder of international law seems misplaced. Any answer to this question would not be just to the many scholars who contributed to the making of the field. Even if one admitted that a few scholars contributed more than others, it seems that these scholars nonetheless stood on the shoulders of giants, that is they relied on previous sources. The Solomonic proposal to acknowledge the existence of several founders of international law may be plausible.[69]

Yet, investigating the question as to what contribution Gentili made to the development of international law seems a more promising endeavour. Certainly, Gentili contributed a number of concepts to the law of nations.[70] In fact, retrieving his life and work entails "inquiring into [concepts] we take for granted but without which we could not live in the world as we do."[71]

Gentili conceived the *jus gentium* in the sense of law between nations (*jus inter gentes*)[72] governing the international community

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REV. INT'L STUD. 11, 11 (1989) ("Whatever the merits of these and similar claims . . . [t]hey may describe pieces of the puzzle, but they do not . . . reveal the nature of the whole development.").

67 Martti Koskenniemi, *International Law and raison d'état: Rethinking the Prehistory of International Law*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 297. *See also* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 2 (2001) (noting where Koskenniemi locates the origins of international law in the late nineteenth century).

68 *See* Holzgrefe, *supra* note 66, at 11 ("Only by tracing the distinctive and often uneven development of views in each of these areas [from 1300 to 1650], and the contribution made to their development by various theorists, can we obtain a full understanding of the origins of modern international relations theory.").

69 Meron, *supra* note 65, at 116 ("It is only fair that Gentili share with Grotius the latter's reputation as the founder of modern international law.").

70 *See* Part II.

71 *Cf.* Mark Antaki, *Book Review*, 57 MCGILL L.J. 1009, 1010 (2012) ("To inquire into 'foundations' is to inquire into things we take for granted but without which we could not live in the world as we do.").

72 Coquillette, *supra* note 41, at 55.

(*societas gentium*).[73] According to Gentili, the international community, also called the "community of mankind"[74] or "global commonwealth,"[75] (*respublica omnium*) included all of the states of the world, not merely Christendom.[76] Gentili did not include private individuals as subjects of *jus gentium*.[77] Rather, Gentili considered that only states were the subjects of this branch of law, marking the beginning of modern international law.[78] In an often-quoted passage of the *De iure Belli*, Gentili stated that:

> All this universe, which you see, in which things divine and human are included, is one, and we are members of a great body. And in truth the world is one body . . . And this union of ours is like an arch of stones, which will fall, unless the stones push against one another and hold one another up . . . Now you have heard, that the whole world is one body, that all men are members of that body, that the world is their home . . . .[79]

The notion of the commonwealth of mankind played a pivotal role for Gentili, justifying offensive wars and intervention in support of "humanity" and "liberty," and also against violations of the law of nations.[80] According to Gentili, "[g]ood neighbourhood . . . imposes a duty of intervention" if our neighbour's house is on fire.[81] Likewise, one state can intervene to defend another.[82]

Gentili contributed to the development of the concept of

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73 VAN DER MOLEN, *supra* note 6, at 135.

74 Andreas Wagner, *Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth*, 31 OXFORD J. LEGAL STUD. 565, 581 (2011).

75 *See generally id.* at 565–82 ("[D]ifferent conceptions of a global legal community affect the legal character of the international order and the obligatory force of international law.").

76 VAN DER MOLEN, *supra* note 6, at 115.

77 Wagner, *Francisco de Vitoria*, *supra* note 74, at 577.

78 David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L. J. 1, 58–59 (1986) (stating that the new focus on states "marked the beginning of the end of primitive legal scholarship").

79 VAN DER MOLEN, *supra* note 6, at 136 (quoting Gentili in *De iure belli libri tres*).

80 Diego Panizza, *The 'Freedom of the Sea' and the 'Modern Cosmopolis' in Alberico Gentili's De iure Belli*, 30 GROTIANA 88, 94 (2009).

81 VAN DER MOLEN, *supra* note 6, at 136.

82 *See* VAN DER MOLEN, *supra* note 6, at 136 ("Gentili is firmly convinced, that one has to assist one's allies against an unjust attack, even if this has not been expressly stipulated . . . .").

diplomatic immunity, "produc[ing] the first coherent study on diplomatic law."[83] When the Privy Council sought Gentili's advice as to the treatment of Don Bernardino de Mendoza, the Spanish Ambassador, who had participated in a plot against the Queen, Gentili developed the notion of diplomatic immunity.[84] While "[t]he general expectation at the time was that the ambassador would be executed,"[85] "[t]he [P]rivy [C]ouncil respected th[e] verdict, however reluctantly,"[86] and the ambassador was given two weeks to leave England.[87]

More generally, Gentili emphasized the importance of the peaceful settlement of international disputes.[88] He stressed that "differences among sovereigns [. . .] must be decided by the law of nations," and pinpointed the importance of arbitration as a dispute settlement mechanism.[89] Gentili also considered the possibility of establishing "judicial processes . . .between sovereigns" upon their consent.[90]

B. Gentili and the Law of War

Gentili's most famous work, *De iure belli*, was published posthumously in 1612.[91] The volume is composed of three books.[92] The first focuses on the law relating to the right to go to war—the *ius ad bellum*.[93] The second explores the law governing the conduct of war—the *ius in bello*.[94] The third explores the "*ius*

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83 Gause, *supra* note 23, at 2.

84 *Id.*

85 Paul Behrens, *Diplomatic Interference and Competing Interests in International Law*, 82 BRIT. Y.B. INT'L L. 178, 181 (2012).

86 Gause, *supra* note 23, at 2.

87 Coquillette, *supra* note 41, at 61.

88 *See* VAN DER MOLEN, *supra* note 6, at 116 ("In Gentili's time, arbitration was the only peaceful means for the settlement of disputes.").

89 Schroeder, *supra* note 61, at 185.

90 VAN DER MOLEN, *supra* note 6, at 116.

91 *See, e.g.*, Vaughan Lowe, *The Use of Force in the British Tradition of International Law*, *in* L'USO DELLA FORZA NEL DIRITTO INTERNAZIONALE 71, 71–95 (2006).

92 Randall Lesaffer, *Alberico Gentili's ius post bellum and Early Modern Peace Treaties*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 210, 217.

93 *Id.*

94 *Id.*

post bellum, the laws on the conclusion of war and restoration of peace."[95] Although Gentili's treatise was overshadowed by Grotius, who was very familiar with the work of the former, Gentili's work deserves autonomous scrutiny due to its important contribution to the making of the law of war.[96]

Gentili "rejected religious difference alone as a just cause of war."[97] Rather, he "made systematic efforts . . . to separate *jus divinum* ('divine law') from *jus humanum* ('human law')."[98] Gentili was "an advocate of complete religious liberty."[99] His work reflects a "secularization" process of "legal and political theory that [occurred] in early modern Europe."[100] One of Gentili's most famous mottos was that of "[*s*]*ilete theologi in munere alieno*"[101] or, as Malcolm translates it, "[t]heologians, mind your own business."[102] This famous sentence was directed against a group of Spanish theologians—the School of Salamanca—who had written on the law of war and the legal basis of the Spanish conquest of the Americas.[103] The reputation of the school paralleled the growing importance of Spain on the international scene, whose hegemony was fiercely opposed by Elizabethan England.[104]

However, Gentili's separation between theology and politics was not absolute.[105] According to Gentili, pre-emptive war is just when it is needed to oppose an expansionist regime, such as that of

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95 *Id.*

96 Peter Haggenmacher, *Il diritto della guerra e della pace di Gentili. Considerazioni sparse di un "Groziano"*, *in* IL DIRITTO DELLA GUERRA E DELLA PACE DI ALBERICO GENTILI – ATTI DEL CONVEGNO QUARTA GIORNATA GENTILIANA 9, 19 (1995) (noting that Gentili's contribution to the law of war is the most renowned aspect of his work and remains important today).

97 Gause, *supra* note 23, at 4; VAN DER MOLEN, *supra* note 6, at 121 ("[Gentili] demonstrates . . . that difference in religion can never be a just ground of war.").

98 Gause, *supra* note 23, at 3.

99 VAN DER MOLEN, *supra* note 6, at 131.

100 Noel Malcolm, *Alberico Gentili and the Ottomans*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 127.

101 Alberico Gentili, DE IURE BELLI LIBRI TRES 55 (J.B. Scott ed., J.C. Rolfe trans., 1933).

102 Malcolm, *supra* note 100, at 127.

103 Koskenniemi, *International Law and Raison d'état*, *supra* note 7, at 299.

104 *Id.*

105 Malcolm, *supra* note 100, at 145.

the Ottoman Empire.[106] Furthermore, despite his appreciation of the *ragion di stato* (reason of state), Gentili despised military alliances with the Turks.[107]

Gentili used civil law principles to develop a system alternative to the scholastic doctrine.[108] According to Piirimäe, Gentili translated the humanist political philosophy – namely Machiavellism, Tacitism and reason of state – into legal terms.[109] In the aftermath of the discovery of the Americas and the subsequent explorations, the Pope and the Emperor were no longer the apexes of the political and legal system.[110] As Piirimäe highlights, "the international order increasingly appeared as a competitive and violent stage on which the states could grow and achieve greatness, or decline and even disappear, depending on the quality of their government and the 'virtue' of their rulers and citizens."[111] Therefore, "the main duty of rulers," argues Piirimäe, was in Machiavelli's terms to "maintain the state."[112]

Gentili's doctrine of defensive war and one of its particular aspects, the right to go to war pre-emptively on the basis of fear, constituted a watershed as previous theories about just war had been elaborated mainly by theologians and in particular the Spanish Dominicans and Jesuits such as Francisco de Vitoria, Domingo de Soto and Luis Molina.[113] Theologians had developed a theory of just war (*bellum iustum*) according to which, only an injury could give rise to a just war.[114] For Gentili, pre-emptive action was permitted as it concerned the safety of the state: "No one ought to wait to be struck, unless he is a fool" and "a defense is just which anticipates dangers that are already meditated and prepared, and also those which are not meditated, but are probable

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106 *See id.* at 140.

107 *See id.* at 139.

108 Pärtel Piirimäe, *Alberico Gentili's Doctrine of Defensive War and its Impact on Seventeenth-Century Normative Views*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 187, 187–209 (debating whether such an approach is self-contained or also draws elements from the scholastic tradition).

109 *Id.* at 194.

110 *Id.* at 187.

111 *Id.* at 194.

112 *Id.*

113 Piirimäe, *supra* note 108, at 187.

114 *Id.*

and possible."[115] Gentili elaborates the concept of just fear (*metus iustus*), *i.e.*, "the fear of a greater evil, a fear which might properly be felt even by a man of great courage."[116] As Piirimäe points out, "Gentili . . . decoupled the notion of just war from the concept of punishment and described all just wars as defensive in character."[117]

Another innovative concept translated from political theory into legal terms and introduced by Gentili into his treatise *De iure belli* is that of the "balance of power."[118] This concept expresses the idea that international peace and security is maintained when political, economic and military power is distributed among various states so that no state can predominate over others. The theory, derived from Francesco Guicciardini and Niccolò Machiavelli, was originally context specific: it indicated how the balance of power maintained by Florence under Lorenzo de Medici helped to preserve peace in Italy.[119] Gentili used this concept more broadly, arguing that no state should be allowed to reach hegemony.[120] Gentili considered the importance of proportionate action in the conduct of war.[121] He held that "reprisals should be strictly proportionate to the damage inflicted by the enemy," and that acts of violence should be avoided with regard to women and children.[122] He also deplored the destruction of cultural heritage in times of war.[123] He wrote that prisoners of war should be treated humanely.[124]

Gentili also focused on the *ius post bellum*, the body of law regulating the restoration of peace.[125] Early modern peace treaties "played a crucial role in the formation of the political and legal order of Europe in the early modern age."[126] As Lesaffer

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115 *Id.* at 198 (citing Gentili, *supra* note 101).

116 *Id.*

117 *Id.* at 208.

118 Piirimae, *supra* note 108, at 199.

119 *Id.* at 208.

120 *Id.*

121 Schroeder, *supra* note 61, at 176.

122 Gause, *supra* note 23, at 4.

123 Gentili, *supra* note 101.

124 Gause, *supra* note 23, at 4.

125 Lesaffer, *supra* note 92, at 210.

126 *Id.*

pinpoints, "[t]hrough peace treaty practice, the *ius post bellum* grew into a mass of customary principles, concepts, institutions, and rules."[127] Several different types of clauses characterised such treaties. First came the clauses putting an end to the state of war.[128] A second type of clause was that relating to the restoration of peaceful relations for the future.[129] Among these were early peace treaties, which included regulations concerning trade and navigation.[130] From the seventeenth century onward, separate Treaties of Friendship, Commerce and Navigation supplemented peace treaties.[131] More importantly, Gentili conceived the three different phases of *ius ad bellum*, *ius in bello* and *ius post bellum*, not as separate, but as closely tied parts of the law of war.[132] According to Gentili, both in the *ius ad bellum* and the *ius in bello*, the parties should refrain from conduct that could prevent the restoration of peace.[133]

C. Gentili and the Law of the Sea

Gentili lived in "an era that saw the transformation of European naval powers to colonial empires."[134] Not only did he witness these dramatic events during his service as advocate to the Spanish Embassy at the Court of Admiralty,[135] but he also played a role in shaping modern concepts of the law of the sea.[136] By molding ideas he drew from a wealth of sources, including Roman law, Gentili elaborated important notions that still inform the current law of the sea.[137]

At the beginning of the seventeenth century, the battle of ideas concerning the freedom of the sea reached its zenith. Some

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127 *Id.* at 212.

128 *Id.* at 213.

129 *Id.*

130 Lesaffer, *supra* note 92, at 210.

131 *Id.*

132 *Id.* at 221.

133 *Id.*

134 Gause, *supra* note 23, at 7.

135 Panizza, *supra* note 80, at 91.

136 *See generally id.* at 88 (analyzing Gentili's position on the law of the sea as expressed in his classic *De iure belli*).

137 *Id.* at 104–06. *See generally* ANAND PRAKASH, ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA: HISTORY OF INTERNATIONAL LAW REVISITED (1983) (describing the historical origins of the law of the sea).

scholars, including Hugo Grotius, argued for the freedom of the seas (*mare liberum*).[138] John Selden, on the other hand, argued for the enclosure of the seas (*mare clausum*).[139] The debate was far from theoretical; rather, it could affect the geopolitics of the time. When, in 1580, Spain wanted to exclude England from the trade on the West Indies, Elizabeth I declared that "the use of the Sea and Ayre is common to all. Neither can a title to the Ocean belong to any people or private man."[140]

Gentili contributed to the elaboration and inception of the principle of the freedom of the sea.[141] In fact, he supported the idea of "*mare liberrimum*," that is, the freedom of the high seas.[142] In Gentili's thought, the freedom of the seas implied that the high seas "were not susceptible of dominion"[143] and open to free, public use.

Gentili anticipated the concept of the common heritage of mankind.[144] Relying on Roman sources, Gentili advocated that the sea was *res communis* (thing that is common) to all mankind.[145] In Roman law, the seas were *res publica extra commercium*, or public goods which could not be owned or traded.[146] Gentili goes beyond the Roman conceptualization of the seas, anticipating the

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138 Hugo Grotius, DE MARE LIBERUM (1608); *see also* Koen Stapelbroek, *Trade, Chartered Companies, and Mercantile Associations*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW 338 (Bardo Fassbender & Anne Peters eds., 2012).

139 Scott J. Shackelford, *Was Selden Right? The Expansion of Closed Seas and Its Consequences*, 47 STANFORD J. INT'L L 1, 11 (2011) (highlighting that "[i]n answer to Grotius, and to uphold the English claim on exclusive use of the North Sea, John Selden wrote Mare Clausum (Closed Seas) in 1618").

140 VAN DER MOLEN, *supra* note 6, at 162.

141 *Id.* (stating that Gentili "had his share in the creation of the principle of the free sea").

142 Frank Frost Abbott, *Alberico Gentili and His Advocatio Hispanica*, 10 AM. J. INT'L L. 737, 744 (1916).

143 Alison Reppy, *The Grotian Doctrine of the Freedom of the Seas Reappraised*, 19 FORDHAM L. REV. 243, 276 (1950); *see also* David J. Bederman, *The Sea*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 359, 363–65 (Bardo Fassbender & Anne Peters eds., 2012) (stating that while Roman sources distinguished the concepts of ownership (*dominium*), power (*imperium*) and control or jurisdiction (*jurisdictio*), in his *De iure belli*, Gentili revived the distinction between property and jurisdiction, which has become "[A] fundamental theme in the . . . history of the law of the sea.").

144 *See* Panizza, *supra* note 80, 88–106.

145 *Id.*

146 Bederman, *supra* note 143, at 362.

idea of the common heritage of mankind.[147] This notion is expressly mentioned in a number of contemporary international law instruments in relation to the status of resources in common spaces, notably the deep seabed and the moon.[148] The areas which are designated as "common heritage" cannot be appropriated or subjected to claims of sovereignty; rather they are *res publica* (commons), and the benefits derived from the exploitation of the common heritage are to be shared equitably and for the benefit of mankind.[149] The notion of common heritage challenged the "structural relationship between rich and poor countries" and amounted to a "revolution not merely in the law of the sea, but also in international relations."[150]

Yet, Gentili admitted that maritime states could exercise

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147 *Id.*

148 *See* United Nations Convention on the Law of the Sea art. 136, Dec. 10, 1982, 1833 U.N.T.S. 3 ("[T]he area . . .as well as its resources, are the common heritage of mankind"); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies art. 11, Dec. 5, 1979, 1363 U.N.T.S. 3 (stating "the Moon and its natural resources are the common heritage of mankind"). The concept of common heritage has also been used in some international cultural law instruments to indicate a general interest of the international community in the conservation and enjoyment of cultural resources. Convention on the Protection and Promotion of the Diversity of Cultural Expressions preamble, Oct. 20, 2005, 2440 U.N.T.S. 346 (recognizing that "cultural diversity forms a common heritage of mankind"). In the cultural sector, however, the notion of common heritage of mankind would be akin to common concern. Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT'L L. 1209 (2004).

149 KEMAL BASLAR, THE CONCEPT OF THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW xxi (1998); Graham Nicholson, *The Common Heritage of Mankind and Mining: An Analysis of the Law as to the High Seas, Outer Space, the Antarctic and World Heritage*, 6 NEW ZEALAND J. OF ENVIRONMENTAL LAW 177, 178 (2002).

150 Arvid Pardo, *Ocean, Space and Mankind*, 6 THIRD WORLD QUARTERLY 559, 565–69 (1984). The concept was not uncontroversial though. While developing countries favored it because if minerals found in the deep seabed were common heritage, profits from the resources should be shared with the rest of the world, "critics of this view, including the United States argued that the concept of 'common heritage of mankind' was founded on wishful thinking . . . and a serious philosophical misunderstanding of property rights and the true common heritage of humanity." *See* Anne M. Cottrell, *The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Shipwrecks*, 17 FORDHAM INT'L. L. J. 667, 675 (1994) (citing BERNARD H. OXMAN ET AL., LAW OF THE SEA: U.S. POLICY AND DILEMMA 6 (1983)). According to Oxman, "it is not clear whether the common heritage principle, as incorporated into an elaborate convention, has legal content apart from that contained in the other requirements of the Convention." Bernard H. Oxman, *Marine Archaeology and the International Law of the Sea*, 12 COLUM. J.L. & ARTS 353, 361 (1988).

different forms of jurisdiction[151] over ocean areas to punish crime and suppress piracy.[152] Gentili defined pirates as the common enemy of all mankind.[153] Yet, "such jurisdiction, according to Gentili, was not to be permitted to 'degenerate into abuse,' by one nation denying the use of the sea to another, which action could justifiably be regarded as sufficient cause for lawfully waging war."[154]

In parallel, Gentili contributed to the development of the doctrine of the territorial sea. The notion of territorial waters is not of Roman origin; rather, it was theorized after the fall of the Roman Empire when several Italian maritime cities advanced claims upon the neighboring waters.[155] While earlier jurists had elaborated the notion of territorial waters out of feudal law,[156] Gentili "place[d] the distinction between the high seas and territorial waters upon a much firmer foundation":[157] "[u]nlike his predecessors . . . he assimilate[d] the land and the territorial waters into a single unit, in so far as concerns the powers which the coastal sovereign may exercise over them."[158] He was the first to elaborate the notion of territory as including both land and adjacent waters.[159] However, according to Gentili, the coastal state powers are not absolute; rather, they are subject to two limitations.[160] First, coastal states cannot deny to foreign ships free passage through territorial waters.[161] Second, foreign ships can freely use harbors.[162]

Other important maritime issues appear in the *Hispanica Advocatio*, a collection of Gentili's writings authored between

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151 Reppy, *supra* note 143, at 276.

152 *Id.*

153 Peter Schröder, *Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 163, 175.

154 Reppy, *supra* note 143, at 276 (citing GENTILI, THE WARS OF THE ROMANS, *supra* note 1, at 19).

155 *Id.* at 276–77.

156 *Id.* at 276.

157 *Id.* at 278.

158 *Id.*

159 Reppy, *supra* note 143, at 278.

160 *Id.*

161 *Id.*

162 *Id.*

1605 and 1608, when Gentili appeared as an advocate for Spain before the English Court of Admiralty.[163] This work, which was published posthumously in 1613,[164] is important for two reasons. First, it is about real cases, drawing on the author's practical experience and showing Gentili's method of argumentation.[165] He used to list first all of the possible counterarguments that the opponents could raise against his case.[166] Then, he moved to vigorously put forward the arguments in favor of his case.[167] As Benton points out, these cases show certain inconsistencies in Gentili's arguments with respect to his previous works.[168] Yet, law is not an exact science and such contradictions probably reflect "his agility as a lawyer,"[169] or "shrewdness,"[170] rather than imperfections of legal reasoning.[171] Gentili was "hired to defend Spanish interests with the approval of the English crown," and had to use delicate diplomatic skills in performing his duties.[172]

Second, the cases also shed light on "the imperial and maritime contexts" of the kingdom of James I.[173] Gentili addressed a number of important questions. He defined pirates as the common enemies of all mankind.[174] He argued for the duty to pay compensation in the case of expropriation of an English ship (carrying Turkish property) by Tuscans during a conflict between the Tuscans and the Turks.[175] In an anticipation of the famous *Alabama* arbitration, Gentili discussed the requisition of a British ship by Sardinians because it was carrying munitions to the

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163 Lauren Benton, *Legalities of the Sea in Gentili's Hispanica Advocatio*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 269–82. For an earlier study of the *Hispanica Advocatio*, see Abbott, *supra* note 142, at 737–48.

164 *Id.*

165 Abbott, *supra* note 142, at 746.

166 *See, e.g.*, *id.*

167 *See, e.g.*, *id.*

168 Benton, *supra* note 164, at 271.

169 *Id.*

170 Abbott, *supra* note 142, at 746.

171 Benton, *supra* note 164, at 272–73.

172 *Id.* at 273.

173 *Id.* at 272.

174 *Id.* at 276. *See also* Alain Wijffels, *Alberico Gentili e i Pirati*, *in* ALBERICO GENTILI CONSILIATORE, ATTI DEL CONVEGNO QUINTA GIORNATA GENTILIANA 83–130 (Alain Wijffels ed., 1999).

175 Benton, *supra* note 164, at 280.

Turks.[176] He sketched the concept of territorial waters as jurisdiction over proximate seas.[177]

As Benton highlights, "Gentili's interest in maritime cases overlapped neatly with Grotius' work preparing a defence of the Dutch seizure of the *Santa Caterina* in the East Indies,"[178] and there is evidence that Grotius read Gentili's work while imprisoned in the Castle of Lowenstein.[179] Some scholars have hypothesized that Grotius may have borrowed some key concepts from Gentili's work while not always acknowledging it openly.[180]

D. Gentili and the Injustice of Empire

Gentili framed a legal approach to an emerging international order, borrowing concepts, methods and principles from Roman law.[181] According to Kingsbury and Straumann, early modern international law scholars borrowed concepts and ideas from Roman law to justify two opposite phenomena: on the one hand, the republican model nourished and sustained aspirations to self-determination, independence and representation.[182] The powerful concept of *res publica*, or common wealth, inspired the constitutions of a number of former colonies, including that of the United States; in turn, this egalitarian perspective deeply influenced contemporary international law, with regard to the decolonization process and the consolidation of the concept of state immunity (*i.e.*, the idea of *par in parem non habet imperium*,

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176 *Id.*

177 *Id.* at 277.

178 *Id.* at 281. *See also* Alain Wijffels, *Early-Modern Literature on International Law and the Usus Modernus*, 16 GROTIANA 35–54 (1995) (comparing Gentili's *Hispanica Advocatio* and Grotius' *De iure Praedae*).

179 *Id.* at 281 (referring to MARTINE VAN ITTERSUM, PROFIT AND PRINCIPLE: HUGO GROTIUS, NATURAL RIGHTS THEORIES AND THE RISE OF DUTCH POWER IN THE EAST INDIES, 1595–1615 (2006)).

180 *See* Bederman, *supra* note 143, at 366 ("Grotius does make a limited recognition of the difference between proprietary rights and the authority to protect and assert jurisdiction offshore, a legal distinction for which he cites Baldus but for which he may have been in Gentili's intellectual debt."); *see also* HUGO GROTIUS, THE FREE SEA 31 (David Armitage ed., Richard Hakluyt trans., 2004) (1609) ("[Some] affirm a right over the sea [based on] protection and jurisdiction, which right they distinguish from property.").

181 Kingsbury & Straumann, *Introduction*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 4–18.

182 *Id.*

"an equal has no power over an equal") among others.[183] In this context, Kingsbury and Straumann point out that "probably the most important and lasting legacy of this Roman tradition is the formulation of natural and later human rights."[184] On the other hand, the absolutism that characterized the expansion of the Roman Empire provided arguments to justify imperialist expansionism of colonial powers.[185]

The binary use of Roman law (to either justify or condemn imperialist projects) is evident in Gentili's *De armis Romanis et iniustitia bellica Romanorum libri duo*.[186] This work takes the form of a pair of speeches or "a forensic clash between a prosecutor and a defending advocate" and "emerges as a lively piece of forensic rhetoric."[187] In the first speech, Picenus (*i.e.*, a lawyer coming from Picenum, Gentili's native region) condemns Roman wars as unjustified and leading to immoral results.[188] The second speech praises them.[189] The defense of Roman imperialism was twofold. On the one hand, it illustrates the presumed constraining effect of compliance with the procedural rules of the *ius fetiale*—a complex of religious rules in order to ensure divine support for Rome in international relations.[190] On the other hand, the defense alleged a civilizing effect of Roman conquests. According to this argument, the peoples conquered by the Romans benefited from joining the Roman Empire[191] because they acquired

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183 *Id.*

184 *Id.*

185 *Id.*

186 Diego Panizza, *Alberico Gentili's De armis Romanis: The Roman Model of the Just Empire*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 52, 58.

187 *Id.*

188 *Id.* at 58–59.

189 *Id.* at 58.

190 *See* Federico Santangelo, *The Fetials and their Ius*, 51 BULLETIN INST. CLASSICAL STUD. 63, 65–88 (2008) (describing the *fetiales* of Ancient Rome, an assembly of priests who served as the guardians and interpreters of a special law, the *jus fetialis*; ensured the application of the *jus gentium*, the rudimentary international law of the time; maintained the *pax deorum*, the alliance between Rome and its gods; advised the Roman Senate on foreign affairs and international treaties; made formal proclamations of peace and war; confirmed treaties; and carried out the functions of traveling heralds or ambassadors).

191 Panizza, *supra* note 186, at 73 (identifying the unique "Roman practice of granting citizenship to the conquered people").

a sophisticated legal system and Roman citizenship.[192] The statement "*civis Romanus sum*" ("I am a Roman citizen") opened many doors at the time and constituted a sort of passport *ante litteram*.[193] According to the defense, the *pax Romana*, the two centuries of peace between 27 B.C.E. and 180 A.D., furthered the common wealth in the Roman Empire.[194]

Despite the legal arguments' sophistication, it remains unclear whether Gentili was criticizing or praising the Roman conquest. As the *De armis Romanis* lacks an introduction or conclusion, the reader is left without a clear indication of the author's preference.[195] Did Gentili write in a spirit of post-modern anxiety or indeterminacy?[196] Some scholars contend that he praised the Roman conquest and used the Roman model in support of his theory of the just grounds for going to war.[197] As Wagner noted, "while the Accusator of the first book can be recognized as Gentili's alter ego, the Defensor of the second book gets more than twice as many pages to make his case, has the 'last word', and gets to use many arguments that Gentili had advanced in his more systematic *De iure Belli*."[198] Analogously, Panizza considers that the first book of *De armis Romanis* reflected the theological or scholastic tradition that was principally represented by the School of Salamanca,[199] imposing strict criteria for legitimate self-

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192 *Id.* at 79–80 (highlighting the benefits of Roman law and consequentially of Roman citizenship).

193 Arno Dal Ri Jr. & Luciene Dal Ri, *Civis, hostis ac peregrinus – Representações da condição de homem livre no ordo iuris da Roma Antiga*, 18 PENSAR (2013) 328, 344–45 (stating that these few words granted Roman citizens a system of legal protection); *see also* ADRIANA MURONI, CIVIS / CIVITAS. LA CITTADINANZA IN ROMA ANTICA (DAL REGNUM ALLA FINE DELL'ETÀ REPUBBLICANA): TERMINI, CONCETTI, SISTEMA GIURIDICO-RELIGIOSO 62–66 (Università degli Studi di Sassari Press 2012) (clarifying the various entitlements of the *Civitas Romana*).

194 Panizza, *supra* note 186, at 76–77 (discussing the benefits of "public tranquility" on the Roman Empire).

195 *See* GENTILI, THE WARS OF THE ROMANS, *supra* note 1.

196 Clifford Ando, *Empire and the Laws of War: A Roman Archaeology*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 30, 30 ("Gentili did not write in a spirit of post-modern indeterminacy.").

197 *See* David Lupher, *The De armis Romanis and the Exemplum of Roman Imperialism*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 85, 91–92 (questioning Panizza's confidence that Gentili supported Roman conquest).

198 Andreas Wagner, *Lessons of Imperialism and of the Law of Nations: Alberico Gentili's Early Modern Appeal to Roman Law*, 23 EUR. J. INT'L L. 873, 875 (2012).

199 Panizza, *supra* note 186, at 56.

defense,[200] whereas the second book, which is of humanist character,[201] better reflected Gentili's personal views.[202]

Yet, other scholars argue that Gentili may have been highly critical of the Roman conquest. In fact, Gentili highlighted the importance of sources in the making of history by stressing that lack of access to alternative viewpoints, namely Carthaginian sources or "any by those other peoples with whom the Romans had their disputes," could give rise to "interested manipulation" of historical facts by Roman sources.[203] The first speech of the *De armis Romanis* questions "the very legitimacy of the Roman empire, and even more fundamentally, the question of the legitimacy of empire in general."[204] According to Panizza, Gentili attempted in *De armis Romanis* to justify a preventive war against the Spanish empire[205] to preserve Europe's liberty.[206]

Certainly, Gentili shows not only the "malleability of the Roman model" in this work,[207] but he also deliberately used the technique of the paired speeches (*dissoi logoi*).[208] One could argue that the *De armis Romanis* can be read as "a rhetorical humanist exercise."[209] Moreover, the two books were delivered as public speeches at the University of Oxford and, therefore, should be examined keeping in mind "the academic environment and culture" of the time.[210]

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200 *Id.* at 57.

201 *Id.* at 58.

202 *Id.* at 54.

203 Ando, *supra* note 196, at 31.

204 Panizza, *supra* note 186, at 55.

205 *See id.* at 57–58 (linking the political motivations behind both *De iure belli* and *De armis Romanis* as both works were dedicated to the same patron, the Earl of Essex).

206 *See id.* at 57 (stating that the same political motivation behind *De iure belli*, justifying a pre-emptive war against expansionist Spain to preserve European liberty, is present in *De armis Romanis*).

207 Lupher, *supra* note 197, at 91–100.

208 *Id.* at 98 (arguing that this rhetorical device could be inspired by an earlier text written by Cicero).

209 *Id.* (noting that Cicero, in the third book of *De republica*, describes two famous speeches delivered by a skeptical philosopher Carneades to protest a fine that Rome had levied on Athens. The first speech praises justice, while the second praises injustice).

210 *Id.* at 99.

E. Gentili and Classical Studies

While contemporary international law scholars rarely refer to literary sources, Renaissance theorists deployed passages of poetry as ornaments of their writings.[211] In *De iure belli*, Gentili devoted space to a variety of epic actions, and his "lawyerly reading of Vergil's *Aeneid* contributed to his laws of war."[212] Gentili also admired contemporary poets and praised Torquato Tasso's *Gerusalemme Liberata*.[213] These literary references confirm that international law is best understood historically amidst its cultural, social and political context.[214] Gentili's fascination for classical studies also appears in his other legal works.[215]

IV. Key Challenges

What are the key challenges ahead in the study of the life and figure of Alberico Gentili? First and foremost, a systematic translation of his work into English would constitute the first step toward its diffusion and broader engagement with a larger audience. In recent years, some excellent translations have been undertaken,[216] yet a comprehensive project to translate all of Gentili's work is missing. One could argue that relying on previous generations' work is not a bad habit. Yet, linguistics and

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211 Christopher N. Warren, *Gentili, the Poets, and the Laws of War*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 146, 146 (exploring how Gentili connected the law of war to the *studia humanitatis*, *i.e.*, classical studies including poetry).

212 *Id.* at 147.

213 *Id.* at 156.

214 Reportedly, however, Gentili was not a great poet. *See* VAN DER MOLEN, *supra* note 6, at 41 ("One winter evening . . . [Gentili's] father said to his sons: 'let each of you take a piece of charcoal and write a Latin poem on the wall. I shall relate the theme in prose.' Scipio [Alberico' younger brother] succeeded in expressing the theme in a few lines of poetry, but the story relates that Alberico covered the entire wall with his poem. The father then encouraged Scipio to cultivate the Muse, but at the same time extracted a promise from Alberico that he should never again turn his mind to verse.").

215 For instance, in his *Commentatio ad legem III codicis de professoribus et medicis*, a comment on an ancient Roman regulation, Gentili used the commentary for writing a defense of poetry and drama in response to a dispute with the erudite John Rainolds, a scholar of divinity. While the latter condemned drama on theological ground, the former argued that poetry benefited morals. *See* Artemis Gause-Stamboulopoulou, *Gentili, Alberico (1552–1608)*, *in* 21 OXFORD DICTIONARY NAT'L BIOGRAPHY 753, 755.

216 *See, e.g.*, GENTILI, THE WARS OF THE ROMANS, *supra* note 1, at 2–235.

other sciences have progressed immensely in the past decades, and there is some added value in addressing the *opera omnia* of a given author at the same time because one can make use of a coherent methodology, consistent linguistic choices, and improved readability, as well as new types of analysis.

While 'it impossible to translate perfectly,' translating Gentili is particularly challenging. [217] On the one hand, classicists may lack the legal expertise to detect and thus translate key legal concepts. On the other hand, lawyers may lack the linguistics skills to translate these texts. Additionally, a translator must decide whether to rely on Gentili's original manuscripts or printed editions of his works, including the editions conserved at the Bodleian Library in Oxford as well as recent republished versions. Given the complexity of Gentili's way of writing, one also wonders whether a literal translation would be meaningful, or whether a more liberal approach, faithful to the spirit of the text, would be preferable. However, these challenges should not be overestimated. A more liberal approach to translation might do justice to Gentili's work bringing more brevity, clarity, and coherence to his ideas. In case of interpretative doubts, the translator could refer to translations from Latin into other languages. Furthermore, translators have developed a number of mechanisms to deal with the challenge of translating a text from a given language to another.[218] Because of the challenges stated above as well as the abundance of his writing, the systemic translation of Gentili's work would likely require a collaborative effort spanning years if not decades.

Second, reportedly, there are a number of manuscripts in the Bodleian Library, and it would be useful to explore this unpublished material.[219] Eminent scholars have investigated parts

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217 *See* Annelise Riles, *Models and Documents: Artefacts of International Legal Knowledge*, 48 INT'L COMP. L. Q. 805, 818–20 (1999) (pinpointing that different kinds of translations "transform the document into further versions of itself" and that "it is these translations that will ultimately make the document a global significant entity").

218 *See* Edgardo Rotman, *The Inherent Problems of Legal Translation*, 6 IND. INT'L & COMP. L. REV. 187, 187 (1995) (discussing translation methodology).

219 VAN DER MOLEN, *supra* note 6, at 58–59 ("In the Bodleian Library, there are no fewer than twenty-eight volumes of notebooks, partly written by Scipio [Alberico's brother] and, partly by Alberico. Holland unearthed a great many personal notes from them, which were of great importance in bringing to light facts on Gentili's life and spiritual outlook.").

of these archival resources. Yet, a complete archival scrutiny remains to be done. The digitization process that the Bodleian Library is undertaking will facilitate the digital access to these resources, making them accessible worldwide.[220] This will be useful for lawyers and social scientists, as it will likely unveil additional elements of Gentili's life and work, as well as for historians interested in the social history of the sixteenth century.

A third substantive challenge lies in confronting Gentili's and Grotius's work systematically on a range of themes. This would dispel the mystery behind the genesis of given international law concepts and allow a proper attribution of these concepts to their respective authors. During his stay in prison in Holland, Grotius read Gentili's work.[221] Some contend that "Grotius . . . built many of his theories on Gentili's *De iure belli* and borrowed heavily on Gentili's examples without checking the original sources (thus duplicating several of Gentili's own misquotations)."[222] Furthermore, they suggest that although "in his *De iure belli ac pacis* . . . Grotius names Gentili as one of the worthiest legal theorists on war, in general he was rather remiss in acknowledging Gentili's influence on his own work."[223]

Comparing the work of Gentili and Grotius may be challenging because Gentili's work is characterized by a peculiar lack of unitarian framework: his treatises are "a collection of main questions, unified within a topical distribution and not dependent on a single principle."[224] Rather than adopting an abstract theoretical perspective, Gentili was a great practitioner and his scholarly work addressed pragmatically the major political questions of the day.[225] For example, he discussed the law of war and the law of the sea through schemes based on practice,[226]

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220 *See Bodleian Library & Radcliffe Camera*, http://www.bodleian.ox.ac.uk/bodley (last visited Oct. 7, 2014).

221 Reppy, *supra* note 143, at 267.

222 Gause-Stamboulopoulou, *supra* note 215, at 757; *see also* Peter Haggenmacher, *Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural lecture*, *in* HUGO GROTIUS AND INTERNATIONAL RELATIONS 133, 149–51 (Hedley Bull, Benedict Kingsbury, & Adam Roberts eds., 1990) (outlining similarities between Grotius's work and Gentili's pre-existing work, including identical passages).

223 Gause-Stamboulopoulou, *supra* note 215, at 757.

224 Scattola, *supra* note 46, at 1094.

225 *See id.*

226 *Id.*

following the common law rather than the continental tradition.[227] Furthermore, his typical use of arguments and counterarguments, the use of metaphors, and his idealism tempered by sound realism make difficult the determination of his preferred line of argument. Gentili "often hesitates in drawing precise conclusions," and "it is sometimes difficult not to lose the thread of his argument."[228] Grotius's argumentative style was more structured, linear, and clear.[229] This does not necessarily mean that Grotius' arguments were of better quality, but that they can be more easily grasped by his readership.[230] On the other hand, if Gentili seemed to "struggl[e] with his subject matter . . . it must not be forgotten that he had first to gather the raw material himself to work it up."[231] Therefore, any juxtaposition of the works of Gentili and Grotius needs to: (1) take into account the diverging styles of the authors; (2) detect the lines of their respective arguments; and (3) evaluate the findings in light of their analytical merit. The scrutiny of both works would allow the researcher to be fully just to each author and their respective original contributions.

Fourth, it remains to be seen whether the renewed interest in and growing scholarship on Gentili's life and work will help decipher some of the controversies raised by his writings.[232] There

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227 In the prolegomena to his *De iure belli ac pacis*, Grotius himself, after acknowledging that he "derive[d] profit from [Alberico] Gentili's painstaking," stated that he "le[ft] it to his readers to pass judgment on the shortcomings of his work as regards [to] the method of exposition, arrangement of matter, delimitation of inquiries, and distinctions between the various kinds of law." HUGO GROTIUS, DE IURE BELLI AC PACIS LIBRI TRES § 38, at 22 (Francis Kelsey trans., 1925) (1625). Yet, "Grotius owed infinitely more to Gentili than one would conclude from reading the sober words of the [p]rolegomena." VAN DER MOLEN, *supra* note 6, at 243. Scholars noticed that "even a superficial comparison of the two works shows, that the third book of '*De iure belli ac pacis*' [by Grotius] runs practically parallel with the second and third book of '*De iure belli*' [by Gentili]. The titles of the chapters show a great similarity and the material is treated in the same order." VAN DER MOLEN, *supra* note 6, at 319 n.242 (citation omitted). Moreover, "a whole section of chapter [twelve] of Grotius' . . . *Mare liberum*, was drawn from Gentili's *De iure belli*." Meron, *supra* note 65, at 113 n.25 (citing W. KNIGHT, THE LIFE AND WORKS OF HUGO GROTIUS 94 (1925)).

228 VAN DER MOLEN, *supra* note 6, at 243.

229 Haggenmacher, *supra* note 96, at 12 (noting that Grotius' thought was rigorous and lucid and his Latin crystal clear).

230 *Id.*

231 VAN DER MOLEN, *supra* note 6, at 245.

232 *E.g.*, Panizza, *supra* note 186, at 59, 63 (discussing examples of contradictions and paradoxes in Gentili's writing).

is an element of controversy in Gentili's positions due to some contradictions and even paradoxes within his writings.[233] While some contend that he supported imperialist expansion,[234] others have a contrasting point of view, stressing that Gentili criticised hegemonic attempts (in particular, those of Spain and of the Ottoman Empire), thus favoring a balance of power.[235] Key passages of his work referring to the politics of the Italian peninsula—then fragmented in a multiplicity of states and oppressed by foreign invasions—seem to lend support to the latter reading.[236]

His anticipatory approach of distancing theology from foreign affairs and international law probably reflects the position of his adoptive country. His acrimony against the Ottoman Empire was probably due to the fact that Gentili came from a coastal town along the Adriatic Sea[237] and was well aware of (and perhaps had personally experienced) the fear related to the Ottoman incursions in the Adriatic Sea occurring in the sixteenth century. More significantly, however, Gentili does not deny the fact that the Ottoman Empire constitutes part of the international community.[238] Gentili detaches himself from the medieval and euro-centric tradition of the *Res Publica Christiana*, or Christian Commonwealth.[239] Rather, he seems open to a broader and de-centralized understanding of the international community.[240]

V. Dialectic Antinomies: The Hermeneutics of Gentili's Work

What kind of work must we do to interpret, understand, and critically assess Gentili's work? Several complementary methods

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233 *Id.*

234 Anthony Pagden, *Gentili, Vitoria, and the Fabrication of a 'Natural Law of Nations'*, *in* THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS, *supra* note 1, at 340, 343.

235 *See* Panizza, *supra* note 186, at 57–58 (stating that Gentili advocated for a pre-emptive war against the Spain due to its expansionist policies).

236 *Id.*

237 *See* Scattola, *supra* note 46, at 1 (stating that Gentili was born and lived in the town of San Ginesio).

238 *See* Malcolm, *supra* note 100, at 129 (stating that it is proper to "exchange embassies with [the Ottoman Sultan]").

239 *See id.* at 130.

240 *Id.*

can help scholars achieve a more comprehensive understanding of the life and work of Alberico Gentili. In approaching Gentili's work, a fundamental issue is that of hermeneutics. While exegesis focuses primarily upon texts, hermeneutics—meant as a theory of text interpretation—includes different levels of interpretation.[241] Gentili's training in the Bartolist Faculty of Perugia, his early studies of the classics, and his Protestant belief shaped and sharpened his approaches to the study of the law and, therefore, his work may require a particular hermeneutics, moving beyond a purely textual interpretation to include context, *telos*, and the use of rhetorical tools.

Medieval hermeneutics, which characterized not only biblical interpretation but also the literature of the day, emphasized the distinction between the letter and the spirit of the text.[242] The Protestant Reformation brought about a renewed interest in the interpretation of biblical texts, enabling the interpretation of the scriptures without the aid of intermediary authority.[243] With the plurality of possible interpretations for any biblical text, a need arose to establish the rules of interpretation and hermeneutics studied such rules.[244] In parallel, different levels of meaning and allegories were used extensively in Renaissance literature[245] and figurative arts.[246] Gentili had an elaborate style, using "irony and sarcasm, rhetorical questions, and all sorts of other devices amply."[247] The *ars rhetorica* (*i.e.*, the art of discourse) was commonly taught in the universities of the day.[248] Most probably,

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241 *Hermeneutics*, OXFORD ENGLISH DICTIONARY, http://www.oed.com (last visited Oct. 7, 2014).

242 *See* Florence H. Ridley, *Chaucer and Hermeneutics*, *in* HERMENEUTICS AND MEDIEVAL CULTURE 15, 15 (Patrick J. Gallacher & Helen Damico eds., 1989) (distinguishing a "grammatical interpretation focused on language" and an "allegorical interpretation focused on meaning").

243 DAVIS BAGCHI & DAVID C. STEINMETZ, THE CAMBRIDGE COMPANION TO REFORMATION THEOLOGY 250 (2004).

244 *See* R. Palmer, *Hermeneutics*, *in* CONTEMPORARY PHILOSOPHY: A NEW SURVEY 453 (Guttorm Fløistad ed., 1981).

245 *See* Rhodes Dunlap, *The Allegorical Interpretation of Renaissance Literature*, 82 PLMA 39, 39–43 (1967) (explaining the significance of allegorical interpretation in Renaissance Literature).

246 *See* MALCOLM BULL, THE MIRROR OF THE GODS: HOW RENAISSANCE ARTISTS REDISCOVERED THE PAGAN GODS (2005).

247 Wagner, *supra* note 198, at 875 n.6.

his texts present different levels of meaning, which were detected by his contemporaries who were familiar with the cultural, political, and historical context of his writings. Today, detecting unwritten elements and decoding the written parts of his work may be complicated by the lack of knowledge of the assumptions implicit in the text.[249] In retrieving Gentili, one must be mindful that this thinker was engaged in his own "exercise of retrieval,"[250] being part of two different legal cultures and epistemic communities—the civil law tradition of the University of Perugia and the English common law of the University of Oxford.

Some apparent contradictions, antinomies, and even paradoxes in his writings may be explained by using this hermeneutical matrix. For instance, the apparent contradictions in the two books of *De armis Romanis* are due to the rhetorical device of the *dissoi logoi* and the Bartolist tradition in which Gentili was trained.[251] His dialectic style of argumentation consisted of first enumerating the cons and then the pros of a given position.[252] This contrasts with the argumentative Aristotelian pattern of thesis, antithesis, and synthesis expressing a sort of 'mathematical reason' (*ratio mathematica*) which Gentili deemed incompatible with law.[253]

Not only did the dualism of some of his writings bear witness

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248 LOUIS J. PAETOW, A GUIDE TO THE STUDY OF MEDIEVAL HISTORY FOR STUDENTS, TEACHERS, AND LIBRARIES 417 (1917).

249 For an analogous argument with regard to Renaissance painting, *see* EDGAR WIND, PAGAN MYSTERIES IN THE RENAISSANCE 15 (1968). "An iconographer trying to reconstruct the lost argument of a Renaissance painting . . . must learn more about Renaissance arguments than the painter needed to know; and this is not, as has been claimed, a self-contradiction, but the plain outcome of the undeniable fact that we no longer enjoy the advantages of Renaissance conversation. We must make up for it through reading and inference." *Id.*

250 Mark Antaki, *Book Review*, 57 MCGILL L.J. 1009, 1012 (2012); *see also* Scattola, *supra* note 46, at 1094 ("Gentili was part of a legal tradition which stretched back to ancient and medieval jurisprudence.").

251 *See* Panizza, *supra* note 186, at 58 (describing *De armis Romanis* as a "forensic clash between a prosecutor and a defending advocate").

252 *See, e.g., id.* (stating that *De armis Romanis* starts with the arguments against the justness of the Roman wars and then counters with arguments for the justness of the Roman wars).

253 *See* Panizza, *supra* note 186, at 213 n.2 ("The original Latin about Gentili's rejection of the new "mathematical" method reads as follows: Neque ego tibi dico demonstrationes, quas petes a Mathematico; sed quales ista tractatio patitur, suasorias." This is translated as: "And I will not offer you mathematical demonstrations; rather persuasive arguments.").

to his powerful intellectual skills, but it also enabled him to express alternative viewpoints not necessarily in conformity with the political and religious orthodoxy of his time.[254] In other words, antinomies, contradictions, and deliberate paradox allowed him to express his opinions and freed him from the control of political and religious powers.[255] Against this background, some antinomies were intended and indeed necessary, not only to escape negative reactions, but also to progress in one's own career if not to save one's own life. The political instability and uncertainty which characterized Gentili's time could not but be reflected in his work.[256] This particular reading of Gentili's work seems supported by the circumstance that other contemporary scientists attempted to introduce innovative ideas by pairing them to more conservative views and using dialectical tools rather than syllogism.[257] According to Dietz Moss, "The decision to cast the work in the form of a dialogue was in itself a rhetorical strategy that enabled [the scientist] to present his ideas as if they were an unbiased collaborative investigation of the issue."[258] Gentili's pragmatism is reflected in the *Hispanica Advocatio*.[259] When discussing the seizure by Sardinians of an English vessel transporting arms destined to the Ottomans, Gentili started his speech with several arguments against the release of the English vessel.[260] He then

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254 ANDREA GREENBAUM, EMANCIPATORY MOVEMENTS IN COMPOSITION: THE RHETORIC OF POSSIBILITY 1–22 (2002) (considering the use of the two-fold argument as a way of expressing dissent).

255 *See id.*

256 *See supra* Part II.D.

257 For instance, Galileo used dialectical reasoning "to persuade his audience to accept the Copernican theory as the best explanation of the cosmic system." *See* Jean Dietz Moss, *The Interplay of Science and Rhetoric in Seventeenth Century Italy* RHETORICA – J. HIST. RHETORIC 7(1) 23, 23–24 (1989) (referring to how "scientific demonstration yielded to dialectic and to rhetoric as means of gaining assent to a scientific theory"). In the *Dialogue Concerning the Two Chief World Systems*, in which Galileo attempted to gain recognition for Copernican theory as superior to the Aristotelian in the face of the Church's opposition, Galileo did not argue openly for the Copernican system, rather "he was careful to describe the argument of his *Dialogue* as a mathematical exercise." *See id.* at 41.

258 *See id.* at 42.

259 *See* Abbott, *supra* note 142, at 742 ("In [*Advocatio Hispanica*] Gentili presents the arguments actually made before the court and where important issues were at stake.").

260 *Id.* at 745–46.

moved to highlight the reasons why the vessel should be released.[261] In this elegant articulation of arguments, one could hypothesize that the first set of arguments reflected the author's inner beliefs (that providing arms to the Turks was not a good idea, as explained in the *De iure belli*), while the second set of arguments reflected the duties of the lawyer to defend the position of his client. Gentili adapted to the customs of his adoptive country.[262] Yet, given the fact that he had argued both ways and that the ultimate decision had to be taken by the Court of Admiralty, nothing could be reproached to him in the inner tribunal of his soul.[263] While the ambiguity and even antinomies of his scripts were thus probably due to political expediency, they make his thought even more interesting today, as the interpreter is presented with a thought-provoking jigsaw.

Interdisciplinary approaches can complement philological approaches, delineating a multilayered framework of analysis, including contributions written by historians, lawyers, classicists, and political scientists. These interdisciplinary approaches have proven to be very successful in the past and are worth further consideration.

The historical, political, and cultural context of Gentili's work deserves scrutiny and attention. Gentili's work becomes intelligible only when it is set forth in their proper context of life and thought. Understanding the cultural, political, and social context of a given author is the only way of understanding the manner in which that author interpreted and applied the law, as well as why he or she authored certain works.

Yet, most scholars adopt a perspective of the present by examining the works of past jurists for their impact on current issues rather than for the influence such works had in their own time.[264] Contrasted to resilient utilitarian approaches, a holistic approach is to be preferred.

VI. Conclusion

Alberico Gentili was a pivotal thinker because of the richness

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261 *Id.* at 746.

262 *See supra* note 13.

263 *See* Abbott, *supra* note 142, at 742.

264 For a critical stance of this utilitarian approach to the history of international law, *see* Kennedy, *supra* note 78, at 2 n.2.

of his writings and contributed to the emergence of the law of nations as an autonomous discipline.[265] Gentili's work contributed to the emancipation of early international law from theological sources and, thus, to a separation between law and religion.[266] Whether this process was fully successful or whether Gentili borrowed some elements from the same scholastic tradition that he criticised remains open to debate.

Gentili contributed greatly to the coalescence of the law of war, which he meaningfully articulated in the three distinct and yet connected parts of *ius ad bellum*, *ius in bello*, and *ius post bellum*.[267] He highlighted the importance of moderation in the conduct of war and stressed the connection between the different phases of war. His support for pre-emptive war was linked to the perilous nature of his times.[268] He translated the political theory of his day into legal terms.[269] His words against forms of hegemony and his praise of the balance of power are timely as ever.[270]

Gentili also gave an important contribution to the theory of the law of the sea.[271] The concept of the freedom of the sea and the idea that the sea is a *res communis* (commons) have made history and remain part of our understanding of the law of the sea.[272] His thoughts on piracy and compensation in case of seizure remain valid today.[273] Gentili's work is stimulating, and this brief article contributes to further the understanding of this extraordinary figure of a humanist jurist. Gentili's work should be read by anyone interested not only in the past, but also in the future of international law.

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265 *See supra* Part I.

266 *See supra* Part III.B.

267 *See* THE ROMAN FOUNDATION OF THE LAW OF NATIONS, *supra* note 1.

268 *See supra* Part III.B.

269 *See id.*

270 *See id.*

271 *See supra* Part III.C.

272 *See id.*

273 *See id.*