

# **The Program in the History and Theory of International Law**

Presents:

Political Theory and Jurisprudence in Gentili's *De Iure Belli*.  
The great debate between 'theological' and 'humanist'  
perspectives from Vitoria to Grotius

**Prof. Diego Panizza**  
Department of International Studies  
University of Padua

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**Directors:** Benedict Kingsbury and Martti Koskenniemi

**Institute for International Law and Justice**

New York University School of Law

40 Washington Square South, VH 314

New York, NY 10012

Website: [www.iilj.org](http://www.iilj.org)

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Summary

1. Introduction – 2. War as 'duel' vs. war as 'execution of justice' – 3. Bilateral justice of war vs. 'invincible ignorance' – 4. Pre-emptive self-defence vs. necessary self-defence – 5. The making of peace: restitution-punishment vs. conquest-empire – 6. Civilization vs. barbarism and the common law of mankind – 7. Conclusion

1. Introduction

I must begin by thanking Professor Benedict Kingsbury and his distinguished Colleagues for their kindness in inviting me to speak at such a prestigious Institute. Its excellence and prestige are an established fact, and it is not up to me to sing its praises. I only wish to stress that elsewhere, especially where the "Reine Rechtslehre" in its various forms reigns, international lawyers and jurists in general would not care much to listen to what an historian of political thought may have to say about the subject-matter "international". This simple fact is such, in my view, to confirm and add greatly to the established reputation of the Institute. Briefly, it is a great honour, indeed, and a pleasure to be here.

The title of my talk is "Political Theory and Jurisprudence in Gentili's *De Iure Belli*. The great debate between theological and humanist perspectives from Vitoria to Grotius". I would like first to

stress the comparative novelty of the topic. With his masterpiece on the law of war (1588/1598), Gentili is rightly famous for the crucial part he played in the emergence of international law as an independent legal discipline. However, the interpretation of his thought has been until recently the intellectual reserve of international lawyers, who have tended to reconstitute a teleological history of the discipline, superimposing on the past the theoretical consensus of the present, or some polemical version of what that consensus should be. Thus, according to this fashion, past authors were usually inducted into the canon of the discipline as precursors or forbears, each wearing a label conveniently summarising his “contribution”.

New methodological tendencies have emerged in the recent sixties and seventies of last century, tendencies committed to a genuinely historical re-creation of the past and alerted, in particular, to the importance of properly locating an author into the context of his own coeval “map of knowledge”. Returning to Gentili’s case, it is essential to bear in mind that in his time jurisprudence, more precisely natural jurisprudence, was a sort of “masterscience” in the field of the moral sciences. Indeed it embraced much of the territory now assigned to distinct autonomous dominions of knowledge, such as law and legal theory, moral and political philosophy, political science, social science and economics. We could say in particular that the treatment of “things political” – the vagueness of the phrase is most convenient - was then an essential part of “jurisprudence”.

It is undoubtedly true that Gentili laid the foundations of international law and reached a clear modern conception of the subject, but it is equally true that he could not think of himself as a specialist in international law. This is due in the first place to the fact that in his time the term “international law” was unknown and men dealing with that subject-matter spoke of the law of nature or the law of nations or the laws of war. But, at a deeper level of explanation, more relevant is a related factor, namely the empire of a “map of knowledge” based on the primacy of jurisprudence. Not surprisingly Gentili insists on the theme of the jurist as “a priest of justice”, a

priest charged with discerning just from unjust, lawful from unlawful. In doing so he echoed the famous claim of Ulpian, the Roman jurist who in the *Digest* of Justinian speaks of lawyers exactly in these very terms, reinforcing the point by saying that their discipline is the “true philosophy”, not the pretended version. Significantly and in the same key, Gentili in the opening chapter of *D.I.B.* touches upon this very point by claiming that his book is about the “philosophy of war”. The expression suggests the idea of the comprehensiveness and nobility of the subject, in the sense of suggesting a close interaction between jurisprudence and the environment of modern political thought and institutions. Even more, it was generally held that jurisprudence was true “science”, because of its universality and its rationality and above all because it offered understanding in terms of cause and effect, *scire est per causas cognoscere* (“to know is to understand through causes”), to quote an emblematical formula.

Gentili does time and again insist on the theme of jurisprudence as “civil science” and “masterscience”. The distinctiveness of Gentili’s position to this regard consists in the fact that the polemical target was above all the holy pretence, as it were, of theology and theologians. More specifically he insisted on the point of the superior competence of jurists in the field of social and political relations. Gentili lived in age of wars, civil and international, exacerbated by religious passion and fanaticism. *Silete theologi in munere alieno*, his tart advice to theologians to keep silent in matters which concern others is certainly his best known phrase, and a most significant one, in relation both to his work as a scholar and to the historical movement towards modern “secularization”.<sup>1</sup>

Thanks to the new methodologies, we have become aware of the simplifications and distortions enforced on past figures and thought. A large proportion of Gentilian studies, aimed at reconstructing his “contribution” to international law, has not escaped this form of reductionism,

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<sup>1</sup> For a full discussion of this crucial theme, see D. PANIZZA, *Alberico Gentili, giurista ideologo nell’Inghilterra elisabettiana*, Padova 1981, chap. III, pp. 55-87.

mainly bound up with doctrinal struggles which characterized the discipline in the age of legal positivism.

Fortunately in the past twenty years a new wave of investigations has changed profoundly the perception and assessment of his role in the history of international law, or in what it would be more convenient to define under the label of “international theory”, a label more alive to the several dimensions of the subject-matter in the past.

All this has seemed to me an appropriate premise in order to justify both the novelty and value of an enquiry focused on the “theoretical political” dimension of Gentili’s “jurisprudence of war”.

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To understand in what respect Alberico played a crucial and original part in the genesis of international law, interpreters usually emphasize two elements: a) the systematic and b) the juristic character of the burgeoning subject. It is rightly assumed that Gentili’s treatment of the law of war is in a significant sense systematic. It is likewise maintained that the rules of war must live up to their name as law and cannot be derived from religious beliefs, moral ideals or philosophical systems. A related, but distinct point is that only jurists, as against theologians and philosophers, are equipped to expound the principles of international law and justice.

I am not going to rehearse these traditional themes, which continue to remain fundamental and have been dealt with great historical sophistication in the past twenty years. My objective will be instead to pursue a “substantive” reconstruction of Gentili’s “system”, more particularly to isolate and identify within the complex system of thought involved in the *De Iure Belli* the so-called “theoretical political” component.

Something needs to be said, though, concerning the formal aspects of Gentili’s “systematic” treatment of the subject. His method is said to be essentially topical and dialectical, having its roots in the medieval style of disputations, a method typical of the so-called *mos italicus* in which as a

civilian he was trained in Perugia. A method typical also of the scholastic tradition, by which the rationality and truth of propositions is proved on the basis of authority and consent. This picture of his method is only partially correct. It is correct only in the sense that in Gentili's exposition historical examples and learned opinions, rather than rules and classifications, tend to dominate the discussion, but the "systematic" strand is evident and paramount in the fact that "auctoritates et exempla", "rationes et exempla" are discussed within a framework of general principles, expressly formulated and logically interrelated.

To be short, Gentili's construction is definitely "systematic", although not in the strong sense in which Grotius and Hobbes understood the concept of "system", that is to say as a deductive calculus on the geometrical or mathematical model. By the way, showing a sharp awareness of the methodological changes under way, he literally denounced the "ratio geometrica", or the "geometrical reason", as a method not really suited to the realm of law and justice. On that assumption international law could only be built through practice and experience, as Gentili did, rather than deduced *a priori* from immutable premises.

So Gentili's method is certainly "topical" and "scholastic", but only up to a point, because these characteristics are qualified by their being confined within the framework of a settled order, an order which is of new conception and distinctly "modern".<sup>2</sup>

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<sup>2</sup> This aspect, indeed a fundamental aspect I would call as "the epistemic key" of the whole intellectual enterprise, accounts for the relative obscurity in which Gentili's work fell as long as the "geometrical method", in conformity with the genius of "modern rationalism", prevailed, Grotius enjoying an undisputed reputation as the founder of international law. The comparative "modernity" of Gentili in contrast to the "backward-looking" Grotius emerged much later, in coincidence with the decline of pure rationalism and the ascendancy of legal positivism. It was an Oxford professor, Sir Thomas Erskine Holland, a leading exponent of classical international law, who challenged the established view with his famous inaugural lecture, delivered at All Souls College on 7 November 1874 (the text of the lecture is reproduced with several appendices in Th. E. HOLLAND, *Studies in International Law*, Oxford 1898, pp. 1-39). From a "mere forerunner" Gentili was to become the "founder", or one the founders, of international law. In the Introduction of his edition of Gentili's *De Iure Belli*, Oxford 1877, Holland becomes more emphatic in extolling the merit of Gentili's treatise, calling it the *archetypus* of Grotius' treatise and hence the "real cradle of the modern Law of Nations", Grotius being only the "most famous of Gentili's imitators" (p. XXI). This view will emerge as basically confirmed by the results of the present study, though from a somewhat different perspective, that is from the perspective of Gentili's "substantive" vision of international order.

If we consider the structure of Gentili's system from the point view of its intellectual substance rather than of its formal aspects, the construction appears to rest on three basic pillars: the Romanist jurisprudence, the "scholastic" or "theological" tradition, and the "humanist" tradition about war. In the light of what we have just noted about his style of thought, especially relevant is the fact that Gentili, while discussing *pro* and *contra* the arguments relating to a general principle, deploys as a rule three distinguishable "registers" of language, corresponding to the three intellectual traditions just mentioned.

Gentili was trained in civil law at the University of Perugia and remained a civilian by intellectual formation. Moreover, his writings on the laws of Justinian outweigh by a large margin his contributions to "international law". Not surprisingly therefore, even his approach to the law of war, as well as that to the law of embassies and of prize, could not but be deeply conditioned by his civilian background. To this regard, while noting that the study of the Romanist component of *De Iure Belli* has remained in a state of historiographical neglect, it is convenient to illustrate a little more closely how such a component happens to be so central.

Gentili is aware that the law of Justinian does not explicitly contain a law of war, so that also previous civilians had little to say about it. The point is made in the opening chapter of his treatise, in the framework of a characteristic discussion concerning the respective spheres of competence of the jurist, the political philosopher and the theologian. He says: "Our own Justinian, who made laws for his countrymen, did not go beyond the boundaries of the state which he desired to furnish with those laws...What, pray, shall I say of the modern interpreters of Justinian's laws, whom Jean Bodin justly declares to be wholly ignorant of this law of war". On the ground of a similar argument, focused on the "internal" character of the subject, Gentili excluded from the sphere of competence of the moral and political philosopher a subject-matter which was instead "external". Here are his densely significant words: "It does not appear to be the function either of the moral or of the political philosopher to give an account of the laws which we have in common with our

enemies and with foreigners...This philosophy of war belongs to that great community formed by the entire world and the whole human race”.<sup>3</sup>

Gentili’s train of thought, in assessing the value and pertinence of the existing literature, is best put again in his own words: “By undertaking to write about the law of war, which hides in the recesses of nature, and is highly fragmented, I am attempting a large and difficult task... but “I take it as settled that there is a law of nature which includes a treatment of the topic of war”.

Here we have the first and fundamental connection between the Romanist jurisprudence and Gentili’s “international” jurisprudence. Although the law of war is not collected and expounded in Justinian’s books, his law however refers to the law of nature and of nations as valid species of law. By virtue of the association of civil law, through *ius naturale* and *ius gentium*, with the lofty notion of “natural reason”, the Romanist legal tradition lent itself to be used in the form of *ratio scripta*, thus providing both the conceptual model and the quarry for the new subject of international law.

The Romanist tradition is referred to not only as the supreme model of legal rationality, but also as “civil science”, that is as a model of “political science” and a repository of political wisdom and political attitudes. On the basis of such presuppositions, the “civilian” ceases to be simply an expert in municipal or state law and becomes the “perfect jurist”, that is the modern equivalent of the ancient “priest of justice”. As such he was not only the “international lawyer”, but the master of legal, social and political science - the fulfilment in modern terms of the ancient ideal of “true

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<sup>3</sup> See Gentili, D. I. B., Book I, Chap. I. While referring to the opening chapter of *De Iure Belli*, I would like to stress the fundamental and original character of the observations therein contained. Indeed, a magnificent and most revealing *ouverture* about the nature and structure of the whole work. In particular I would like to stress that Gentili demonstrates to possess a clear perception that the ambit of the law of war constituted a specific normative order. In other words he had a clear vision of the dichotomy “internal”-“external”, which is the basic presupposition of the emergence of the modern concept of an order of things distinctly “international”. We can say that such a vision incorporated the idea of “external” as practically equivalent to “interstate”, “sovereign princes” being the principal subjects of the new area of relations. At the same time the normative order pertaining to the “external” domain was in Gentili’s conception a specific normative order, or an order *sui generis*. Nothing comparable therefore to the “rationalistic” and “individualistic” approach which was to emerge with Grotius’ and Hobbes’ idea of a close analogy between the rights and obligations of individuals and those of groups and states.

philosophy”, ideas which are at the heart of Gentili’s exalted conception of jurisprudence, as we have already pointed out.

This order of considerations finds a clear and emphatic expression in a series of statements of principle made by Gentili himself, who finds it appropriate to qualify his methodology by stressing that the tradition of civil law, if interpreted as “written reason”, far from being confined to “internal” matters, can be used as a most excellent source in building up the rules and principles relating to the domain of the “international”. Apart from this, the relevance of civil law in the construction of Gentili’s system emerges in the form of a regular chain of arguments, which the author employs as a rule in discussing any single question.<sup>4</sup>

A second major component of Gentili’s system is the theological one. Great weight is assigned to biblical sources and theological opinions as sources of evidence of the law of nature in formulating the definitions of the law of war. The point of principle is enunciated expressly in the introductory chapter and amply reflected in the actual treatment of any single question all along the treatise, in the same fashion as the civil law. No contradiction with the famous motto *Silete theologi in munere alieno!* As already pointed out, the demarcation dispute between lawyers and theologians consisted in establishing who had the primary jurisdiction, a jurisdiction that was not exclusive then. As a consequence, if the detailed exegesis of biblical sources belonged to jurists, theologians might properly express opinions about the general principles involved. Gentili could not dispense therefore with arguments, *pro* and *contra*, derived from Christian moral theology.

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<sup>4</sup> For Gentili’s emphatic assertions about the central relevance of civil law in the “international” domain, see Book I, end of chapter I ( *De Iure Belli*, Carnegie Endowment for International Peace, Oxford 1933, vol. II, p. 11, Translation by J. C. Rolfe) and especially chapter III, p. 17: “As a matter of fact, jurists are not restricted to the books of Justinian, any more than physicians are limited to those of Galen, or philosophers to the writings of Aristotle. The same is true of all branches of learning, with the exception of the sacred writings to which the theologians are confined...Moreover, the law which is written in those books of Justinian is not merely that of the state, but also that of the nations and of nature...This law therefore holds for sovereigns also, although it was established by Justinian for private individuals...”. It is worth noting that the relevance of civil law is increased as an effect of the so-called “domestic analogy”. In other words Gentili resorts to a specific hermeneutic procedure in his search of the law of nature/law of nations by drawing upon the parallelism between private law/public “international” law. This clearly amounts to an anticipation of the “geometrical” analogy between the pre-social “state of nature” among individuals and the state of nature among nations, which was to be inaugurated by Hobbes and, though less explicitly, by Grotius.

However, considering the nature of the subject Gentili was dealing with, namely the law of war, the role of the theological tradition in his system cannot be reduced to that of an ordinary quotation, according to the ordinary style of discourse of the times. In fact, the scholastic-theological tradition had played a dominant part in the elaboration of the existing literature on war, which also comprised of course the fragmentary contributions, in form of glosses and comments, of the canonists and the civilians. The dominant language of such literature was the scholastic language of the “just war” tradition. The doctrine of the “just war”, first systematized by Thomas Aquinas, had been brought to its final shape by the Spanish theologians of the sixteenth century, mainly represented by the school of Salamanca and by its leading exponent, the Dominican Francisco de Vitoria. This is the tradition and the literature on the law of war Gentili had to take account of in building up his own system. It is against this background that Gentili’s jurisprudence of war will be here assessed, his contribution and originality appreciated.<sup>5</sup>

A careful comparison of Gentili’s *De Iure Belli* with the literature of the Spanish Thomists will be especially relevant to this end. Through such a comparison we shall be able to identify the focal points of convergence and contrast. Actually the enquiry will bring into light a profound opposition between the theological tradition and Gentili’s work. And, what is more significant for our purposes, the spirit and the terms of such opposition will lead us to the consideration of the third major component of Gentili’s system, namely the so-called “theoretical political” component. In fact, the different perspective held by Gentili with regard to the theologians is to be imputed to a profoundly different moral vision of politics, which is derived in turn from another powerful tradition of thinking about politics and war, which is usually called the “humanist” tradition.

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<sup>5</sup> For general information on the medieval development of theories of war, including the “just war” tradition, see especially F. H. RUSSELL, *The Just War in the Middle Ages*, Cambridge, 1975; J. BARNES, *The Just War*, in N. KRETZMAN-A. KENNY-J. PINBORG (eds.), *The Cambridge History of Later Medieval Philosophy*, Cambridge 1982, pp. 750-784. In particular on the Spanish theologians of the *Siglo de Oro*, see J. B. SCOTT, *The Spanish Origin of International Law*, Francisco de Vitoria and His Law of Nations, Oxford 1934; A. PAGDEN, Introduction to his edition of F. de VITORIA, *Political Writings*, Cambridge 1991; J. BELDA PLANS, *La Escuela de Salamanca*, Madrid

The assumption underlying the present study is that the “theoretical political” component plays a very special part in the construction of Gentili’s system in two basic senses: a) it reveals the ideological thrust, or the driving force, behind the whole work, b) humanist keywords and values play a decisive role both in constituting the overall formal structure and in providing the solution to a variety of topical questions. What is striking in the *De Iure Belli* is Gentili’s extraordinary ability to manage the complexity and create a wholly new coherent system out of different intellectual traditions, basically the three briefly illustrated here. The *De Iure Belli* is not just a kind of *summa* of the whole literature which formed the substance of those traditions, but more importantly is the end-result of an original process of complex combinations, each tradition equally contributing under essential respects. The assumption, however, behind the present study remains that the uniqueness of the work, its inner logic and its seminal historical significance depend, to a great extent, upon the centrality of the “political” dimension.<sup>6</sup>

Gentili’s work does not represent of course a restatement of the traditional humanist thinking about war. To this regard it is important to note that the cited “humanist” tradition about war was cast in a pre-eminently descriptive-pragmatic kind of language, as the so-called language of civic humanism and classical republicanism. This was a language primarily concerned with the practice of politics and employed in the literary genre of advice-books for princes of the early Renaissance or the how-to-do-it books typical of the reason-of-state literature of the late sixteenth century. Recalling the ancient distinction between practical understanding (*phronesis*) and a science (*episteme*), we can appreciate the first and fundamental move made by Gentili in constructing his system. He

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2000. For the best analysis of the political thinking of the Neo-Thomists, see Q. SKINNER, *Foundations of Modern Political Thought*, Cambridge 1978, II, pp. 135-173.

<sup>6</sup> For a most valuable insight into the influence of humanist political thinking on Gentili’s jurisprudence of war is provided by R. TUCK, *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant*, Oxford 1999, especially chaps. 1-2. The insight is held to be correct with regard to the fundamentals of Gentili’s view of war and international relations. Particularly illuminating is the account provided of the classical and medieval cultural roots of the so-called “scholastic” and “humanist” traditions of thinking about war. The reconstruction of Gentili’s vision, however, turns out to be rather sketchy, basically inadequate in so far it fails to capture essential features of it, both of a substantive and linguistic kind. Tuck’s interpretation remains, nonetheless, far-reaching and thought-provoking, consequently an important point of reference at the level of a general assessment of the themes being discussed here.

transposes the discourse of civic humanism into a different key, that is the key of science as represented by the discourse of “natural jurisprudence”.

To this regard it is worth anticipating that the moral vision of politics underpinning the *De Iure Belli* is fundamentally conditioned by Machiavelli, who, not surprisingly, was openly admired by Gentili as the hero of republican liberty and the supreme master of the modern “art of government”. Such a basic picture needs, however, to be tempered and qualified in relation to Gentili’s preoccupation with the theme of civil war, which implied the reception of some motifs associated with the Tacitist evolution of the humanist tradition which took place in the late sixteenth century. In sum, the model is Machiavelli, who shares company with Justus Lipsius, the *modernus Politicus*, as Gentili is used to call him.<sup>7</sup>

## 2. War as ‘duel’ vs. war as ‘execution of justice’

Let us move on now to the representation and analysis of the “great debate” between Gentili and the theologians of the Spanish school, the modern incarnation of the medieval scholastic tradition. The Spanish school included a number of prominent writers, theologians and theologian-jurists, from Francisco de Vitoria to Domingo de Soto, Diego de Covarruvias, Fernando Vazquez y Menchaca, and finally to Luis de Molina and Francisco Suarez. The school had been active throughout the sixteenth century until the early seventeenth century and had produced a fairly coherent doctrinal corpus which was aimed at adapting the Thomist tradition of “just war” to the changed political setting, characterized by the rise of the modern state, with its claim to sovereignty, and the

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<sup>7</sup> For an in-depth analysis of Gentili’s political thought, as expressed in the whole of his writings, see D. 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*, Milano, Giuffrè, 2002, pp. 57-213. Gentili’s political thought is represented as evolving through three basic stages, corresponding to three basic images : a) the orthodox, or Ciceronian, moralistic humanism of the early Renaissance (see his *De Legationibus*, London 1585 ); humanist political thinking according to Machiavelli’s new canon; finally the Tacitism and political scepticism of the *Regales Disputationes* of 1605. The “Machiavellian moment” is the dominant moment and the dominant characteristic of his work. It certainly determines and defines the “theoretical-political “ dimension of his *De Iure Belli*, at least in so far the basic moral vision of politics is concerned. In fact, the projection of such a vision on to the international plane, though largely and essentially Machiavellian, does not coincide with that put forward by the Florentine writer. The basic difference, as we shall see, is related to the theme of empire.

complexities of the new “international” scenario, especially in connection with the European colonization of the New World.

This is to stress the fact the Spanish school was active during Gentili’s time, when he wrote his *De Iure Belli*. In other words, the Spanish literature on war represented a direct polemical target of his theorising, a target which sometimes comes to surface in the form of explicit tart expressions of dissent and even disgust. Such a theoretical antagonism concerned questions of central political importance. In fact, England and Spain were at war with one another at the time. Gentili, who interpreted his academic role as a man of affairs engaged in public service, never fails to uphold the legitimacy of English political claims and attack the Spanish imperial policy, both in Europe and in the extra-European world. But Gentili’s attitude towards the Spanish school involves more than just a legal-political contrast, it is rather the expression of a profound difference in terms of a general cultural perspective. Significantly enough, the famous phrase “Silete theology in munere alieno” was most probably directed against Francisco de Vitoria, who had openly proclaimed the primacy of theology in the field of human sciences.<sup>8</sup>

It is to be noted here that, in describing the views of the theological position, mention will also be made of the views which Grotius was to adopt on the same points later in his *De Iure Belli ac Pacis* of 1625. The reference to Grotius is assumed to be highly significant in two basic respects. First, in relation to the theme of Grotius’ standing in the debate between the humanist and scholastic traditions about war. Second, in relation to his role within the “modern” school of natural law, a theme of wider historical significance. As a result, a striking similarity between the Spanish theologians and Grotius’ mode of thought will emerge, a similarity of a surprising extent, as it were, pointing to the much greater “modernity” of Gentili’s approach to international law and politics. A

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<sup>8</sup> A vivid illustration of the theme can be found in the opening sentence of Vitoria’s *Relectio De Potestate Civili*: “The duties and functions of the theologian extend over a field so vast, that no argument, no discussion, no text, seem alien to the practice and purpose of theology. And this may account for the fact that the lack of able and sound theologians is as great as - not to say greater than- the lack of orators which is mentioned by Cicero, and which he explains by saying that

modernity which derives its main thrust from the political culture which is incorporated in his jurisprudence of war.<sup>9</sup>

The debate turns out to be focused on a number of fundamental issues, to start from those concerning the range of justifiable causes of war. The most important of these were the issue of the legitimacy of pre-emptive self-defence and of warfare against the barbarians. Another issue concerned the question of the rights pertaining to victory, which was related to the theme of conquest and empire. To justify war in the interests of one's *respublica*, even for glory and dominion, including pre-emptive strikes, was a humanist commonplace. A marked feature of the same tradition is the idea of a deep moral divide between civilization and barbarism, with important consequences on the question of the permissible grounds of war against the barbarians.

The position of the scholastic tradition on these keypoints was wholly different and characterized in general, as one can intuitively guess, by a restrictive and austere view of the role of war in international affairs. The competitive rivalry of states, or, more specifically, self-defence on the basis of fear, rather than any real injury, could never count as proper grounds for war, just as the pursuit of glory and empire was utterly forbidden, either as a cause or an effect of a just war. The Spanish theologians in particular were definitely critical in principle of the arguments put forward in justification of the Spanish conquest of the New World, although with a degree of practical ambiguity regarding the *species facti*, due to the constraints imposed by their position in the heartland of empire.

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men who are distinguished and skilled in every science and in all the arts are very rare. Theology, indeed, is the first of all those sciences and studies which the Greeks call 'teologia'".

<sup>9</sup> For the study of Grotius' *De Iure Belli ac Pacis*, the standard authority remains P. HAGGENMACHER, *Grotius et la doctrine de la guerre juste*, Paris 1983. For a critical reappraisal of his thought on international law and international relations, especially relevant is a collection of essays, *Hugo Grotius and International relations*, H. BULL-B. KINGSBURY-A. ROBERTS eds., Oxford 1990. For a recent in-depth analysis of Grotius' role in the formation of modern international theory, see R. TUCK, *The Rights of War and Peace*, cit., especially pp. 78-108. As regards Tuck's assessment of Grotius' role, his main point is that Grotius, far from being an heir to the tradition of Vitoria and Suarez, is in fact an heir to the tradition of humanist jurisprudence, and that his theory of states' rights in international affairs is modelled on that of jurists such as Gentili (*ibidem*, p. 108). It is worth anticipating and stressing, however, that the analysis which is carried out in the present paper points to a completely different conclusion, confirming the view that Grotius is to be considered in many respects an heir to the Spanish theological tradition.

Gentili, while drawing inspiration from the humanist tradition, imparted to it important modifications, both of a formal and a substantive kind, thus giving shape to an original system. The originality transcended the specific solutions given to the topical questions and involved fundamental matters of principle. So, before embarking on the analysis of the particular *topoi*, let us consider some basic definitions concerning war as set out by Gentili himself in the first chapters of his *De Iure Belli*.

“War is a just and public contest of arms”, this is his definition of war, which as such does not involve innovative aspects in respect of the scholastic tradition, including the neo-Thomist version. That a war must be waged by a “public” authority and for a “just” cause was a common tenet. Equally shared was the old analogy of the just war and a judicial process. The legitimacy of war as such depended on this fundamental analogy. Gentili literally writes: “Reason shows that war has its origin in necessity; and this necessity arises because there cannot be judicial processes between supreme sovereigns or free peoples unless they themselves consent, since they acknowledge no judge or superior. Consequently they are only supreme and they alone merit the title of public, while all others are inferior and are rated as private individuals...Therefore it was inevitable that the decision between sovereigns should be made by arms”.<sup>10</sup>

A profound difference of approach arises however in the same context when Gentili, while developing his arguments about the “public” character of war, puts forward, placing maximum emphasis on it, the notion of war as a “duel” between equal parties: “The arms on both sides should be public, for *bellum*, “war”, derives its name from the fact there is a contest for victory between equal parties, and for that reason it was first called *duellum*, a contest of two...The term *hostis* was applied to a foreigner who had equal rights with the Romans. In fact *hostire* means ‘to make

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<sup>10</sup> GENTILI, D. I. B., Book I, Chap. III, Engl. Transl. p. 15. The topic of the “subjects” of the law of war is of course of central importance in a broader historical perspective, but it is not part of the debate between Gentili and the Spanish theologians, subjectively speaking. We only wish to stress briefly that the question of the “legitimate subjects” is strictly connected with the themes of sovereignty, of civil war and the very concept of the “international”. And in this respect,

equal"...Therefore *hostis* is a person with whom war is made and who is the equal of his opponent".<sup>11</sup>

The root of this assumption is that the notion of war as a "duel" and the associated notion of the "equality" of the warring parties thoroughly subverts the theological tradition of the "just war". In fact, according to the theological perspective, war is intrinsically conceived as a "unilateral" act of legal execution, literally *executio iuris*. The presupposition of all theological writings on war is that war is a sort of reparation/punishment against wrongdoing, or *iniuria*, and as such against the delinquent party. A related presupposition is that right and wrong, justice and injustice are objectively on one side only, and that that they also are fundamentally evident to "individual conscience", or to "natural reason". A confirmation of this is the general definition given by Vitoria: "The sole and only just cause for waging war is when harm has been inflicted". Almost identical is Grotius' definition: "No other just cause for undertaking war can there be excepting injury received. 'Unfairness of the opposing side occasions just wars', said Augustine, using 'unfairness' when he meant 'injury' ".<sup>12</sup>

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objectively speaking, Gentili is here assumed to have ploughed new ground and thus played a uniquely foundational role.

<sup>11</sup> GENTILI, D. I. B., Book I, Chap. II, Engl. Transl. p. 12.

<sup>12</sup> See VITORIA, *De Iure Belli, Relectio theologica*, 1.3, in *Vitoria, Political Writings*, Cambridge 1991 (eds. A. PAGDEN-J. LAWRENCE), p. 303, and GROTIUS, *De Iure Belli ac Pacis*, Book II, Chap. I, Sect. 1. (Carnegie Edition of the Classics of International Law, Oxford 1925, Introduction by J. B. SCOTT, Translation by F. W. KELSEY ). For the sake of conceptual precision, the original text in Latin is slightly different from the translator's version. Vitoria uses the phrase "iniuria accepta", whereas Grotius uses only the word "iniuria", without any additional qualification. Vitoria endorses the typical scholastic assumption that there must be an injury committed, which is in keeping with the narrowly juridical and austere conception of war which was characteristic of the scholastic tradition: war had to be thoroughly dissociated from self-interest of any kind, including for example the case of pre-emptive self-defense. As we shall see further on, Grotius' position is exactly the same, notwithstanding the different formulation, both in general, with regard to the concept of "expediency", and in particular, with regard to the crucial question of the legitimacy of pre-emptive strikes. The assumption is that the differences between Grotius and the Spanish theologians tend to regard only the formal structure of discourse, whereas the "substantive" content tends to be strikingly similar. Grotius does not refer any longer to the concepts of "sin" and "individual conscience", used by Vitoria, but his approach remains rooted in the analogy between private/individual and public/political morality. The Grotian parallelism is evident in his definition of war, considered as a species of human conflict, and therefore deprived of an exclusively "public" character: "war is the condition of those contending by force, viewed simply as such. This general definition includes all the classes of war ...private war is in fact more ancient than public war and has, incontestably, the same nature as public war..."(GROTIUS, *ibidem*, book I, chap. I, Sect. 2). Clearly such a position is deeply opposed to Gentili's perspective, which is instead characterized by the idea of the "specificity", both formal and substantive, of the laws of war and, more generally, of international order.

Now, if one examines Gentili's definitions of war, the notion of *iniuria* loses its central relevance, dimmed by the idea of "duel", that is of the *aequalitas* of the two contending parties, parties which are contending for "victory" rather than for the enforcement of "justice". In fact, the notion of "equality" seems to govern the entire apparatus of arguments developed by Gentili on the cited basic definition of war, "war is a just and public contest". With regard to its "public" character, "equality" is satisfied by the "sovereign" character of the "subjects" waging war. With regard to the "just cause", "equality" imports the idea that war is to be considered "just on both sides". The consequence of this way of thinking is that the traditional concept of *iniuria* is replaced by the concept of *probabilis causa*. In fact, for a war to be just it is sufficient that each side has a "plausible claim" against the other.

### 3. Bilateral justice of war vs. 'invincible ignorance'

The view that war may be just on both sides is a fundamental point of contrast in the debate between the neo-scholastic and the humanist approach. The Spanish theologians ruled out this possibility, at least on the objective plane, ostensibly because it involved a logical contradiction, stemming from the very concept of war as a redress to *iniuria*. I said ostensibly, because the true reason lay, of course, in the epistemological presupposition of the existence of truth and, above all, that truth could be known. The contradiction consisted in the implication that war would be tantamount to unlawful killing and to a "sin" in the eyes of God. Vitoria was drastic in his pronouncement: "FIRST, except in ignorance it is clear *that this cannot happen*. If it is agreed that both parties have right and justice on their side, they cannot lawfully fight each other, either offensively or defensively. SECOND, where there is provable ignorance either of fact or of law, the war may be just in itself for the side which has true justice on its side, and also just for the other

side, because they wage war in good faith and are hence excused from sin. Invincible ignorance is a valid excuse in every case...”.<sup>13</sup>

Grotius, although the topic is discussed with many distinctions and qualifications, holds the same basic position: “A war cannot be just on both sides, just as a legal claim cannot, because a moral quality cannot be given to opposites as to doing and restraining”. The only exception to this principle is the concept of “invincible ignorance”, as it had been literally enunciated by Victoria. Grotius writes in fact: “Many things are done without right and yet without guilt, because of unavoidable ignorance”. In addition to that, it should be noted that the concept of “right reason”, or *recta ratio*, played a crucial role in Grotius’ system. The avowed purpose of his system was to enable anybody to make out infallibly, on the ground of “right reason”, both what an *iniuria* really was and on which side it lay.<sup>14</sup>

Gentili 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. He did so by questioning again that basic assumption,

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<sup>13</sup> See VITORIA, *De Iure Belli*, Q. 2, art. 4, pp. 312-313. The self-contradiction is further clarified in another passage where, in rejecting the quest for empire as a just cause of war, he does so by pointing out that this cause would be tantamount to admitting the thesis of the bilateral justice of war. From this it would follow, so the author explains, that “it was unlawful for either side to kill the other, and this would be self-contradictory, for it would mean that the war was just, but the killing was unjust”( *ibidem*, Q. 1, art. 3, p. 303). The point is particularly interesting because the idea of both parties being in the right is refuted through evoking and refuting a standpoint that was typical of mainstream humanist tradition, namely the one that linked the value of patriotism to the pursuit of empire. If a state is morally justified to seek imperial power, the implication would be that also another state would be similarly justified. The reasoning deployed by Victoria is interesting because it highlights what might be called, and is sometime called, “the relativism of patriotism”: see, for example, R. TUCK, *The Rights of War and Peace*, p. 31-34. With regard to the theological notion of “sin”, Vitoria underlines its centrality at the conclusion of his *De Iure Belli*: “The prince should remember that other men are his neighbours, whom we are all enjoined to love as ourselves; and that we all have a single Lord, before whose tribunal we must each render account for our actions on the day of judgement” (VITORIA, *De Iure Belli*, Conclusion, First Canon, pp. 326-327).

<sup>14</sup> See GROTIUS, D. I. B. P., book II, chap. XXIII, Sect. 13. With regard to Grotius’ qualifications of his position, here are his criteria: “A thing can be called just either from its cause, or because of its effects; and again, if from its cause, either in the particular sense of justice, or in the general sense in which all right conduct comes under under this name. Further, the particular sense may cover either that which concerns the deed, or that concerns the doer” (par. 1). Here is, however, Grotius’ main point: “A war cannot be just on both sides, just as a legal claim cannot; the reason is that by the very nature of the case a moral quality cannot be given to opposites as to doing and restraining” (par. 2). His position is somewhat tempered, however, with regard to “justice” considered in relation to “certain legal effects” of war: “In this sense surely it may be admitted that a war may be just from the point of view of either side; this will appear from what we shall have to say later regarding a formal public war” (par. 5). For the concept of “unavoidable ignorance” (“ignorantia inevitabilis”, in his original Latin), see *ibidem*, par. 3.

by recalling the concept of the “equality” of the warring parties, a concept already expressed dealing with the general definition of war and *hostes*, or enemies. This is to confirm and underline the overall coherence of his theoretical stance.

In order to demonstrate the “equality” of the belligerents in relation to “justice”, namely the assertion that a war may be waged with justice on both sides, Gentili develops a complex line of reasoning which appears to be hinged on two essential arguments. The first argument makes reference to the Roman law tradition, in particular to a new line of thought that had emerged in the context of the Renaissance Romanist tradition. To this regard he expressly indicates Fulgosius of Piacenza and, with particular emphasis, the influential Andrea Alciato, who in the new context had both felt reassured to restate openly the views of the Roman jurists as expressed in the *Digest*, which tended to treat the *hostes* on a juridical par, in relation to their formal public quality. The argument was used in combination with the metaphor of war as a “judicial process”, a metaphor already and principally used to justify war as such in the first instance. Gentili writes: “Those who contend in the litigation of the *forum* justly, that is to say, on a plausible ground, either as defendants or plaintiffs, and lose their case and the verdict are not judged guilty of injustice. And yet the oath regarding false accusation is taken by both parties. Why should the decision be different in this kind of dispute and in a contest of arms?”<sup>15</sup>

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<sup>15</sup> See GENTILI, D. I. B., L. I, Chap. VI, Engl. Transl., p. 32). With regard to his use of the jurisdictional metaphor, in addition to Alciato, Gentili makes express reference to his favourite Romanist sources, Bartolus and Baldus. These medieval authors, however, had refrained from endorsing all the way the Roman jurists’ classical position and had adhered instead, as Gentili noted, to the orthodox doctrine: “when war arises among contending parties, it is absolutely inevitable that one side or the other is in the wrong”. With regard to the equation war=judicial litigation, it should be noted that Gentili changed profoundly its established sense, which, in keeping with the “unilateral” notion of war typical of the scholastic vision, was traditionally confined to the aspect of the “law execution” (i.e. “*exsecutio iuris*”). Gentili, in conformity with his concept of war as “duel”, extended it also to the aspect concerning the “cognition” of the law, so that, prior to armed conflict, no one could assess the legitimacy of a claim or cause. According to such vision of the entire process, only victory would decide the legal controversy (and inextricably political as well!) and restore a state of orderly, though inherently troubled and unstable, peace. The connection of his reasoning with the basic concept of “duel” is confirmed by the citation of a Renaissance Italian moral philosopher, Francesco Piccolomini, who in his *Universa Philosophia de Moribus*, while dealing with the duel, refers incidentally, but significantly, to the bilateral justice in war (book 6, chap. 22).

The second argument is of epistemological character. If Gentili as a Romanist is not the first to assert the thesis of the bilateral justice of war, his originality emerges powerfully when he shifts his emphasis from the condition of the parties to the “material cause” of war and points out the “radical impossibility to know” the justice of the case. Gentili speaks of “the weakness of our human nature, because of which we see everything dimly, and are not cognizant of that purest and truest form of justice, which cannot conceive of both parties to a dispute being in the right”. Given the fact that in most cases it is impossible to ascertain which party is in the right, Gentili’s viewpoint is that it is better to assume, as a general rule, that both parties are in the right, in the sense that each has a plausible claim against the other. Again in perfect logical coherence with his basic idea of war as “duel”, only victory will decide the legitimacy of the cause.<sup>16</sup>

The epistemological argument, stressing the limits of human knowledge, appears to be central and pervasive in Gentili’s discussion of the matter and brings to surface once again the impact of the humanist tradition. I would like to stress, however, contrary to a different influential interpretation, that the humanist viewpoint is not connected here with the orthodox humanist perspective of the early Renaissance, a perspective advocating the legitimacy of the pursuit of glory and imperial power and therefore recognizing a similar moral right to the enemies.

Gentili’s arguments bring to surface quite a different strand of thought, a strand which rather reflects a later development of the humanist movement, which in the last quarter of the sixteenth century was entering a phase of “crisis” culminating with the culture of neo-scepticism and Tacitism. So Gentili’s position on the bilateral justice of war, being essentially characterized by neo-sceptical elements, far from reflecting the value of patriotism with its relativistic implications, reflects a shift towards a “culture of crisis”, a culture turning away from the humanism of early Renaissance towards an opposite paradigm, the paradigm of the “reason of state”. It is worth

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<sup>16</sup> *Ibidem*, Engl. Transl., p. 31. The pervasiveness of the “epistemological” motif is proved by its being evoked in the summing up of the whole argument, towards the end of the chapter: “Although it may sometimes happen (it will not

reminding, though, that the political culture underpinning his *De Iure Belli* still remains substantially linked to the moralistic humanism of Machiavellian descent, in which however his commitment to the moral value of liberty is mitigated by elements belonging to the contemporary neo-sceptical approach.<sup>17</sup>

#### 4. Pre-emptive self-defence vs. necessary self-defence

The most important of the topical questions, on which the battle between the humanists and the theologians was focused, was the issue of the legitimacy of the pre-emptive self-defence. Gentili considers it legitimate to oppose the violence of enemies not only when it is being committed, but also when it may possibly be committed. He starts the relative chapter, entitled “Defence on Grounds of Expediency”, by saying: “I call it a defence dictated by expediency, when we make war through fear that we may ourselves be attacked”.

“Fear” emerges here as a central concept of his vision of international order, both on the normative and the analytic level. He continues: “No one is more quickly laid down than one who has no fear, and a sense of security is the most common cause of disaster. This to begin with. Then, we ought not to wait for violence to be offered us, if it is safer to meet it halfway”. Again, in a likely reference to Vitoria’s definition of war - “The sole and only just cause for waging war is when harm

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occur very often, as you will learn forthwith) that injustice is clearly evident on one of the two sides, nevertheless it ought not to affect the general principle, and prevent the laws of war from applying to both parties”(Transl. p. 33).

<sup>17</sup> On the theme of the so-called “relativism of patriotism”, see R. TUCK, *The Rights of War and Peace*, cit., pp. 31-33. To this regard, while accepting as valid in principle Tuck’s insight concerning the relativistic implications of “patriotism”, I maintain that “the ethic of empire” is not a necessary feature of all humanist writings about war and, more particularly, that Gentili’s position, with regard to the thesis of the bilateral justice of war, is based on fundamentally different grounds. In this respect, as in many others, it is not correct to say, as Tuck does, that Gentili, though certainly deeply imbued with humanist political culture, is simply putting forward a humanist commonplace. For a general account of the emergence of the new humanism, based on neo-scepticism and Tacitism, see R. TUCK, *Philosophy and Government 1571–1651*, Cambridge 1993, Chap. 2. On Gentili’s variety of attitudes towards the transformations of humanist political thought, see D. PANIZZA, *Il pensiero politico di Alberico Gentili. Religione, virtù e ragion di stato*, cit., pp. 64-68, 207-213. On *De Iure Belli* as falling within the so-called “machiavellian moment”, see *ibidem*, pp. 146-163. In addition to the Romanist and humanist factors, Gentili’s reasoning about the bilateral justice is also influenced by a general factor, that is by his strongly “realistic”, or pragmatic, cast of mind. “It is the nature of wars for both sides to maintain that they are supporting a just cause”, this is a factual realization Gentili happens to make frequently in his discussion. In general terms, to Gentili, for international law to be a viable system, it has to conform closely to practice, although this is to be understood in the sense of the “best practice”. On Gentili’s methodology, considered in a broad trans-historical perspective, see the penetrating analysis by B. KINGSBURY,

has been inflicted” - he says: “One ought not to delay, or wait to avenge at one’s peril an injury which one has received”. This view is supported with an array of references to historical examples and learned opinions in an effort to demonstrate that an effective protection of the principle of “self-preservation” prescribes “pre-emptive” action on the basis of “fear”.<sup>18</sup>

An essential aspect of Gentili’s position is the further clarification he makes of the concept of “fear” by stressing its relativistic, or subjective, character. To this regard the clearest expression of his clarification is the following: “I read in Cicero: I do not inquire whether anything ought to be feared. I think every man ought to have the privilege of fearing what he chooses” (“Puto arbitrio suo quemque timere oportere”).

Gentili is probably led to specify his position against the objections that could be raised on the basis of Roman and civil law, where according to the views of some jurists justifiable “fear” had to be an actual and evident one. On the one hand he maintains that in an important public question like this the definitions of private law are wholly unsuitable, on the other he opposes a number of passages of Justinian’s *Corpus Iuris* and different authorities, all justifying anticipatory self-defense. Here is a clear significant passage, stressing the discretionary character of “fear: “You may also apply here the saying of the law: One must not dictate to any one what he is to fear” (“Non praescribendum, cur quis metuat”, *Digest*).

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“Confronting Difference: the puzzling durability of Gentili’s combination of pragmatic pluralism and normative judgement”, in *The American Journal of International Law*, vol. 92 (1998), pp. 713-723.

<sup>18</sup> See D. I. B., book 1, chap. XIV “De utili defensione”, Engl. Transl. pp. 61-66. “Fear” and “defence”, the combination of the two concepts entitles Gentili to characterize the entire system of the “just causes” of war as fundamentally based on “defence”. See to this regard the closing sentence of the chapter devoted to the justification of war as such: “Be it established as a fact, that even a war of vengeance and an offensive war may be waged justly. For I shall show that in the case of these also there is always a defensive aspect, if they are just. As Cicero says: “Certain it is that those wrongs which are inflicted intentionally, with the design of doing harm, often proceed from fear, since one who plans to injure another fears that, if he does not so, he will himself suffer some damage” (D. I. B. book 1, chap. V, Engl. Transl. p. 30). “Fear” constitutes also a key criterion for the victor who, in view of the establishment of a permanent peace, has the right to guarantee his future security. Particularly revealing is, for example, the following passage: “If the victor has regard to security, then he will be satisfied when the cause of fear is removed. And indeed the limit of justifiable protection is not said to be passed when any step is taken to avert danger, although that limit is not the subject of inquiry in a treatise on the law of nations or of princes”(D. I. B., book 3, chap. IV, Engl. Transl. p. 305 ).

In addition to the keywords of “self-preservation” and “fear”, not surprisingly Gentili introduces into the discussion the crucial notion of “power”. He does so ostensibly in close relationship to the theme of the ultimate subjectivity of “fear”, probably in order to mitigate it in some way, but also to develop further the argument with regard to its implications of political theory and contemporary political issues. Since no objective criteria, no general rule are available about legitimate “fear”, Gentili recalls the permanent relevance of a maxim of political prudence: “we should oppose powerful and ambitious princes”. Through a variety of historical instances and sources, Gentili demonstrates that the logic of power is necessarily a logic of imperial expansion. Hence he reiterates the general point: “It is better to provide that men should not acquire too great power, than to be obliged to seek a remedy later, when they have already become too powerful”.<sup>19</sup>

The conceptual argument is developed and reinforced empirically in a way that points to Gentili’s political preoccupations, namely to what he considered as the supreme urgencies of the times. The Turks on one side and the Spaniards on the other are expressly denounced as pursuing a policy of empire and presented as the best demonstrations of the theoretical validity of the point he is making. But of course it not only a matter of theory. In fact, the reference to the Turks and to the Spaniards culminates with an appeal to pre-emptive military action, more precisely to a collective action against the common danger: “Do not all men with complete justice oppose on one side the Turks and on the other the Spaniards, who are planning and plotting universal dominion... Shall we wait until actually they take up arms?... We must unite in opposing the common danger”.<sup>20</sup>

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<sup>19</sup> Here is the relevant key-passage in full: “Since there is more than one justifiable cause for fear, and no general rule can be laid down with regard to the matter, we will merely say this, which has always been a powerful argument and must be considered so today and hereafter: namely, that we should oppose powerful and ambitious chiefs. For they are content with no bounds, and end by attacking the fortunes of all... For pretexts for war are not lacking to those who strive for dominion and are already hated because of their power” (see GENTILI, D. I. B., book I, chap. XIV, Engl. Transl. p. 64). The original text reads as follows “Cum autem non una probabilis timendi causa sit; et generaliter de ea definiri nihil possit: hic dicemus tantum, quod semper fuit valde consideratum, et hodie, et deinceps considerandum est, ut principibus potentibus et ambitiosis obviam eatur: illi enim nullis contenti finibus, omnium aliquando fortunas tandem invadent... Neque enim occasiones desunt belli his qui ad imperium contendunt et iam odiosi propter potentiam sunt”. The original text of the second passage quoted above is: “Obsistendum igitur. Et cavere satius est, ne homines augeantur nimium potentia, quam contra potentiores postea remedium quaerere”.

<sup>20</sup> See GENTILI, *ibidem*, Engl. Transl. pp. 64-65. Then he continues in harsh terms: “ While your enemy is weak, slay him. Wickedness should be destroyed, that it may not yield a crop of weeds. Why are not these words of St. Jerome

It is important to stress that Gentili's argument about the Turks and the Spaniards is devoid of any ideological connotation. No reference at all to the Catholic Counter-Reformation or to an Islamic expansionism. The appeal to action is based solely on the "legitimate fear" justified by the inner "logic of power", a logic Gentili describes in neutral, almost "scientific", terms. A scientific overtone of a kind can be detected in a quotation he makes, apparently with a view to further developing his "theoretical political" point. The author, while rehearsing the same basic point from the angle of "power", maintains that "It is enough to be able to do harm" ("Posse nocere, satis est"). Then he recites: "So, too, the maintenance of union among atoms is dependent upon their equal distribution; and on the fact that one molecule is not surpassed in any respect by another".<sup>21</sup>

Here Gentili moves on to enunciate the principle of the "balance of power" and presents it as the cornerstone of a just and stable international order. Correspondingly, he extolls the supreme wisdom of Lorenzo de Medici who, by deliberately and successfully pursuing a policy of balance of power, had given peace to Italy. Such an exemplary policy, according to Gentili, should be taken as the right recipe in order to solve the problems of the age: "Is not this even today our problem, that one man may not have supreme power and that all Europe may not submit to the domination of a single man? Unless there is something which can resist Spain, Europe will surely fall".

This is Gentili's scheme of thought on the issue of "pre-emptive self-defence". In order to better assess its character and originality, we have to consider it in the context of the "great debate", by comparing it with the theological paradigm of Vitoria and with the position of Grotius, also bound to become paradigmatic. At the end of the analysis, we shall also be able to fully appreciate how topical, highly contentious and dense with implications of various order was that theme in early-

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appropriate here? We must unite in opposing the common danger. A common cause for fear unites even those who are most alien; this is a natural law, quoted by our friend Baldus from Aristotle. The purpose of empires is to avoid harm, as Dionysius represents some one as justly saying; and no oracle could have spoken with greater truth, in the opinion of Bodin".

<sup>21</sup> As regards the metaphor relating to the physical world, which the translator, John C. Rolfe, renders with terms like "atoms" and "molecules", if its general sense is preserved, the original wording does not sound so modern: "Etiam perseverantia concordiae inter elementa sic ab aequa partitione est; et dum in in nullo aliud ab alio vincitur" (passage drawn from Apuleius, *De mundo*, , XXI, 336).

modern Europe. And, perhaps, all this may have an archetypical relevance in respect of the “great debate” raging on the same issue today.

“The sole and only just cause for waging war is when harm has been inflicted”, this is the fundamental principle which governs Vitoria’s system of ideas on the law of war. As such, besides the general aspects of the system which have already been discussed, this principle projects its relevance on the issue of legitimate defense. The Romanist legal formula “Force may be repelled by force”, as quoted from the *Digest* (*Vim vi repellere licet*), is the governing principle adopted by Vitoria and applies both to public and private self-defence. If by blurring the distinction between public and private, Vitoria diverges from the Thomas Aquinas’s line which denied that war could be declared by a private person, on the other hand by doing so he reinforces the mainstream tradition regarding the point at issue, namely the concept of self-defence. In fact, the Dominican theologian endorses the same fundamental principle, “Self-defence must be a response to immediate danger”, namely to an immediate and actual attack. The idea of “response” remains central, in keeping with his basic definition of war, just as equally central remains the criterion of “immediacy”, or “immediate necessity”. This is the only form of “defensive” war admitted by Vitoria and permitted to anybody, private or public.

A difference is however established between a private person and a legitimate ruler, in the sense that the “response” of the latter may transcend the limit of an “immediate retaliation” and take the form of an “offensive” war. Offensive war in this case is justified by “punishment and revenge” of *iniuria accepta*. As a consequence, this kind of war loses its connection with the concept of “defence” while remaining subject to the usual condition of “injury received”: “there can be no vengeance where there has not first been a culpable offence”, Vitoria underlines once again.<sup>22</sup>

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<sup>22</sup> For the essential passages concerning Vitoria’s position on the question of self-defence, see VITORIA, *On the Law of War*, in A. PAGDEN ed., *op. cit.*, especially pp. 297-298 (Question 1, Article 1), 299—300 (Question 1, Article 2), pp. 302-304 (Question 1, Article 3).

This is the essence of the views and arguments set out by Vitoria on the crucial question of self-defence. The doctrinal difference between the Spanish theologian and Gentili is evident and profound, a difference marking in exemplary way the full distance between scholasticism and humanism. Moving on to Grotius, his views on the issue seem to reproduce the fundamentals of the “theological paradigm”. The structure of his argument is more articulate, insofar as he seems to be more aware of the challenge represented by the humanist tradition, which, although amply mobilized, appears to be cast in a linguistic register which remains distinctly “theological”.

Firstly, most significant is the fact that Grotius, when dealing with the issue of defense in public war, not only rejects out of hand the legitimacy of pre-emptive action, but he does so by singling out and openly attacking Gentili’s position on the same issue. The title of the relative section reads as follows: “A public war is not admitted to be defensive which has its only purpose to weaken the power of a neighbour”. It is worthwhile quoting in full the terms of this extraordinary, uniquely illuminating passage, all the more so as Gentili emerges as the principal target, the only target explicitly cited at margin of the text.

Here is the passage: “Quite untenable is the position, which has been maintained by someone, that according to the law of nations it is right to take up arms in order to weaken a growing power which, if it became too great, may be a source of danger. That this consideration does enter into deliberations regarding war, I admit, but only on grounds of expediency, not of justice. Thus if a war be justifiable for other reasons, for this reason also it might be deemed far-sighted to undertake the war; that is the gist of the argument which the writers cited on this point present. But that the possibility of being attacked confers the right to attack is abhorrent to every principle of equity. Human life exists under such conditions that complete security is never guaranteed to us. For protection against uncertain fears we must rely on divine providence, and on wariness free from reproach, not on force”.

The tone of the attack is definitely harsh and direct. Gentili's assertions are labelled as "untenable", even "abhorrent to every principle of equity". Equally significant, almost "theological", one might be tempted to say, are the considerations Grotius puts forward in support of his stance: since insecurity is a permanent feature of the human condition, we ought to rely on divine providence in the first place, then also on precautionary measures, provided they are non-violent ("Adversus incertos metus a divina providentia, et ab innoxia cautione, non a vi praesidium petendum est"). In other words, Grotius extends to public war the basic criteria laid down with regard to individual self-defence, which, in emphasizing the classical requirements of "immediacy" and "certainty", were as such a commonplace. The general principle involved is therefore one based on a concept of legitimate "fear" which admitted only a response to an actual and obvious danger: "Fear of an uncertainty cannot confer the right to resort to force" ("metus rei incertae ius ad vim dare non potest"), this is Grotius' concise terse pronouncement.<sup>23</sup>

The Dutch jurist appeals to the same principle in relation to another case of pretended "defensive war", which is discussed in the following section, entitled "A public war is not admitted to be defensive on the part of him who has himself given just cause for war". To render the symmetry strikingly perfect, it is to be noted that Gentili is once again explicitly pointed out as the principal villain and his views on the matter defined as "unacceptable", or "distasteful" ("Nec minus illud displicet..."). Gentili, in fact, had distinguished three different cases of defence, namely necessary, expedient and honourable, or *ratione humanitatis*. And, prior to the question of defence on grounds of expediency (book I, chap. XIV), he had discussed the case of "necessary" defence, corresponding to the classic axiom of the *Digest* (*Vim vi repellere licet*). Though this was basically a shared uncontroversial axiom, at the heart of what Grotius found unacceptable was the unrestricted latitude Gentili demonstrated to allow to the right of self-defence, by stating that "even though we have provoked the war which is made upon us, this is a just cause". More precisely, Grotius found

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<sup>23</sup> For Grotius's cited key-passage, see GROTIUS, D. I. B. P., book II, chap. I, sect. XVII. For his discussion on the requirements of just defense in private war, see *ibidem*, book II, chap. I, sect. V, entitled "War in defence of life is

objectionable the ground given by Gentili, that the victor is never “satisfied with a punishment commensurate with the wrong which he has suffered”. Clearly this consideration implied the idea that “fear of something uncertain” could constitute a legitimate cause of war, so Grotius could not but attack Gentili also on this account, in rigorous coherence with the arguments he had just deployed on the issue of pre-emptive strikes.<sup>24</sup>

The political and cultural relevance of the issue of pre-emptive self-defence is highlighted by the fierce and articulate attack that Grotius, with unusual explicitness, mounts against Gentili. This attack is confirmed and reinforced by the fact that, in a chapter expressly devoted to the principal kinds of “unjust causes”, the case of “fear with respect to a neighbouring power” figures as the first of the enumeration. As to its inherent theoretical magnitude, this is revealed by the multiple connections the arguments employed by the two jurists present with basic aspects of their respective systems. On Grotius’ part the repudiation of the “fear of uncertainty” as a legitimate ground of war is linked to the impact of various factors, first the “unilaterality” of the scholastic concept of “wrong received” (*iniuria accepta*) and the correlative “unilaterality” of “right reason” (*recta ratio*).

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permissible only when the danger is immediate and certain, not when is merely assumed”.

<sup>24</sup> Here is the relevant Grotian passage: “Not less acceptable is the doctrine of those who hold that defence is justifiable on the part of those who have deserved that war may be made upon them; the reason they allege is, that few are satisfied with exacting vengeance in proportion to the injury suffered. But fear of an uncertainty cannot confer the right to resort to force; hence a man charged with a crime, because he fears that his punishment may be greater than he deserves, does not, on that account, have the right to resist by force the representatives of public authority who desire to take him” (GROTIUS, D. I. B. P., book II, chap. I, sect. 18). The issue of anticipatory self-defence is referred to and discussed again, with some additional interesting arguments, when Grotius undertakes to discuss the theme of the “unjust causes” drawing up a list of them: see *ibidem*, book II, chap. XXII, sect. 5, entitled “Such a cause is the fear of something uncertain”. Particularly interesting appears the express denial of the relevance of “power” as such in justifying “pre-emptive” self-defence: “Fear with respect to a neighbouring power is not a sufficient cause...” (“Metum ergo ex vicina potentia non sufficere supra diximus. Ut enim iusta sit defensio, necessariam esse oportet, Qualis non est nisi constet, non tantum de potentia, sed et de animo, et quidem ita constet, ut certum id sit ea certitudine quae in morali materia locum habet”). In other words, against those who like Gentili recognized the importance of “power” as something objectively “offensive”, thus justifying “pre-emptive” self-defence, Grotius stresses here the primary relevance of the “intention” or “animus”. It is the “intention” that confers to the potential danger constituted by military “power” the quality of “certainty” justifying an action of defence. These qualifications, however, turn the issue into an ordinary case of legitimate self-defence, or “necessary defence”. Gentili, by the way, distinguished between “necessary defence” and “defence on grounds of expediency”. Furthermore, Gentili consistently excluded from his system the notion of “intention”, a notion clearly derived from the “theological” tradition about war (see end of chap. VII, book I, where he dismisses expressly the relevance of the “bona intentio” for the justice of war - “this is a problem for theologians”, he says). To the contrary Grotius seems to keep alive that tradition in some way, as we shall see later..

Besides, although Grotius' moral system is based on the minimalist principle of self-preservation (*defensio sui and rerum*), just as in Gentili's case (*tuitio sui*), he is not prepared in the least to depart from the cited presuppositions, in particular to come to terms with the Machiavellian "verità effettuale", or the "realities" of politics. By repudiating the idea that "expediency" can be the ground of legitimate self-defence, he repudiates more generally the basic humanist assumption of "expediency" as an ethical principle.

With regard to the same points Gentili stands on the opposite side. In particular, it is evident that for the Italian jurist the category of "expediency" is considered an autonomous source of "justice" and is interpreted according to the Machiavellian paradigm of civic humanism. It is also appropriate to reiterate here how dominant is the influence exercised by Renaissance humanism on his jurisprudence of war.<sup>25</sup>

#### 5. The making of peace: restitution-punishment vs. conquest-empire

Another pivotal theme of the "great debate" between theologians and humanists was that focused on the rights of the victor in establishing peace. The central importance of the theme is clearly linked to its relevance with regard to the issue of the legitimacy of conquest and empire. On the part of the theologians, we are faced with an austere view of war, a view emphasizing its narrowly penal or jurisdictional function. This view corresponded to the mainstream tendency to deny legitimacy to the idea of conquest, at least in principle. On the humanist side, instead, we move from the Machiavellian "quest for empire" as a precondition of "civic virtue" and "good life" to the more realistic theme of "self-preservation" in a context of inherent insecurity, dominated by the logic of

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<sup>25</sup> The "theoretical political" thrust of Gentili's position is mainly drawn upon Thucydides and the ancient orators, Cicero being the most important of them. Grotius, though amply imbued with same culture, holds fast to an austere view of political justice and war. For example, in the case we have just examined, he maintains that "expediency" alone cannot constitute a "just cause" of war. In that context, however, a minimal vague concession can be discerned in the following remark: "Public powers have not only the right of self-defence, but also the right to exact punishment. Hence for them it is permissible to forestall an act of violence which is not immediate, but which is seen to be threatening from a distance; not directly - for that, as we have shown, would work injustice - but indirectly, by inflicting punishment for a wrong action commenced but not carried out" (see GROTIUS, D. I. B. P., book II, chap. I, sect. 16).

“power” and “fear”. As we shall see, the latter version of the paradigm is at the heart of Gentili’s treatment of the issue.<sup>26</sup>

Starting with the “theological” model of thinking, the cogency of the “jurisdictional” metaphor with regard to the role of the victor is evident in the following canon: “The victor must think of himself as a judge sitting in judgement between two commonwealths, one the injured party and the other the offender; he must not pass sentence as the prosecutor, but as a judge”. Of course, another key presupposition was that the victor, in order to be a “judge”, had to be a “just” victor, which involved the characteristic consequence of maintaining a rigorously tight connection between the question of the “effects” of war and that of the overall “justice” of war. In particular this aspect was consonant with the basic view of war as a unilateral *executio iuris* or “law enforcement”, in clear contrast with Gentili’s vision of war as “duel”, which implied necessarily the idea that war responded to the need of settling the uncertainty about who is in the right.<sup>27</sup>

The strictly jurisdictional character of peace finds its substantive expression in the two purposes that the victor-judge, according to Vitoria, must realize in making peace, namely “restitution”/“reparation” and “punishment”. In other terms, respectively, the victor may reclaim all losses on the one hand and avenge the injury on the other. The sole purpose of punishment/vengeance is to deter the enemy-delinquent from harming others: no *libido ulciscendi* is therefore admitted. The two basic purposes must be carried out in observance of two crucial criteria, “proportionality” and “moderation”, sometimes even “mercy” or “humility”.

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<sup>26</sup> By stressing that we are dealing here with the positions of the “mainstream” theological tradition, namely the Spanish school and medieval scholasticism, we refer to the existence of a medieval theological tradition endorsing Aristotle’s notion of “natural slavery”, justifying wars of enslavement and empire. In the age of the colonization of the New World, that tradition found its most authoritative supporter in Juan Ginés de Sepulveda, translator and editor of Aristotle’s *Politik* (on the tradition of natural slavery, see R. TUCK, *The Rights of war*, cit., pp. 65-67). On Machiavelli and the “republican tradition” on the topic of “empire, see Q. SKINNER, *Machiavelli*, in *Great Political Thinkers*, Oxford 1992, pp. 81-86; J. POCOCK, *The Machiavellian Moment*. With regard to the alternative version, fully developed by the “reason of state” theorists, see the general account given by R. TUCK, *Philosophy and Government*, cit., Chap. 2.

Vitoria is, of course, aware of the “political dimension” of war and peace, and we can find appropriate, though minimal, references to it. For example, while dealing with the issue of the rights of victory, he proclaims the following general principle: “A prince may do everything in a just war which is necessary to secure peace and security from attack”. The example he immediately adds to the principle appears to be, however, of a comparatively restrictive kind: the victor may pursue security and peace “for instance pulling down fortresses and all other such of this kind”. The purposes of “peace and security” are also satisfied by the institute of “punishment”, but this was a commonplace and does not alter the minimality of the “political” aspect in Vitoria’s treatment of the whole subject.<sup>28</sup>

But the “political” side of the matter comes to the forefront again in a different context, in that part of his treatise specifically devoted to the most contentious issues, in particular the issue relating to the right of the victor to carry out conquest. With special regard to the purpose of “peace and security”, Vitoria recognizes that it is sometimes lawful to “occupy and hold any enemy fort or city which is necessary for our defence”. In other words, sometimes victory can be translated into “conquest”, but any territorial annexation ought to be limited by the necessities of defence.

More important titles of a “just conquest” are the other two basic purposes of war, “restitution” and “punishment”. After stressing again that “moderation” and “proportionality” must be the governing factors, Vitoria spells out clearly the practical effect of the whole set of principles: in the name of punishment, the victor is entitled to occupy a part of the enemy territory. The author is explicit in describing as “intolerable” the acquisition of the whole territory, whereas he declares legitimate, legitimate beyond any doubt, the occupation of “a part” of it. What is striking is the fact that Vitoria reinforces his final point by citing the example of the Roman Empire. Since the Roman Empire was built up step by step on the same justifications and its justice and legitimacy is universally

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<sup>27</sup> For the passage on the victor as “judge”, see VITORIA, *On the Law of War*, Conclusion, Third Canon, in PAGDEN ed., *op. cit.*, p. 327.

recognized, Vitoria considers his point conclusively proved beyond doubt. In this respect, in strictly logical terms, the reference to the Roman Empire is not inconsistent with the development of his arguments on that particular point. Nonetheless the citation sounds in some way abrupt and paradoxical in respect of the overall structure and spirit of Vitoria's reasoning, characterized as it is by an austere theological ethic and by a concomitant abhorrence towards the values and principles of Renaissance political culture. In fact, the Roman Empire was pre-eminently a humanist *topos*, employed by the humanist writers to support a totally opposed vision of morality and politics.

We are confronted here with the same ambiguity which characterizes the previous relection *On the American Indians*, where Vitoria, after discussing a whole series of titles which might be alleged to justify the conquest of the New World, left the Castilian crown with only a slender claim to jurisdiction, but he subtly abstained from ruling out the legitimacy of the Spanish empire in America. This ambiguous attitude was probably imposed by the starkly objective situation of *fait accompli*, the precarious legitimacy of which however could be supported by the example of the Roman Empire, especially since that empire had been declared legitimate by great Christian authorities like St. Augustine, St. Ambrose and St. Thomas.<sup>29</sup>

As to Grotius, the essentials of his position on the law of victory seem to be modelled on the Spanish theological position, although considerations pertaining to political expediency, drawn from humanist sources, are given a wider and more incisive role. He holds fast to the basic principles of the scholastic doctrine of just war, first of all the rigid dichotomy between "just" and "unjust" war, with its obvious implications on the "just" victor. Another central feature is the strictly "judicial" conception of war, having as a consequence the right of the victor to act as a

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<sup>28</sup> See *ibidem*, Question 1, Article 4 ("what, and how much, may be done in the just war?"), pp. 304-306. For Vitoria's "political" references to "peace and security", see *ibidem*, p. 305.

<sup>29</sup> For the relevant passages on the question of the victor's right of conquest, see *ibidem*, Question 3, Article 7 "Whether all the booty taken in war belongs to the captors", in particular p. 324. For Vitoria's defence of the legitimacy of the Roman Empire, see p. 325, to be supplemented and compared with similar passage in his *On the American Indians*, Question 3, Article 7 (Seventh just title, for the sake of allies and friends), p. 289. For a general assessment of Vitoria's attitudes towards the legitimacy of the Spanish empire in America, see A. Pagden's Introduction to his *VITORIA, Political Writings*, cit..

“judge” by inflicting “punishment” upon the wrongdoing state. Only on this ground, that is only and exclusively in the name of “punishment”, Grotius acknowledges the right of the victor to deprive the defeated enemy of its sovereignty. But, contrary to Vitoria, who had declared “intolerable” the acquisition of the whole of the enemy’s land, Grotius maintains that this right of territorial conquest is not subject to any preliminary limit of extent, at least in principle.

This specific divergence from the theological tradition does not alter however the general character of Grotius’ theoretical scheme of thought. In fact, the traditional limits of the right of conquest are emphatically reaffirmed, firstly the criterion that “punishment should not exceed the crime“, as Vitoria had literally said. Here is a significant passage: “As other things may be acquired in a lawful war, so there may be acquired both the right of him who rules over a people and the right which the people itself has in the sovereign power; only in so far, however, as is permitted by the measure of the penalty which arises from a crime, or some other form of debt”. Other limits mentioned in the same context are a sentiment of “compassion” for the vanquished and, above all, considerations of “political prudence”.

According to the scholastic canon of the just war theory, the concept of “punishment” or “vindicative justice” involved a “political” aspect, identified in the purpose of “deterrence” from future harm or attack. To be more precise, as we have already stressed, “punishment” was the only heading under which the “political” aspects of the matter, in particular the issue of “peace” and “security”, was dealt with and settled. Now, Grotius does not fail to touch upon this crucial aspect according to the canon, but he does so in a rather characteristic manner. Instead of considering the need of “security” as a factor adding to the “severity” of punishment, as for example Vitoria had done, he chooses to refer to “security” only as to a basic factor of “moderation”, a moderation linked to prudential, rather than humanitarian, considerations. This peculiar reversal of perspective is apparent in a proposition, which follows immediately the previous quotation: “ To these reasons should be added the avoidance of extreme danger. But this reason is very often confused with the

others, although both in establishing peace and in making use of victory it deserves particular attention for its own sake. It is possible to forgo other things from compassion; but, in case of public danger, a sense of security which exceeds the proper limit is the reverse of compassion”.<sup>30</sup>

Grotius shows, in fact, a characteristic propensity to use classical and Renaissance sources in support of views which were antithetical or quite different to those generally upheld by the humanist writers. For example, Thucydides and Tacitus were used, through well chosen quotations, to deny legitimacy to anticipatory self-defence, whereas the same authors represented the paradigm for that very case, and for what we can term ”reason of state” views of war and international relations. With regard to the Roman empire, Grotius’s attitude seems mainly bent on denouncing its fundamental injustice. Most significant is the fact that the chapter specifically devoted to the “unjust causes” starts with an express reference to the exemplary case of the Roman wars. In particular, the Romans are accused to have always pursued a deliberate policy of power and empire under the veil of pretended “just causes”, that is by maintaining the appearances that they waged war only to ward off injuries.<sup>31</sup>

Since the issue of “empire” was a central *topos* in the contrast between the humanist and theological perspectives, Gentili as a champion of the humanist perspective could not fail to address the issue.

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<sup>30</sup> See GROTIUS, D. I. B. P., Book III, Chap. XV, Sect. 1 (“Temperamentum circa acquisitionem imperii”/“To what extent moral justice permits sovereignty to be acquired”). For Grotius’ emphasis on the “utility” of “moderation” in the “acquisition of empire”, see *ibidem*, sect. 7 and 12. This peculiar combination of concepts, in stressing the dangers inherent in “excess” of imperial expansion, represent an interesting anticipation of a theme bound to become central in eighteenth century political thought (Montesquieu, Gibbon, Hume, Bentham and others). Such a convergence is, of course, largely extrinsic, since the scholastic inspiration of Grotius’ position, rooted in the concept of “punishment” in relation to “temperamenta belli”, has little in common with the theoretical and political concerns of the Enlightenment philosophers.

With regard to the concept of “punishment” in Grotius, an additional factor of “moderation”, which was also in line with the scholastic tradition, is the rejection of the subjective element of “vengeance” as an acceptable ingredient of it. The gist of the arguments is that “punishment” must have in view only the public good, which consists in preventing the future recurrence of a wrong. As a consequence to take vengeance in order to soothe distress and obtain psychological satisfaction for a wrong suffered is censured as immoral by Grotius. To this regard see *ibidem*, Book. II, Chap. XX, sect. 4, 5 and 10. As we shall shortly see, Gentili’s attitude is totally opposed to such a position and Grotius had certainly in mind such a position, though he abstained from another direct attack (see GENTILI, D. I. B., Book I, Chap. XIX, Engl. Transl., p. 83; and Book 3, Chap. XIII, Engl. Trans. p. 353.

<sup>31</sup> On the peculiar use of classical sources by Grotius, see for example D. I. B. P., Book II, Chap. I, Sect. 5, where in defense of his view on pre-emptive self-defence he selects passages from Thucydides, Cicero and Livius, the same authors Gentili uses in support of a completely different view. As to Grotius’ attitude towards the Roman wars and the Roman empire, particularly significant and emblematic are the evaluations expressed in D. I. B. P., Book II, Chap. XX, Sect. 43; B. II, Chap. XXII, Sect. 1; B. II, Chap. XXV, Sect. 8.

As a matter of fact, he did it in a most resounding way by launching a blunt attack to the ensemble of the school of the Spanish theologians. These are the opening words of his attack, in the form of an invective: “Inepti, inquam, isti Hispanici, neque ex Hispanico praesenti stomacho, qui non Alexandri unius, sed omnium gentium et omnium temporum imperia, tenuibus nata initiis, aucta per rem bellicam, condemnarunt. Romanorum imperium a casis pastorum venit, et virtute factum audimus” (“Those Spaniards, I say, were foolish and not of the kidney of the modern Spaniards, who condemned the empires, not of Alexander alone, but those of all nations and all times which were sprung from humble beginnings and increased by the art of war. We hear that the Roman Empire began with shepherds’ huts and was created by valour”). The core point, against those who oppose the right of conquest of the victor, is then summarized in this way: “I reply that such things (namely the seizure of lands) are just for princes, since in that way they provide for their own victory and security by making their enemies weaker and themselves stronger; so that the enemy may dare less in the future or have less power, and that they themselves may have less cause to fear the same dangers”.<sup>32</sup>

In order to make full sense of Gentili’s point, it is necessary to consider it in the context of his general approach to the subject of “peace”, more precisely the right order of peace. Starting from the famous definition of Augustine about peace as the true end of war (“peace is not sought in order to arouse war, but war is waged in order to win peace”), he stresses the supreme importance of an approach aimed at establishing a permanent peace. The moral value of the stability of peace is clearly expressed by the following passage: “The victor should grant a peace of such a kind as to be lasting, since it is the nature of peace to be lasting”. On this somewhat conventional basis Gentili moves on towards a profoundly innovative conception of peace, a conception that places maximum emphasis on the tight linkage between the “right order of peace” and “political prudence”, between

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<sup>32</sup> See GENTILI, D. I. B. P., Book III, Chap. IV (“On Exacting Tribute and Lands from the Vanquished”), Engl. Transl. pp. 304-305. Although the attack is directed against the whole of the Spanish school, Gentili seems to be referring in particular to Diego de Covarruvias and his relection *Regulae Peccatum* (paragraph 11, “de Rebus in bello captis”), the only source which appears cited at margin.

“justice” and the “art of statecraft”. In this case the discourse of “jurisprudence” tends to coincide with the discourse of the “political scientist”, preoccupied with the objective of the stability of peace as understood from the point of view of the victor’s “security”. Gentili is aware of the overlapping of the different planes of discourse: “In this discussion we are approaching the boundaries of politics and leaving our subject; and I seem to wish to teach the same human wisdom as Cardanus...Our researches are directed towards natural wisdom, which tells what may be justly done”. Such a conception marks a significant departure from the narrowly penal view of peace which was so characteristic of the traditional theological school.<sup>33</sup>

The theoretical structure of Gentili’s reasoning is based on two distinct key concepts, the traditional one of “punishment” (*ultio*) and the innovative one of the “firmness of peace” (*firmitas pacis*), closely linked to the concept of “security”. As a consequence, contrary to the scholastic tradition, which resolved the issue of “security” within the confines of “punishment”, Gentili deals with “security” under two distinct headings, that of “punishment” and that of the “firmness of peace”, thus assigning to it a stronger and, more importantly, an additional independent role in the construction of a “just order of peace”. In fact “security”, being in part dissociated from “punishment” and attached to “firmness of peace”, becomes free from the constraints of the rules concerning “punishment”, namely the limits of “proportionality”, “moderation” and “compassion”. This important distinction and its novelty are apparent in one of the basic preliminary definitions: “The past has an eye to vengeance, the future to a permanent establishment of peace; nay, the past also has regard to this permanence. But the two topics must be considered separately”.<sup>34</sup>

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<sup>33</sup> On the basic definition of peace, see GENTILI, *ibidem*, Book III, Chap. I (“On Peace and the End of War”). With regard to the overlapping of the “juridical” and “theoretical political” discourses as reflected in Gentili’s words, see *ibidem*, Book III, Chap. XIII, Engl. Transl. p. 359.

<sup>34</sup> For the novel distinction between “punishment” and “firmness of peace”, see *ibidem*, Book III, Chap. I, Engl. Transl. p. 290. On the general criteria to be followed by the victor in the infliction of punishment, see *ibidem*, Book III, Chap. II (“Of the Vengeance of the Victor”). Particularly striking and characteristic is Gentili’s inclination to deal with the “virtuous” limits to “punishment” in a pragmatic way, which reminds of the Machiavellian treatment of the theme “virtues/vices” in *The Prince*. For example, dealing with “moderation” and “compassion”, he observes: “Hold to the mean, if you do not want to lose moderation; a middle course is the seat of moderation and moderation is virtue...Cicero indicates as this mean, and as due moderation, the absence of licence and cruelty. But here, as in other

It is, however, in dealing with the topic of the victor's rights of "punishment" that Gentili comes across the highly contentious *topos* of territorial conquest and launches his attack against the Spanish theologians. Choosing to respond on the same level of language, he mobilizes the assumption that "punishment" is not limited to the past, but applies also to the future by preventing future wrongs: "Punishment usually fulfils two ends, solace for injury and security for the future". As a consequence, the victor is entitled to deprive the enemy of his territory in the name of punishment. Gentili's arguments about "security" are strictly linked with the twin concepts of "power" and "fear". In fact, in legitimating the victor's right to "security" through territorial acquisition, he stresses the general point in terms that emphasize the centrality of the two concepts. It is worth recalling the relative key passage quoted above: "The princes provide for their security by making their enemies weaker and themselves stronger... so that they themselves may have less cause to fear the same dangers".

The logic of "power" and "fear" stands out even more clearly when Gentili tackles the second part of his definition of peace, namely the conditions of a "permanent peace". The relative chapter, entitled "On Insuring Peace for the Future", embodies the quintessence of the humanist "art of statecraft". The political substance of his discussion is provided by the writings of the ancient orators like Demosthenes and Cicero, Tacitus, by the "reason of state" ideas expressed by Guicciardini and Cardanus, by assumptions and precepts clearly derived from Machiavelli. As already anticipated, given the equation between "just peace" and "permanent peace", given also the convergence of the latter principle with that of "self-preservation", the language of humanist political theory tends to translate almost directly into the language of jurisprudence. Machiavelli, though never cited, is clearly the central source of inspiration. We can detect the same appeal to the realities of political life, to its incessant flux and to the variability of situations. These ideas

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cases, anger must not always be kept in check, for it often leads to good actions and brings about justice. Even to spare is not always a sign of compassion, but sometimes it is a fault and due to cowardice" (see *ibidem*, Engl. Transl. p. 294).

reflected the central principle of Machiavelli's new political morality, that is the freedom for the "virtuous" prince to do whatever dictated by necessity in order to attain the highest moral ends.

Although repudiating, expressly and repeatedly, the axiom that might is right, Gentili recognizes the paramount importance of "power" and "fear" in the dynamics of international relations, and their consequent impact on the normative aspects. In other terms, also in relation to the problem of peace, we can see at work the same way of thinking which underpins Gentili's treatment of the issue of pre-emptive self-defence. Here is a significant passage: "If the victor provide for his own interests by leaving nothing to the will of the conquered, he cannot be censured with justice. Even an ungrounded fear is not censured in a matter which depends upon the will of another. Power is always under suspicion, since it is believed to desire whatever it is supposed to be able to effect. For the statement of Aristotle is true that men do injury in great part because they have the power to do so". As we can readily see, the quotation highlights both the relevance of "power", including its objective character, and that of "fear", including the characteristic idea of "legitimate fear" as inherently "subjective".<sup>35</sup>

These are the essential features of his theoretical approach to the subject of peace. The thesis of the legitimacy of conquest and empire clearly emerges as the end-result of his arguments and the distinguishing feature of his position. For a correct assessment of it, though, it is essential to stress

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<sup>35</sup> See *ibidem*, Book III, Chap. XIII, Engl. Transl. p. 358. The argument of "power" as an objective factor is confirmed on a more general level in the same context: "Those are our enemies who have cause for hostility, even though they pretend the contrary. Therefore the strength of the conquered should be broken. Fear should be instilled into them besides, lest even even in their weak state they might venture intoupon some move. For on these two things, a consciousness of weakness and the fear of punishment, are nearly all the laws of mankind by which society is held together. The philosophers discuss the question whether it is more advantageous to be feared than to be loved, and some say it is foolish and entirely erroneous to trust more to love. And those who hold the contray view, and say that nothing is more suitable than love and nothing more alien than fear, nevertheless tell us that severity must be used by those who hold others in their power" (*ibidem*). The reference to Machiavelli's treatment of the dilemma love/fear is evident, although he only cites Cardanus and Cicero (see *The Prince*, Chap. XVII). Another related point derived from the same source is the precept that "half measures are for the most part foolish" (GENTILI, *ibidem*, Engl. Transl. p. 357). As regards the correlation between "security" and "fear" and the subjectivity of the latter, here is a significant passage: "Everything is done according to the discretion of a good man, which varies under different circumstances. If the victor has regard to security, then he will be satisfied when the cause of fear is removed. And indeed the limit of justifiable protection is not said to be passed when any step is taken to avert danger, although that limit is not the subject of inquiry in a treatise on the law of nations or of princes" (see GENTILI, D. I. B., Book III, chap. IV, Engl. Transl. 305). While dealing with the question of pre-emptive war, the author had given a definition fundamentally similar: "I do not inquire whether anything ought to be feared. I think every man ought to have the privilege of fearing what he chooses" (*ibidem*,

that the legitimacy of conquest and empire is only justified in so far as it is functional to what is the highest moral goal of all, that is self-preservation. Gentili's arguments about the conclusion of peace contain no concession to the orthodox humanist ideals of glory and dominion for their own sake. Again, most significantly, the pursuit of empire does not figure at all among the legitimate causes of war, whereas self-preservation emerges as the paramount principle underlying the whole system. Moreover, it should be remembered that Gentili, in attacking the Spanish and Turkish ambitions of empire, strongly recommends the principle of the balance of power as the ideal basis of international order.

It is in the light of these considerations that Gentili's defence of the legitimacy of paradigmatic historical empires, such as the Alexander and the Roman empires, must be interpreted. In particular, the Roman empire is legitimate because it could profit from a series of victories subsequent to a series of just wars, in conformity with the laws of war. In other words, the Roman empire is legitimate because it can be construed as the "unintended consequence", as it were, of legitimate wars. It should be remembered, however, that according to Gentili the notion of "just cause" means only "plausible ground" (*probabilis causa*) and that, in respect of the justice of war, only an ostensible "plausible ground" is necessary and sufficient, regardless of a possible unjust "concealed reason" (*ratio latens*). So, although he recognized that, at the level of true motives, the Romans pursued a deliberate policy of empire, their empire was nonetheless legitimate because their wars were justified on the ground of legitimate causes. In particular, because the Romans had extended their empire by pretending to come to the aid of their friends and allies.<sup>36</sup>

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Book I, Chap. XIV, Engl. Transl. p. 63. See also *supra*, note 18).

<sup>36</sup> See GENTILI, D. I. B., Book I, Chap. XIV, Engl. Transl. p. 64: "Pretexts for war are not lacking to those who strive for dominion and are already hated because of their power... For presently by lending aid to their allies and friends they achieved the conquest of the world". The passage is rather dense of meaning, with particular regard to the case of the Roman empire, then more generally to the logic of power as engendering more power, and to the question of the "just cause" as "plausible ground". For another significant passage of the same tenor concerning the Romans, see *ibidem*, Book I, Chap. XV, Engl. Transl. p. 71. Gentili is likewise engaged in defending the legitimacy of Alexander's empire, which was also a traditional *topos* of debate. Here is one of the many references to it, where the author's main point about "empire" is summed up in these terms: "Lucan is not to be endorsed when he calls Alexander the plunderer of the earth. For if he made war with justice and waged and brought it to an end justly, he had the right as victor to take possession of the realms". (see *ibidem*, Book III, Chap. IV, Engl. Transl. p. 304). With regard to the theme of the "quest

Neither his defence of the Roman empire nor, at a more fundamental level, his assumptions about the key role of the “struggle for power” in human affairs can be construed as evidence of Gentili’s endorsement of the classical “ethic of empire”. On this account Gentili clearly distances himself from Machiavelli’s view, according to which the pursuit of dominion abroad is held to be a precondition of the good life at home, thus rendering “empire” as such a moral value. It is possible, though, to detect a degree of ambiguity in Gentili’s attitude towards the matter. An element of ambiguity, for example, could be found in that very passage, quoted above in connection with his invective against the Spanish theologians, where he stresses that the Roman empire was built on civic/military virtue. By shifting the focus from the theme of legitimacy to that of moral greatness, the idea of the ethical value of empire itself tends to gain prominence. Gentili’s admiration for the Roman paradigm is, undoubtedly, a central motif of his jurisprudence, but its precise connotation in terms of political culture remains a topic that needs, perhaps, further investigation. The ambiguity is, most probably, a reflection of the difficult balance that Gentili, in his *De Iure Belli*, attempts to strike between two contrasting moments of the humanist tradition, the truly Machiavellian moment, which puts “virtue” at the heart of the *polis*, and the Tacitist, or “reason of state”, moment.<sup>37</sup>

#### 6. Civilization vs. barbarism and the ‘common law of mankind’

Another focal point of contrast, which takes once again the form of an open attack from Gentili on Covarruvias, concerns one of the central topics raised by the European expansion in the New World. It concerns the fundamental question of the legitimacy of a war undertaken in order to redress “gross violations of natural law”, a question which is generally put by interpreters in slightly

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for empire” as irrelevant in respect of the justice of war, it is appropriate to stress that on a more general level, concerning the aetiology of war, Gentili considers the “struggle for power” as part of the nature of things: “It is through the fault of the human race that dissensions arise, since mankind is uneasy and untamed, and always engaged in a struggle for freedom or glory or dominion. And the the cause is not the course or rotation of the stars, or even fate, but the ambition and injustice of men” (See *ibidem*, Book I, Chap. XII, title “Whether there are natural causes for making war”, Engl. Transl. p. 54).

<sup>37</sup> The question of Gentili’s attitudes regarding the theme of “empire” and of the Roman empire, which was a crucial *topos* of the political literature of his times, needs further investigation. All the more so as Gentili published a work, *De Armis Romanis libri duo* (Hanoviae 1599), which is specifically devoted the problem of Roman imperial expansion in

different terms, namely if one is entitled to conquer and rule the less civilized peoples with the intention of civilizing them.

In his general scheme of the just causes of war, Gentili envisages the legitimacy of a war that is waged for “the sake of honour“, or “honourable reasons”. This kind of war can be either “defensive” or “offensive”, the first corresponding roughly to what later came to be called “humanitarian intervention”, in response to cruelty, unjust oppression, tyranny; the latter aimed at enforcing some minimal standards of justice at the level of mankind. To justify these two kinds of war Gentili uses the classical Stoic notion of “the natural society of the human race”: “Nature has established among men kinship, love, kindness, and a bond of fellowship...and the law of nations is based upon this association of the human race...This union of ours is like to an arch of stones, which will fall, unless the stones push against one another and hold one another up”.<sup>38</sup>

On the ground of this idea of the *societas humana*, or *respublica magna*, Gentili maintains that the Spaniards took up arms justly against the Indians for practising customs contrary to the law of nature: “I approve the more decidedly of the opinion of those who say that the cause of the Spaniards is just when they make war upon the Indians, who practised abominable lewdness even with beasts, and who ate human flesh, slaying men for that purpose. For such sins are contrary to human nature, and the same is true of other sins recognized as such by all except haply by brutes and brutish men”.<sup>39</sup>

It is to be noted that Gentili’s position, regarding the theme of the relations between Europeans and non-Europeans, can be generally defined as comparatively “progressive”. In particular, he condemns as thin pretexts many of the Spanish justifications for war in the Americas. Gentili

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the form of a pair of distinct orations, one arguing against its justice and the other for it. See also *De Iniustitia Bellica Romanorum Actio*, Oxford 1590, which was to become Book 1 of *De Armis Romani*.

<sup>38</sup> See GENTILI, D. I. B., Book I, Chap. XV “Of Defence for the Sake of Honour”, Chap. XVI “On Defending the Subjects of Another against their Sovereign”, concerning “defensive” wars of “honour”, and Book I, Chap. XXV, “Of an Honourable Reason for Waging War”, concerning the “offensive” war of “honour”. With regard to Gentili’s abundant definitions of the idea of the “natural society of mankind”, see especially Chap. XV, Engl. Transl. pp. 67-69.

completely rejects the argument that war on the Indians was justified because they refused to accept Christianity or Christian missionaries. While arguing in support of the fundamental principle of religious liberty, Gentili upholds with similar emphasis the principle that cultural differences as such cannot be the source of “legal injury”: “If men in another state live in a manner different from that which we follow in our own state, they surely do us no wrong” . With special reference to the trading activities of the Europeans in the New World, he stresses the obligation to respect the moral habits and institutions of native peoples: “Strangers have no right to argue about these matters, since they have no license to alter the customs and institutions of indigenous peoples”. In spite of, or contrary to this attractive spirit of tolerance, Gentili thinks however that there may customs and practices of an abominable kind, such as those he had mentioned, which represent not just different *mores*, but monstrous offences against “human nature” and the “common law of humanity”, as it is literally defined by him: “For they do not deserve to be called men, who divest themselves of human nature, and themselves do not desire the name of men. And such a war is a war of vengeance, to avenge our common nature”.<sup>40</sup>

His approach can be defined, anyway, relatively “liberal” and “pluralistic”, if compared to traditional doctrines which are instead characterized by the sense of a dramatic moral difference between civilization and barbarism, between Christians and the Infidels. Most notable among these radical doctrines are the Aristotelian doctrine of natural slavery, by virtue of which “some are by

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<sup>39</sup> See *ibidem*, Book I, Chap. XXV, Engl. Transl. p. 122.

<sup>40</sup> With regard to Gentili’s remark concerning the theme of “cultural tolerance”, as it were, which is touched upon almost incidentally in relation to the really topical question, concerning the theme of religious differences, see *ibidem*, Book I, Chap. IX (“Whether it is just to wage war for the sake of religion”), Engl. Transl. p. 41 (original text: “At qui in alia civitate sunt, hi si vivunt aliter atque nos vivimus in civitate nostra, nos utique non offendunt”). As regards his remark concerning the conduct to be observed towards the indigenous peoples, see *ibidem*, Book I, Chap. XIX, Engl. Transl. p. 92 (original text, “Quaedam contra religionis: quaedam contra disciplinam sunt: et similia. De quibus contendere advenae non habent: qui nec ius habent mutandi mores et instituta indigenarum”). In the same vein Gentili urges that victors hesitate to insist that the conquered adopt new customs and religions. He refers to a rule of mankind “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” (*ibidem*, Book III, Chap. IX, Engl. Transl. p. 333). For the quotation regarding Gentili’s disgust at various monstrous habits of mankind, see *ibidem*, Book I, Chap. XXV, Engl. Transl. p. 125.

For an in-depth analysis of Gentili’s position on the cluster of themes concerning the relations between Europeans and the non-European world, see B. KINGSBURY, *Alberico Gentili e il Mondo Extra-Europeo*, Atti Convegno Settima Giornata Gentiliana, Milano: Giuffr , 2001 and R. TUCK, *The Rights of War and Peace*, cit., especially pp. 36-36, 47-50, 113-114.

nature slaves, those, to wit, who are better fitted to serve than to rule”, and the so-called doctrine of *dominium rerum*, by virtue of which infidels and heathens are by definition sinners and as such incapable of property-rights and self-government.

Clearly aware and deeply averse to such radical views, Gentili’s approach is rooted in what was the most authoritative doctrine within the church throughout the late Middle Ages, namely the view enunciated by Pope Innocent IV in the mid-thirteenth century. Infidels as such were not enemies of the Christian world, nor deserving of punishment, but they could be punished by Christian arms for sins against nature, like sodomy or idolatry, because sins of this kind could be recognized even by natural men. An essential part of the doctrine, as originally formulated, was also the notion of the Pope’s *dominium mundi*, or universal jurisdiction. In advocating the legitimacy of a punitive “honourable” war in support of a minimal moral code, Gentili appears to follow this line of argument, rejecting of course the idea of the universal jurisdiction of the Pope or the Roman Emperor and replacing it with the new/ancient notion of the “natural society of mankind”.

Gentili’s clash with the Spanish school on the point at issue comes up in connection with the important changes introduced by the Dominican theologians in the Innocentian tradition on the occasion of the great controversy about the legitimacy of the American colonization. Vitoria, Covarruvias and De Soto argued that practises against the law of nature could not justify armed intervention. The main argument was that a punitive war for crimes against the law of nature presupposes jurisdiction, “*iurisdictio necessaria ad punitionem*”, as Covarruvias concisely notes, and the Pope has no jurisdiction, spiritual or temporal, over the unbelievers. Vitoria, however, had adopted a sort of compromise position on the same topic, conceding that, in the case of customs such as human sacrifice or cannibalism, namely customs causing injury to innocent men, “sinners against nature may be punished”.<sup>41</sup>

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<sup>41</sup> See GENTILI, D. I. B., Book I, Chap. XXV, Eng. Transl. p. 124. On the Spanish great debate about the American colonization, including an essential overview of the Thomist tradition and other traditional doctrines concerning the

As anticipated, the contrast between Gentili and the Spanish school on this specific topic comes to surface in the form of a direct attack. Covarruvias happens to stand out also in this case as the principal target. In fact, after enunciating the essential terms of his position, Gentili abruptly evokes his antagonist expressly in the text: “Why should Covarruvias reproach me and others for that other war, waged by the Spaniards against violators of the law of nature and of common law, against cannibals, and monsters of lewdness”. What is somewhat disconcerting, however, is the fact that Gentili in support of his point cites Vitoria’s assertions about the lawful defense of the innocent, as expressed in his *Relectio De Indis*. The paradox is increased by the fact that Vitoria alone is cited at margin as the principal authority for the whole argument, as though Gentili ignored that in the same relection Vitoria had put forward a completely different view with regard to a different kind of crimes against nature, namely those which did not involve “the detriment of the innocent”, namely murder, theft, sodomy and buggery with animals. Regardless of this puzzling detail, which can possibly be explained with the inherent difficulties of Vitoria’s position and the vicissitudes of the posthumous publication of his relections, the contrast between Gentili and the standard view of the Spanish school, as represented by Covarruvias and De Soto, remains an undisputable and significant fact.

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relations between Christians and Infidels, Europeans and non-European peoples, see especially A. PAGDEN, “Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians”, in A. PAGDEN ed., *The Languages of Political Theory in Early Modern Europe*, Cambridge 1987, pp. 79-98; A. PAGDEN (ed.), *Vitoria. Political Writings*, cit., Introduction. On the political thinking of the Spanish Neo-Thomists, see Q. SKINNER, *Foundations of Modern Political Thought*, Cambridge 1978, vol. II, pp. 135-173). As regards Vitoria’s difficulties and ambivalences concerning the theme of the so-called crimes against the law of nature, to start from his assertions about the legitimacy of intervention, see PAGDEN, *ibidem*, *On the American Indians*, Question 3, Article 5 : Fifth just title, in defence of the innocent against tyranny, p. 288, and *ibidem*, Question 2, Article 5: Fifth unjust title, the sins of the barbarians, pp. 272-275. With regard to the first point, Vitoria’s main proposition reads as follows; “I assert that in lawful defence of the innocent from unjust death, even without the Pope’s authority, the Spaniards may prohibit the barbarians from practising any nefarious custom or rite”, whereas with regard to the latter point, his basic proposition is the following: “Christian princes, even on the authority of the Pope, may not compel the barbarians to give up their sins against the law of nature, nor punish them for such sins”. It should be noted that the chapter XXV of Book I, devoted to punitive “honourable” war, is particularly significant in relation to theme posed by Gentili of the so-called “common law of mankind”. The moral principles common to all men, beyond religious and cultural diversity, which Gentili indicates expressly in that chapter, are sparsely mentioned: “Marriage, the begetting of children, and education belong to this law which they have violated, and they deprive all men, whose kindred and associates they are, of their natural rights”; “Some kind of religion is natural, and therefore if there should be any who are atheists, destitute, of any religious belief, either good or bad, it would seem just to war upon them as we would upon brutes”. The indications made available in this context are not exhaustive, of course. Others can be identified in the principles of “liberty of religion”, freedom from “tyranny” and oppression, and the

Its significance needs, however, to be amply qualified, in the sense that, with regard to the specific topic of “crimes against nature”, the basic opposition between humanism and scholasticism does not appear to be so drastic and unequivocal as in the other topics previously discussed. In the first place, the scholastic tradition appears divided in a cluster of different positions. In particular, the views of the School of Salamanca mark a clear turning away from the mainstream tradition, namely the Innocentian tradition. Moreover, extreme doctrines such as the heretical one of *dominium rerum*, often confused and mixed with that of Aristotle’s “natural slavery”, which are also an integral part of the theological tradition, enjoy both a revival in connection with the debate over the legitimacy of the Spanish and, more generally, the European colonial enterprise.

On the other side, it is certainly true that the dichotomy civilization-barbarism is an integral part of the humanist tradition and that, apart from the rigorously Aristotelian account of the natural slave, the humanist writers, following the cultural model set by the Greeks and the Romans, tend to justify the forcible enslavement of the barbarians as such, that is because they live outside normal morality and violate the so-called “common code of mankind”, a phrase possibly first used by Polybius. In other terms, according to the humanist way of thinking, the value of civilization, together with the value of patriotism, have always played a crucial role in sustaining the ethic of empire.

A further element of asymmetry is given by the fact that Grotius, contrary to what he had done with regard to all the other issues, specifically rejects the views of the Spanish School, singling out expressly Covarruvias, Vitoria, Vazquez and Molina, and endorses decidedly the Innocentian tradition. He does so in a most emphatic way, refuting the assumption that jurisdiction is necessary to justify a punitive war against “monstrous” violations of the law of nature. Though characteristically without acknowledgement, Grotius’ argument is strikingly close to that used by Gentili, namely the notion of “natural society of mankind” and the consequent responsibility of rulers to uphold a minimal universal morality. Like Gentili, he stresses the distinction between

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humanitarian values or *rationes humanitatis*, all general values so often appealed to in his *De Iure Belli*. But this could

“civil mores” and “law of nature”, warning against the practice of the powerful to equate their own mores with the law of nature.

Moreover, Grotius appears to have drawn from the notion of human society one further conclusion, namely the view that uncultivated land was to be considered unoccupied and might be appropriated by cultivating it, provided the new occupants accept the sovereignty of the ruler of the territory. This idea, including the distinction between “property” and “jurisdiction”, presents a striking resemblance with the ideas formulated by Gentili in his *De Iure Belli* in discussing the grounds for making offensive war “out of necessity”. It corresponds to the so-called “economic” justification, in addition to that of the “civilizing” mission, of the European overseas expansion, a justification which was bound to have subsequently great fortune with the English and the Dutch, and to be powerfully reformulated by John Locke.

Grotius himself was probably led by his various roles of political adviser and jurist of the United Provinces to trace out suitable arguments, such as Gentili’s theories on occupation of vacant land and on punitive wars in the name of humanity, in support of the Dutch expansion into the Indies. This aspect may also help explain why the Dutch jurist, although perfectly aware of the risk of abuse, seems to transcend such considerations and abandon his generally rigorously restrictive attitude towards war.<sup>42</sup>

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well be the object of a specific further research.

<sup>42</sup> For Grotius’s treatment of punitive war against those who “monstrously” violate the law of nature (original wording, “in quibusvis personis ius naturae et gentium immaniter violentibus”), see GROTIUS, *De Iure Belli ac Pacis*, Book II, Chap. XX, Sect. XL, entitled “An reges et populi bellum recte inferant ob ea quae contra ius naturae fiunt, non tamen adversus ipsos ipsorumve subditos, explicature, rejecta sententia statuente naturaliter ad poenam exigendam requiri jurisdictionem”, whereas for his discussion of “humanitarian” intervention, see *ibidem*, Book II, Chap. XXV, Sect. 8 “An pro subditis alienis defendendis iustum sit bellum, distinctione explicatur”. On Grotius’ related caveat against the equation of one’s mores with the law of nature, see *ibidem*, Chap. XX, Sect. XLI, “Discernendum ius naturae a moribus civilibus late receptis”. On the occupation of vacant land, see *ibidem*, Book II, Chap. II, Sect. XVI-XVII.

For the best analysis of Grotius’ arguments concerning the non-European world, see R. TUCK, *The Rights of War and Peace*, cit., 3, pp. 78-108. In particular, as regards Gentili’s theories on “honorable” war against “crimes against nature” and on the occupation of vacant land, see *ibidem*, respectively pp. 34-35 and pp. 47-50. With specific regard to Grotius’ position about the war of “humanitarian” and “punitive” intervention, see H. BULL-B. KINGSBURY-A. ROBERTS eds., *Hugo Grotius and International Relations*, cit., Introduction, pp. 38-47.

Having pointed out the asymmetries characterizing the doctrinal contrast under discussion here, for a correct assessment of its significance it is also important to stress that the civilization/barbarism dichotomy, usually referred to as the key element, is not the key element, if we take a closer look at the linguistic structure of the argument. Gentili is fully aware of the civility/barbarism dichotomy, which permeates the whole of his work, not only his treatment of the questions concerning the extra-European world. The point I wish to make is that the basis of his argument is not the “moral diversity of cultures”, but the notions of “law of nature” and of the “natural human sociability”, which are inherently “culture-neutral”, at least on the basis of a stringently linguistic approach, that is internal to the language sustaining the writers’ thinking. The same applies to the so-called “economic” argument, which is also couched in the same “culture-blind” language of natural law and natural rights.

The same kind of considerations is appropriate with regard to the arguments employed by the theologians of the Salamanca school. The key to their arguments does not seem to consist in an attitude of genuine “cultural pluralism”. Vitoria himself spoke of the “evil and barbarous education” which made the natives incapable of fully rational behaviour and incapable of exercising their rights, though in full possession of the same rights. If we consider closely their reasoning, we find that the truly crucial arguments are the following ones: “who is to judge?”, “war can only be the vindication of injury”, “no wrong is done by sinners against nature”, “we may all be, Christians and natives, sinners against nature”. As a consequence, the key factor is thoroughly unrelated to the theme of “civilization” and is rather to be seen in their general approach towards the use of violence, namely in their austere and strictly jurisdictional conception of war, which we have already observed to be at the basis of their views on the other topics of “the great debate”.

The pre-eminently humanist foundation of Gentili’s thinking about the point at issue manifests itself not in the form of the civilization/barbarism dichotomy, but rather in the form of the humanist idea of the “natural society of mankind”, or of the “global commonwealth”, together with the idea of the

“common law of mankind”. To this regard it is appropriate to underline that these assumptions and ideas make up yet another fundamental axis of Gentili’s entire system of thought about the law of war and, more generally, about international relations. The other fundamental axis is constituted by the principle of “self-preservation”, which, as we have previously stressed, plays a crucial role in respect of the “just causes” of war and the “right order of peace”.

It is worth emphasizing here that the search for a balance between these two cardinal principles, the needs of “self-preservation” on the one hand and the needs of the “global human society” on the other, emerges as a key theme of Gentili’s treatment of many issues. Alongside this aspect, which implies a substantive contradiction between the two principles, the idea of the global *respublica* performs also a different and a more fundamental function: it constitutes the foundation of the so-called “international community” and the primary source of legitimation of the *ius gentium bellicum*, namely of “international law” as applied to war, as Gentili points out in the opening lines of his *De Iure Belli*: “This philosophy of war belongs to that great community formed by the entire world and the whole human race” (“Haec de bello Philosophia reipublicae est magnae, universi terrarum orbis, et generis hominum universi”).

## 7. Conclusion

It is time now to draw some conclusions from the ‘great debate’ which we have tried here to explore. First, with special regard to Gentili’s position, in order to achieve a deeper understanding of his system of thought and his vision of international order. Second, with regard to the significance of the ‘great debate’ in relation to the wider theme of the formation of “modern international theory”. The comparative analysis of the different positions expressed by the protagonists of the debate has proved to be a most fruitful way to illuminate both aspects of the enquiry.

First of all, the comparison has shown the profound opposition existing between the Spanish school and Gentili, and between Gentili and Grotius. Such opposition is built into their respective theoretical systems, but at times it also takes the form of severe open attacks. We have seen, in particular, Gentili accuse the Spanish school of “ineptitude” and “hypocrisy” with regard to the theme of conquest and empire. On the other hand we have seen Grotius accuse Gentili of holding views defined as “untenable” and “abhorrent to every principle of equity”, this in connection with the issue of pre-emptive self-defense. Most significantly, Grotius argument, as on most issues of the debate, is basically in line with the positions of the Spanish school.

This kind of exchanges highlights both the fundamental character of the opposition and the central importance of the issues which were in debate. The most important among these, from the point of view of their practical implications, were the question of the legitimacy of pre-emptive strikes and that of conquest and empire. Gentili thinks that “self-preservation” prescribes “pre-emptive” action on the basis of “fear”. The logic of “power”, assumed to imply a search of power after power, and the ultimate subjectivity of “fear” are at the heart of his argument. For the Spanish theologians the sole and only just cause of war is *iniuria accepta*, or “injury inflicted”. In the same spirit Grotius re-emphasizes the classical criteria of “immediacy” and “certainty” and denies that “fear of something uncertain” can constitute a just cause of war.

The same logic of “power” and “fear”, understood in relation to the imperative of the victor’s future “security”, is likewise the central motif of Gentili’s views on the conclusion of the “right order of peace”, which, in order to be just, must be permanent and may, therefore, envisage the need and legitimacy of conquest. Although repudiating the pursuit of empire as a just cause of war, he upholds the legitimacy of “empire” as an “unintended consequence” of just war, in relation to the overriding preoccupation with “self-preservation”. On the opposite side, the Spanish theologians tend to maintain the contrary, although with a degree of ambiguity. Grotius is perhaps less strict, but

he does not distance himself from the concept of “punishment” and the relative criteria of “proportionality” and “moderation” recommended by the Spanish school.

These crucial differences on the specific *topoi* in debate are to be interpreted as the expression of differences of a more fundamental kind, concerning the theoretical structure of their respective systems of thought. In this respect the whole argument can be summed up through a series of conceptual dichotomies: war as the “execution of justice” vs. war as “duel”; “justice/delinquency” vs. “equality” of the warring parties; “injury” vs. “plausible claim”; “right reason” / “unilateral justice” vs. “equality” / “bilateral justice”; “just victor” / “judge” vs. “victor” / “judge”; “peace” / “restitution-punishment” vs. “peace” / “conquest-empire”; “civilization” vs. “barbarism” and the “common law of mankind”. This array of dichotomies represent the theoretical scaffolding of two radically different conceptions of war, the theological one stressing the metaphor of war as “judicial process” and the other, as interpreted by Gentili, stressing its role as a necessary instrument for the resolution of moral/legal conflict among states. Against the theological tradition, which employs the jurisdictional metaphor in the strong sense of *executio iuris*, Gentili employs it in the weak sense of the *aequalitas* of the two warring sides. Crucial is his emphasis on the notions of *bellum-duellum*, of *probabilis causa* as against *iniuria*, of *opinio* as against *veritas*.

Another important result of the present enquiry suggests that the essence of the antithesis between Gentili and the Spanish school is to be interpreted as a reflection of the broader historical antithesis between humanism and scholasticism. Further, it suggests that the peculiarity of Gentili’s vision of international order is to be imputed to the decisive impact of the theoretical political component, namely of the humanist component. Not only the spirit and the ideological thrust of his arguments, but also the overall formal structure of his system are determined by his own version of the humanist tradition. In fact, the basic criteria of order of Gentili’s system are drawn from the moral tradition of civic humanism. We are referring here to the criteria proceeding from the distinction between the “necessary”, the “useful” and the “honourable” character of just wars.

The basic dichotomy here is of a fundamental kind and concerns the correlation between “expediency” and “honour”, *utilitas* and *honestas*. Following in the steps of Machiavelli, who had overturned the orthodox axioms that “expediency can never conflict with moral rectitude” and “honesty is the best policy”, Gentili dissociates the two notions by subsuming them under the wider category of “justice”. So “expediency” becomes an autonomous criterion of “justice” and as such a distinct basis of legitimate war. In matters where “expediency” conflicts with “honesty”, the general principle is that priority should be given to what is morally right, but, if “self-preservation” is at stake, “expediency” must prevail. The implications of this moral vision have been examined at length in connection with the issues of pre-emptive strikes and the law of victory. Significantly, Grotius expressly objects to any divorce between expediency and the moral realm, and by implication he objects to the Gentilian idea of a “legal morality”, as it were, let alone the Spanish school. Again, in particular, Grotius includes “expediency apart from necessity” in the special list he draws up of the principal kinds of “unjust causes” of war.

It is to be noted that the dichotomy “expediency”-“honesty” transcends the ambit of the just causes of war and projects its influence on the whole work, influencing the treatment of many crucial questions of *ius in bello* and *ius victoriae-ius pacis*, this in the form of a characteristic tension between “reason of state” (*ratio status*, or *ratio utilis*) and “strict morality” (*honestas*). Closely connected with these two concepts, in a relation of conceptual symmetry, are also the two principles of “self-preservation” and “natural society of mankind”, equally drawn from the rich tradition of humanist political thought. In the analysis of the “great debate”, we have underlined the paramountcy of “self-preservation” and pointed out the difficult balance Gentili is trying to strike between “self-preservation” and the needs of the “global republic”.

Alongside the “realist” and “sceptical” traits of his vision, Gentili shows also an “idealist” strain which has been discussed in relation to his position on the questions of “humanitarian intervention”, in defense both of “liberty” and of a “common law of mankind”. Characteristically, his version of

humanism, hence his vision of international order, is the result of a complex synthesis of the languages of Machiavellian humanism and of the late Renaissance Tacitist doctrines.

These are the essential defining characteristics of the political theoretical dimension of Gentili's jurisprudence of war. The general assumption is that both the originality and the foundational character of the *De Iure Belli* are principally based on that dimension. Gentili creates a wholly new system, indeed a new science, by incorporating the "modern art of statecraft" and subverting the old tradition of the just war. More precisely, he carries out a complex operation by transposing and translating the languages of Renaissance political theory into the new language of "natural jurisprudence".

By so doing, Gentili lays the foundation both of a new science and of a new vision of international order. The new science is the incipient "science" of the "modern" law of nations, in the sense of a *ius inter gentes*. Gentili is only a short step away from the semantic mutation introduced by Hobbes and Zouche. On the other hand, from a substantive point of view, Gentili's jurisprudence of war marks the emergence of a specific and distinctly "modern" paradigm, which has produced lasting effects on the internal dialectic of the discipline in the early-modern phase of its development. In this respect, bearing in mind the general historiographical theme of the relationship between Renaissance political thinking and the "modern" school of natural law, Gentili's jurisprudence of war stands out as crucially relevant in the formation and future developments, not only of modern international law, but also of modern political theory.

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