

Comments on Diego Panizza, “Political Theory and Jurisprudence in Gentili’s *De Iure Belli*”

Benjamin Straumann

I will start by giving a brief account of how Hugo Grotius (1583-1645) judged Alberico Gentili’s work, and will then go through Professor Panizza’s paper, outlining the most salient points and trying to sketch a few questions that could serve as a starting-point for further discussion. I will try to gloss over my lack of expertise with regard to Gentili by making some occasional references to Grotius.

Grotius acknowledged in his *De iure belli ac pacis* that Gentili’s work had what other, earlier writers on the law of war lacked, namely the “illumination of history”: “Knowing that others can derive profit from Gentili’s painstaking, as I acknowledge that I have, I leave it to his readers to pass judgement on the shortcomings of his work as regards method of exposition, arrangement of matter, delimitation of inquiries, and distinctions between the various kinds of law. This only I shall say, that in treating controversial questions it is his frequent practice to base his conclusions on a few examples, which are not in all cases worthy of approval, or even to follow the opinions of modern jurists [*novi iurisconsulti*], formulated in arguments of which not a few were accommodated to the special interests of clients, not to the nature of that which is equitable and upright [*non ad aequi bonique naturam*]. The causes which determine the characterization of a war as lawful or unlawful Ayala did not touch upon. Gentili outlined certain general classes, in the manner which seemed to him best; but he did not so much as refer to many topics which have come up in notable and frequent controversies.”¹

It seems, then, that the two main objections Grotius raised against Gentili were, first, that Gentili had collapsed the distinction between *ius gentium* and *ius naturale*. According to Gentili, the law of nations is identical to the law of nature,² and a legal rule has to be “shown to be peculiar to a given state”³ in order not to be identified as *ius gentium*, as law of nations. Grotius, on the other hand, stresses the distinction, which allows him to contrast even very widespread custom with the norms of the law of nature. Grotius’ second main objection against Gentili

¹ *De iure belli ac pacis libri tres* (henceforth *IBP*) prol. 38.

² *De iure belli libri tres* (edition of 1612, henceforth *IB*) 1, 1, p. 13f.

³ *IB* 1, 3, p. 27.

seems to lie in the latter's treatment of the just causes of war, which was not detailed enough in Grotius' view and, methodologically, based on insufficient evidence.

In his paper, Professor Panizza identifies three main elements that make up *De iure belli*'s intellectual substance:

- (1) Romanist jurisprudence, which Panizza calls the “conceptual model and the quarry for the new subject of international law.”⁴

Roman law for Gentili was not just domestic law, but could also be used as a source for the rules between sovereign rulers, as the following quotation out of *De iure belli* shows: “It is also an absurd statement [...] that it is inadvisable to appeal to jurists in the case of such differences among sovereigns, because these disputes must be decided by the law of nations and not by the subtleties and fictions of the civil law of Justinian, which was later established by the emperors for the disputes of private individuals alone. [...] 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; and with this last it is all so in accord, that if the empire were destroyed, the law itself, although long buried, would yet rise again and diffuse itself among all the nations of mankind. This law therefore holds for sovereigns also, although it was established by Justinian for private individuals [...]”⁵

- (2) What Professor Panizza calls the “theological” tradition:

Under this head the just war tradition is subsumed, ranging from Thomas Aquinas to the Spanish theologians of the sixteenth century, the School of Salamanca and its main protagonist, Francisco de Vitoria.

- (3) The “theoretical political” component:

The main subject of the paper is what the author calls “the great debate” between theological and humanist perspectives; Professor Panizza aims at a reconstruction of Gentili's

⁴ Panizza, p. 7.

⁵ *IB* 1, 3, p. 25f.

work *De iure belli* which is meant to identify the third major component of Gentili's system, namely the "theoretical political" component that seems to consist in the "humanist" tradition of political thought, offering, in Professor Panizza's words, "a profoundly different moral vision of politics"⁶ and finding itself in a "profound opposition between the theological tradition and Gentili's work."⁷ The model here according to Panizza is Machiavelli.⁸

The "great debate" between theological and humanist traditions centered on a number of fundamental issues, which are dealt with separately in the respective chapters of Professor Panizza's paper.

1. Duel vs. *executio iuris*

Professor Panizza writes that "the notion of war as a 'duel' and the associated notion of the 'equality' of the warring parties thoroughly subvert the theological tradition of the 'just war'."⁹ Panizza then proceeds and holds that both Vitoria and later Grotius have to be seen in that older theological just war tradition. Yet in Grotius' case, I am not sure if this is correct, given Grotius' own definition of war, which actually employs the very etymology that Gentili uses, too: "For *bellum*, 'war', comes from the old word *duellum* [...]. The word *duellum*, again, bears to *duo*, 'two', a relation in sense similar to that which we have in mind when we call peace 'union'."¹⁰ This is not to say that Gentili's view of war did not differ from Grotius'—it is just to say that the notion of war as a *duellum*, along with the according etymology of *bellum*, was a commonplace among writers on the law of war and therefore cannot be adduced as evidence in favor of a specific view on war.

Professor Panizza then contrasts Gentili's view of war as a duel with the "theological" view of war as "a sort of reparation/punishment against wrongdoing, or *iniuria*, and as such against the delinquent party."¹¹ Yet Gentili himself in his discussion of the divinely sanctioned just causes for offensive war also subscribes to a "right of taking vengeance for a wrong which one has suffered [*ius ulciscendi acceptam iniuriam*],"¹² adding later that while private individuals go to court because of injuries received and "bring a suit for damages before a magistrate, [...]"

⁶ Panizza, p. 9.

⁷ Ibid.

⁸ Ibid., p. 11.

⁹ Ibid., p. 15, referring to *IB* 1, 2, p. 18.

¹⁰ *IBP* 1, 1, 2, 2.

¹¹ Panizza, p. 15.

¹² *IB* 1, 18, p. 134.

one who is not a private individual makes war [*Agit privatus iniuriarum pro his apud magistratum. non privatus igitur bellum infert*].”¹³

It is therefore not entirely clear whether Gentili in fact “changed profoundly”¹⁴ the sense of the established analogy between war and forensic litigation—Gentili seems to have retained important elements of the just war tradition, and he seems to have additionally enriched them with elements of the Roman law tradition, as his use of the concept of an injury and the accompanying terminology (*iniuriarum agere*) suggest.

2. Bilateral justice of war?

Professor Panizza shows how Gentili adduces two lines of argument in order to defend the notion of a war waged justly by both sides. The first is the Roman law idea of the public enemy, the *hostis*, being legally equal with the own warring party, as long as both parties have at least a probable cause (*probabilis causa*) for war. The second is the epistemological claim that although there may be as a matter of fact a just cause of war just on one side of the war, the justness cannot properly be discerned in all cases. Therefore, neither side of the war can sensibly be called unjust. According to Professor Panizza, this represents a shift towards the paradigm of “reason of state,” which is not to be confounded with the early Renaissance perspective “advocating the legitimacy of the pursuit of glory and imperial power.”¹⁵

With regard to this point, the bilateral justice of war seems to be flowing ultimately from Gentili’s definition of war, insofar as this definition already includes the justness of both parties’ causes: “War is a just and public contest of arms [*Bellum est publicorum armorum iusta contentio*].”¹⁶ If it is evident, writes Gentili, “that one party is contending without any adequate reason, that party is surely practising brigandage and not waging war.”¹⁷ I wondered to what a degree Gentili’s originality can already be found in his definition of war. In Grotius’ view, the inclusion of justice into the definition of war would beg the question: “I do not include justice in my definition because this very question forms a part of our investigation, whether there can be a just war, and what kind of a war is just; and a subject which is under investigation ought to be distinguished from the object towards which the investigation is directed.”¹⁸ Grotius’ own

¹³ *IB* 1, 19, p. 149.

¹⁴ Panizza, p. 18, n. 15.

¹⁵ *Ibid.*, p. 19.

¹⁶ *IB* 1, 2, p. 17.

¹⁷ *IB* 1, 6, p. 49.

¹⁸ *IBP* 1, 1, 2, 3.

definition of war includes neither the qualification of “public” nor the term “just”: “[W]ar is the condition of those contending by force [...]”¹⁹

It seems to me that in terms of the traditions that are influential here, Gentili might rather be drawing on ideas stemming from the realm of *public* Roman law regarding war, such as the *ius fetiale*, while Grotius is basing his doctrine of just war on the Roman doctrine of just war as it appears in Cicero’s *De officiis* and *De re publica*, enriching this Ciceronian tradition with quite detailed an account of the violations of natural law that can give rise to a just war, an account that is indebted mainly to *private* Roman law, the Roman law of property and obligations.

3. Pre-emptive self-defense vs. necessary self-defense

The question of pre-emptive self-defense is dealt with by Gentili under the heading of “Defence on grounds of expediency.”²⁰ As Professor Panizza shows, it is the notion of “legitimate fear” that emerges as the key criterion of the international order in *De iure belli*. Along with this, Gentili is shown to develop a concept of “balance of power.” In Panizza’s paper, Gentili emerges as a figure quite different from the so-called theological tradition, especially with regard to the question of pre-emptive self-defense, and both Vitoria and Grotius are said to adhere to profoundly different doctrines. The “theological tradition,” collapsing the distinction between *private* self-defense stemming from Roman law, and *public* self-defense, arrives on Panizza’s account at a criterion of “immediate danger,” while Gentili is said to hold up a doctrine of specifically public self-defense that allows for the looser criterion of “legitimate fear” in order to justify pre-emptive self-defense.²¹

I would like to cast some doubt on this sharp divide between Gentili on the one hand and Vitoria and Grotius on the other. It is said in the paper that Vitoria just went back to the Roman law formula of the *Digest*, according to which “force may be repelled by force.”²² It is also said, however, that Vitoria did introduce a notion of public war, which is not connected with defense anymore, but is a concept of offensive war, justified by punishment and revenge of a wrong suffered (*iniuria accepta*). This does not seem to be entirely different from Gentili’s own treatment of the matter in Chapter 18 of the first Book of *De iure belli*, where an “injury suffered

¹⁹ *IBP* 1, 1, 2, 1: *Bellum status per vim certantium*.

²⁰ *IB* 1, 14, p. 96: *De utili defensione*.

²¹ Panizza, p. 20ff.

²² *Dig.* 43, 16, 1, 27: *vim vi repellere licet*.

[*iniuria accepta*]]”²³ is likewise mentioned as an expedient and also just cause for waging offensive war.

Also, without wanting to gloss over the important differences between Gentili and Grotius, I would like to draw attention to what Gentili says at the end of Chapter 14 of the first Book: “[T]o conclude, a defence is just which anticipates dangers that are already meditated and prepared, and also those which are not meditated, but are probable and possible. This last word, however, is not to be taken literally, for in that case my statement would be that it is just to resort to a war of this kind as soon as any one becomes too powerful, which I do not maintain. For what if a prince should have his power increased by successions and elections? Will you assail him in war because his power may possibly be dangerous to you? Some other reason must be added for justice’s sake. We shall add this reason to others which have some justice.”²⁴ Gentili, then, acknowledges, *pace* Grotius and maybe *pace* Panizza, that defense on grounds of expediency is not enough morally, which is why he adds at this point a chapter “On virtuous defence.”²⁵

An additional argument for a certain similarity between Grotius and Gentili with regard to the question of self-defense may also be seen in the fact that Grotius, in showing that “War in defence of life is permissible only when the danger is immediate and certain,” adduces the exact same passages by Gellius and Cicero that Gentili also uses.²⁶

4. Making of peace: restitution-punishment vs. conquest-empire

In this very interesting chapter on the making of peace, the paper deals with the topic of empire. Professor Panizza shows very convincingly the prominence of the Roman Empire in the discussions of both the so-called “theological” tradition and the humanist tradition. Trying to get to grips with the view the Spanish Thomists had of the Roman Empire, I used David Luper’s excellent book *Romans in a New World*.²⁷ It seems that, contrary to Vitoria, there were some Dominican theologians in the context of the School of Salamanca, such as Domingo de Soto and Melchor Cano, who attacked the justness of the Roman Empire quite vigorously—the “theological” tradition, then, was by no means united on the issue.

²³ *IB* 1, 18, p. 134.

²⁴ *IB* 1, 14, p. 106f.

²⁵ *IB* 1, 15, p. 107: *De honesta defensione*.

²⁶ *IBP* 2, 1, 5, 1; *IB* 1, 14, p. 100f. Grotius seems to have taken these and other citations in this section directly out of Gentili’s work.

²⁷ David Luper, *Romans in a New World. Classical Models in Sixteenth-Century Spanish America* (Ann Arbor: University of Michigan Press, 2003), pp. 43-102.

The question of empire and its legitimacy, and especially the use of the Roman model, is certainly very interesting in the early modern writers on the law of nations; I am not sure if we are to understand Gentili to be slightly contradictory on the issue, since he seems to entertain a robust skepticism towards the Spanish and Turkish empires of his own day and, at the same time, a certain enthusiasm about the Roman empire and its justness.²⁸

As to Gentili's relation with the Spanish theologians, it seems to me that Gentili actually endorsed the views of those of them who, like Vitoria, were defenders of the justness of the Roman empire—Gentili's invective against the Spaniards, as quoted on page 34 of Professor Panizza's paper, where it is supposed to serve as evidence for Gentili's alleged "blunt attack" on the "ensemble of the school of Spanish theologians,"²⁹ is in my view clearly directed against the Spaniards of classical antiquity, such as Lucan and Seneca, who are both censured by Gentili in the passage cited by Panizza for calling into question the legitimacy of the Roman and other empires.³⁰ It is the ancient Spaniards whom Gentili bluntly attacks with regard to their stance on empire, not his Salamancan contemporaries.

As to Grotius' stance on the legitimacy of the Roman empire, I am not sure if Grotius can really be portrayed as a denier of its legitimacy. Grotius' position to me seems rather to be formed on a case-by-case basis, by applying his normative criteria for just war to the concrete historical examples.

In that, Grotius is very close to Cicero. In *De re publica*, Cicero, after having established a link between natural justice and Roman imperial conquest, showed the fragility of this link by reference to Rome's violations of natural justice and the danger to Roman rule that such violations entailed. Grotius' own imperial undertaking in *De iure praedae* and *Mare liberum* reflected an awareness of that fragility—failure to establish the legitimacy of Dutch expansion in the East Indies might very well have amounted to jeopardizing that very expansion. Having once allowed natural reason an important role, *any* rational argument, also one adverse to Grotius' more mundane purpose of defending the VOC's war, had to be considered.

²⁸ Panizza, pp. 19; 34.

²⁹ Panizza, p. 34.

³⁰ *IB* 3, 4, p. 496f.: With *isti Hispanici*, Gentili refers back to the aforementioned Spaniards Lucan and Seneca, whom he contrasts unfavorably with the Spaniards of the sixteenth century: *Inepti, inquam, isti Hispanici, neque ex Hispanico praesenti stomacho: qui [...] omnium gentium, et omnium temporum imperia [...] condemnarunt.*

5. Civilization vs. barbarism

With regard to the question raised in the sixth section of the paper, it seems as if Gentili was an early exponent of a doctrine of punishment similar to Grotius' and John Locke's, who both acknowledge a *natural* right to punish in the state of nature, independent of and preceding any established political order, thereby ensuring the enforceability of the law of nature. This, however, presupposes an objective system of rules. Gentili, then, seems to uphold such an objective system of rules, spelling out a minimal moral standard that can be enforced, and in acknowledging a natural right to punish, Gentili went even further than Vitoria, who in his fifth just title for war only allowed for the lawful defense of innocents, not for a right to punishment.

I would like to conclude by saying that the use of the categories "theological" and "humanist" obviously constitutes a very fruitful approach to the interpretation of early modern natural and international law. Insofar as the differences between the authors are concerned, a further examination of the nature of Gentili's and Grotius' humanism, and this means an examination of their respective approach to the ancient world, might yield further interesting results, especially when directed towards these authors' use of substantive Roman law in formulating a law applicable between sovereign rulers, as in Gentili's case, or between the inhabitants of the state of nature, as in Grotius' case.