CONFRONTING DIFFERENCE: THE PUZZLING DURABILITY OF GENTILI'S COMBINATION OF PRAGMATIC PLURALISM AND NORMATIVE JUDGMENT

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Reprinted from THE AMERICAN JOURNAL OF INTERNATIONAL LAW,
Vol. 92, No. 4, October 1998

EDITORIAL COMMENTS

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The four hundredth anniversary of Alberico Gentili's *De jure belli* (1598) has been little noticed outside his native region in Italy.[1] The history of international law generally has received less attention in recent decades than its importance warrants, but there are signs of renewed interest.[2] This Editorial Comment makes a case for the continued importance of the study of Gentili. It focuses on a persistent feature of international law, the problem of reaching normative judgments in a heterogeneous world while simultaneously accommodating deep cultural, social and religious differences. It argues that Gentili's approach to this problem, which combined a pragmatic pluralistic understanding of international society and a willingness to make judgments based on his own narrower moral, religious and political commitments, has remained prominent in international law as a strategy for dealing with difference. That this approach endures, despite its poor grounding in modern normative theory and its evident practical defects, is a disconcerting challenge at the heart of contemporary international law.

Alberico Gentili (1552–1608) was born in San Ginesio, in the Marches region of central Italy.[3] He studied law in the Bartolist faculty at Perugia, then took up legal practice and scholarly pursuits in the Marches. The arrival of the Inquisition in San Ginesio and the investigation of the strong Protestant convictions of members of the Gentili family precipitated Alberico's abrupt departure with his father. Reaching England by 1580, he gradually established himself in Oxford, and was appointed Regius Professor of Law in 1587. After 1600, he became increasingly absorbed in legal practice in London, serving from 1605 until his death as an advocate for the Government of Spain in the English courts. He produced numerous works on Roman law, and wrote tracts on controversies of theology and British constitutionalism. His three books of most direct significance for international law, however, are *De legationibus* (*DL*) (1585), a work concerned with the law of embassies and the conduct of ambassadors that arose from his successful argument that the Spanish Ambassador Mendoza ought to be expelled rather than criminally punished for plotting against Queen Elizabeth; *De jure belli* (*JB*), a work that began as three tracts prepared in 1588–1589 during English debates on issues of war prompted by the Spanish Armada; and *Hispanicae advocationis* (1613), a collection of legal opinions from his practice published posthumously by his brother Scipio.[4]

[1] The Centro Internazionale di Studi Gentiliani in San Ginesio marked the anniversary with two academic meetings, and is working with scholars at several Italian universities to produce a new edition of *De jure belli*, with a new Italian translation to supplant Antonio Fiorini's *Del Diritto di guerra di Alberico Gentili: Traduzione e discorso* (1877). This Comment uses the more familiar "jure" and "jus" rather than the original "iure" and "ius."

[2] *See* PHILIP ALLOTT, EUTOPIA: THE RETURN OF THE IDEAL (forthcoming). A new *Journal of the History of International Law* is shortly to begin publication.

[3] A judicious and carefully researched biography and appraisal is GEZINA VAN DER MOLEN, ALBERICO GENTILI AND THE DEVELOPMENT OF INTERNATIONAL LAW: HIS LIFE WORK AND TIMES (2d ed. 1968) (1937).

[4] DE LEGATIONIBUS LIBRI TRES (photo. reprint 1594 ed., with translation by Gordon J. Laing, Carnegie Classics 1924) (1585) [hereinafter DL]; DE JURE BELLI LIBRI TRES (photo. reprint 1612 ed., with translation by John C. Rolfe, Carnegie Classics 1933) (1598) [hereinafter JB]; HISPANICAE ADVOCATIONIS LIBRI DUO (photo. reprint 1661 ed., with translation by Frank Frost Abbott, Carnegie Classics 1921) (1613). *De legationibus* was reprinted in English translation in 1997, with a short introduction by John Yoo. Also of interest is DE ARMIS ROMANIS ET INJUSTITIA BELLIUCA ROMANORUM LIBRI II, *in* ALBERICI GENTILIS, OPERA OMNIA (Naples, Gravier 1770) (1599).

does not have a very precise concept of the state—he discusses many different types of political entities without much distinction. Fourth, the whole concept of sovereignty is not clearly developed, and the sovereignty of rulers and of the people is not systematically separated from the sovereignty of the state as a legal entity, although Gentili does see this as an issue. Fifth, there is no notion of equality among states, a concept emphasized in modern international law. In all of these respects, Gentili seems to stand on the cusp of modern international law, to be quickly succeeded by writers with more sophisticated concepts of international law such as Hobbes (whose *De cive* appeared in 1642) and one of his own successors at Oxford, Richard Zouche (whose *Juris et judicii fecialis* appeared in 1650). Gentili scarcely uses the phrase *jus inter gentes*, the idea of a "law between states" that has come to be seen as marking a crucial divide in the long transition from premodern to modern international law. But looking back, is this divide now so important as it once seemed?

Gentili uses the Roman law idea of *jus gentium* in part as a kind of transnational law, applied by custom and on the basis of reason in many different political and legal orders. This is how he sees the law applicable to ambassadors in *DL*.[9] The modern theory of international law seeks to confine this type of *jus gentium* to the so-called private sphere of commerce, transferring public law questions such as the law of embassies to the *jus inter gentes*. But increasingly this distinction between public and private in international law appears misplaced.

Gentili seems premodern in that he does not focus on states as separate legal entities monopolizing the *jus gentium*. In recent times, however, international lawyers have again become concerned with legal relations that are not simply the relations of states, as attested by work on autonomy regimes, the laws of war, environmental incentives and corporate codes of conduct. Thus, Gentili's careful analysis of the legal rights of parties to unequal agreements, for example those of German princes vis-à-vis the Holy Roman Emperor,[10] now seems less and less remote from agreements involving nonstate groups.

Arguments that the breakdown of the domestic/international dichotomy, the gradual eclipse of the public/private divide, and the erosion of some distinctions related to formal sovereignty are precursors to the impending reconstitution of the world on the medieval European model fail to recognize that much has changed irreversibly. Gentili's significance is not as a guide to a reappearing world in which he once lived. For the present topic, it lies rather in the remarkable persistence, not simply of the dilemmas of difference, but of the basic approach he took to dealing with them.

Difference and the Skeptical Challenge of Montaigne

The question of how to deal with difference has been a central one in the history of international law, particularly the history that is bound up with Western philosophy and values.[11] Aspirations for a universal system have been continuously confronted by fundamental differences—in culture, religion, social patterns and political systems—which must be ignored, accommodated, managed, subsumed or suppressed. Such confrontations were acute for Western legal thinkers in the late sixteenth century. Europe was rent by religious divisions that precipitated not only war and social tumult but upheaval in political theory. The deluge of images and information produced by expanded European engagement with the extra-European world contributed to new

[9] *See* Daniel Coquillette, *Legal Ideology and Incorporation: The English Civilians, 1523–1607*, 61 Boston U. L. Rev. 1, 54–63 (1981).

[10] JB, *supra* note 4, bk. I, ch. 3.

[11] *See* David Kennedy, *New Approaches to Comparative Law: Comparativism and Governance*, Utah L. Rev. 545, 560, 568–80 (1997).

dence scientific precepts of the sort associated with Francis Bacon, basing the law of nature on right reason.[18] Thus, as Richard Tuck puts it, the great contribution of Grotius was to restate skeptical ideas "in the language of natural rights and duties," in such a way that they could also "play the role of cross-cultural universals."[19]

Gentili's response to skepticism and the challenges of difference has no such philosophical character, but has persisted as a strategy for simultaneously defending universality and moral judgment in the face of fundamental difference. Admittedly, Gentili's combination of pragmatic pluralism with willingness to hazard normative judgments is not usually interpreted as responding to the problems of natural law and moral judgment raised by the skeptics: he has most often been evaluated by reference to competing traditions in Roman law.[20] But there is ample evidence in his thought and his sources of the influence of Florentine republicanism, humanism and skepticism. It appears that he was conscious of the connections between the implications of difference and the specific problems of the skeptical challenge, although the evidence is more tangential or inferential. In *JB* he refers expressly in three places to Montaigne's *Essays* and also shows considerable respect for the arguments of the Flemish skeptic Justus Lipsius, and for the writings of the Roman historian Tacitus, to whom the contemporary skeptics were heavily indebted. Gentili's combination of pragmatic pluralism and normative judgment may be traced in at least three areas of his work in which the challenges of difference were central: legal thought, political theory and international society.

THE CHALLENGE OF DIFFERENCE IN GENTILI'S LEGAL THOUGHT

Gentili's approach to legal problems exhibits at least five features that may be interpreted as a pragmatic response to skepticism and difference. First, he makes a great effort to compile information on the actual diverse practices of different societies. He makes considerable use of detached and somewhat ironical observers of historical events, epitomized by Tacitus but extending from ancient historians such as Herodotus, Thucydides and Livy to his near-contemporaries such as the Italians Guicciardini, Paolo Emilio and Paolo Giovio. He searches widely for examples, making use of recent practice in a way that Grotius, for instance, in *De jure belli ac pacis,* does not.[21] Second, he focuses not just on conduct, but on normative assessment of that conduct: so an act that was much criticized, or that made its perpetrator ashamed, counts for little, but an act that was widely approved carries great weight. He does not simply present a collection of examples but seeks to incorporate them into a legal system through legal reasoning and normative appraisal. Third, he is content to base legal rules on a combination of the practice of sizable majorities of people and the views of leading legal authorities. While consensus on a rule of law is of course desirable, Gentili responds to skepticism by explicitly rejecting any need to base law on a true consensus.[22] He recognizes that choosing how

[18] For Grotius, a law of nature is one that can be shown to agree with a rational and social nature. His methodology brought to the natural law tradition what has come to be called the New Science of Law and Morality.

[19] TUCK, *supra* note 14, at 347. The impact of this Grotian approach is discussed in Benedict Kingsbury, *A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull,* 17 QUINNIPIAC L. REV. 3 (1997).

[20] *See, e.g.,* GUIDO ASTUTI, MOS ITALICUS E MOS GALLICUS NEI DIALOGHI "DE IURIS INTERPRETIBUS" DI ALBERICO GENTILI (1937).

[21] Gentili's choice and assessment of examples is one of the grounds on which Grotius criticizes him. GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, *Prolegomena,* para. 38 (photo. reprint 1646 ed., with translation by Francis W. Kelsey, Carnegie Classics 1913/1925) (1625).

[22] Pufendorf was later to attack Grotius for proposing to base natural law on consensus, realizing that such a proposal concedes in practice to the objections of the skeptics. SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS [DE JURE NATURAE ET GENTIUM], bk. II, ch. iii, §7 (Basil Kennet trans., 4th ed., London, J. Walthoe 1729).

compact from which the ruler derives his or her power. But even in *JB* the right of ordinary private subjects to resist their ruler in matters of religion is denied.[26] In later disputations (1605), Gentili moves closer to accepting the absolute sovereignty of the authorities of the state. This position was associated with the argument of the new king, James I, that the king's rule is by God-given right and that the king is answerable only to God for any breach of the duties of kingship.[27]

Despite the prevalence of religious conflict at the time and his own bitter experience of it, Gentili argues that much civil war is not in fact attributable to religious conflict: "our forefathers witnessed the same troubles when there was unity of religion."[28] Thus, Gentili sees the problem of civil war not primarily as a product of religious strife, so that religious factionalism does not seem for Gentili to be the main source of the need for strong sovereign states. In part, this is because Gentili has a realistic and pragmatic sense of the recurrent features of politics. Gentili offers stirring defenses of both the balance-of-power politics of the powerful Lorenzo de Medici,[29] and the practical and engaged republicanism of Machiavelli.[30] It is cautiously suggested, however—and the evidence for this view is limited—that Gentili sees a particular justification for more centralized state power in the more dangerous and competitive international environment. He wrote at a time of intensifying struggles for maritime commerce and control of extra-European territories, Spanish and Turkish threats of universal empire, endless cycles of ruinous wars, and more lethal military technology as demonstrated in the siege of Antwerp and the battle of Lepanto. This view is reinforced by Gentili's awareness of the relationship between the spiraling violence in France and the need for effective central power,[31] a relationship that in the seventeenth century culminated in a centralized monarchy that, as Joël Cornette puts it, channeled violence by engaging in external war.[32]

INTERNATIONAL SOCIETY

The combination of pragmatic pluralism and normative judgment as a means to reconcile universality with the challenge of difference is evident in Gentili's view of international society. His treatment of the idea of international society is, once again, pragmatic rather than philosophical.[33] He offers a perceptive account of the essential political and institutional characteristics of an international society composed of states and similar collective entities. This account of international society is often described as "Grotian,"[34] but the key features of this idea of international society, it will be suggested, are all present in Gentili's work, and Grotius adds little to Gentili's account.[35]

First, a functioning international society depends on the smooth and trustworthy operation of basic devices of communication and commitment for all of the permanent

[26] *Id.*, ch. 11.

[27] ALBERICO GENTILI, REGALES DISCURSUS TRES (Helmstedt, Johanes Heitmuller 1669) (first published as REGALES DISPUTATIONES, 1605). Of particular relevance are *De potestate regis absoluta, id.* at 1, esp. 26–28; and *De vi civium in regem semper injusta, id.* at 77.

[28] JB, *supra* note 4, bk. III, ch. 11.

[29] *Id.*, bk. I, ch. 14.

[30] *Id.*, bk. III, ch. 9.

[31] *Id.*, bk. I, ch. 10.

[32] JOËL CORNETTE, LE ROI DE GUERRE 119–76 (1993). *See also* Anthony Carty, *Japanese Deconstructions of the Grotian Tradition in International Law*, 66 BRIT. Y.B. INT'L L. 477 (1995).

[33] Gentili makes reference to the standard Stoic and Ciceronian accounts, in which the closest bonds are among friends and family, then among the inhabitants of the city, then among the people of the particular state, and finally there are diffuse bonds in the great society of humankind. JB, *supra* note 4, bk. I, ch. 15. But he does not really contribute to the philosophical development of the idea.

[34] *See* Hedley Bull, *The Grotian Conception of International Society*, *in* DIPLOMATIC INVESTIGATIONS 51 (Herbert Butterfield & Martin Wight eds., 1966).

[35] *See generally* HEDLEY BULL, THE ANARCHICAL SOCIETY (1977).

Roman Empire. And not these territories as a whole, but their cities, for Gentili seems to have envisaged political life as lived in cities rather than the countryside. As to the world outside the ancient Roman Empire, this seems to have lain only at the periphery of Gentili's vision. He says virtually nothing about non-Mediterranean Africa and, while he exhibits some up-to-date knowledge of Asia and the Americas,[42] he does not show a great deal of the curiosity and intellectual reconsideration that the discoveries sparked among his European contemporaries. In conformity with his biography, the substantive values to which Gentili subscribes generally fall within the range of those of the Christian European world, with its Judaic and Greco-Roman heritage.

Growing up in the Marches, Alberico would have been aware of periodic alarms about impending Turkish attacks on the neighboring coast.[43] Certainly, a view of continuing hostility is evident in *JB*. Gentili says that war between Christians and Turks is not a necessary fact of nature, but it is almost that: "we have war with the Turks because they act as our enemies, plot against us, and threaten us. With the greatest treachery they always seize our possessions, whenever they can. Thus we constantly have a legitimate reason for war against the Turks."[44] Gentili is well aware that there is often right on both sides in wars, and much of his work deals with the vital pragmatic problem of controlling war when both sides honestly believe they have a just cause. But when it comes to the Turks, he takes a decidedly one-sided, pro-Christian stance.

There is much in Gentili's treatment of the extra-European world that lends support to interpretations of his pluralism not as a neutral construction of a universal international society in the face of deep difference, but as part of a legal-moral ideology that justified European expansion.[45] It is notable that Gentili says nothing about English military operations in Ireland, despite their notoriety at the time; nor does he deal directly with issues raised by Portuguese conduct in Africa. As to the Americas, Gentili argues that it is proper for Christians to make war against peoples who engage in practices contrary to nature, specifically cannibalism and bestiality. "I approve most decidedly of the opinion of those who say 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."[46] This was a conservative and interventionist position even at the time. Not all of the Spanish writers accepted it—Covarruvias, for example, did not—and Montaigne's skepticism undercut it. The Spanish went to the Americas expecting to find widespread cannibalism, and even without finding real evidence asserted its existence anyway as a justification for wars they wished to wage.

On other issues, however, Gentili's combination of pluralism and moral judgment produces positions capable of radically divergent interpretations. Thus, he follows Vitoria in asserting that total refusal by a people to engage in commerce with other peoples would be a justification for war,[47] but argues that denial of commerce was not in fact a

[42] Gentili accurately notes, for instance, that China confined trade by Europeans to just a few port cities, and he holds that this practice is entirely lawful. *Id.*, ch. 19. He regards it as beyond doubt that there is a land connection between the extreme east of Europe and the Americas, suggesting an ancient connection between the people of the New World and those of Europe. *Id.* This accurate conjecture supported a belief in the common origins of Europeans and American Indians, and was very important in refuting arguments that the Indians were not human beings in the same way as Europeans.

[43] *See* SPENCE, *supra* note 12, at 1–58.

[44] JB, *supra* note 4, bk. I, ch. 12.

[45] *See* ROBERT WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 194–200 (1990). A similar argument is made about Vitoria in Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321 (1996).

[46] JB, *supra* note 4, bk. I, ch. 25.

[47] Such views remain a source of conflict, as with Indian groups in Mexico and elsewhere in the Americas who argue that neoliberal trade agreements such as the North American Free Trade Agreement force them into world markets that confer few benefits while undermining their cultures and economies.

cultivation. This argument was eventually formulated most powerfully by John Locke.[56]

That discordant assessments of Gentili's doctrines readily coexist is indicative of the effective and stable, if unsatisfying, operation of his combination of pragmatic pluralism and normative judgment. The chasm Gentili sought to bridge by this combination poses much the same obstacle today, and his approach remains significant because of the continuing difficulty of superseding it.

CONCLUSION

Gentili is celebrated for the pragmatic pluralism of his concept of an international society open to all organized political communities and based upon essential minimal rules for coexistence and the pursuit of common interests. But this is not the whole architecture of Gentili's structure for responding to the challenges of difference. Gentili's international society did not exclude morality, or contests about the practices and values of different cultures. He did not respond to the problem of diversity of practices by adopting the relativism of the skeptics. He adhered to a majoritarian rather than a consensus view of natural law, in which many different practices could be accommodated, but in which an irreconcilable conflict would usually be resolved in favor of the values of his own culture. This remains one of the most troubling problems in contemporary international society. Gentili has at times a self-righteous assumption of the superiority of the European over the extra-European world, although he also shows some signs of caution and doubt. His approach to the challenge of difference is criticized in modern terms as chauvinist and inequitable—but much modern practice seems in fact to be remarkably close to the approach he charts.

The recurrence of Gentili's combination of universalism based on pragmatic pluralism and normative judgment based on a personal and culturally bounded set of morals or values is a striking feature of the practice and scholarship of international law. Now, as in past epochs, proposals abound to transcend it. At present, however, none of these proposals seems likely to succeed. The positing of a set of definitive norms encompassing the globe but neutral as to culture and detached from the particularities of the human agents who constitute and operate the international law system is an attractive, but illusory, response. An alternative, which currently enjoys some intellectual support in the West, is to construct a universal justification on the basis of the rectitude of the moral and political theory of the West, and to envisage the problems of international law as an extension of the problems of legislating and operationalizing moral and political codes in the West. Yet this proposal faces profound normative challenges that have scarcely been considered, let alone resolved, and in any case it is far from materializing in practice. Other universalist and particularist projects have adherents. For the time being, however, the position charted by Gentili endures in international law. For international lawyers concerned with meeting the challenges of difference, reading *De jure belli* after four hundred years is a sobering cause for reflection.

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[56] For a useful discussion, see Barbara Arneil, *The Wild Indian's Venison: Locke's Theory of Property and English Colonialism in America*, 44 POL. STUD. 60 (1996). Gentili endorsed the view that the world's many areas of unoccupied land, including vast tracts in Turkey, Africa and the New World, may be occupied by those in need of land, but held that the new occupants must accept the sovereignty of the existing ruler of the territory. JB, *supra* note 4, bk. I, ch. 17.

* The author wishes to thank the Centro Internazionale di Studi Gentiliani for hosting a lecture entitled "Alberico Gentili e il Mondo Extra-europeo: gli Infedeli, gli Indiani d'America, e la sfida della differenza," at which some of the arguments presented here were developed. The comments of Diego Panizza and Philip Allott, and the research assistance of Anthony Cashman and Carla Spivack, are gratefully acknowledged.