

2. GENTILI, GROTIUS, AND THE EXTRA-EUROPEAN WORLD

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The modern textbook organization of the law of the sea, with its cascading zones of jurisdiction and its preoccupation with things that happen in the sea such as fishing, navigation, war, pollution, or scientific research, to some extent masks the connections of the subject with reasons for travelling across the sea, including commerce, evangelism, slavery, migration, and empire. Grotius' *Mare Liberum*, which was published in 1609 to contest the claims of Portugal and Spain arising in part from the sea-borne expeditions to the extra-European world commemorated by this conference, is a reminder of the close links between the developing law of the sea and the expansion of Europe into the extra-European world. The point is manifest even in the title of *Mare Liberum*: "The freedom of the seas or the right which belongs to the Dutch to take part in the East Indian trade." This conference falls also on the 400th anniversary of Alberico Gentili's *De Jure Belli* (1598),¹ a work which had considerable influence on Grotius but which in its own right merits study. I propose in this paper to consider the views of the extra-European world held by these two foundational writers on the law of the sea and on what became international law. I will focus more attention on Gentili, who is less well known in part because of having been succeeded so quickly by Grotius.

Alberico Gentili (1552-1608) was born in San Ginesio, a much more powerful and populous town then than now, in the Marche region east of the Apennines in central Italy.² He studied law in the Bartolist faculty at Perugia,

*This paper draws extensively on other works of the author: "Confronting Difference: the Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment," 92 *Am. J. Int'l L.* 713 (1998); "A Grotian Tradition of Theory and Practice? Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull," 17 *Quinnipiac L. Rev.* 3-33 (1997); and *Alberico Gentili e il Mondo Extra-europeo: gli Infedeli, gli Indiani d'America, e la Sfida della Differenza* (Milan: Giuffrè, forthcoming). Thanks to the Centro Internazionale di Studi Gentiliani for hosting a lecture in which some of the arguments in this paper were developed. The comments of Diego Panizza and Philip Allott, and the research assistance of Anthony Cashman and Carla Spivack, are gratefully acknowledged.

1. It is a reflection of the parlous state of studies in the history of international law that the anniversary has been little noticed outside Gentili's native region in Italy. 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, *Del Diritto di Guerra di Alberico Gentili: Traduzione e Discorso* (1877).

2. A judicious and carefully researched appraisal is Gezina van der Molen, *Alberico Gentili and the Development of International Law: His Life, Work and Times* (2nd ed.,

then took up legal practice and scholarly pursuits in the Marche. 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 in controversies of theology and British constitutionalism, but his three books of most direct significance for international law are *De Legationibus* (1585) [DL], 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 1588-89 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.³

Hugo Grotius (1583-1645) was born in Delft, and had a precocious career in Dutch law, politics and intellectual life until his arrest in 1618 in a politico-religious controversy. After escaping from prison in 1621 he spent most of his career in Paris, latterly as Swedish ambassador to France. JB had considerable impact on Grotius in the composition of both *De Jure Praedae* (written in 1604-6, but essentially unknown until rediscovery of the manuscript in 1864) and *De Jure Belli ac Pacis* (1625) [JBP].⁴ JBP was vastly more systematic, elegant, and philosophically rigorous than JB, and it is fair to say that JB has been to some extent in the shadow of JBP ever since.⁵ The contrast has been magnified by the importance of Grotius' contributions to theology, philosophy, history and letters, which have assured him a luminous position in the history of European thought to which Gentili's fame will not compare. Gentili's fortune revived in academia after 1870, aided by post-unification Italian enthusiasm for what

1968) (first publ. 1937).

3. *De Legationibus Libri Tres* (Reproduction of the 1594 edition, with a translation by Gordon J. Laing, Oxford: Classics of International Law, 1924) (original 1585); *De Jure Belli Libri Tres* (Reproduction of the 1612 edition, with a translation by John C. Rolfe, Oxford: Classics of International Law, 1933) (original 1598); *Hispanicae Advocationis Libri Duo* (Reproduction of the 1661 edition, with a translation by Frank Frost Abbott, New York: Classics of International Law, 1921) (original 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 Belli Romanorum Libri II*, in *Alberici Gentilis, Opera Omnia* (Neapoli, Gravier, 1770) (1599).

4. Thomas Erskine Holland, "Alberico Gentili," in Thomas E. Holland, *Studies in International Law* 1 (1898). Peter Haggemacher, "Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture," in *Hugo Grotius and International Relations*, (Hedley Bull, Benedict Kingsbury and Adam Roberts, eds., 1990), 133.

5. On 18th century views of Gentili, see Haggemacher, "Grotius and Gentili," *supra* note 4, at 134-8.

Gentili could be made to symbolize, as well as the wider aspiration of international lawyers to craft an evolutionary history of the discipline and make its canonical texts available.⁶ But *JB* is probably seldom used by practitioners nor widely studied in universities. Nowadays it is scarcely cited as direct authority by international or national tribunals, whereas Grotius' work, while cited much less than in earlier epochs, is still periodically discussed.⁷

I wish to argue that both Gentili and Grotius were aware of what has been a persistent difficulty in international law ever since, the problem in a heterogeneous world of coping with difference while retaining a faculty for normative judgment. Gentili and Grotius have much in common in their responses to deep differences of society, culture, and religion. An express distinction between "Europe" and the "extra-European" world is not drawn systematically by either of them, but the impact of increasing European overseas engagement is evident in the work of each. Neither of them adopts simple universalism based on the rectitude of Christianity, or simple relativism based on the problem of grounding judgments – this is perhaps an illustration of the limited analytic value of the universalist/relativist dichotomy that has so often been drawn since. Gentili and Grotius both draw heavily on natural law for

6. The revival of interest in Gentili 1874-98 is considered in Holland, *Studies in International Law* (*supra* note 4), at 37-9. Surveying Italian attitudes toward Gentili from the Risorgimento onward, Diego Panizza chronicles successive acclaim for Gentili as a patriotic anticleric, a philosopher of peace, and (during the fascist regime) an apologist for assertive Italian nationalism and an example of Italian genius. "Appunti sulla storia della fortuna di Alberico Gentili," 5 *Il Pensiero Politico* 373 (1972). Gentili's place in the wider history of international law owes much to Holland's inaugural Oxford lecture in 1874 (*supra* note xx) and his scholarly edition of *De Jure Belli* (1877), as well as to the indefatigable James Brown Scott's superintendence of the Carnegie Endowment's Classics of International Law.

7. In separate and dissenting opinions in the International Court of Justice, Grotius appears much more frequently than Gentili, but such citations have more often been to adorn an argument than to establish one. In national courts the authority of Grotius has been invoked on significant points of fundamental principle in a few modern cases, for example with regard to eminent domain and obligations to pay compensation for takings of property (*Burmah Oil v. Lord Advocate*, [1965] A.C. 75 (UK H.L.); *Caltex v. U.S.*, 100 F. Supp. 970 (US Ct. Cl.); *Royal Bank of Scotland v. Clydebank District Council*, [1995] 1 EGLR 229 (Scot. Ct. Sess.)) the implications of property rights for land reform (*Davies v. Minister of Land, Agriculture and Water Development*, [1995] 1 BCLR 83 (Zim. High Ct); *Midkiff v. Tom*, 702 F. 2d 788 (U.S., 9th Cir. 1983),) land rights of indigenous inhabitants (*Mabo v. Queensland* (No. 2), (1992) 175 CLR 1, per Deane and Gaudron JJ (High Ct. of Aust.)) and public law necessity and the law when government has been usurped (*Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645 (P.C.); *Adams v. Adams*, [1971] P. 188 (Eng. High Ct.)) In the U.S. Supreme Court, Grotius might still be referred to occasionally on claims to adjacent waters (e.g. *U.S. v. Maine*, 475 U.S. 89 (U.S. Sup. Ct., 1986)) or other specialist matters, but citations even to Grotius have declined sharply since World War I, and references to Gentili, which were never common, are almost non-existent. In jurisdictions influenced by Roman-Dutch law Grotius continues to carry some authority which Gentili never enjoyed (e.g., *Chelliah Kodeeswaran v. Attorney-General of Ceylon*, [1970] A.C. 1111 (P.C.))

universal principles, and each concedes that various rules of the *jus gentium* which are not part of the corpus of natural law may not be universal. Both Grotius and Gentili are pluralistic, religious and relatively tolerant, both seek to temper power with law, both understand the problems for lawyers of relating theory to practice, and both confronted in their careers the difficulties of reconciling the arguments needed to represent particular clients with the integrity of intellectual positions. On many points of doctrine they take similar positions, as will be shown in subsequent sections. That their approaches relating to questions of heterogeneity in many respects overlap may readily be accepted. But are there any points of contrast between them of lasting importance to international lawyers confronting problems of deep difference? I will argue that Gentili's approach was to combine a pragmatic pluralistic understanding of international society with normative judgment based on the narrower world-view constituted by his own moral, religious and political commitments. Much the same characterization might be applied also to Grotius' writing. But Grotius goes beyond Gentili in his attempt to construct a philosophically robust system of natural law that he believes might be truly universal. Grotius' system has been interpreted by Richard Tuck as an answer to the skepticism of Montaigne, that is as a defense of universal natural law on which universalist normative judgments might more plausibly be grounded. We must consider, therefore, whether Grotius constructed a response to difference that was a real alternative to Gentili's. Whether or not this was for Grotius an objective of importance, Grotius' approach was embraced by some subsequent legal scholars (and perhaps by one strand of the "Grotian tradition") as a commitment to a grounded universality that tempers more parochial normative judgments. Whatever views are taken on questions of interpretation of Grotius' own texts and intentions, I suggest that the difference between the position I ascribe to Gentili and the position that might in this view be called Grotian continues to be evident in modern international law, that the Grotian approach remains more appealing but apparently unattainable, and that the endurance of Gentili's approach, with its poor grounding in modern normative theory and its evident practical defects,⁸ is a disconcerting challenge at the heart of contemporary international law.

8. Cf. Georges Abi-Saab, "Cours général de droit international public," 207 *RCADI* 1 (1987) (publ. 1996), arguing on cosmopolitanist-internationalist grounds for universality as the precondition and basis of normative judgment; and Martti Koskenniemi, "Repetition as Reform: Georges Abi-Saab, Cours Général de droit international public," 9 *European J. Int'l L.* 405, 411 (1998), arguing that the institutional implications of legal pragmatism "always seem less appealing than the analysis on which they are based," and lamenting the pursuit of pragmatic approaches to international law in the absence of a great "overarching normative vision" that is now unavailable.

1. PROBLEMS OF METHOD AND RELEVANCE

Projects to weigh the enduring significance of texts such as *JB* or *JBP* -- to consider a scholar such as Gentili or Grotius "not merely as a defunct publicist, someone who ran his lap some time ago,"⁹ must overcome serious problems of method. To avoid anachronism or naiveté, they must incorporate close study of groups of related texts, and of the historical and intellectual context in which the author worked. In so doing they risk being overlooked as recondite, or dismissed as chaining the modernist impulse to move forward free of the excesses of tradition and historical pedantry. Some critical scholars identify in hankerings to look back with reverence or nostalgia on figures such as Gentili and Grotius a politics or ideology of ancestor-worship,¹⁰ and others have problematized projects that construct international law as a continuous and progressing discipline from the sixteenth century to the present.¹¹ Yet there is much to be learned from past texts, and from the methods of their authors.

It has been argued that neither *JB* nor even *JBP* is really concerned with international law in any modern sense of the concept. Peter Haggemacher, for instance, argues that they represent instead the development and culmination of the just war tradition, drawing on the writers of the *seconda scolastica* – Vitoria, Ayala, Covarruvias, Vasquez de Menchaca – and others such as Pierino Belli.¹²

It is true that the accounts of both Grotius and Gentili lack many features found in high modern writing on international law. Neither treats the problem of sources of international law as one of systematic hierarchy. Gentili does not have a systematic theory of sources of international law at all; indeed, while *JB* begins promisingly with what looks like a system in which different sources of law are to be discussed in order, in most of the remainder of the book different sources are jumbled together, and these so-called "sources" are very open-ended and unclear by modern standards. Grotius offers a systematic theory of sources of law in general, but does not draw systematic or hierarchical distinctions among sources when treating the extra-civil or extra-national issues that for him are the relevant subject matter. Second, neither Grotius nor Gentili have a clear modern theory as to who are the subjects and who are the objects of international law: they apply the law freely to diverse countries, rulers, magistrates, soldiers, and individuals. Third, neither of them has a very precise concept of the state – they discuss many different types of political entities without much distinction. Fourth, the whole concept of sovereignty is not clearly worked out, and the sovereignty of rulers and of the people is not

9. The felicitous image is R.J. Vincent's, "Grotius, Human Rights, and Intervention," in *Hugo Grotius and International Relations*, *supra* note 4, at 241, 253.

10. Anthony Carty, "Japanese Deconstructions of the Grotian Tradition in International Law," 66 *British Year Book of International Law* 477 (1995).

11. See generally, David Kennedy, "Primitive Legal Scholarship," 27 *Harv. Int'l L.J.* 1 (1986).

12. *Grotius et la doctrine de la guerre juste* (1983).

systematically separated from the sovereignty of the state as a legal entity, although both Grotius and Gentili 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 and even Grotius seem to stand on the cusp of modern international law, to be quickly succeeded by writers with more modern concepts of international law such as Hobbes (whose *De Cive* appeared in 1642) and one of Gentili's successors at Oxford, Richard Zouche (whose *Juris et Judicii Feccialis* appeared in 1650).¹³ Gentili seems scarcely to see a distinction, and Grotius does not try systematically to draw one, between *jus gentium* and *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 pre-modern 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*.¹⁴ Grotius sometimes uses *jus gentium* in a similar way (e.g. *JBP* III.ii.2). The modern theory of international law has sought 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 seems misplaced.

Gentili and Grotius seem pre-modern in not focusing on states as separate legal entities monopolizing the *jus gentium*. In very 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, or corporate codes of conduct. Thus careful analysis of the legal powers of parties to unequal agreements, for example Gentili's discussion of the powers of German princes vis-à-vis the Holy Roman Emperor (*JB* 1.3), now seems less and less remote from agreements involving non-state groups.

The 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 overlook a great deal that has changed irreversibly. The significance of Grotius and of Gentili is not as a guide to a reappearing world in which they once lived. It lies rather in the remarkable durability of the architecture and basic approaches they developed to deal with enduring problems. In this paper I focus on one question

13. These five points draw upon Haggemacher, *Grotius et la doctrine de la guerre juste*, *supra* note 12; Peter Haggemacher, "On Assessing the Grotian Heritage," in *International Law and the Grotian Heritage* (1985) at 150; and *A Normative Approach to War* (Onuma Yasuaki, ed., 1993).

14. Daniel Coquillette, "Legal Ideology and Incorporation: The English Civilians, 1523-1607," 61 *Boston U. L. Rev.* 54-63 (1981).

in particular, the problem of dealing with deep difference.

2. 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, and certainly of that part of its history that has been bound up with Western philosophy and values.¹⁵ The aspiration for a universal system has been continuously confronted by fundamental differences – in culture, religion, social patterns, and political systems – which must be ignored or accommodated or managed or 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 from the expanding European engagement with the extra-European world contributed to new intellectual currents that displaced established ideas.¹⁶ As Michel Foucault has suggested, European thought was at the time ceasing to be restricted by the search for similitude, even though it had not really developed the tools to engage effectively with difference.¹⁷ Michel de Montaigne (1533-92) remarked that China's government and arts surpassed "ours" in many excellent features.¹⁸ Gentili's brilliant contemporary from Macerata, the Jesuit priest Matteo Ricci, saw Chinese calligraphy in 1582 and immediately realized that ideograms might provide a much better means than Latin for universal communication.¹⁹ José de Acosta, author of one of the most influential sixteenth century European works on the Americas, endeavored to compare Native Americans and European peasants, and Chinese and Mexican government.²⁰

This set of data and experiences gave sustenance to philosophical challenges to the assumptions of universality that underpinned much European moral thought. The natural law framework that supported many of the principal moral and juridical arguments of the time was placed in particular jeopardy. The revival of Pyrrhonist skepticism – doubts that it is possible to know something

15. David Kennedy, "New Approaches to Comparative Law: Comparativism and Governance," in *Utah L. Rev.* 545 (1997), at 560 and 568-80.

16. See e.g., J.H. Elliot, *The Old World and the New, 1492-1650* (1970); and Walter Mignolo, *The Darker Side of the Renaissance: Literacy, Territoriality, and Colonization* (1997).

17. Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (1970).

18. "On Experience," in Michel de Montaigne, *Essays* (J.M. Cohen trans., Penguin, 1958), at 352.

19. Jonathan Spence, *The Memory Palace of Matteo Ricci* (1984), at 21. Chinese writing was also known to priests in the Americas by this time, as José de Acosta's papers indicate.

20. Acosta's influential *Historia natural y moral de las Indias* (J. Alcina Franch, ed., Madrid, 1987) (original 1590), is discussed, e.g., in Anthony Pagden, *The Fall of Natural Man* (2nd ed., 1986), at 161-5.

to be true, or to be certain of good and evil, leading to a quietist design for living based on empirical assessments of how things *appear* as opposed to belief about how things *are* – was a challenge to the assertions of universal natural law. This was not purely epistemological skepticism of the sort associated with Descartes and considered by Hume, but skepticism as an ethics for living, represented above all in Montaigne's *Essays*, which were available in fairly complete form by 1584.²¹ Montaigne argued that the diversity of cultural practices in different societies around the world was so great that there could not possibly be any "natural" law. "What truth is that, which these Mountaines bound, and is a lie in the World beyond them?"²² To give an example used in the skeptical debate, some societies accorded great veneration to the elderly, but others hurled the elderly from cliffs when they became unable to work. How then could one say that Nature prescribed a law concerning respect for the elderly?

If law could not be based on nature as universally observed, what was its basis? Montaigne's response was that each of us should protect our self from harm and live in accordance with the laws and customs of our country, but that we should not believe that these laws and customs are more justified or better than the different laws and customs of any other country. The laws of each country are maintained "not because they are just, but because they are laws."²³ Montaigne's skepticism was not despairing – he sought from his own life experience a pattern for living broadly consonant with some basic commitments, including a strong belief in self-preservation.²⁴

Richard Tuck has suggested that self-preservation provided for Grotius the key element in the defense of natural law against the skeptical challenge. Beginning in the three or four years before Gentili's death in 1608, Grotius sought scientifically to construct an adequate system of natural law rules on the basis of the one universal precept the skeptics did accept, the natural urge of all of us to self-preservation.²⁵ Grotius' methodological innovation was to apply to natural jurisprudence scientific precepts of the sort associated with Francis Bacon, basing the law of nature on right reason.²⁶ *JBP* contains little explicit

21. The case for the importance of Montaigne's position is made by Richard Tuck, *Philosophy and Government 1572-1651* (1993). For a useful overview see J.B. Schneewind, *The Invention of Autonomy* (1998), at 37-100.

22. "Apologie de Raimond Sebond," in Michel de Montaigne, *The Essays of Michael Lord of Montaigne* 297 (John Florio trans., J.M. Dent, 1924), at 297.

23. "On Experience," *supra* note 18 at 353.

24. Schneewind, *The Invention of Autonomy*, *supra* note 21, at 51, discusses Montaigne's condemnation of lies, torture, and witch-burning. See also, Nancy Struever, *Theory as Practice: Ethical Inquiry in the Renaissance* (1992), at 182-209.

25. Self-preservation plays a more central role in the logical system of rules of natural law constructed in *De Jure Praedae* (beginning with the first two precepts of the law of nature) than in *JBP* where human sociability plays a more significant role, but self-preservation is still prominent in the basic construction of natural law in *JBP* – see section I.ii.1.

26. For Grotius, a law of nature is one which can be shown to agree with a rational and

discussion of moral relativism, and it is difficult to gauge the degree to which he was consciously preoccupied with the problem, but he is quite explicit in recognizing this challenge of skepticism, and he accords it a prominent place when listing objections he must face.²⁷ In any case, Grotius' work was undoubtedly understood by some contemporaries and successors as an important philosophical defense of natural law against skepticism.²⁸ Although this may well not have been his major concern, in retrospect a significant 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."²⁹

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 for natural law and moral judgment raised by the skeptics: he has most often been evaluated by reference to competing traditions in Roman law.³⁰ While there is ample evidence in his thought and his sources of the influence of Florentine republicanism, humanism, and skepticism, there is little evidence of his consciousness of the connections between the implications of difference and the specific problems of the skeptical challenge. Nevertheless, his writings can be interpreted in retrospect as entailing such a connection. In *JB* he refers expressly in three places to Montaigne's *Essays*, and shows considerable respect also for the arguments of the Flemish skeptic Justus

social nature. His methodology brought to the natural law tradition what has come to be called the New Science of Law and Morality. This interpretation owes much to Jules Barbeyrac, "An Historical and Critical Account of the Science of Morality" (Carew trans.), in Samuel Pufendorf, *Of the Law of Nature and Nations* (Basil Kennet trans., 4th ed., J. Walthoe, 1729).

27. Grotius, *JBP*, Proleg. 5 accords a representative role to the second century B.C. Greek sceptic Carneades: "Carneades... was able to muster no argument stronger than this, that, for reasons of expediency, men imposed upon themselves laws, which vary according to [peoples'] customs, and among the same peoples often undergo changes as times change; moreover that there is no law of nature, because all creatures, men as well as animals, are impelled by nature toward ends advantageous to themselves; that, consequently, there is no justice [*justitia*], or, if such there be, it is supreme folly, since one does violence to his own interests if he consults the advantage of others." Richard Tuck makes the case that "for 'Carneades' one should in effect read 'Montaigne' or 'Charron'." Richard Tuck, "The 'Modern' Theory of Natural Law," in *The Languages of Political Theory in Early Modern Europe* (Anthony Pagden, ed., 1987), at 109.

28. Barbeyrac, *supra* note 26, made this case strongly.

29. Richard Tuck, *supra* note 21 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.* 3-33 (1997).

30. See e.g. Guido Astuti, *Mos Italicus e Mos Gallicus nei Dialoghi "De iuris Interpretibus" di Alberico Gentili* (1937).

Lipsius, and for the writings of the Roman historian Tacitus to whom the contemporary skeptics were heavily indebted.

In the following sections, I argue that Gentili and Grotius both adopted a pluralistic view of international society, in which a great deal of difference could be accommodated. Both were influenced in their political theory by problems of difference, although they disagreed on the extent to which religious difference necessitated a powerful centralized sovereignty. Although their doctrines and methods overlap considerably, a difference of style and emphasis may be discerned between them that has been of enduring importance in the history of European expansion and the struggles of contemporary international law. Grotius sought to defend against the challenges arising from deep difference a universal natural law system accessible by right reason, whereas Gentili's universalist aspirations are pragmatic rather than systematic, and his normative judgments are grounded more expressly in his own cultural and moral world than are those of Grotius.

3. INTERNATIONAL SOCIETY

The seventeenth century lawyers' account of an international society comprised of states and similar collective entities is often described as "Grotian," and Grotius' account of international society has been much discussed,³¹ but I argue that the attribution to Grotius is somewhat misleading. Gentili offers a perceptive account of the essential political and institutional characteristics of international society, and Grotius, while more systematic, adds little to Gentili's account of its key features. As with other aspects of his thought, I believe that Gentili's view of international society reflects his distinctive combination of pragmatic pluralism and normative judgment as a means to reconcile universality with the challenge of difference. His treatment of the idea of international society is pragmatic rather than philosophical,³² and Grotius treated the topic more systematically and with stronger philosophical grounding, but the practical features of Gentili's account largely recur in *JBP*. Five indicative features of Gentili's account of international society may be noted, of which the first four were endorsed and carried forward by Grotius.³³

First, the functioning of international society depends on the smooth and

31. Hedley Bull, "The Grotian Conception of International Society," in *Diplomatic Investigations* (Herbert Butterfield and Martin Wight, eds., 1966), at 51.

32. Gentili makes reference to the standard Aristotelian, 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* I.15.) But he does not really contribute to the philosophical development of the idea.

33. Cf. Hedley Bull, *The Anarchical Society* (1977).

trustworthy operation of basic devices of communication and commitment: embassies and treaties. Gentili's argument for the legal protection of embassies and ambassadors does not apply to pirates or rebels, but it does apply without distinction to all of the permanent organized polities of international society. Thus Gentili shows that the law of embassies applies to ambassadors from states of different religions – this is true whether the ambassadors are sent between Protestants and Catholics, Catholics and Orthodox, Christians and Muslims, Turks and Persians, or Jews and Gentiles. (*DL* II.11.) Gentili makes a passionate argument for good faith in the making and observance of treaties – and he extends this, admittedly with some hesitation, to non-Christians, particularly the Ottoman Turks.

Second, an effective law for international society must be founded on reciprocity, and must treat identical cases identically. Thus Gentili agrees with Catholic lawyers who argue that the Roman Empire legally continued to exist in Gentili's time, but he points out that this must mean that other old empires continue legally to exist as well.

Third, all political entities meeting some basic functional requirements are entitled to be members of the international society. These requirements include: a state, a senate, a treasury, united and harmonious citizens, and some ability to agree and adhere to treaties. (*JB* I.4. Gentili takes these requirements from Cicero's *Philippics*. Grotius utilizes a similar approach in *JBP* III.iii.1.) These are largely practical, non-ideological criteria for membership in international society. There is no requirement that states have a particular religion, or that they be organized in a particular way.

Fourth, war has a place in international society. In a system which lacks international magistrates and depends on self-help, war is in some cases the only way to maintain international society. But Gentili argues that war should be an instrument of last resort, and he includes a lengthy discussion of arbitration (*JB* I.3), upon which Grotius appears to have drawn increasingly in preparing successive editions of *De Jure Belli Ac Pacis*.³⁴ Gentili is careful to distinguish full-scale war, with all of its legal and political implications, from minor skirmishes and frontier incidents in which violence can be contained without escalating into war. (*JB* I.2.) Gentili, unlike Grotius, incorporates into the definition of war a public element.

Fifth, it is essential that a balance of power be maintained among the major states. Force must sometimes be used to maintain this balance. Gentili warns strongly against permitting either Spain or Turkey to become so strong as to be able to subordinate all of the other states into a universal empire. (*JB* I.14.) Grotius, by contrast, shows little interest in the balance of power as a principle of order, perhaps because it seemed to offer little of immediate assistance to a Europe engulfed in the Thirty Years War.

34. Haggemacher, "Grotius and Gentili," *supra* note 4, at 173.

4. POLITICAL THEORY AND RELIGIOUS DIFFERENCE

A major theme in the political theory of western Europe at the end of the sixteenth and the beginning of the seventeenth centuries was the growth in support for strong secular government as a means to control the religious fanaticism that had brought civil war to many European states. Gentili, Grotius, and Hobbes were among the many intellectuals who experienced religious exile – these three also had in common the experience of being threatened by fellow Protestants.³⁵

Grotius took many of the same positions as Gentili – he denies that religious difference is a just cause of punishment (*JBP* III.ii.48-50), and favors both toleration and state security. Nevertheless, Grotius diverges somewhat from Gentili on this key point of political theory. He had direct personal experience, in recurrent controversies in Holland, of the dangers posed by friction among religious factions, and took the side of state power in the intense Dutch controversies concerning the power of the state to intervene in and resolve religious disputes. In curbing the right of resistance even to an unjust ruler, and upholding the central power of the ruler as a means to overcome the dangers of religious fanaticism, Grotius' establishes a political theory for managing and subduing difference that leads directly to Hobbes.³⁶

Gentili's combination of pragmatic pluralism and normative commitment may be discerned in his account of the relationships between the form of government, the rights and powers of the rulers, and issues of religious difference. Although himself a committed believer and willing on occasion to take positions in heated theological controversies, Gentili argues that religious difference is not a just cause of war. He favors religious toleration, but does not advocate this to the point where the security of the state would be threatened. In *JB* he shows some willingness to strike a balance between rights of rulers and rights of subjects, in matters touching religion as in many other matters of good government. He makes a strong prudential argument for religious tolerance within states as a means to avoid civil war (*JB* I.10). He provides an important justification for religious tolerance, that religion is a relationship with God and not with rulers or with other subjects. (*JB* I.9.) As a matter of general political theory, Gentili famously asserts that the king has duties to the people in the same way that the people have duties to the king. What these duties are depends very much on the specific circumstances, including the exact terms of the compact from which the ruler derives his or her power. But even in *JB* the right

35. Diego Panizza, *Alberico Gentili, Giurista Ideologo Nell'Inghilterra Elisabettiana* (1981), and Panizza, "Alberico Gentili: vicenda umana e intellettuale di un giurista italiano nell'Inghilterra elisabettiana," in *Alberico Gentili: Giurista e Intellettuale Globale* 31-58 (1988), assess Gentili's struggles with the puritan extremism of John Rainolds and others in Oxford in the 1580s and 1590s.

36. Richard Tuck, *supra* note 21.

of ordinary private subjects to resist their ruler in matters of religion is denied (*JB* I.11). And in later disputations, published in 1605, Gentili moves more and more to accepting the absolute sovereignty of the authorities of the state, a position which in England came close to James I's view 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.³⁷

Despite the prevalence of religious conflict at the time and his own bitter experience of it, Gentili argued that much civil war is not in fact attributable to religious conflict: "our forefathers witnessed the same troubles when there was unity of religion" (*JB* III.11.) Thus Gentili sees the problem of civil war not primarily as a product of religious strife, so 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 (*JB* I.14), and the practical and engaged republicanism of Machiavelli (*DL* III.9.) It is cautiously suggested, however – and the evidence for this is limited – that Gentili sees a particular justification for more centralized state power in the more dangerous and competitive international environment, with 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 (*JB* I.10), 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.³⁸

5. THE CHALLENGE OF DIFFERENCE IN LEGAL THOUGHT

Five features of Gentili's legal thought may be evaluated to illustrate the distinctive structure of his combination of pragmatic pluralism and normative judgment as an answer to skepticism. First, he makes a great effort to compile information on what the diverse practices of different societies actually *are*. 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 more use of modern practice than Grotius, for instance, in *JBP*, thinks proper – Grotius indeed criticized Gentili's choice and assessment

37. *Regales Discursus Tres* (Helmstadii, Johanes Heitmuller, 1669) (first pub. as *Regales Disputationes*, 1605.) Of particular relevance are "De Potestate Regis Absoluta," at 1-28, and "De Vi Civium in Regem Semper Injusta," at 77-104.

38. Joël Cornette, *Le Roi de Guerre* (1993).

of examples.³⁹ Second, he focuses not just on conduct, but on normative assessment of that conduct: so that an act which was much criticized, or which 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 sizeable 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 for true consensus as a basis for law. He recognizes that choosing how to act in a particular situation, or choosing the true rule of law from among several possible alternatives, is a matter of judgment. He appreciates that the choice is moral and political, but considers it more useful to engage in that process of choice, with the best motives one can have, than to withdraw from the world in the manner of Montaigne. There is here a difference in style or temperament between Gentili and Grotius. Both make hard choices, and Grotius often expressly prefers the practice of the "better" sort of nations where practices diverge, but Grotius even more than Gentili hankered in law as in religion for the security and social peace of consensus.⁴⁰ Fourth, while Gentili believes that the fundamental laws of nature are immutable, he accepts the Thomist distinction between primary and secondary laws. Thus he accepts that there will be variation among different societies in the secondary rules, arising from different capacities and methods for reasoning. Hence Gentili is able in practice to accommodate wide variation in social customs within a natural law framework; he is influenced here by the works of sixteenth century Spanish jurists such as Vitoria and Covarruvias, struggling to make sense of the New World. Fifth, and this is probably Gentili's most important contribution – one which Grotius to a considerable extent internalizes – he confines the scope of the universal *jus gentium* to a narrow set of social practices, and establishes a pluralist scheme in which legal interaction between different societies is quite possible even with huge differences in such matters as religious practices, political systems, commercial laws, and family laws. He offers a view of international law in which legal relations are possible notwithstanding divergences in many kinds of social practices. But he does not take the relativist position and exclude all such practices from legal consideration. He has no hesitation in prescribing rules where there is an unavoidable clash of social practices, as where through war a state comes into military occupation of people

39. *JBP*, Proleg. 38. Grotius nevertheless refers extensively to contemporary practice on some issues, as in the discussion of non-belligerents' shipping and cargo in *JBP* III.i.5.

40. *Cf.* the consensual argument for ecumenism in Hugo Grotius, *Meletius* (ed. and trans. G.H.M. Posthumus Meyjes, 1988) (original c. 1611). 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, *supra* note 26, bk II, ch. iii, s. 7.

of a different religion.

Many of Grotius' ideas and legal methods overlap with Gentili's. But Grotius goes beyond Gentili in taking a systematic approach to sources of law that provides a foundation for a more credible universalism. Throughout *JBP* he sustains a distinction between divine law, natural law, and human volitional law. He endeavors to construct natural law on universal premises, and is frequently careful to note that where the human-made *jus gentium* goes beyond natural law, it is likely not to be universal.

6. UNIVERSALITY, NORMATIVE JUDGMENT, AND THE EXTRA-EUROPEAN WORLD

The pluralism of the conception of international society described here – a conception usually termed Grotian but in my view already largely evident in the works of Gentili – has long been acclaimed, particularly in the English school of international relations. The pluralism is animated by pragmatism and universalism. War is tolerated where necessary, and the balance-of-power principle advocated, to maintain the system: those engaging in war or balance-of-power politics do not ipso facto fall outside the system. Grotius' universalism is well-documented. A major argument of *Mare Liberum* is that independent political communities in the East Indies and elsewhere enjoyed property rights and freedom of contract: they “are free men and *sui juris*.”⁴¹ Grotius treats them in the same way as other peoples, and denies the Portuguese pretense to have “discovered” seas off coasts inhabited by Moors, Ethiopians, Persians, Arabs, or Indians who were already well acquainted with these seas. (*ML* v.) Although Gentili's universalism is less pronounced, on the pressing practical question of his day, the status of the Ottoman Empire within international society, Gentili's tendency is to be inclusive. Gentili often refers to Ottoman practice to show the existence of rules of international law – in discussing the protection of civilians in war, for example, he comments that “even the Turks ordered that women be respected when Turkish armies entered Jerusalem and Constantinople” (*JB* II.21). He recognizes that the Islamic religious beliefs of the Turks give them as much reason to act as do religious beliefs of Christians or others. He holds that Christians may conclude treaties of commerce with infidels, since the law of man commands commerce among all men. (*JB* III.19.) This was in keeping with widespread practice. There was considerable commerce between the Ottoman Empire and the Christian world, with Venice and France especially but also with much of coastal Italy. Queen

41. *ML*, ch. 4. Whether Dutch practice accorded with this is another matter. At the Anglo-Dutch Colonial Conferences in 1613 and 1615 Grotius defended Dutch practices of preventing East Indians from selling spices to anyone but the Dutch, on the ground that the East Indians had agreed to this.

Elizabeth in 1581 chartered the Turkey Company to promote trade with the Ottoman Empire, and shortly thereafter appointed a permanent English ambassador to Constantinople.⁴² For prudential and ethical reasons Gentili did not think Christians should conclude military treaties with infidels. Nevertheless, Turkey was probably the strongest military power in Europe, and Christian rulers from the Pope to the King of France made military and diplomatic arrangements with the Ottoman Sultan when necessary, especially to draw on Ottoman power to help counterbalance Spain. Gentili had no doubt that the basic laws of war applied also to wars between infidels and Christians, even though some more refined rules, for example that concerning the non-enslavement of prisoners captured in war, applied in his view only in wars between Christians. Grotius followed this approach to the laws of war, while noting that similar *inter se* rules applied also amongst other groups, such as Muslims. (*JBP*, III.vii.9)

Some of these features point to a difference between Gentili and Grotius on issues that were important not only for the extra-European world but for the development of the law of the sea. Grotius is willing to make normative judgments about extra-European practices, but when he does so he at least purports to be applying a universal legal scheme, and his universality, influenced perhaps by the relativism and skepticism of Montaigne, in some respects tempers inclinations to judge on the basis of a narrower morality. Gentili's universalistic pluralism does not so obviously temper his willingness to make normative judgments based on his own moral universe, a universe that was far from being coextensive with international society as he conceived it.

The temporal scope of Gentili's moral world was very extensive. He draws little distinction between an episode that occurred in the ancient Roman Republic and an event in 16th-century Spain. The physical space of his world, however, was more tightly bounded. It comprised roughly the territories covered by the civilization of the ancient Roman Empire. And not these territories as a whole, but their cities, for Gentili seems to envisage political life 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 Americas⁴³ he does not show a great deal of the curiosity and intellectual reconsideration that the discoveries sparked among his contemporaries. Grotius' range was somewhat wider: he was

42. Laura Coulter, "An Examination of the Status and Activities of the English Ambassadors to the Ottoman Porte in the Late Sixteenth and Early Seventeenth Centuries," 28 *Revue des Études Sud-Est Européennes* 56 (1990).

43. Gentili accurately notes, for instance, that China confined trade by Europeans to just a few port cities, and he holds that this is entirely lawful. 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. (*JB* I.19.) 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.

professionally much concerned with the affairs of the East Indies, and also showed some interest in Asia, as well as entering the controversy about the origins of American Indians. He points out that the Roman Empire at times amounted to only one-sixth of the then-known world, and that it is absurd to claim that the Emperor had the right of ruling over the most distant and hitherto unknown peoples (*JBP* II.xxii.13).

Consistent with their biographies, the substantive values to which Gentili and Grotius subscribe generally fall within the range of those of the Christian European world, although Gentili's compass is again somewhat narrower. Gentili stays close to the Judaic and Greco-Roman heritage of his world, and shares its anxieties about Islam.⁴⁴ Growing up in the Marche, Alberico would have been aware of periodic alarms about impending Turkish attacks on the neighboring coast.⁴⁵ He may have internalized a looming terror of cruel infidel Turks advancing from the East that was widespread in Christian Europe: 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." (*JB* I.12.) 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.

Are there implications for the extra-European world and treatment of difference of the divergence I have identified between Grotius and Gentili? Some answer that it is an immaterial distinction, in that neither Gentili nor Grotius really were interested in a neutral construction of a universal international society in the face of deep difference; their supposed pluralism was part of a legal-moral ideology that justified European expansion.⁴⁶ Thus Grotius

44. Gentili's views of Judaism cannot adequately be analyzed here. Like many Protestant legal scholars of the period, above all John Selden, he made considerable use of ancient Jewish sources. At a time of widespread intolerance and exclusion of Jews in Christian-ruled Europe, passages in *JB* may arguably be interpreted as protests against mistreatment. He condemns Sejanus (Tacitus' account of the servile but power-hungry imperial favorite Sejanus was then much discussed) for inciting the Roman Emperor Tiberius to destroy the peaceful freedom of the Jewish community in Rome, and adds: "I only wish there were no Sejanuses today." (*JB* III.11.)

45. In Macerata, fear of conflict with the Turks led to compilation in 1551 of a list of all those eligible for military service, and further anxiety was provoked in Ancona and Macerata in 1566 when the Turks attacked the Gargano to the south. Spence, *supra* note 19, at 1-58.

46. On Gentili, see Robert Williams, *The American Indian in Western Legal Thought* (1990) at 194-200. On Grotius, see De Pauw, *infra* note 47; and B.V.A. Röling, "Jus ad Bellum and the Grotian Heritage," in *International Law and the Grotian Heritage* (T.M.C. Asser Instituut, 1985) at 111. For similar arguments relating to Vitoria see e.g.

rather disingenuously argued that Dutch military operations in the East Indies were for the protection of the native inhabitants, and that spice monopolies were granted voluntarily by the natives to the Dutch in appreciation of this protection, when the colonial record was much more sordid.⁴⁷ Similarly it is notable that Gentili says nothing about English military operations in Ireland, despite their notoriety at the time, nor does he engage directly with issues raised by Portuguese conduct in Africa. As to the Americas, Gentili and Grotius both argued that it was proper for Christians to make war against peoples who engaged 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." (*JB* I.25. See also *JBP* II.xx.40.) 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 cannibalism, and even without finding real evidence asserted its existence anyway as a justification for wars they wished to wage.

On other issues, however, the opinions of Gentili and of Grotius are not so unambiguous in their implications for European expansion. Thus Gentili and Grotius both followed Francisco de Vitoria in asserting that total refusal by a people to engage in commerce with other peoples would be a justification for war,⁴⁸ but Gentili argued that denial of commerce was not in fact a real reason for the Spanish invasions. According to Gentili, the Spaniards were aiming at dominion, and were quite wrongly trying to take possession of the lands of the Indians as if they were possessed by no one. (*JB* I.19.)

Similarly Gentili and Grotius both showed considerable sympathy with the Aristotelian idea that the Indians are slaves by nature,⁴⁹ but both were ultimately swayed by the argument of Vitoria and his followers that Indians were not natural slaves. Gentili concludes instead that they were people who through migration had become isolated from the mainsprings of civilized culture, and rejects Aristotle's theory of natural slavery, treating it simply as a belief the ancient Greeks had (*JB* I.12.) He inclines to the Spanish position that it was the responsibility of advanced Christian Europeans to provide tutelage to the

Onuma Yasuaki, "Eurocentrism in the History of International Law," in *A Normative Approach to War* (Onuma Yasuaki ed., 1993), at 371; and Antony Anghie, "Francisco de Vitoria and the Colonial Origins of International Law," 5 *Social and Legal Studies* 321 (1996).

47. *Mare Liberum*, p. 109. For an anti-colonial denunciation, see Frans De Pauw, *Grotius and the Law of the Sea* (P.J. Arthern trans., 1965), at 56-9.

48. Such views remain a source of conflict, as with Indian groups in Mexico and elsewhere in the Americas who argue that neo-liberal trade agreements such as the North American Free Trade Agreement (NAFTA) force them into world markets that confer few benefits while undermining their cultures and economies.

49. *JB* II.24; *JB* III.9. In *De Jure Praedae* Grotius endorsed the Aristotelian notion of natural slavery (Ch. 6, 61-2), but he rejected this in *JBP* (II.xxii.11-12; III.vii.1.)

Indians; this proved to be an enduring justification for the *encomienda* system and other potentially abusive institutions.

As these fragments of doctrine suggest, Gentili and Grotius can certainly be seen as contributing to the aggregate of ideas and beliefs that justified European capitalist development and overseas expansion, but on some issues their pluralism has also been read as "ahead of its time" or potentially progressive.⁵⁰ Both usually opposed cruelty toward barbarians. Gentili urged that victors hesitate to insist that the conquered adopt new customs and religions. He referred 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." (*JB* III.9.) Most important, Gentili condemned as thin pretexts many of the Spanish justifications for war in the Americas. He completely rejected the argument that war on the Indians was justified because they refused to accept Christianity or Christian missionaries. (*JB* I.12; *JB* I.25.) This is a refutation of the whole Spanish pretext symbolized by the extraordinary practice of preceding many attacks on Indians by a public reading, in unintelligible European languages and usually well out of earshot of any Indians, of a requirement that the Indians receive the word of Christ.⁵¹ In *JBP* Grotius does not explicitly evaluate Spanish conduct, but he follows Vitoria in rejecting pretexts of discovery, civilizing beneficence, and religious conversion as justifications for force (II.xxii.8-12; II.xx.41-51).

It may be argued that colonial expansion was justified all the better by these ambiguities and by the minor anxieties and criticisms that add to the appeal of any justificatory discourse. On this view, such divergence as may exist between Gentili and Grotius counts, but only as a diversion. This view is reinforced by the realist argument that the legal opinions given by Gentili and Grotius were simply to serve the interests of clients, and adopted any tolerable reasoning to reach a predetermined result.⁵² It does not seem that Gentili's *JB*, which in its origins and perhaps in its complete form seems to predate his substantial involvement with commercial practice, was written with the exigencies of practice in mind, and no strong case has been made that Grotius in *JBP* was preoccupied with the interests of past or future clients. In any event, larger questions of importance to contemporary international law are implicated in the comparison between the two approaches to difference which have been sketched here.

50. Charles Henry Alexandrowicz, "Introduction," in Van der Molen, *supra* note 3, at viii. Cf. Gezina van der Molen, "Alberico Gentili and the Universality of International Law," 13 *Indian Year Book of World Affairs*, Part II (1964), at 33; and Onuma Yasuaki, "Conclusion," in *A Normative Approach to War*, *supra* note 13, at 369.

51. The *requerimiento* is discussed in Pagden, *supra* note 20.

52. Cf. Guy Ladreit de Lacharrière, "The Controversy Surrounding the Consistency of the Position adopted by Grotius," in *International Law and the Grotian Heritage* (T.M.C. Asser Instituut, 1985), at 207.

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, perhaps more so than Grotius, 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.

Grotius too makes normative judgments grounded in his own values. But he has been read as seeking to reason to these judgments through the construction of a philosophically robust account of natural law grounded in a plausible universal understanding of human nature. Whether he is able to derive from the precepts of this system all of the precise rules which he asserts form part of natural law is another question. Nevertheless, the "Grotian" project has been shared by many in subsequent generations. While its express influence has declined with the formal eclipse of systematic natural law theory in international law scholarship, many variants survive, including in much of modern human rights thought, elements of feminist theory, the New Haven School, peace movements, and libertarian branches of international liberalism.

Most theories of international law envisage the possibility of its universal application as a normative system. To be functional and engage with the world of practice, such universalistic theories are, of necessity, at least somewhat pluralist. With varying degrees of cogency or success, they seek to accommodate deep differences of belief, culture, socio-economic patterns, and political organization. The participants in the international legal system must often make normative judgments, and must determine whether these judgments should be grounded in universalistic principles, deferential pluralism, or the normative commitments of a particular actor or reference community. This is a challenge in any legal system that is rendered much more acute in international law not only by diversity but by the absence of a strong political community or civil society in which approaches to such problems may be hammered out.

At issue between the positions ascribed to Gentili and Grotius is a struggle over how to move from minimalist pluralism to an international legal system

with more searching substantive principles. The issue arises to the extent that this cannot in practice be achieved by express universal consent. The approach associated here with Grotianism seeks to address this problem by grounding substantive principles in universal truths, while acknowledging limits, beyond which pluralism operates. The approach associated with Gentili despairs somewhat of this solution – it admits problems of coherence, allows for some pragmatic pluralism based on the limits of power and legitimacy, but nevertheless proceeds to normative judgment from practical necessity and to avoid abdicating responsibility. Neither approach envisages that the power of normative judgment is monopolized by states, but the subjectivism inherent in Gentili's position allows more scope for self-appointed judges, including NGOs, and is perhaps a better reflection of the practices shaping some dynamic features of contemporary international law. This struggle plays out in many areas of international law, not least the law of the sea. Is it coherent for the Law of the Sea Convention and the International Watercourses Convention to make little or no reference to indigenous and traditional communities while the Biodiversity Convention and much national practice does? Are Makah Indians in the US Northwest entitled to hunt whales, or to sell them? Should costly international law measures be prescribed to avert sea-level rise that threatens distinctive small island communities and ecosystems? Is past use by industrialized states of the absorptive capacity of the oceans an equitable factor to be taken into account in Kyoto Protocol negotiations or other distributive decisions? What ocean resources can legitimately be claimed by states left landlocked in the colonial process of boundary-making? What is the legitimacy and future of the Australia-Indonesia Timor Gap treaty? In what circumstances may naval interdiction be used to buttress a "humanitarian" military intervention not authorized by the UN Security Council?

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.⁵³ 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

53. As Gentili's Gray's Inn colleague, Francis Bacon, observed of the science of medicine, it had proceeded "rather in circle than in progression. For I find much iteration, but small addition." Bacon, *The Advancement of Learning* (Arthur Johnston, ed., 1974) (original, 1605).

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.