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► **To cite this version:**

Alain Wijffels. The jus post bellum, cornerstone of Gentili's 'De iure belli'?. Luigi Lacché & Vincenzo Lavenia (a cura di). Alberico Gentili e lo jus post-bellum. Prospettive tra diritto e storia, pp.17-35, 2020. hal-03328344

HAL Id: hal-03328344

<https://hal.science/hal-03328344>

Submitted on 30 Aug 2021

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Alain Wijffels

The *jus post bellum*, Cornerstone of Gentili's 'De iure belli'?

1. Introduction

Why should the *ius post bellum*, if that is how one may characterise the third book of *De iure belli*, qualify as the cornerstone of Alberico Gentili's most famous work? My personal explanation or bias in that respect is that the main purpose of Gentili's work, including his treatises on topics of international law, was to secure the position of civil law scholarship, and by implication, of graduates educated in civil law faculties, in public governance. That purpose, I would argue, was an *aggiornamento* of the legal and political tradition prevailing in late-medieval Italian cities, which had still been the foundation of academic legal teaching and scholarship during Gentili's own formative years at Perugia¹. Legal science, in late-medieval Italy, was first and foremost the science of the art of government². Good government, in that political culture, was any specific form of government which achieved, or aimed to achieve, efficiency and justice. Law graduates, either from canon law or civil law faculties, were deemed to have developed

¹ And also of his early professional career in his native Marches: Luigi Lacchè, *Giuristi e cultura giuridica nella Marca ai tempi di Alberico Gentili. Spunti per una riflessione*, in *Alberico Gentili (San Ginesio 1552 - Londra 1608). Atti dei convegni nel quarto centenario delle morte*, vol. 3, Milano, Giuffrè, 2012, pp. 231-260.

² For a short outline of that argument, which implies that our present-day understanding of law in legal education in law schools and law faculties fails to live up to the purpose of legal studies when universities and legal faculties were originally founded in the late Middle Ages: Alain Wijffels, *Une très brève histoire du droit dans la civilisation occidentale (1000-2000)*, «Annales de Droit de Louvain», 77/3, 2017 [2019], pp. 397-411.

a special expertise on both scores. They were not alone: theologians, and some artists such as historians could also lay claim on their own relevant expertise for counselling the political rulers³. However, particularly when it came to express justice, whether the justice of a policy established by the statutory or executive ruling powers, or the justice of a decision at the end of a judicial process, university-educated lawyers could claim that their Roman law based jurisprudential skills could play a conclusive part in conceiving and implementing efficient and fair decisions.

From that perspective, the issues dealt with in the third book of *De iure belli* are probably those where lawyers, as political councillors, could hope to wield the most influence. If one considers that the central theme of Book I is the issue of a just war, the lawyer's role will not so much be decisive in the actual resolution to go to war. Instead, the lawyer's intervention will be to argue the justification of his prince's war, or the unjust circumstances and motives of his prince's enemy. That civil lawyers could prove exceedingly useful at such a two-fold exercise of argumentation was spectacularly displayed by Gentili himself in his *De armis romanis*⁴. Nevertheless, the decision of going to war is such an essential feature and prerogative of the supreme political power that, all the theories on a just

³ I have argued along the same lines with regard to Gentili's position vis-à-vis theologians, in particular in the light of his work on the law of marriage (*De nuptiis*), Alain Wijffels, 'Audiuntur theologi'. *Legal Scholarship's Claim on the 'Second Table' in Alberico Gentili's 'De Nuptiis' (1601)*, in 'De rebus divinis et humanis'. *Essays in honour of Jan Hallebeek*, eds. Harry Dondorp, Martin Scheimaier, Boudewijn Sirks, Göttingen, Vandenhoeck & Ruprecht, 2019, pp. 497-512.

⁴ Alberico Gentili, *The Wars of the Romans. A Critical Edition and Translation of 'De armis Romanis'*, eds. Benedict Kingsbury and Benjamin Straumann, transl. David Luper, Oxford, Oxford University Press, 2011. Here, also, I have argued that the perspective of Gentili's work is ultimately an apology of the Roman Empire's good governance: Alain Wijffels, 'Antiqui et recentiores': *Alberico Gentili – Beyond Mos Italicus and Legal Humanism*, in *Reassessing Legal Humanism and its Claims. 'Petere fontes?'*, eds. Paul J. du Plessis & John W. Cairns, Edinburgh, Edinburgh University Press, 2015, pp. 11-40; see also Anthony Pagden, "Turning Barbarians into Gentle Peoples": *Alberico Gentili, Francisco de Vitoria and the Justice of Empire*, in *Alberico Gentili. Giustizia, guerra, impero. Atti del convegno della XIV Giornata Gentiliana, San Ginesio, 24-25 settembre 2010*, Milano, Giuffrè, 2014, pp. 103-115.

war notwithstanding, it is largely beyond the office of the legal councillor to determine such a decision. The second book of *De iure belli* deals with the conduct of warfare or *ius in bello*. Here again, military expediency is more likely to be decided by the commanders, including, for the more serious issues, the prince as commander in chief. While the war is being waged, legal advice cannot take precedence. All that of course does not belittle the importance of law in the *ius belli* and the *ius in bello*, nor Gentili's achievement in establishing to what extent issues of both features of war can be regulated by legal principles from which a systematic law of war begins to emerge. However, when the decision of going to war is reached, and throughout the chain of decisions which warfare implies, the ordinary principles of good government will not apply in the same way as in peace-time. Only when the war is terminated will ordinary government be restored and will arms have to yield again to the lawyers' gowns. That is the stage where decisions must be made, on behalf of the victor, to avenge any injury suffered, to exact retribution, and to secure a new permanent peaceful order; or, on behalf of the vanquished, arguments need to be found for mitigating the effects of the defeat. The third book of *De iure belli* therefore discusses issues where lawyers may expect to take centre stage in counselling the decision-making process of public governance⁵.

Whatever the attempts of Gentili and other early-modern legal writers to encompass the whole of a war, from its inception through the whole of military operations to its ultimate ending, in a legal framework and regulation, the lawyers' contribution will be most in demand once the ruler is in a position to put an end to the state of warfare. For centuries, the right to wage war was primarily a matter of high politics and ideology, the method of warfare a matter of humanity and ethics (beyond the concerns of military strategy and expediency), while law

⁵ On Gentili's *ius post bellum*, see Randall C.H. Lesaffer, *Alberico Gentili's 'jus post bellum' and Early Modern Peace Treaties*, in *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, eds. Benedict Kingsbury and Benjamin Straumann, Oxford, Oxford University Press, 2010, pp. 210-240.

and lawyers were needed to organise *post bellum* policies and peace⁶.

The argument for recognising in Gentili's work primarily a concern for readjusting legal scholarship to the changing paradigm of early-modern public governance (including international governance) may be seen as a tribute to the Gentilian Studies accomplished under the aegis of the Centro Internazionale di Studi Gentiliani in San Ginesio since the late 1980s⁷. The format of the conferences organised by the Centro fostered the development of two main interest groups in Gentilian Studies, the history of political thought and legal history. Thanks to the efforts of Diego Panizza and his international network, Alberico Gentili has become a set figure in the history of political theories⁸. Legal historians have broadened our view on Gentili's work as a lawyer far beyond the cliché of Gentili as an immediate precursor of Grotius and as an early writer on classic international law: the whole range of Gentili's interests as a civil law scholar is now far better known than thirty years ago. Yet, the promise of the Centro's beginnings, depicting Alberico Gentili as a "global intellectual", was not entirely fulfilled. Historians of legal thought and legal historians went much each their own way, as new or unpublished areas of Gentili's interests were uncovered. Focusing Gentili's work on the author's commitment to the essential role he recognised for civil lawyers in public governance is therefore also an attempt to pull together the strands of distinct historiographic

⁶ Giuliano Marchetto, *La definizione giuridica della pace nel 'De iure belli' di Alberico Gentili*, in *Alberico Gentili. Giustizia, guerra, impero*, cit., pp. 295-309.

⁷ A few months before the Giornata Gentiliana 2019 in San Ginesio, I was able to make the same point at a conference at Wittenberg, commemorating Giordano Bruno, where I had been asked to present an outline of Gentilian Studies. The proceedings of that conference are now in the press, including my contribution: Alain Wijffels, *Alberico Gentili and the Ideal of International Governance* [Conference "Giordano Bruno: Will, Power, and Being. Law, Philosophy, and Theology in the Early Modern Era", Wittenberg, 17-18 May 2018].

⁸ On Diego Panizza's own scholarly work, see Vincenzo Lavenia, *Diego Panizza (1938-2014). Bibliografia degli scritti*, in *Alberico Gentili. "Responsibility to Protect": nuovi ordinamenti su intervento umanitario e ordine internazionale. Atti del convegno della XV Giornata Gentiliana, San Ginesio, 14-15 Settembre 2012*, a cura di Vincenzo Lavenia, Macerata, eum, 2015, pp. 269-275.

interests which developed in the San Ginesio conferences over the past decades, and culminating ten years ago in the series of meetings and conferences held during the commemorative year of Alberico Gentili's death.

At this stage, it needs to be emphasised that our understanding of civil law scholarship has also changed over the past decades. In the case of Alberico Gentili, Giovanni Minnucci (who published, only a few weeks before the *Giornata Gentiliana* of 2018, the long awaited first edition of *De papatu Romano antichristo*)⁹ has profoundly transformed the profile of the jurist's ideal in Gentili's work, drawing on the latter's concept of *interpres iuris*¹⁰. Gentili's *interpres iuris* is a jurist who for his reasoning and argumentative competence needs to adduce elements from beyond the legal materials to be found in Justinian's compilations. Minnucci has documented this development in Gentili's approach by linking the ideal of *interpres iuris* with the polemics involving the French lawyer Jean Hotman (during the early 1580s) and the English theologian John Raynolds (during the 1590s)¹¹. As a result of these polemics, Gentili quickly acquired and mastered a legal-humanistic register and method, although combining these with a continued reliance on the traditional Italian method of his own legal education. Gentili also became more specific on the civil lawyers' province of expertise, in particular vis-à-vis the theologians' claims on various aspects of social regulation¹². In short, Gentili's work may be seen as an undertaking to maintain or restore the central role of academic lawyers in public governance, but in the

⁹ Albericus Gentilis, *De papatu Romano Antichristo*, *Recognovit e codice autographo Bodleiano* d'Orville 607 Giovanni Minnucci, Milano, Monduzzi, 2018.

¹⁰ Giovanni Minnucci, *Alberico Gentili 'iuris interpres' della prima età moderna*, Noceto, Monduzzi, 2011.

¹¹ See the author's earlier articles now collected in Id., "*Silete theologi in munere alieno*". *Alberico Gentili tra diritto, teologia e religione*, Milano, Monduzzi, 2016.

¹² Id., *La nuova metodologia di Alberico Gentili nel I libro del 'De nuptiis' (1601)*, in *Alberico Gentili. L'uso della forza nel diritto internazionale. Atti del convegno dell'Undicesima Giornata Gentiliana, San Ginesio, 17-18 Settembre 2004*, Milano, Giuffrè, 2006, pp. 399-432.

changed political and cultural context of early-modern polities and early-modern political theories¹³.

2. 'De jure belli', Liber III

From that vantage-point, the third part of *De iure belli* should be read with the reassertion of the jurist at the *post bellum* stage in mind. In spite of recurrent criticism or scepticism about Gentili's capacity to order systematically his materials, it is possible to recognise an incremental general structure in the third book¹⁴. The book is subdivided in 24 chapters with each a distinctive heading covering the topic or issues dealt with in the individual chapter. In general, Chapters 1 to 11 deal with issues of vengeance, retribution, satisfaction, compensation in various forms, and with regard to land, property and persons. Chapters 13 to the end deal with issues related to the making of a peace treaty. With regard to the substance of peace treaties, some issues are recurrent in both parts of Book III, but remain nevertheless distinct, for what the victor may legitimately acquire and exact by virtue of the laws of war is not identical to what is being agreed in a treaty.

Chapter 12 stands between those two parts of Books III. The chapter's title is «Si utile cum honesto pugnet», and it may be regarded as a condensed theory of good governance applied to *post bellum* situations. The notions of expediency, honor and justice appear throughout the work, but significantly, their

¹³ Silvia Ferretto, *La "scienza" della politica tra filosofia e riflessione religiosa nella formazione di Alberico Gentili. Ipotesi di ricerca*, in *Alberico Gentili (San Ginesio 1552 - Londra 1608). Atti dei convegni nel quarto centenario della morte*, vol. 3, cit., pp. 261-277.

¹⁴ All references and quotations in this contribution are to the reprint: *De iure belli libri tres* by Alberico Gentili, vol. 1, *The Photographic Reproduction of the Edition of 1612*, Buffalo, William S. Hein & Co., 1995. For the most reliable bibliography of Gentili's work: Ian Maclean, *Alberico Gentili, i suoi editori e le peculiarità del commercio di libri tra Inghilterra e Germania, 1580-1614*, and *Appendice. Alberico Gentili: bibliografia annotata delle sue opere, 1582-1614*, in *Alberico Gentili (San Ginesio 1552 - Londra 1608). Atti dei convegni nel quarto centenario della morte*, vol. 2, Milano, Giuffrè, 2010, pp. 119-173.

strained relationship is discussed from the very start of Book III. Thus, in Chapter 1:

[...] Sic & victoria finis artis imperatorię Aristoteli: quum ea honestatem habet, et iustitiam, que pax est¹⁵.

Thus, victory is for Aristotle the ultimate goal of the supreme commander's skills, provided it has honesty (honour) and justice, which is peace.

In the following Chapter (on the victor's vengeance), Gentili refers critically to an unqualified utilitarian approach:

[...] Et ut alii, iustum, quod potentiore utile est. Et similia: quae notavi, & improbavi alibi.

[...] As others say: might is right (litt.: what is expedient to the more powerful, is just). Or similar statements, which I noted and disapproved of elsewhere¹⁶.

On the contrary, Gentili approves a little further a quotation borrowed from Guicciardini's history of Italy:

[...] Etiam Guicciardinus, historicus ille nobilis, & iurisconsultus laudatus, crudelia haec accusat: & in ore legati Florentini ponit, *Iustitiam fundamentum esse virtutum omnium. Neque ab ea descendendum caussa utilitatis*. Quod & plus quam manifestum est.

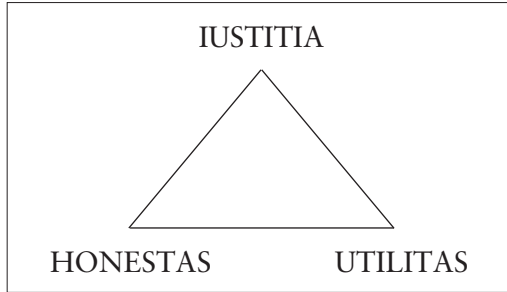
[...] Guicciardini, too, that noble historian, and an esteemed jurist, criticises such cruelties. He puts in the mouth of the Florentine ambassador the words: 'Justice is the foundation of all virtues, and one should not depart from it for reasons of expediency'. That is more than evident¹⁷.

These examples from the first chapters of Book III show that the notions of expediency (*utilitas*), honor (*honestas*) and justice (*iustitia*) are recurrently used as tests of the victor's governance towards the vanquished, but also that those tests may compete and vie with each other. Chapter 12 is an attempt to summarise the relationship between the three, and to establish a degree of hierarchy between them.

¹⁵ Albericus Gentilis, *De iure belli libri tres*, Hanoviae, apud haeredes Guilielmi Antonii, 1612, p. 471 (hereafter: Gentili, DJB).

¹⁶ Gentili, DJB, p. 474.

¹⁷ Gentili, DJB, p. 483.



Why, however, should that chapter have been inserted at that place of the sequence of Book III?

It could be argued that the chapters on vengeance and retribution are still, even though, by then, the fighting has finished, a direct continuation of the situation *in bello*, waiting for the orderly settlement in a formal treaty. During that period of transition, expediency (at least, what may be perceived as the most expedient course of action to the victors) will prompt the victors' behaviour more strongly before they are appeased, although even at that stage, it should be counterbalanced by justice and honour, as in the *ius in bello*. Conversely, when the stage of treaty negotiation and making is reached, expediency may have to give way more readily to considerations of justice and honour.

Chapter 12 states the question of the relationship between expediency, honour and justice in the following terms:

At notemus quaestionem hic generaliter, si utilitatem magis, vel honestatem sequi noster debeat victor: quum alio trahit honestas, alio illum impellit utilitas. Id quaero salva iustitia, de qua hactenus disputavi.

Now let us address here the question in general terms, whether our victor should rather pursue expediency, or what is honourable. For on the one hand he will be drawn by honour, on the other pushed by expediency. I ask this assuming that [in any case] the requirements of justice will be met, which I have been discussing so far¹⁸.

¹⁸ Gentili, DJB, p. 570.

The question therefore seems to focus on a tension between expediency and honour, but the tension is somehow contained and balanced within the requirements of justice. If one assumes that the expert counsel on justice is the *interpres iuris*, the balance should make sure that these considerations will not be severed from one another:

Quemadmodum vero non tract[o] de utili, quod a iusto sepositum sit; vel quia nec possit (ut Socrates dicebat, & disserit Cicero) seponi; vel quia sepositum damnat prorsus *interpres iuris*: ita nec disputo, si aliud ab honesto potest esse utile. Quod idem Cicero facit, & negat in libris *De officiis* [...].

However, insofar I am not dealing about what is expedient, that has been severed from what is just, either because it cannot be severed (as Socrates said, and was discussed by Cicero), or because the *interpres iuris* reproves entirely that expediency should be severed from justice. Likewise, I am not discussing whether some other matter of expediency can be separated from what is honourable. That is what Cicero puts forward and rejects in his books *On duties* [...] ¹⁹.

Yet, as a less refined guideline for lawyers (*iurisconsulti*, a phrase which in this context Gentili appears to use for less sophisticated members of the legal profession than his *interpres iuris*)²⁰, Gentili is willing to discuss conflicts of interests between the diverging considerations. Taking his cue from a decretal of Innocent III (X. 3.34.8), where equity (*aequitas*), in this context, appears to be closely related to the notion of justice, the distinction opens the possibility of establishing some hierarchy. Strict law, or perhaps positive law more generally, which occasionally may legitimise what is expedient, is in any

¹⁹ *Ibidem*.

²⁰ That is a distinction I have drawn from Albericus Gentilis, *De nuptiis, Hanoviae, apud haeredes Guilielmi Antonii*, 1601, pp. 91-92: «[...] Et de iuris Iustinianici interprete illic [viz. in *De interpretibus*] egi, non simpliciter de interprete iuris». Compare with what Gentili wrote in the same Book I, pp. 58-59: «Ea scientia claudi libris Iustinian[is] potuit: cum et novae indies emergant species, quibus novae aptandae sin leges [...]», a remark which may be linked to an obiter Gentili expresses in a different context, p. 708: «Sic est autem potestas regia, ut, quod lex scripta videre nequit per dies, videat lex viva casus, qui sub generalitate scripti iuris possunt non concludi: et eosdem sua definiat aequitate». See for a more in-depth analysis: Giovanni Minnucci, *Alberico Gentili 'interpres iuris Iustiniani' o 'simpliciter interpres iuris'?*, in *Alberico Gentili. Giustizia, guerra, impero*, cit., pp. 237-265.

case subordinated to justice. Honour, which at one stage Gentili states to be the paramount principle among the most important principles of law («Summum item summorum praeceptorum iuris est honestas»)²¹, should prevail over expediency, for honour (which collides with the sense of both what is honourable and what is honest) serves the common good. The age-old opposition to tyranny, where the ruler and his cronies seek their private interests, is here adduced in contrast. Honour, therefore, prevails over what is strictly legal (and also, one may imply, over any expediency that may be lawful in a strict sense).

Yet that hierarchy is not comprehensive. Towards the end of the chapter, Gentili discusses an exception, or at least a qualification, to the general principle that honour should prevail over expediency:

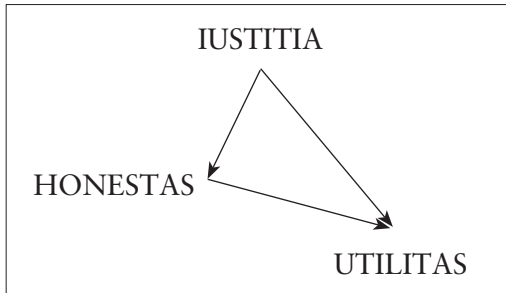
Suscipit tamen limitationem definitio in ea utilitate, quae spreta periculum salutis habet.

The determination suffers a qualification when the expediency which, if it is disregarded, entails a danger for one's safety [*salus*: safety, welfare, *raison d'état*... a host of translations may be offered depending on the context]²².

The qualification is, however, not absolute, for it may legitimise a departure from honour, but not from justice. Thus, even in the case of this exception to the ordinary hierarchy, justice remains the superior norm which should regulate the prevalence of expediency. The reasoning is in some respect reminiscent of the traditional attempt by late-medieval legal science to justify and contain the cases where the rule may depart from the ordinary exercise of power and the rule of law, and instead exercise his extraordinary, absolute power, provided the ruler has a justification (recognised by law) for doing so.

²¹ Gentili, DJB, p. 571.

²² Gentili, DJB, p. 575.



3. *Justice, honour, expediency – and the law*

Because of his expertise in the *ars boni et aequi*, the jurist is expected to provide expert advice on matters of justice, an essential component of the good public governance. That expertise is to a large extent supposed to have been acquired through the study of the civil law, particularly the reasoning behind the rulings to be found in the Digest and the Code. The link between justice and the jurisprudence of positive rules of civil law is therefore established.

Honour and expediency, however, are also forms of a normativity, albeit each of a different kind. Gentili's appeal to honour and expediency, and the issue of resolving the tension between the two, refers therefore to a conflict of norms, which the *interpretes iuris* is capable of managing. In managing that multi-normativity, the jurist will need to master different, heterogenous authorities. In Gentili's work – and the third book of *De iure belli* is no exception –, strictly legal authorities (mainly: texts of Roman and canon law, the commentaries of civil and canon law, the collections of opinions and reported cases, and also a few minor genres of legal literature) do not provide the main body of references. The various types of norms and principles are also, as in many other legal works from that period, adduced via an array of non-legal sources. In Gentili's arguments, these can hardly be dismissed, as Grotius was

tempted to suggest in his *Prolegomena*, as mere ornaments of the discourse²³.

These non-legal sources, which have attracted a growing scholarly interest from historians over recent years, include: ancient Greek and Roman sources (literary, political, historical); Biblical texts, the Church fathers, theologians; more recent (i.e. late-medieval and early-modern) political and historical literature. Many of these sources are adduced in order to discuss *exempla* from literature and history, which have been judged positively or negatively by various authors, and which Gentili himself adduces, sometimes briefly, sometimes more extensively, as forms of behaviour he approves or censures – very much in the same way as he endorses or criticises opinions of legal writers on legal issues. That judgemental approach to *exempla* enhances their normative status in Gentili's argumentation. In that sense, honour and expediency are specified in the context of particular issues (here, the issues selected for discussing systematically the situation *post bellum* by subject-matter) through the norms expressed in the course of discussing such *exempla*. (This normative approach to issues of honour and expediency through *exempla* taken from the classical and Biblical history may also be recognised in the representations of *exempla* in contemporary visual art forms).

Non-legal sources thus serve as authorities in Gentili's argumentation on honour and expediency (and occasionally also on justice and law, particularly the *ius gentium*). By using these *exempla* as normative authorities, Gentili also contributed to transform underlying principles attributed to these *exempla* into legal authorities. A certain similarity may be seen with the way principles of Roman private law were transformed into principles of international law: by using those principles of private law in a legal treatise on international law (e.g. on the

²³ Hugo Grotius, *De iure belli ac pacis libri tres in quibus ius naturae et gentium item iuris publici praecipua explicantur*, curavit Bernardina J.A. de Kanter-van Hettinga Tromp. Editionis anni 1939 quae Lugduni Batavorum in aedibus E.J. Brill emissa est exemplar photomechanicum iteratum. Annotationes novas addiderunt Robertus Feenstra et Caroline E. Persenaire, Aalen, Scientia Verlag, 1993, § 47, p. 24. Grotius refers in particular to poets and orators.

law of war), early-modern writers ensured that such principles became also, autonomously, specific principles of international law. The difference here is that principles of honour and expediency may not so readily be recognised by a modern reader as legal principles. That, however, is more to be attributed to a modern view which tends to restrict the concept of law and rules of law. In a perspective where rules of law were subsumed in a broader concept of art of public governance, principles of honour and expediency in international relations were part of the normative order of international governance, or of a *ius gentium* not restricted to positive rules of law. However, as early-modern legal science veered increasingly towards a proto-positivistic mode, the reception of works such as Gentili's *De iure belli* tended to regard the principles expressed in a treatise now anchored in legal literature as legal principles (subject to their acceptance by the community of legal scholars, even though they were stated by a mere private author).

The need in Gentili's agenda for securing the place of legal science and jurists at the heart of public governance (where, especially for international public governance in English politics, there was a niche for civil lawyers) explains how the so-called humanistic-legal learning was required in order to embrace the wide range of sources which were necessary when dealing with issues of honour and expediency.

To some degree, it is possible to recognise layers or clusters of authorities and references serving the argumentative register on particular topics. On some topics, Gentili's use of legal authorities is scarce, on others, his argument follows a blueprint of legal reasoning and concepts, often backed up with references to legal authorities. Chapter 14, for example²⁴, first discusses the general aims of a peace, a discussion largely buttressed by opinions and illustrations borrowed from non-legal sources; when, in the same chapter, Gentili addresses issues on the formal and substantive requirements for establishing the powers of a prince's negotiator, on a treaty concluded on behalf of a monarch who is under age, on the modalities of a treaty's ratification, on

²⁴ Gentili, DJB, pp. 589-600 (*De iure conveniendi*).

an implied or express clause *rebus sic stantibus*... the argument and the authorities on which Gentili relies follow a recognisable conventional legal pattern. In the last Chapter (24)²⁵, where Gentili addresses issues where a breach of the peace treaty may be claimed, the register and the use of authorities is again strongly influenced by legal methods. Conversely, in Chapter 19²⁶, which raises the question whether a treaty can be made with a party who adheres to a different religion²⁷, Gentili initially refers to an opinion by the Italian lawyer Tiberio Deciani, but mainly to discuss more intensively Biblical authorities (mostly from the Old Testament) and opinions of the Church Fathers.

Although there is no strict allocation of authorities to specific types of normative reasoning, and most arguments will be supported by different types of references, it may tentatively be suggested that a more specific normativity will more readily call for specific types of sources.

4. *The limits of jurisprudential expertise in international governance*

If the *interpres iuris* is deemed capable of commanding a reasoning taking into account the demands of honour, utility and justice, the question arises how far his expertise may reach into the province of policy considerations. The question is all the more pressing in the light of Gentili's acceptance of an absolute monarchy as a model (though perhaps not the exclusive model) of government²⁸.

²⁵ Gentili, DJB, pp. 703-715 (*Quando foedus violetur*).

²⁶ Gentili, DJB, pp. 649-662 (*Si foedus recte contrahitur cum diversae religionis hominibus*).

²⁷ Religion and public governance as a theme in Gentili's work is a central thread in Diego Panizza, *Il pensiero politico di Alberico Gentili. Religione, virtù e ragion di stato*, in *Alberico Gentili. Politica e religione nell'età delle guerre di religione. Atti del convegno della Seconda Giornata Gentiliana, San Ginesio, 17 Maggio 1987*, Milano, Giuffrè, 2002, pp. 57-213.

²⁸ On the theological paradigm and its transformation into secular theory: Massimiliano Traversino Di Cristo, *La questione della 'potentia Dei absoluta' in Alberico Gentili: l'adesione 'sui generis' al luteranismo in quanto elemento storico-genealogico della riflessione sui concetti del principe e della sovranità*, in *Alberico*

That difficulty is encapsulated in the last paragraph of Chapter 13²⁹. The chapter deals with the general aim of a stable peace. Here again, the tension between honour, justice and expediency is at stake, for the victor may be tempted, with regard to expediency, to secure a peace which will permanently incapacitate his former enemy as a potential threat. The vanquished, on the contrary, will want to retain as much as possible a degree of liberty and autonomy. After dealing with historical examples illustrating the point, Gentili concludes:

Verum ad fines politici accedimus per huiusmodi tractationem, & a nostris discedimus. & sapientiam istam humanam cum Cardano tradere velle videmur. Ille id tradit, quomodo sine seditione retineri possint, quae bello parta sunt. Nos de naturali sapientia quaerimus: quae docet, quid fieri iuste valeat. Et nostrum ergo disceptationem sic concludamus, licere victori, iure nature salvo, omnia facere, quae stabilem sibi victoriam, et iustam sibi, victoque valeant pacem. Omnia in manu sunt victoris : his exceptis, quae a iure gentium maneat. De cautionibus omnia in arbitrio sunt iudicis: qui hic victor est. Et qui ex qualitate personarum, periculi, & locorum habet statuere, quae caveant, & quae non caveant cautiones. Id fatentur nostri omnes. Et dici observatam moderationem, etiam si sit ventum ad maximum, & extremum remedium, si visum bonum nullum aliud sit.

However, by treating the matter in such way, we near the borders of politics, and move away from ours. We seem to want to convey with Cardano that human wisdom: he explains how what has been acquired during the war may be retained without any uprising. We ask ourselves about the natural wisdom: the one which imparts, what may be done in a just way.

We therefore finish our disquisition by acknowledging that the victor may lawfully do everything, provided natural law is heeded, which will secure him an enduring victory, and a just peace, for him and for the vanquished. All is in the hands of the victor: all, except what remains by virtue of the law of nations.

As regards the sureties, all is in the discretion of the judge, who here is the victor. He will determine with respect to the quality of the persons, the risk and the locations, what the sureties guarantee and what they don't guarantee. All our writers agree with this. Moreover, moderation

Gentili. Diritto internazionale e Riforma. Atti del convegno della XVI Giornata Gentiliana, San Ginesio, 19-20 settembre 2014, a cura di Vincenzo Lavenia, Macerata, eum, 2017, pp. 113-145.

²⁹ Gentili, DJB, pp. 576-589 (*De pace futura constituenda*).

is said to be observed, even if the most extensive and extreme remedy has been sought, if no other good remedy has been come up with [*References omitted*]³⁰.

One should perhaps beware of reading too much in that passage. However, without straining the construction of those lines, one may recognise again the conundrum of reconciling the exercise of supreme political power and some rule of law. The first sentence seems to confirm that however broad the brief of the jurist/*interpres iuris* may be in public governance, his task remains essentially different from that of the ruler. In the case of a *post bellum* settlement, Gentili is willing to give the ruler who comes out of the war as the victor, a very wide discretionary power with regard to the terms of that settlement and peace. Far-reaching considerations of expediency may thus be justified. It is also a corollary of the logics of war, envisaged as a trial which cannot take place before a superior tribunal, since the belligerents are sovereign. As Gentili puts it elsewhere: the international judge ought to be the sovereign. Victory in battle is how justice is done, the victor emerges from the war as the judge. Yet, even that judge remains bound by natural law or the law of nations (it would be difficult, in this passage, to differentiate the two). The example of the sureties (in the context of *ius post bellum*, as the previous paragraphs in the same chapter may suggest, these are the hostages) shows that the decision is entirely in the power of the victor. Yet, the text also insists that the general aim is a peace which is just for both the victor and the vanquished. That requirement of justice appears to be the ultimate restriction on the victor's arbitrary power. It leaves therefore an opening for the jurists at least to advise the ruler on what may be regarded as just or unjust in his *post bellum* policies.

³⁰ Gentili, DJB, pp. 588-589.

5. Conclusion

On the strength of the third part dealing entirely and specifically with the *ius post bellum*, Gentili's *De iure belli* would deserve – perhaps even more so than Grotius' most famous book on international law – the title of *De iure belli ac pacis*³¹. As the final paragraphs of *De iure belli* make clear³², however, such was not the intention of Gentili: in his view the law of peace was much broader, including the law of treaties in general (not only peace treaties) and the law of embassies³³. He therefore refers to the literature on such issues, including his own book on embassies and, perhaps more surprisingly, his *De armis romanis*.

Nevertheless, the third book of *De iure belli* is arguably the first systematic treatise on the *ius post bellum* in legal history. The whole of *De iure belli* should be acknowledged as a major stage in early-modern legal literature. It brings together not only the whole tradition of legal scholarship on the law of war from beginning to end, but also, according to Gentili's understanding of the range of expertise required from the *interpres iuris*, other areas of scholarship deemed relevant for informing the decision-making process in public governance³⁴. A specifically

³¹ Grotius's perspective in his *De iure belli ac pacis* remains focused on the (just) war, even when it provides him with opportunities to deal extensively and systematically with topics of the law of peace, Alain Wijffels, *Grotius, 'On the Law of War and Peace'*, in *The Formation and Transmission of Western Legal Culture. 150 Books that Made the Law in the Age of Printing*, eds. Serge Dauchy, Georges Martyn, Anthony Musson, Heikki Pihlajamäki, Alain Wijffels, Cham, Springer, 2016, pp. 173-177.

³² Gentili, DJB, pp. 714-715.

³³ Peter Hagenmacher, *Il diritto della guerra e della pace di Gentili. Considerazioni sparse di un 'groziano'*, in *Il diritto della guerra e della pace di Alberico Gentili. Atti del convegno della Quarta Giornata Gentiliana, 21 Settembre 1991*, Milano, Giuffrè, 1995, pp. 7-54 ; Giorgio Badiali, *Il diritto di pace di Alberico Gentili*, Fagnano Alto, il Sirente, 2010.

³⁴ Hence also the relevance of what may be referred to with some anachronism as 'public law' in Gentili's work, Alain Wijffels, *Alberico Gentili e il rinnovamento del diritto pubblico nella tradizione dello 'ius commune'*, in *Alberico Gentili (San Ginesio 1552 - Londra 1608). Atti dei convegni nel quarto centenario della morte*, vol. 2, cit., pp. 517-556; Id., *Le disputazioni di Alberico Gentili sul diritto pubblico*, in *Alberico Gentili. La salvaguarda dei beni culturali nel diritto internazionale. Atti del convegno della Dodicesima Giornata Gentiliana, San Ginesio, 22-23 settembre*

legal normativity is bound to cede precedence to the normativity of honour and expediency when considering the justification of going to war or the calculations governing warfare itself. Nevertheless, the emphasis that considerations of both honour and expediency should remain subordinated to the demands of justice contributed to reinforce the notion that even at those stages, the policies of war and warfare were also governed by rules of law. With the advent of peace, the ordinary principles of good governance are restored and, in the legal-political culture developed by late-medieval legal scholarship, a rule of law reflecting the fundamental requirement of justice should prevail effectively³⁵. Gentili's *ius post bellum* is precisely intended to secure that re-instatement of the rule of law in its full force. The display of scholarship from which it draws its principles confirms that the jurist will need to extend his skills beyond the strict expertise of civil law. The *ius post bellum* in Gentili's work is primarily the establishment of a just peace – a notion which, unfortunately, has long been underdeveloped in comparison to the vast literature on just war.

2006, Milano, Giuffrè, 2008, pp. 247-261; Id., *Assolutismo politico e diritto di resistenza: la 'disputatio' gentiliana* "De vi civium in Regem semper iniusta", in Alberico Gentili, *L'uso della forza nel diritto internazionale. Atti del convegno dell'Undicesima Giornata Gentiliana, San Ginesio, 17-18 settembre 2004*, Milano, Giuffrè, 2006, pp. 433-496.

³⁵ One may in that context refer to the recurrent theme in late-medieval and early-modern art representing the embrace between Justice and Peace.

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