

CENTRO INTERNAZIONALE DI STUDI GENTILIANI

SAN GINESIO (MC)

Alberico Gentili

e Ugo Grozio:

i “momenti” del diritto internazionale e
il contributo degli internazionalisti alla
costruzione e allo sviluppo della disciplina

Atti del convegno della
XXI Giornata Gentiliana

San Ginesio, 13-14 settembre 2024

a cura di Luigi Lacchè e Vincenzo Lavenia



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Studi gentiliani

Collana diretta da Luca Scuccimarra, Paolo Palchetti e
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Luigi Lacchè

Presentazione

La XXI Giornata Gentiliana del 13 e 14 settembre 2024¹ ha segnato un'altra tappa importante nella storia del Centro Internazionale di Studi Gentiliani: la prima volta che il convegno biennale è stato dedicato al “confronto” con Ugo Grozio, giurista, filosofo, politico, teologo, umanista olandese, che ha avuto enorme influenza sulla cultura occidentale moderna. Ci è parsa propizia l'occasione di accostare Gentili e Grozio giusto pochi mesi prima dell'apertura delle celebrazioni del 2025 dedicate ai quattrocento anni del capolavoro dello scrittore olandese, il *De iure belli ac pacis* del 1625.

Per questo il volumetto – il decimo della nuova serie di pubblicazioni del Centro – è dedicato ad Alberico Gentili e Ugo Grozio, ai “momenti” del diritto internazionale e al contributo degli internazionalisti alla costruzione e allo sviluppo della disciplina. Come sempre, la Giornata Gentiliana, pur unitariamente concepita, è caratterizzata da un duplice *focus*, quello storico e quello internazionalistico, privilegiando l'approccio interdi-

¹ L'organizzazione della Giornata Gentiliana è stata possibile grazie al sostegno della Regione Marche, del Comune di San Ginesio, dell'Università di Macerata, dell'Unione Montana dei Monti Azzurri e della Fondazione Cassa di Risparmio della Provincia di Macerata, con il patrocinio inoltre della Società Italiana di Diritto Internazionale e di Diritto dell'Unione Europea e dell'Istituto di Studi Giuridici Internazionali. Il Convegno si è avvalso del prezioso contributo che i membri del Comitato Scientifico proff. Vincenzo Lavenia (che ha anche curato l'*editing* dei materiali che vengono qui pubblicati), Paolo Palchetti e Luca Scuccimarra hanno dato all'organizzazione scientifica. Un ringraziamento davvero caloroso va agli illustri relatori, ai presidenti di sessione, agli organi di governo del Cisg, e in particolare alla dott.ssa Pepe Ragoni, Presidente onoraria, al segretario dott. Marco Taccari e ai giovani collaboratori del Centro.

sciplinare e coinvolgendo storici del diritto, storici del pensiero politico, studiosi delle relazioni internazionali e del diritto internazionale. Avvicinare Gentili e Grozio significa riflettere sulle origini del diritto internazionale, a cominciare proprio dal “rapporto” tra questi due grandi personaggi vissuti tra Cinque e Seicento. Ma questo punto di partenza è stato anche lo stimolo per ragionare su come, specie nell’ultimo secolo, gli internazionalisti hanno contribuito al processo di consolidamento e di sviluppo del diritto internazionale e su come, di fronte alla crisi attuale, tale sviluppo appaia minacciato *ab imis fundamentis*.

Tra Gentili (n. 1552) e Grozio (n. 1583) c’è una differenza di trent’anni. Sono “contemporanei” soprattutto grazie alla straordinaria precocità del giurista nato a Delft. A ben vedere c’è un elemento “biografico” – oltre a quello sostanziale – che li avvicina: nei primi anni del Seicento si sono occupati, come *legal practitioners*, del diritto del mare, del diritto delle prede, di pirateria, di commercio internazionale e delle neonate Compagnie delle Indie (l’*East India Company* e la *Vereenigde Oost-Indische Compagnie*). Grozio difese tra l’altro la causa della Compagnia olandese delle Indie orientali davanti al Tribunale delle prede a seguito della cattura di un vascello lusitano nello stretto di Malacca. Gentili, esattamente negli stessi anni (dal 1605), fu avvocato della Spagna presso l’Alta Corte dell’Ammiragliato di Londra (l’*High Court of Admiralty*), fino alla sua morte avvenuta nel 1608, in varie controversie che coinvolsero anche le Province Unite. Da queste esperienze nel 1609 Grozio ricavò la pubblicazione (anonima) del fortunatissimo *Mare liberum*² (che era in realtà il capitolo XII del *De iure praedae commentarius* pronto nel 1606 ma rimasto inedito sino al 1868); Gentili lasciò in stato di avanzata elaborazione il manoscritto degli *Hispanicae Advocationis libri duo* pubblicato postumo dal fratello

² Hugo Grotius, *Mare Liberum, sive de jure quod Batavis competit ad Indicana commercia, dissertatio*, Lugduni Batavorum, Elzevir, 1609. Sull’opera cfr. il numero monografico di «Grotiana», 30, 2009.

Scipione nel 1613³, contenente pareri e note di Gentili relativi a una serie di casi pratici⁴.

Ovviamente, c'è una differenza di fondo, al di là della diversa natura delle due pubblicazioni citate: Gentili aveva alle spalle le sue opere principali e in particolare il *De iure belli* (1598), Grozio diede alle stampe nel 1625 l'opera che l'avrebbe messo al centro della storia del diritto internazionale moderno oltre che della moderna dottrina del diritto naturale.

Il confronto “classico”⁵ si è basato soprattutto sulle due opere più importanti e sistematiche e di conseguenza sulle rispettive

³ Albericus Gentilis, *Hispanicae advocacionis libri duo*, Hanoviae, apud haeredes Guiliemi Antonii, 1613.

⁴ Frank F. Abbott, *Alberico Gentili and his Advocatio Hispanica*, «The American Journal of International Law», 10/4, 1916, pp. 737-748; Guido Astuti, *La Advocatio Hispanica de Alberico Gentili*, «Anuario de Historia del Derecho Español», 20, 1950, pp. 50-69; Kenneth R. Simmonds, *Alberico Gentili at the Admiralty Bar, 1605-1608*, «Archiv des Völkerrechts», 8, 1958, pp. 3-23; Alain Wijffels, *Alberico Gentili et la genèse de la Hispanica Advocatio*, in *De la república a los estados modernos. Journées internationales d'histoire du droit*, ed. Virginia Tamayo Salaberría, Bilbao, UPV, 1992, pp. 299-329; Id., *Alberico Gentili and Thomas Crompton. An Encounter between an Academic Jurist and a Legal Practitioner*, Leiden, Jus Deco, 1992; Diego Panizza, *The 'Freedom of the Sea' and the 'Modern Cosmopolis' in Alberico Gentili's De iure belli*, «Grotiana», 30, 2009, pp. 88-106, ora in Id., *Diritto, politica, religione nel pensiero di Alberico Gentili. Saggi e interventi 1969-2014*, a cura di Luca Scuccimarra, Macerata, eum, 2025, pp. 521-542; Lauren Benton, *Legalities of the Sea in Gentili's 'Hispanica Advocatio'*, in *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, eds. Benedict Kingsbury and Benjamin Straumann, Oxford-New York, Oxford University Press, 2010, pp. 269-282; Valentina Vadi, *War and Peace: Alberico Gentili and the Early Modern Law of Nations*, Leiden-Boston, Brill Nijhoff, 2020, pp. 315 ss.

Il Centro Internazionale di Studi Gentiliani ha dedicato la Giornata Gentiliana del 10-11 settembre 2021 a questo tema: *Alberico Gentili e il diritto del mare. Spazi, potere sovrano e diritto internazionale tra gli Hispanicae Advocacionis libri duo e l'età contemporanea*, a cura di Luigi Lacchè e Vincenzo Lavenia, Macerata, eum, 2022, di cui si segnalano Andrea Aldo Cassi, *Lo statuto giuridico dei mari e la “libresca guerra dei cento anni”. Il caso (e i casi) degli Hispanicae advocacionis libri duo*, pp. 19-44; Stefania Gialdroni, *Il mare liberum prima e dopo il “Mare liberum”. La libertà di commercio e navigazione in Gentili, Grozio e Selden*, pp. 45-65; Luca Scuccimarra, *Stati pirati. Gentili e le origini della moderna semantica della “pirateria”*, pp. 67-90.

⁵ Gesina H. J. Van der Molen, *Alberico Gentili and the Development of International Law. His Life, Work and Times*, Leyden, A. W. Sijthoff, 1968, in part. pp. 113, 124-137, 149, 162-167, 176-182, 240-245; Kenneth R. Simmonds, *Hugo Grotius and Alberico Gentili*, «German Yearbook of International Law», 8, 1959, pp. 85-100; Id., *Some English Precursors of Hugo Grotius*, «Transactions of the Grotius Society», 43, 1957, pp. 143-157; Hugo Fortuin, *Alberico Gentili en Hugo de Groot*, «Netherlands International Law Review», 16, 1969, pp. 364-390.

“posizioni” loro assegnate nella storia delle dottrine del diritto internazionale e sull’”uso” che Grozio ha fatto di Gentili, sul giudizio che il grande olandese riservò all’opera dell’italiano, sulle metodologie impiegate, sugli aspetti condivisi o sulle più rilevanti differenze.

Partendo dal presupposto che nessun autore a lui antecedente avesse trattato la materia in modo completo, è nel § 38 dei *Prolegomena* che Grozio richiama due soli autori moderni, Balthasar Ayala⁶ e il nostro Alberico Gentili:

Poiché so che altri possono essere facilitati dalla diligenza di quest’ultimo, e io stesso ammetto di esserne stato aiutato, affido ai lettori il giudizio su ciò in cui egli sia manchevole, quanto al modo di insegnare, all’ordine seguito, all’articolazione delle questioni e alla distinzione delle diverse specie di diritto. Mi limiterò ad osservare che nel definire le questioni controverse egli suole spesso ricorrere a pochi esempi, non sempre accettabili, o all’autorità di moderni giureconsulti, dedotta da pareri in gran parte redatti in ossequio a chi li ha richiesti, più che alla giustizia e all’equità. Ayala non ha toccato le cause per cui una guerra è definita giusta o ingiusta; Gentili ha delineato i principi generali, in una misura che a lui è parsa sufficiente, ma in verità non ha affatto toccato i casi delle controversie più importanti e più frequenti⁷.

Il giudizio di Grozio sull’opera dell’esule italiano è tale da riconoscergli un “posto” di riguardo tra i “precursori”, ma nel merito non esita a segnalarne una serie di carenze e di errori di impostazione destinati a pesare nel prosieguito. Chi meglio ha analizzato questo “confronto”, Peter Haggénmacher⁸, ha anche notato come non ci si possa arrestare al § 38. Lo studio accurato del grande *opus* dell’olandese, insieme al carteggio col fratello

⁶ Autore del *De jure et officiis bellicis et disciplina militari libri III*, Duaci, Jean Bogard, 1582.

⁷ Cfr. la recente e prima ed. integrale italiana: Ugo Grozio, *Il diritto di guerra e di pace*, a cura di Carlo Galli e Antonio Del Vecchio, Napoli, Istituto Italiano per gli Studi Filosofici Press, 2023, vol. 1, pp. 37-38.

⁸ Peter Haggénmacher, *Grotius and Gentili: A Reassessment of Thomas E. Holland’s Inaugural Lecture*, in *Hugo Grotius and International Relations*, eds. Hedley Bull, Benedict Kingsbury, Adam Roberts, Oxford, Clarendon Press, 1992, pp. 133-176: pp. 151-152. Sull’esame comparato, tra i lavori recenti, vedi Vadi, *War and Peace*, cit., pp. 450-495; Martti Koskeniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300-1870*, Cambridge, Cambridge University Press, 2021, pp. 215-271 (Gentili) e 280-345 (Grozio).

Willem (1622-1623), mostrano come Ugo Grozio abbia utilizzato le opere di Gentili ben più di quanto non sembri a prima vista. Appare quindi del tutto verosimile che avesse nella sua biblioteca – e probabilmente sul suo tavolo di lavoro – il *De jure belli* e, forse, le *Hispanicae advocaciones*.

I riferimenti groziani a Gentili hanno contribuito a indirizzare gli autori successivi e la storiografia più o meno risalente. Solo nella seconda metà del XIX secolo cominciò a prendere forma, tra Oxford, San Ginesio e Macerata, quel vero e proprio “momento gentiliano” che trovò nel giurista oxoniense Thomas Erskine Holland (1835-1926) l’indubbio iniziatore grazie alla lezione inaugurale che il 7 novembre 1874 tenne all’*All Souls College*, dedicandola alla vita e alle opere di Alberico Gentili⁹.

Holland iniziò a collocare Gentili – dopo un lungo periodo di relativo oblio o di sottovalutazione – in una posizione più consona al grande esule di San Ginesio, anche rispetto alla figura dominante di Grozio:

I tre libri di Alberico *De iure belli* – osserva Holland – fornirono al Grozio il modello e l’orditura del primo e del terzo libro della sua opera; e può sorgere dubbio, se la materia del secondo libro di Grozio non sia di tale importanza da non potersi acconciamente introdurre, qual mera digressione, in un trattato sui diritti dei belligeranti. Non è davvero mio intendimento di levare Gentili alla medesima altezza del suo seguace, che per certo è più grande di lui; né dico che i suoi scritti non manifestino in qualche misura le mende, che ad essi vengono attribuite. Io aveva in animo semplicemente di richiamare la vostra attenzione ad un nome, la cui fama soffersse troppo lungo oblio; e di ricordarvi che il primo passo verso l’odierna forma del Diritto internazionale, deve recarsi a merito, non di Grozio, ma dell’esule di Perugia, del figliuolo adottivo di Oxford – Alberico Gentili¹⁰.

⁹ Thomas E. Holland, *An Inaugural Lecture on Albericus Gentilis Delivered at All Souls College November 7, 1874*, London, Macmillan and Co., 1874. Il testo fu ripubblicato in *Studies in International Law* series, Oxford, Clarendon Press, 1898, pp. 1-39 (reprint Aalen, Scientia Verlag, 1979).

¹⁰ La prolusione fu tradotta in italiano in tempi piuttosto rapidi ma sarebbe stata pubblicata solo nel 1884: *Alberico Gentili. Discorso inaugurale letto nel collegio dei fedeli defunti in Oxford il 7 novembre 1874 dall’avvocato Tommaso Erskine Holland Prof. di diritto internazionale e di diplomazia in quella Università, tradotto da Aurelio Saffi*, Roma, Ermanno Loescher & C., 1884, pp. 39-40.

Non è questa la sede per riprendere il tema della singolare *renaissance* gentiliana se non per ricordare che le motivazioni che ne sono alla base appaiono tutt'altro che superficiali e meritano di essere tenute in considerazione. La *cultural history* dei “miti di fondazione” del diritto internazionale fa pienamente parte della sua costruzione e della sua storia¹¹. Superato – almeno a livello storiografico – il canone assoluto (e sterile) del “fondatore”, la storia delle dottrine del diritto internazionale ha diversi “padri” e, come osservò Maurice Bourquin, è piuttosto la storia di una “società in nome collettivo”. Un dato è certo: questa storia non sarebbe neppure immaginabile senza il contributo di giuristi, filosofi, politici e diplomatici che, progressivamente, e per restare all'età moderna, ne hanno delineato i confini, individuato le idee forti, consolidato le forme e i contenuti, contribuito allo sviluppo.

Nella prima parte del volume – *Alberico Gentili e Ugo Grozio: relazioni e “momenti” della storia del diritto internazionale* – Carlo Galli (*La giustizia, la religione, la guerra: da Vitoria a Hobbes, attraverso Gentili e Grozio*) colloca i nostri due autori all'interno della fase cruciale della storia moderna europea segnata da due “traumi”: il passaggio dalla guerra giusta alla guerra di Stato con il progressivo abbandono dello spa-

¹¹ Sulla complessa vicenda gentiliana rinvio a Luigi Lacchè, «Celebrato come una gloria nazionale». Pietro Sbarbaro e il “risorgimento” di Alberico Gentili, in *Alberico Gentili. Atti dei Convegni nel quarto centenario della morte*, Milano, Giuffrè, 2010, vol. 2, pp. 189-195; Id., *Monuments of International Law: Albericus Gentilis and Hugo Grotius in Constructing a Discipline (1875-1886)*, in *Constructing International Law: The Birth of a Discipline*, eds. Luigi Nuzzo and Miloš Vec, Frankfurt a.M., Klostermann, 2012, pp. 147-207; Id., *Hugo Grotius and Alberico Gentili: Visions from the Nineteenth-Century Italian International Law Perspective*, «Grotiana», 2026, pp. 1-12; Claire Vergerio, *War, States, and International Order: Alberico Gentili and the Foundational Myth of the Laws of War*, Cambridge, Cambridge University Press, 2022. Su Grozio cfr. Martine Julia van Ittersum, *Hugo Grotius: The Making of a Founding Father of International Law*, in *The Oxford Handbook of the Theory of International Law*, eds. Anne Orford and Florian Hoffmann, Oxford, Oxford University Press, 2016, pp. 83-100. Su Vitoria vedi Paolo Amorosa, *Rewriting the History of the Law of Nations: How James Brown Scott Made Francisco de Vitoria the Founder of International Law*, Oxford, Oxford University Press, 2019. Cfr. Id., Vergerio, *Canon-Making in the History of International Legal and Political Thought*, «Leiden Journal of International Law», 35, 2022, pp. 469-478.

zio universalistico della giustizia “oggettiva” a vantaggio della politica istituzionalizzata, cioè statualizzata; «[...] la scoperta dell’America, e qui il movimento teorico necessario è l’estensione al Nuovo Mondo delle categorie ordinarie del Vecchio – mossa umanitaria a doppio taglio, che legittima anche il colonialismo come normale pratica commerciale fra soggetti uguali»¹². Gentili è uno degli autori chiave nello “spegnimento” della guerra di religione, va ben oltre Vitoria e il richiamo del ruolo nuovo degli Stati. La guerra diventa un affare di Stato, non più dipendente da motivi religiosi. E la giustizia è da riconoscere ad entrambe le parti. Gentili – come abbiamo visto – non è molto presente nell’opera groziana «tranne che nei *Prolegomeni*, in cui è accusato di essere troppo aderente al potere politico nella propria argomentazione, di non avere sviluppato a sufficienza l’elemento teorico del diritto, e di non aver utilizzato esempi adeguati ma solo principi generali in modo deficitario»¹³. L’olandese cita più spesso Vitoria ma su alcuni punti qualificanti non può non discostarsene: «Un giurista protestante olandese della prima metà del Seicento, avvocato della *Vereenigde Oostindische Compagnie*, ragiona in modo molto diverso da un teologo spagnolo professore a Salamanca, di tre o quattro generazioni più vecchio, benché Grozio sia ovviamente anch’egli interno alla temperie cristiana dell’Europa – nelle modalità di una teologia giuridica deistica, distinta dalla teologia politica ancora “sostanziale” di Vitoria e da quella che sarà la teologia politica “formale”, svuotata, di Hobbes»¹⁴.

Da un’altra prospettiva, in *Legal Imagination and International Power: A History of Capitalism*, Martti Koskeniemi osserva come le «Histories of international law have usually been framed as narratives about the expansion and eventual globalization of statehood. The actions and events have been described

¹² Carlo Galli, in questo volume, p. 24.

¹³ Ivi, p. 35.

¹⁴ Ivi, pp. 37-38: «Autore ultra-moderno, Hobbes non lascia spazio alla contraddittoria coesistenza di universalismo sottile e di sovranità, che di fatto la modernità registra: al di là di ogni compromesso teorico, di ogni timidezza speculativa, individua nella sovranità l’unica contingente salvezza pensabile e praticabile nell’età del disincanto e del pericolo. E di questa salvezza non fa parte, per lui, il diritto internazionale».

as actions and events in “state-life” – wars and diplomatic negotiations, treaty-making and other types of activity that can be interpreted as “state behaviour”»¹⁵. Questo approccio, legato ad una serie di fattori, deve però essere sfumato e perfezionato adottando una visione più complessa del ruolo del diritto nel contesto internazionale al di là della sfera di sovranità degli Stati. «State-centric histories reveal just one side of European power»¹⁶. Il punto di vista deve pertanto essere allargato: «Surely it is important to bear in mind that alongside the globalization of a world of state-based international relations, European expansion has also meant the globalization of a certain combination of public and private power, sovereignty and property, that, for want of a better word, may be called “Capitalism”»¹⁷.

Grozio mostra bene l'importanza strategica di questa “combinazione” di pubblico e privato, di sovranità e proprietà. «The Dutch Golden age relied on a successful amalgam of sovereign power of the United Provinces and the property rights of Dutch commercial elites that accounted for the unprecedented prosperity envied across Europe. The country had become a kind of world entrepôt by offering a stable and efficient regime for protecting property and facilitating commercial exchanges»¹⁸. «The arguments in Grotius' principal work produced a general view of statehood, war and commerce that he had rehearsed already in his famous defense of Dutch expansion in the “Indies”. A private company (such as the Dutch east India Company, the VOC), he argued, may engage in just war against a state (Portugal) and to take the property belonging to its subjects in order to compensate for the “injury” caused by preventing the free enjoyment of the rights of trade»¹⁹. Alle origini dei processi di sviluppo del primo capitalismo mercantile e della colonizzazione dei territori extra-europei troviamo la mobilitazione del potere pubblico a sostegno dei mercanti privati ma anche forme di “privatizzazione” proprietaria dello spazio della sovranità. Si

¹⁵ Martti Koskenniemi, in questo volume, p. 45.

¹⁶ Ivi, p. 47.

¹⁷ Ivi, p. 53.

¹⁸ *Ibidem*.

¹⁹ Ivi, p. 54.

tratta di una tensione tra sovranità e proprietà che attraversa i secoli della modernità e che si traduce nel contrasto tra politica ed economia nelle società liberali. «Whether economics – conclude Koskenniemi – should or should not dictate the limits of the politically possible is one of the most important questions of rulership in Europe today, but also elsewhere. It is good to bear in mind that because that debate has to do with the relations of sovereignty and property, two notions that have framed the conditions of legal imagining for centuries, nobody is in a better position to take informed positions in that debate than lawyers»²⁰.

In *Not Every Road: Roman Law and History in Gentili's 'De armis Romanis' and 'De iure belli'*, Mark Somos rilegge in prospettiva storico-critica la presenza nell'opera di Gentili di Roma, del suo diritto e delle sue guerre. «Perhaps aptly, I find myself in the position of Picens, Alberico Gentili's (1552-1608) fictitious native of San Ginesio, who opens Gentili's *De armis Romanis* (Part I first published in 1590, Part II in 1599) in a state of bewilderment: how did apologists for the brutal Roman empire manage the pull the wool over the world's eye and convince contemporaries and posterity that Rome was a Good Thing?»²¹. Se la lettura di Grozio e degli autori giusnaturalisti (Selden, Pufendorf, Thomasius) rivela in maniera univoca un ampio catalogo di espliciti rifiuti dell'autorità e/o della rilevanza dell'antica Roma, la posizione di Gentili appare più complessa e sfumata.

Osserva in conclusione Somos che «Gentili's *De iure belli* and Grotius' *De iure belli ac pacis* are similar in many ways. The originality, the systematisation, the secularising effect, the structure, the list of topics, and fantastic methodological attention to sources, examples, and authorities all attest to this. As noted, Gentili rarely ever relied on Roman law and history alone; and that when he did, he sometimes did so to crystallise a rule that must be rejected. Much of this would have been understood by his readers as a bold departure. Yet Gentili also attributed the greatest authority to ancient Rome when it came to understand-

²⁰ Ivi, p. 71.

²¹ Mark Somos, in questo volume, p. 73.

ing the law of nations; regarded both Roman law and the Roman empire as living and breathing entities; and derived several rules of the law of nations from Roman sources alone. Perhaps Grotius popped open the jar for the genie of modern international law to emerge only because Gentili already loosened it; in any case, it is not *prima facie* implausible to talk of a Gentilian moment, the way Richard Falk, Boutros Boutros-Ghali, and so many others have spoken of a Grotian moment, whether with coherent semantic range or not, but certainly with a clear sense of originality»²².

Anche nell'articolo di Arno Dal Ri Jr., *Rappresentazioni di Alberico Gentili nella scienza del diritto internazionale in Brasile*²³, ritorna il tema delle genealogie dei “fondatori del diritto internazionale”, con al centro Grozio e, in posizione più defilata Alberico Gentili. Il caso brasiliano è di sicuro interesse per verificare come si è costruita una linea genealogica in una determinata tradizione disciplinare allo scopo di legittimare le prime generazioni di internazionalisti brasiliani. Sulla scia della storiografia più recente sul “momento gentiliano” e sui “miti di fondazione” del diritto internazionale, l'articolo di Dal Ri «si propone di esplorare il modo in cui la riflessione di Gentili è circolata negli scritti dei protagonisti della scienza del diritto internazionale in Brasile. A tal fine, intende innanzitutto esaminare le strategie che, a partire dalla fine del XVIII secolo e rafforzandosi nel corso del XIX secolo, sono state messe in atto per recuperare e inserire nella letteratura specializzata il nome del giurista italiano come parte del triumvirato dei “fondatori del diritto internazionale”. Subito dopo, verrà esaminato il modo in cui i manuali e i trattati brasiliani di diritto internazionale lo presentano, così come la sua opera, evidenziando la presenza

²² Ivi, p. 103.

²³ Questo articolo non è stato presentato in occasione della XXI Giornata Gentiliana ma è apparso in sintonia con l'impostazione di questo volume. Ringrazio l'autore – che ha promosso nel 2005 la prima ed. in portoghese del *De iure belli* di Gentili (*O direito de guerra*, introdução de Diego Panizza, tradução de Ciro Mioranza, Ijuí, Editora Unijuí, 2005) per averlo sottoposto all'attenzione dei curatori.

della strategia volta a collocarlo nel pantheon di questo campo della scienza giuridica anche nella nostra dottrina»²⁴.

L'autore mostra come la conoscenza dei "classici" citati nei manuali sia, per lungo tempo, puramente nominale o, nella migliore delle ipotesi, di seconda mano, specialmente attraverso la mediazione di opere francesi²⁵. In generale «Gli echi di questo movimento hanno impiegato alcuni decenni per raggiungere la scienza brasiliana del diritto internazionale. E, quando lo hanno raggiunto, hanno subito oscillazioni significative: la diffusione del pensiero gentiliano non è stata uniforme, come apparentemente è avvenuto con i postulati di Grozio. Anche se a volte ignorata, altre poco esplorata, l'opera di Gentili ha avuto anche momenti di dialogo e persino di esaltazione nelle dottrine brasiliane»²⁶.

Le opere di Gentili e di Grozio rivelano l'importanza, la centralità sin dalle origini, delle grandi "sistemazioni" dottrinali realizzate da giuristi, ma anche teologi, diplomatici e politici che hanno usato prevalentemente il linguaggio giuridico e mediato tra la tradizione delle fonti e l'innovazione immaginativa, adattandolo ai contesti (la scoperta delle Indie, il commercio internazionale, poi lo sviluppo capitalistico, il colonialismo, ecc.). Queste opere sono diventate dei veri e propri classici che hanno contribuito ad organizzare, sistemare e ordinare fonti, esperienze, fatti e pratiche del diritto internazionale.

Questa "centralità" fondativa viene messa alla prova nella seconda parte del volume dedicata a *Il contributo degli internazionalisti nella costruzione e nello sviluppo del diritto internazionale*. Dalla storia passiamo alla dimensione contemporanea. E, a distanza di due anni dallo svolgimento della Giornata Gentiliana, il quadro internazionale appare ancor più dominato da azioni ed eventi che confermano la crisi in atto del diritto internazionale.

²⁴ Arno Dal Ri jr., in questo volume, pp. 106-107.

²⁵ Tra tutte il capitolo su Gentili scritto da Henri Nézard e pubblicato nella raccolta *Les fondateurs du Droit International*, éd. Joseph Barthélemy, Paris, V. Giard & Brière, 1904, pp. 37-92.

²⁶ Arno Dal Ri jr., p. 133.

In *Scholarly Institutions between Research and Authority* Attila Tanzi prende in esame le istituzioni scientifiche e in particolare l'*International Law Association* (ILA). «The developments since the inception of the second Trump presidency – and especially those relating to the US military operation in Venezuela, the US claims of sovereignty over Greenland, the attack on Iran – appear to have brought the international law discourse closer to the Realpolitik of Alberico's time. Fact is that going back to the same patterns represents a grave instance of backsliding. One regarded by many as threatening to undo the construction of the international law framework ever since then, with special regard to the achievements of the last century – including the ban on the use of force against the territorial integrity and independence of States, and the development of the bodies of human rights and environmental law. Concerns have gone so far as to encompass even the preservation of the basic pillars of the international legal architecture, from the principle of sovereign equality to its law-making corollaries, *consuetudo* and *pacta sunt servanda*»²⁷.

Nel secondo dopoguerra l'autorità dei giuristi internazionali ha proceduto in sostanziale sinergia con l'autorità politica, in un processo testimoniato dalla stessa composizione delle istituzioni accademiche, in cui alcuni membri ricoprivano contemporaneamente posizioni governative, o prestavano servizio come giudici internazionali, o come funzionari internazionali in organizzazioni intergovernative. In tale contesto l'*invisible college of international lawyers* (O. Schachter), grazie alla combinazione di ruoli e alla autorevolezza scientifica, ha potuto contribuire a sviluppare un linguaggio comune creando ponti tra nazioni e popoli, pur in presenza di conflitti e profonde spaccature. Al contrario, «The present time seems to be characterised precisely by a sense of irrelevance of the rule of law for political purposes by the State which currently purports to exercise a hegemonic power in international relations»²⁸. Se questa tensione porterà alla disgregazione di una società internazionale basata sulle re-

²⁷ Attila M. Tanzi, in questo volume, p. 137.

²⁸ Ivi, p. 155.

gole dipenderà dal processo politico che si sta prefigurando. Ma non si può neppure ignorare che esiste una comunità visibile di giuristi e ampie fasce della società civile in tutto il mondo pronte a fare il possibile per preservare le radici della legalità, affinché essa possa rifiorire una volta superata la crisi²⁹.

Christian J. Tams in *Scholarly Interventions and their Impact on 20th Century International Law: Notes of Caution and Two Vignettes* integra questa prospettiva cercando di comprendere se e come singoli studiosi abbiano lasciato nel corso del '900 un segno sul corpo delle norme e dei processi che regolano le discipline del diritto internazionale. In generale si tende a dare per scontato «that scholars today play a reduced role, and the influence of their interventions on the development of international law has decreased significantly»³⁰. Naturalmente è improponibile un confronto con l'età delle grandi narrazioni dei "classici" come Grozio, Gentili o Vattel. Ma se si parla di un "relativo declino degli studiosi", ciò non sempre dipende – osserva Tams – dalla "qualità" della dottrina novecentesca.

Bisogna piuttosto considerare alcuni cambiamenti strutturali indotti dall'espansione del positivismo legalistico nell'ambito del diritto internazionale. In particolare vanno segnalati tre fenomeni: l'ampio ricorso ai trattati internazionali, lo sviluppo delle organizzazioni internazionali, la progressiva emersione di grandi apparati burocratici. Ma il fatto che il ruolo degli studiosi internazionalisti non sia venuto meno, ma per certi versi si sia trasformato, e che pertanto il "declino" debba essere considerato nell'ambito di una più vasta evoluzione, è testimoniato da due esempi molto importanti richiamati da Tams: basti pensare al ruolo di Raphael Lemkin nella costruzione/elaborazione del crimine di genocidio e al contributo di Roberto Ago nella sistematizzazione del diritto della responsabilità statale. Si tratta di studiosi e di contributi ben diversi, ma le loro esperienze non esauriscono certo la possibilità di citarne altri. Questi personaggi suggeriscono che, nonostante la perdita del loro status preminente, gli studiosi del XX secolo potevano rimanere influenti,

²⁹ *Ibidem*.

³⁰ Christian J. Tams, in questo volume, p. 158.

a patto che conservassero la tradizionale qualità accademica e la competenza scientifica, e che fossero capaci di utilizzare la propria *expertise* all'interno dei complessi processi legislativi che avevano plasmato il diritto internazionale del XX secolo. «Oracular pronouncements might still be useful, but no longer sufficient: the oracle needs to enter the arena and engage, even where this leaves its face marred by dust and sweat. Lemkin and Ago, for all their differences, did enter law-making arenas. As scholars-in-the-arena, they made lasting contributions to 20th century international law»³¹.

Nell'ultimo contributo al volume, Serena Forlati riflette sul ruolo degli internazionalisti a partire dai lavori della *International Law Commission* sulle fonti del diritto internazionale, in particolare sui cosiddetti mezzi sussidiari per la determinazione delle norme di diritto internazionale (*'The Teachings of the Most Highly Qualified Publicists' Today: Scholarship in the Work of the International Law Commission on Subsidiary Means for the Determination of Rules of International Law*). Si concentra in particolare sull'articolo 38(1) dello Statuto della Corte internazionale di giustizia. Esso individua le fonti del diritto che la Corte deve applicare quando decide «in conformità al diritto internazionale le controversie che le vengono sottoposte». La disposizione traccia una chiara distinzione tra le fonti elencate nelle lettere (a), (b) e (c) – vale a dire, le convenzioni internazionali, la consuetudine e i principi generali del diritto – e i «mezzi sussidiari per la determinazione delle norme di diritto» menzionati nella lettera (d), ossia «[...] judicial decisions and the teachings of the most highly qualified publicists of the various nations»³².

Forlati ricostruisce la genesi, le motivazioni e il dibattito successivo su questa “valvola respiratoria” del sistema del diritto internazionale. Nonostante il peso delle trasformazioni istituzionali che ne hanno limitato l'impatto, come già osservato da Christian Tams, gli insegnamenti dei giuristi più qualificati (a seconda del valore dei generi letterari e delle *communes*

³¹ Ivi, p. 189.

³² Serena Forlati, in questo volume, p. 192.

opiniones) restano significativi. «The work of the International Law Commission on subsidiary means, and the response of States to its outcomes so far, confirm that this is still true also as regards the role that Article 38 envisages for “teachings of the most highly qualified publicists”. On the one hand, teachings remain no more than subsidiary sources; on the other hand, they do seem to retain their relevance for the purpose of ascertaining and interpreting the content of international legal rules despite the significant development of the international legal system, including through the “judicialization” of international law»³³.

Di fronte alla crisi dell'ordine internazionale così come l'abbiamo conosciuto nei decenni scorsi, i saggi contenuti in questo volume fanno molto riflettere sul lungo cammino che dai grandi “classici” dell'età moderna sino ai *most highly qualified publicists' today* ha portato alla progressiva, difficile, controversa, costruzione e al consolidamento e sviluppo novecentesco di un diritto internazionale pattizio chiamato, almeno sulla carta, ad assicurare una cornice normativa e istituzionale accettabile. Pur con tutti i limiti e le carenze ampiamente denunciati, e tanto più di fronte al rischio di una vera e propria disarticolazione/vanificazione delle istituzioni e degli strumenti operativi della comunità internazionale, rimane fondamentale il compito dei “costruttori” delle regole e dei limiti che il diritto pone ai Leviatani. Di fronte alla violazione dei patti, all'esaltazione dei meri rapporti di forza, alla unilateralità delle decisioni, alla messa in discussione di categorie fondamentali come quelle di genocidio e di crimini di guerra, bisogna continuare a *credere* nel diritto internazionale di Gentili e di Grozio e a difendere le conquiste raggiunte. La cosiddetta “crisi del diritto internazionale” è, a ben vedere, un dato strutturale. Vista dalla prospettiva storica, quella attuale non è certo la prima né sarà l'ultima. Di sicuro, non saremo noi a intonare il *de profundis*.

³³ Ivi, p. 210.

Sessione prima

Alberico Gentili e Ugo Grozio: relazioni e “momenti” della storia del diritto internazionale

Carlo Galli

La giustizia, la religione, la guerra: da Vitoria a Hobbes,
attraverso Gentili e Grozio

1. Nel XVII secolo l'Europa si trova davanti a un inedito incrocio di problemi: deve difendere e sviluppare il nascente mercantilismo capitalistico, sostenuto da un importante sviluppo tecnologico, che esige l'affermazione e la centralità del diritto di proprietà e che indirizza l'Europa fuori di sé, verso la colonizzazione commerciale, e anche territoriale, degli spazi extra-europei; e deve uscire dalle guerre civili di religione che infliggono ferite mortali alla pace e alla sicurezza delle società di antico regime. La soluzione storica è lo Stato, ma i problemi teorici da risolvere sono molti: in pratica si tratta di trovare un nuovo paradigma di pensiero che tenga insieme individuo proprietario, Stato di potenza, rapporti fra l'Europa e il resto del mondo. Il che implica la necessità di superare o di modificare radicalmente la nozione di giustizia, di guerra giusta e di diritto di resistenza.

E infatti uno dei processi generali più evidenti della modernità è il passaggio dalla guerra giusta alla guerra di Stato: a partire dal XVI secolo la guerra abbandona progressivamente lo spazio universalistico della giustizia intesa oggettivamente ("spessa") ed entra nello spazio della politica istituzionalizzata, cioè statualizzata. Gli Stati che fanno guerra non cessano di appellarsi alla giustizia, naturalmente, né cessa la teorizzazione di un diritto naturale e di un "diritto delle genti" e poi di un diritto internazionale (alle soglie del XIX secolo) da parte di filosofi e giuristi, ma quella giustizia naturale si stacca quasi del tutto dal fondamento della religione e si assesta su parametri sempre più individualistici, mentre il diritto delle genti e quello internazionale

risentono sempre più della presenza dello Stato; l'universalismo che ne consegue è in ogni caso "sottile", non effettuale né oggettivamente fondato né in grado di essere stabilmente fondativo, e anzi destinato a essere deformato, perforato, piegato a un pluralismo di interpretazioni che corrispondono di fatto agli interessi – per definizione "giusti" – dei singoli Stati, ormai monopolisti della politica. Semmai, acquista senso concreto il "diritto pubblico europeo», ovviamente non universalistico, cioè l'insieme delle consuetudini diplomatiche, in via di giuridificazione patiziosa, degli Stati d'Europa. In parallelo, la Chiesa cattolica esce dalla sfera delle decisioni politiche.

Questo passaggio avviene, lo si è anticipato, dentro alle guerre civili di religione, per superarle in una pace almeno relativa, territorialmente (statualmente) definita; un passaggio determinato dall'esigenza di mettere riparo al grande trauma della Riforma, per sanare il quale è necessario superare il diritto di associare alla guerra la religione, la verità e la giustizia in senso sostanziale, e ridurre praticamente a zero il diritto di resistenza. Un altro grande trauma apre la modernità ed esige un superamento: la scoperta dell'America, e qui il movimento teorico necessario è l'estensione al Nuovo Mondo delle categorie ordinarie del Vecchio – mossa umanitaria a doppio taglio, che legittima anche il colonialismo.

Francisco de Vitoria reagisce al trauma americano; Alberico Gentili, Ugo Grozio, Thomas Hobbes, al trauma della Riforma. Per vie diverse, con diversi obiettivi e con diversi tragitti, gli ultimi tre spostano il *focus* della guerra, la sua legittimazione, dalla religione (in cui era precipitata a causa delle lotte fra eresia e cattolicesimo) alla politica – il che non è una novità, s'intende, ma lo diventa nell'età delle guerre di religione. Il teologo è teorico del diritto naturale universale a forte contenuto oggettivo (e quindi pienamente conoscibile), sia pure con grande attenzione alla statualità, mentre i due giuristi pur delineando un embrione di diritto internazionale danno rilievo eminente alla politica statualizzata (Gentili oscilla fra virtù repubblicana e Ragion di Stato, Grozio al contrario concentra l'attenzione sulla proprietà e sulla sua difesa giuridico-militare, in una sorta di compromesso fra sovranità e diritto internazionale); il filosofo ha poi come

unico obiettivo la pace interna, la sicurezza individuale ottenuta attraverso l'artificio politico razionale, pagata col perenne rischio di guerra esterna. La statualizzazione della guerra, cioè l'uscita della guerra dalla sfera della giustizia, ha un doppio effetto: all'esterno, lo Stato è uguale agli altri Stati; e dentro i suoi confini la sovranità esige la piena subordinazione di tutti alla legge – ne consegue la delegittimazione del diritto di resistenza e ovviamente anche della guerra civile di religione.

Insomma, i presunti “fondatori” del diritto internazionale (in quest'ultimo ruolo naturalmente non c'è Hobbes) devono prima sciogliere il nodo del rapporto fra guerra, giustizia, religione, resistenza e politica, e poi fare i conti con la sovranità dello Stato; il sistema di relazioni fra Stati è un prodotto accessorio di queste mosse teoriche, dettate dalle circostanze, e si fonda tanto sul diritto naturale e poi internazionale (sottile) quanto sulla guerra statale (assai più incombente), in un orizzonte di secolarizzazione (variamente atteggiata). Il diritto internazionale moderno ha alle spalle questo graduale processo di spegnimento della giustizia oggettiva, “spessa”; questa, in quanto universale sostanziale, si è inabissata ed è stata quasi interamente risucchiata nell'interno di ciascuno Stato: non a caso Kant nella *Pace perpetua* definiva i giusnaturalisti Grozio, Vattel e Pufendorf “funesti consolatori” (*leidiger Tröster*), perché il loro diritto naturale era inerme davanti all'elemento anarchico della politica internazionale (le sovranità) e quindi non garantiva per nulla la pace¹. E non a caso per costruire la pace Kant non batterà solo la via del diritto internazionale ma una via prevalentemente politica – un sistema di relazioni internazionali fondato sul diritto esige, per lui, istituzioni statali “illuminate” e federate, e una politica che assuma come proprio dovere il non contraddire in linea di principio la libertà morale dell'uomo. Invece, i giuristi del diritto internazionale, dalla fine del XIX secolo in poi, dovranno cercare di “ispessire” di nuovo l'universale giustizia, che la modernità ha reso debole o nulla.

¹ Immanuel Kant, *Per la pace perpetua* (1795), a cura di Vincenzo Cicero, Milano, Rusconi, 1997, p. 83.

Non vi è alcun teleologismo in questa ricostruzione, né alcuna volontà di far culminare in Hobbes il cammino della modernità, del quale gli altri autori sarebbero soltanto i preparatori: quel processo sicuramente esiste, ma non ha Hobbes come sbocco necessario. Anzi, si può dire che quel processo conosce dopo Grozio una biforcazione: da un lato c'è la compresenza del diritto naturale universalistico e razionalistico moderno (cioè “sottile”) e del diritto internazionale che coesiste compromissoriamente con le sovranità, dall'altro le logiche sovrane vengono estremizzate da Hobbes, che rifiuta il compromesso con l'universalismo giuridico. Nel loro insieme, questi autori saturano la prospettiva moderna fino a Kant, nelle sue due possibilità contraddittorie: diritto universale e sovranità particolare. Due esiti entrambi iscritti nelle logiche della modernità e non destinati a conciliarsi ma ad alternarsi e a confliggere fino ai nostri giorni².

2. È necessario precisare alcuni punti. In primo luogo, a partire almeno dal *Contra Faustum* di Agostino è maggiormente ammesso che al cristiano sia lecita la guerra oltre che, naturalmente, per obbedire a un aperto comando di Dio (“guerra divina”, in pratica relegata al livello biblico – nemmeno le crociate sono “divine”, risultando piuttosto guerre giuste rafforzate da motivazioni religiose), per vendicare le offese (come già ammesso dalla dottrina romana) e per correggere gli errori esiziali per il corpo della società e della Chiesa (la “guerra giusta”)³. La guerra giusta è una guerra di ragione, che implica l'esistenza di una giustizia oggettiva e conoscibile, e che richiede che la ragione e la giustizia stiano tutte da una parte e il torto stia tutto dall'altra. La guerra civile di religione è in pratica (per entrambe le parti) una crociata, ovvero una guerra giusta molto rafforzata da un motivo religioso – sulla medaglia che Gregorio

² Per una ricostruzione complessiva cfr. Eugenio Di Rienzo, *Il diritto delle armi. Guerra e politica nell'Europa moderna*, Milano, FrancoAngeli, 2005; Gustavo Gozzi, *Diritti e civiltà. Storia e filosofia del diritto internazionale*, Bologna, Il Mulino, 2010, pp. 23-130.

³ Cfr. Carlo Galli, *Forme della critica. Saggi di filosofia politica*, Bologna, Il Mulino, 2020, pp. 183-255.

XIII fece coniare in occasione della notte di san Bartolomeo è inciso il motto *Pietas excitavit iustitiam*.

Un passaggio indispensabile per far cessare le guerre civili di religione, ovvero per sganciare la guerra dalla giustizia oltre che dalla religione, è ammettere la possibilità del *bellum utrimque iustum* (*bellum iustum ex utraque parte*): è chiaro infatti che se la guerra è giustificabile da entrambe le parti non può essere interpretata come una lotta del bene contro il male. Al fine di spegnere la guerra di religione è necessario un potenziamento neutralizzante della politica, che non deve più occuparsi di bene e male – nozioni progressivamente relativizzate –, ma di comando e obbedienza, il che implica la tolleranza (facoltativa) e (certamente) la fine del diritto di resistenza: il cittadino non si può opporre al potere sovrano in nome della coscienza religiosa.

Il diritto di resistenza è insegnamento tradizionale del cattolicesimo, ed è proclamato polemicamente dagli ugonotti⁴ con la teoria del doppio patto: fra il popolo e Dio, e fra il popolo e il re – la legittimità sta nel primo, che il re (in pratica un amministratore) non può violare, pena la ribellione dei sudditi. Il principio *cuius regio eius religio*, definito nel trattato conseguente alla Pace di Augusta (1555) fra Carlo V e la Lega di Smalcalda (poi esteso con le paci di Westfalia anche alle potenze calviniste), realizza al contrario la concentrazione della legittimità e della giustizia – e quindi del potere coercitivo e dello *ius ad bellum* – solo nell'autorità politica suprema, nella sovranità, e così toglie alla Chiesa e ai singoli cittadini la capacità sia di disobbedire alla legge civile sia di resistere alla imposizione di una religione.

3. La prestazione di Vitoria consiste nell'estendere il modello tomistico di origine aristotelica al Nuovo Mondo, ipotizzando in tal modo una sorta di universalismo sostanzialistico – è un teologo non certamente fanatico, ma interno a un deciso ontologismo. Esiste una giustizia universale oggettiva, ed esiste una

⁴ Tommaso, *Summa Theologica*, IIa IIae, q. 40; Stephanus Junius Brutus, *Vindiciae contra Tyrannos. Il potere legittimo del principe sul popolo e del popolo sul principe* (1579), a cura di Saffo Testoni Binetti, Napoli, Istituto Italiano per gli Studi Filosofici Press, 2021.

comune umanità che ne è il soggetto: la differenza di religione è superabile, perché i barbari possono essere convertiti con la predicazione, una volta che sia stata appurata la loro umanità – si ricordi che invece Sepúlveda⁵ teorizzerà contro Soto e Las Casas la barbarie naturale e invincibile degli indios.

Per Vitoria la legittimazione del dominio spagnolo sull'America non è quindi né il *descubrimiento* di per sé, né l'estraneità degli indios alla fede o il loro rifiuto della fede, né la loro condizione di peccato né la scarsità del raziocinio: in quanto animali sociali razionali gli indios sono legittimi signori e padroni del loro territorio, capaci di *potestas* e di *dominium* come *ius utendi re*. Tuttavia il re cattolico può avere diritto su di loro se essi per libera scelta vogliono essere governati da lui, oppure se privano gli spagnoli del diritto naturale di transitare per le loro terre, di commerciare equamente con loro (negando così la *cognatio* degli uomini tra di loro, che Vitoria afferma contro il detto plautino dell'*Asinaria* “*homo homini lupus*”), o ancora se ostacolano la Chiesa cattolica nel suo diritto di predicare, o se perseguitano i convertiti – con ciò vulnerando il diritto naturale, il diritto delle genti e il diritto della Chiesa all'evangelizzazione (che è di origine divina); in questi casi commettono ingiustizia e sono passibili di punizione attraverso una guerra giusta. Che può, forse, prendere anche le forme di un intervento umanitario per salvare gli innocenti sacrificati e poi divorati da un popolo che è tanto arretrato da sembrare “amente”⁶ (l'universalismo, che deriva dall'uguaglianza naturale degli uomini, implica sempre la possibilità dell'interventismo).

⁵ Juan Ginés de Sepúlveda, *Democrate secondo ovvero sulle giuste cause di guerra* (1548 circa), a cura di Domenico Taranto, Macerata, Quodlibet, 2009, pp. 59 ss., 94, 129; *Guerra giusta e schiavitù naturale. Juan Ginés de Sepúlveda e il dibattito sulla Conquista*, a cura di Marco Geuna, Milano, Edizioni Biblioteca Franciscana, 2014; Bartolomé de Las Casas, Juan Ginés de Sepúlveda, *Disputa sugli indios. La Giunta di Valladolid*, a cura di Saverio Di Liso, Roma, Edizioni Accademia 'Vivarium Novum', 2020. Cfr. Filippo Ruschi, *L'aurora del diritto internazionale*, Napoli, Satura, 2024, pp. 1-83.

⁶ Francisco de Vitoria, *Relectio de Indis* (1539), a cura e con introduzione di Ada Lamacchia, Bari, Levante, 1996, I,2, pp. 31 ssg. per i titoli non legittimi di conquista; I,3, pp. 77-99 per i titoli legittimi, part. i numeri 14 e 17 per i sacrifici umani e per l'arretratezza.

Resta quindi in vigore (contro l'irenismo erasmiano) l'apparato della guerra giusta secondo ragione: il Messico è stato conquistato dagli spagnoli per diritto di guerra giusta – e non per concessione pontificia con la bolla *Inter coetera*⁷ (che è l'argomento politico al tempo più rilevante). La guerra giusta è sempre fondata solo sulla *iniuria accepta*⁸, e implica la necessaria punizione del vinto (ingiusto) da parte del vincitore (giusto): in quanto punitiva la guerra difensiva può quindi essere anche offensiva⁹. Ovviamente vale l'esclusione del *bellum utrimque iustum*:

a parte i casi di ignoranza ammissibile, non ci può essere guerra giusta da entrambe le parti¹⁰.

E l'ignoranza del bene e del male non è certamente ammissibile. L'uomo può e deve conoscere.

Ora, questo quadro teorico non è moderno – l'universalismo oggettivo in quanto tale comporta infatti, tra l'altro, che il potere politico dello Stato non sia originario e anzi derivi dall'intera umanità –, ma presenta una significativa caratteristica: la guerra giusta in teoria comporta anche il diritto di resistenza, la ribellione, ma questa in pratica non è accettata da Vitoria; tranne che in casi eccezionali evidentissimi (e l'esempio riportato – ovviamente irripetibile – è l'agire degli ebrei e dei romani contro Gesù), i comuni cittadini devono obbedire al re in guerre difensive e offensive¹¹. Anche se la politica va apertamente contro i comandamenti di Dio, non c'è spazio per questioni di coscienza (anzi, la legge obbliga appunto anche le coscienze): il singolo suddito non può esser più informato del governante sulla giusta causa della guerra, e l'obbedienza al potere è di origine almeno paolina. La disobbedienza, l'inizio della guerra civile di religione, resta sullo sfondo come caso teorico che non trova giustificazione pratica – ma è vero, al contrario, che la conver-

⁷ Ivi, I,2,5, pp. 46-48.

⁸ Id., *De iure belli* (1539), a cura e con introduzione di Carlo Galli, Roma-Bari, Laterza, 2005, III,4, p. 31.

⁹ Ivi, IV,I,4, p. 39.

¹⁰ Ivi, IV,I,9, p. 59.

¹¹ Ivi, IV,I, dal punto 6 al punto 10, pp. 43 ss.

sione anche di una parte degli indios pagani al cattolicesimo deve essere consentita dal potere politico: insomma, nella guerra civile di religione (peraltro incipiente ma non ancora divampante in Europa) Vitoria non coglie una questione epocale e sembra implicitamente considerarla come un tradizionale problema di estirpazione dell'eresia, mentre il suo pensiero politico in senso stretto si concentra sui secolari temi del rapporto fra potere spirituale e potere temporale, e sulla legittimità del governo di un non cristiano sui cristiani¹². Certamente, sotto il profilo teologico-dogmatico, Vitoria fu un difensore severo dell'ortodossia, come dimostrò nella vicenda della condanna delle tesi di Erasmo¹³.

Vitoria rimane del tutto interno al paradigma universalistico della guerra giusta, quanto alla legittimazione della guerra, e alle sue conseguenze discriminatorie (*quantum liceat in bello iusto*); ma la decisione della guerra spetta per lui solo agli Stati, per cause politiche e non religiose, senza che i sudditi abbiano possibilità di disobbedire.

Sono motivazioni prudenziali quelle che spingono Vitoria a questa accentuazione pratica del ruolo dello Stato. Gli altri autori si spingono oltre questo livello, e con strategie diverse, fanno della guerra un affare di Stato, non di religione né di giustizia; per superare le guerre civili di religione devono uscire teoricamente dall'assioma che in guerra sia sempre solo una delle due parti ad essere nel giusto, ovvero devono accedere anche sotto il profilo teorico al *bellum iustum ex utraque parte* – e quindi devono perdere l'elemento punitivo che segue la vittoria militare; devono neutralizzare razionalmente, in linea di principio e non solo in via prudenziale, la disobbedienza e lo scontro di religione, superando la guerra giusta e il diritto di resistenza che ne è la causa. E questo è un passaggio teoretico oltre che politico.

¹² Id., *De potestate Ecclesiae I*, in *Relecciones teologicas*, Madrid, Biblioteca de Autores Cristianos, 1960, pp. 196-240, art. V; Id., *De Indis*, cit., III,3, pp. 131 ss.

¹³ Teófilo Urdañoz, *Introduccion biografica*, in Vitoria, *Relecciones teologicas*, cit., pp. 1-107 (30-35).

4. Non ci si può aspettare da un giurista protestante, di formazione umanistica, fuggito dall'Italia per motivi religiosi, qual è Alberico Gentili¹⁴, il medesimo schema di ragionamento che è presente in Vitoria, teologo spagnolo di pensiero indipendente ma certo non ribelle. E infatti Gentili da una parte segue in pratica la struttura del ragionamento vitoriano, organizzando il suo *De iure belli* in tre libri, nel primo dei quali individua la causa materiale della guerra (che può essere divina, naturale, umana), mentre nel secondo analizza la causa formale (la conduzione della guerra), per concludere nel terzo con la causa finale (i diritti del vincitore e del vinto)¹⁵; ma d'altra parte introduce variazioni importantissime. La più rilevante delle quali consiste nel riconoscere la giustizia da entrambe le parti:

la guerra è giusta da una parte, ma dall'altra può essere ancora più giusta, e una parte non cessa di essere nel giusto per il fatto che l'altra sia ancora più nel giusto. Le virtù hanno infatti un grado maggiore e minore [...]. Per quanto possa accadere, di tanto in tanto (e non spesso), che l'ingiustizia sia palesemente e senza incertezze tutta da una parte, tuttavia non è parso opportuno mutare quella definizione generale secondo la quale i diritti di guerra spettano sempre e comunque a entrambe le parti in contesa¹⁶.

Il rovesciamento della posizione di Vitoria riguardo la normalità e l'eccezionalità della giustizia da entrambe le parti nasce dal fatto che Gentili riconosce un'ampia area di oscurità nella capacità conoscitiva degli uomini, a causa della "debolezza della nostra condizione umana" che ci lascia immersi nelle tenebre¹⁷: il mondo giuridico-morale oggettivamente chiaro e distinto a cui fa riferimento Vitoria è ormai alle spalle (del resto, su posizioni analoghe era anche Balthasar Ayala nel *De jure et officiis bellicis et disciplina militari*, 1582). Gentili segue pertanto volentieri

¹⁴ Su Gentili cfr. Diego Panizza, *Alberico Gentili, giurista ideologo nell'Inghilterra elisabettiana*, Padova, La Garangola, 1981; Stefano Colavecchia, *Alberico Gentili e l'Europa. Storia ed eredità di un esule italiano nella prima età moderna*, Macerata, eum, 2018.

¹⁵ Alberico Gentili, *Il diritto della guerra*, introd. Diego Quagliani, trad. Pietro Nencini, apparato critico a cura di Giuliano Marchetto e Christian Zendri, Milano, Giuffrè, 2008, I,7, pp. 49-51.

¹⁶ Ivi, I,6 pp. 46-47.

¹⁷ Ivi, I,6, p. 45.

Vitoria sulla tesi tradizionale che non c'è guerra per motivi di religione – affermando anche, contro Giusto Lipsio, che la religione non necessariamente implica fervore bellico –: la politica non può dettare obblighi religiosi, né da parte del principe né da parte del popolo, perché la religione è un connubio fra Dio e l'uomo nella libertà¹⁸. La questione delle diverse religioni interne allo Stato è solo politica: certo, la loro presenza può essere causa di debolezza del principe ma la soluzione del problema del pluralismo religioso è la sua neutralizzazione in una tolleranza politicamente garantita – e non a caso è citato Bodin –, non necessariamente in un'assoluta unità¹⁹. Dunque, come non possono essere perseguitati i fedeli di una religione diversa da quella del principe, così il popolo non può utilizzare la religione per resistere, per disobbedire, per lacerare lo Stato con la guerra civile: in caso di vessazioni insopportabili del potere politico, la sola risposta ammessa è la fuga (ovviamente, qui gioca l'esperienza personale). L'unica guerra che Gentili ammette per motivi religiosi – e non è una contraddizione, perché non implica la restaurazione del diritto di resistenza, ormai definitivamente obsoleto – è l'intervento umanitario in un altro Stato per aiutare una minoranza oppressa: la “difesa onesta”²⁰.

La neutralizzazione della religione è totale, tanto verso il cattolicesimo intransigente quanto verso il protestantesimo fanatico; Gentili sgancia la guerra e la politica dal fondamento religioso, e le associa esclusivamente allo Stato, non per la gloria (il giovanile retaggio umanistico e repubblicano è parzialmente superato nella maturità) né per la potenza (cioè la pura Ragion di Stato dell'assolutismo, che egli nondimeno preferisce, anche se in forma tirannica, all'anarchia, cioè alla guerra civile di reli-

¹⁸ Ivi, I,9, pp. 55-60 e I,11, pp. 71-76; I,9, pp. 56-59; Vincenzo Lavenia, *Gentili e i Maccabei. Come leggere le guerre bibliche fra teologia e diritto*, in Alberico Gentili ieri e oggi. *Teologia, religioni e diritto internazionale*. Atti del Convegno. Ventesima Giornata Gentiliana, a cura di Luigi Lacchè e Vincenzo Lavenia, Macerata, eum, 2024, pp. 33-57, mostra che il libro dei Maccabei, tradizionalmente paradigmatico della “guerra divina”, non è utilizzato da Gentili come legittimazione della guerra per motivi religiosi.

¹⁹ Gentili, *Il diritto della guerra*, cit., I,10, pp. 61-70 (a p. 64 c'è la menzione di Bodin).

²⁰ Ivi, I,15, pp. 97-107.

gione) ma per l'utile, ovvero per il bene complessivo dello Stato, che ha in sé anche elementi di umana giustizia e di antica virtù repubblicana. Gentili respinge la tesi che gli uomini siano nemici per natura; le contese umane nascono non da cause genericamente antropologiche ma da un "difetto del genere umano", dal "vizio dell'uomo": libertà e gloria, cupidigia di onore e dominio²¹ – simili ma non coincidenti con quelle che identificherà Hobbes: in Gentili c'è ancora una pre-politica socievolezza umana universale, che non è un ordine oggettivo ma che non è neppure la guerra di tutti contro tutti. Nondimeno, anche se non ci sono cause naturali di guerra, nel caso dei Turchi le ostilità sono incessanti e senza speranza di pace (i Turchi fanno sempre eccezione: tanto per Vitoria in merito all'uccisione dei prigionieri di guerra quanto per Erasmo – è invece Lutero a considerarli un flagello divino a cui non si deve resistere). Il celeberrimo *silete teologi in munere alieno* – oltre a essere una risposta a Vitoria che nel *De Indis* aveva affermato che la determinazione dei giusti titoli del dominio spagnolo in Messico non era da attribuirsi solo ai giuristi ma prevalentemente a chi, a differenza di questi, è competente nelle leggi divine – vuole appunto superare, in nome del realismo politico, le tesi dei teologi post-vitoriani che sostenevano che nemmeno contro i Turchi fosse ammessa la guerra preventiva, la cosiddetta "difesa utile"²².

Un grandissimo passo è stato fatto oltre la guerra giusta, un deciso spostamento della guerra dalla religione verso lo Stato, mentre il diritto di natura perde sicuramente gran parte della propria consistenza: un passo, tuttavia, ancora una volta più prudenziale e umanistico, oltre che al contempo statualistico, che non teoretico e filosofico.

²¹ Ivi, I,12, pp. 77-83.

²² Ivi, I,14, pp. 88-96; il passo di Vitoria è in *De Indis*, cit., I,8, p. 11; il "*silete*" è in Gentili, *Il diritto di guerra*, cit., I,12, p. 83; sulle posizioni di Vitoria, Erasmo e Lutero a proposito della guerra dell'Europa cristiana contro i Turchi cfr. Carlo Galli, *Contingenza e necessità nella ragione politica moderna*, Roma-Bari, Laterza, 2009, pp. 81-83.

5. I temi dell'uscita della guerra dalla sfera della giustizia intesa in senso sostanziale, del diritto di resistenza, della guerra di religione e del rapporto fra popolo e principe in relazione alla religione, sono trattati da Ugo Grozio in collegamento tanto con Gentili quanto, maggiormente, con Vitoria. Grozio, in ogni caso, è molto più orientato a legittimare lo spostamento della politica e della guerra verso lo Stato non solo in via prudenziale ma attraverso un nuovo razionalismo giuridico – aperto e flessibile, ma tendenzialmente sistematico.

In un'opera giovanile, il *De imperio summarum potestatum circa sacra*²³, Grozio presenta un cristianesimo ragionevole: la religione cristiana ha dato un contributo fondamentale alla concordia fra gli uomini. La sovranità politica è qui concepita come operatrice di uguaglianza, mentre il clero, invece, ha costruito nei secoli un sistema gerarchico. Il potere politico deve essere ragionevole, orientato alla concordia e all'unità religiosa dello Stato (una neutralizzazione, quindi, su basi umanistiche), mentre il potere religioso è un fattore privato, a carattere persuasivo. La distinzione fra politica e sacro avanza, anche se la politica continua a riferirsi, per quanto riguarda la legittimazione, a un tenue impianto morale-religioso.

Nel *De iure belli ac pacis* questa distinzione viene conservata e rafforzata, anche se naturalmente Grozio non può uscire dalla temperie cristiana del suo tempo. Che la religione non debba avere significato polemico-politico è esplicitato da Grozio attraverso una aperta critica sia delle persecuzioni anticristiane degli imperatori romani, sia delle lotte contro gli eretici, ai quali va invece riconosciuta la retta intenzione e la buona fede, e contro i quali è errato procedere con la violenza politica (è evidente il sotteso riferimento biografico)²⁴.

Al tempo stesso, il diritto di resistenza è negato in quanto contrario all'essenza stessa della costituzione civile, che è la pace

²³ Ugo Grozio, *Il potere dell'autorità sovrana in ordine alle cose sacre* (1614-1617), a cura di Lucia Nocentini, con Prodrómo di Giovanni Fiaschi, Tirrenia, Edizioni del Cerro, 2006.

²⁴ Id., *Il diritto di guerra e di pace*, 3 voll., a cura di Carlo Galli e Antonio Del Vecchio, Napoli, Istituto Italiano per gli Studi Filosofici Press, 2023, vol. 2, 26, pp. 640-647.

interna: la ribellione, fino all'uccisione dell'usurpatore, è legittima solo se prevista nei patti fondativi dello Stato, come esercizio di un diritto popolare positivo, non naturale; la disobbedienza non è legittima tranne che in casi eccezionali e gravissimi, inerenti materie religiose, ma a essa deve seguire la sopportazione della punizione²⁵. Con grandi contorsioni argomentative è anche trattata la questione della disobbedienza dei sudditi nel caso di ordini ingiusti, oppure di dubbi sulla giusta causa di guerra: la linea fondamentale tenuta da Grozio è a favore dell'obbedienza, perché la responsabilità è di chi comanda, ma in alcuni casi è lecito disobbedire e pagare un tributo; e anche nel caso di guerra ingiusta, quando il nemico (che è nel giusto) vuole uccidere tutti, è lecito difendersi.

La parallela uscita della guerra dalla sfera della giustizia oggettiva è acquisita proprio attraverso l'argomentazione di Gentili, cioè attraverso una estensione del concetto – per Vitoria ristretto a un numero infimo di casi – di “ignoranza ammissibile e inevitabile”, che rende possibile e frequente, quasi normale, il *bellum utrimque iustum*²⁶. Gentili qui è citato senza particolare enfasi positiva, benché la sua argomentazione sia identica a quella di Grozio. In generale, infatti, nel *De iure belli ac pacis* Gentili non è molto presente, tranne che nei *Prolegomeni*²⁷, in cui è accusato di essere troppo aderente al potere politico nella propria argomentazione, di non avere sviluppato a sufficienza l'elemento teorico del diritto, e di non aver utilizzato esempi adeguati ma solo principi generali in modo deficitario.

Al contrario, Grozio cita Vitoria spesso e con rispetto («un teologo dal sano giudizio»²⁸). Ma in tre punti principali se ne discosta: oltre che nel citato passaggio a favore del *bellum utrimque iustum*, là dove²⁹ Grozio nega che le città abbiano diritto di

²⁵ Ivi, I,4, pp. 185, 208-209.

²⁶ Ivi, II,23, p. 603.

²⁷ Ivi, *Prolegomeni* § 38, pp. 27-28; altre presenze di Gentili nel *Diritto di guerra e di pace* sono: II,1, p. 25; II,3, p. 66; II,18, p. 409; II,19, p. 428; III,3, pp. 64-65; III,6, p. 108 e p. 110; III,20, p. 352; si tratta di occorrenze minori, a volte di assenso ma a volte di rettifica di posizioni gentiliane su argomenti non decisivi.

²⁸ Ivi, III,12, p. 225.

²⁹ Ivi, I,3, p. 127.

guerra contro altre città dello stesso Stato, e dove³⁰ corregge il teologo che gli pare paradossalmente troppo laico: Vitoria infatti afferma, con riferimento agli indios, che non è legittima una guerra che abbia il fine di punire i loro peccati, mentre Grozio sostiene che non si può limitare la guerra giusta alla riparazione di offese dirette puntualmente a un determinato soggetto (che diventa così il titolare del diritto alla guerra giusta), ma che si deve tenere conto anche dell'esigenza di vendicare le offese alla legge di natura in nome della "intera società comune del genere umano"; certo, secondo il suo stile argomentativo avvocatesco di ricerca delle attenuanti, Grozio si affretta a ridurre la portata potenzialmente pan-interventistica e pan-bellicistica di questa tesi – un pan-interventismo che accomuna i giusnaturalisti, e anche Gentili –, scusando chi pecca contro la legge di natura per ignoranza o per cattiva educazione.

In generale Vitoria è tuttavia accreditato come uno dei garanti delle tesi groziane: sul fatto che le logiche dell'utilità universale (lo Stato) debbano prevalere su quelle dell'utilità particolare (dell'individuo)³¹; sul fatto che gli indios possono esercitare la proprietà e che la Chiesa non ha giurisdizione sulle terre del Nuovo Mondo³²; sulla generale restrizione delle cause di guerra giusta³³ (cioè, si badi, delle guerre in cui il torto e la ragione sono chiaramente separati e attribuiti integralmente all'uno e all'altro dei due contendenti: la posizione di Grozio è invece la preferenza per il *bellum sollemne*, che non è "giusto" in senso oggettivo ma lo è in senso soltanto formale-istituzionale)³⁴; inoltre spesso Grozio si richiama a Vitoria nel terzo libro del *De iure belli ac pacis* a proposito della limitazione della guerra e della mitigazione del trattamento dei nemici vinti e degli ostaggi³⁵.

Naturalmente, la distanza logica, teoretica e politica fra i due è molto grande: l'universalismo di Grozio – che c'è, e ren-

³⁰ Ivi, II,20, pp. 510-515.

³¹ Ivi, II,5, p. 122 (Grozio cita la *relectio* di Vitoria *De potestate civili*).

³² Ivi, II,22, p. 578 e p. 582.

³³ Fra i molti luoghi, cfr. ivi, II,21, p. 564.

³⁴ Per la definizione e i requisiti del *bellum sollemne* cfr. ivi I,3, p. 125 e III,3, pp. 51-66.

³⁵ Ivi, III,1, p. 5 e III, 11, pp. 221-223.

de possibile l'estensione planetaria delle logiche giuridiche proprietarie, e anche le guerre (perfino "private") per difenderle e implementarle – è, appunto, "sottile", ovvero è fondato sul suo assunto principale, che cioè Dio ha creato gli uomini dotandoli del diritto a procurarsi ciò che serve alla loro sussistenza e di una seppur minima capacità relazionale razionale, e che quindi la proprietà è frutto di un primissimo contratto fra gli uomini la cui violazione legittima il ricorso al tribunale, e ove questo manchi alla guerra di chiunque verso chiunque – ma il ruolo dello Stato è assolutamente preponderante. Questo è il razionalismo di Grozio: la giuridificazione, originaria ma "sottile" (la cui possibilità è di origine divina) delle relazioni interumane, per cui esiste «*aliquod inter populos ius commune quod in bella et in bellis valet*»³⁶. È un diritto molto tenue, che nondimeno consente l'edificazione contrattuale del diritto civile (il diritto pubblico interno) e del diritto delle genti (il diritto internazionale, per come lo poteva concepire un uomo del XVII secolo) su basi privatistiche e universalistiche al contempo³⁷. Un quadro in cui l'ignoranza è temperata (ma non interamente debellata) dal lume della ragione e in cui trova spazio politico importante lo Stato, concepito come una costituzione pattizia volta all'utilità dei suoi membri, e quindi detentrica a sua volta di una propria intrinseca utilità, che, pur interna alla razionalità giuridica universalistica, è in grado di condurre guerre giuste – dove il termine "giuste" significa fondate sull'interpretazione razionale dell'utilità dello Stato. Una combinazione di universalismo giuridico, particolarismo proprietario, sovranità politica, del tutto diversa da quella di Vitoria, e molto più aperta di questa alla guerra e al commercio – due modalità di manifestazione del diritto di proprietà. Un giurista protestante olandese della prima metà del Seicento, avvocato della *Vereinigde Oostindische Compagnie*, ragiona in modo molto differente da un teologo spagnolo professore a Salamanca, di tre o quattro generazioni più vecchio, benché

³⁶ Ivi, *Prolegomena* § 28, p. 24.

³⁷ Martti Koskenniemi, *International Law and the Emergence of Mercantile Capitalism*, in *The Roots of International Law. Les fondements du droit international. Liber Amicorum Peter Haggenmacher*, eds. Pierre-Marie Dupuy, Vincent Chetail, Leiden, Brill, 2014, pp. 1-37.

Grozio sia ovviamente anch'egli interno alla temperie cristiana dell'Europa – nelle modalità di una teologia giuridica deistica, distinta dalla teologia politica ancora “sostanziale” di Vitoria e da quella che sarà la teologia politica “formale”, svuotata, di Hobbes.

Lo spostamento verso lo Stato, pur in una tenue maglia di diritto universale, che si trova anche in Vattel, consente alla politica moderna di essere particolaristica (cioè sovrana) e al tempo stesso di invocare a propria legittimazione la difesa di un diritto universale calpestato dal nemico, che può così essere non solo combattuto ma anche criminalizzato e posto fuori dell'umanità. Una guerra giusta senza giustizia oggettiva “forte”. Ciò vale nella linea anglo-olandese, di robusta interazione fra sovranità ed economia capitalistica, mentre un'altra linea, nata anch'essa in Inghilterra ma radicata in seguito in Germania, esce da questo equilibrio fra particolarismo e universalismo e rinuncia del tutto alla valutazione giuridica della guerra e delle relazioni internazionali, portando all'estremo la sottigliezza della “giustizia” moderna e caricando tutto il peso della politica sullo Stato – l'economia resta sullo sfondo, come causa reale di questa politica, una causa tuttavia le cui logiche specifiche non possono interferire con le logiche politiche. È la biforcazione presidiata da Hobbes e dal suo realismo politico.

6. Ovviamente, il realismo non ha il monopolio della realtà – concetto insensato: è anch'esso una narrazione, che è possibile grazie al radicalismo di una filosofia materialistica e razionalistica, ma anche peculiarmente teologico-politica, che spazza via le argomentazioni giuridiche universalistiche e che, pur facendo proprie le ragioni dell'economia individualistica proprietaria, le porta a sistema attraverso logiche politiche superiori.

A differenza di Vitoria, di Gentili, di Grozio, Hobbes assume una originaria divisione radicale degli uomini: in natura questi non sono in grado di stabilire fra di loro alcun legame stabile e giusto, né oggettivo e fondativo né soggettivo e relazionale. Quindi non esiste in natura alcun universale, né spesso né sottile; ma ciò non è dovuto all'ignoranza: anzi, è la ragione

(materialistica, atomistica, neo-epicurea, scientifica) a scoprire il grande Nulla dell'umana esistenza. Il diritto di natura è ridotto alle libere e infinite dinamiche acquisitive del singolo soggetto, mentre le relazioni stabili sono proiettate in un ineffettuale dover-essere (le leggi di natura, che col diritto di natura sono incompatibili), che possono essere implementate, col timore e con la ragione, solo attraverso il dispositivo artificiale sovrano-rappresentativo, il *pactum unionis* che genera la comune soggezione alla legge dello Stato. La politica è ricondotta alla spoliticizzazione del diritto naturale originario, cioè è rivolta alla protezione e all'assicurazione dell'utilità, della vita e della proprietà dei singoli, operosi e industriosi. Questo Stato, questo universale – logicamente ferreo e al tempo stesso “mortale”, perché fondato solo sulla volontà dei singoli e legittimato solo dalla propria reale efficacia –, realizza la giustizia nel senso che non tanto la interpreta quanto la crea, come propria opera politica, come strumento della propria volontà di unità e di pace interna. Nulla di esterno e di precedente allo Stato lo vincola: *auctoritas non veritas facit legem*, il che a sua volta si basa, logicamente, sul concetto che «la legge di natura e la legge civile si contengono reciprocamente»³⁸. E quindi, ovviamente, non c'è alcun diritto di resistenza, perché è proprio alla naturale insociabile libertà che si deve rinunciare per costruire il sovrano – solo se il potere politico, venendo meno alla propria funzione, comanda a un cittadino di uccidersi o di uccidere altri questi può rifiutarsi, e porsi così fuori dallo Stato, ritornando nello stato di natura; e lo stesso vale se lo Stato comanda al cittadino di andare in guerra, dove la vita è in pericolo (il disonore, la viltà, non hanno significato politico); solo se dalla disobbedienza viene vulnerata la sovranità scatta l'obbligo legale di combattere³⁹.

³⁸ Thomas Hobbes, *Leviatano* (1651), trad. it. di Gianni Micheli, saggio introduttivo di Carlo Galli, Milano, Bur, 2021⁹, i capp. 13, 14, 16, 17; in part. l'assenza di giustizia in natura è al cap. 13, p. 132, e al cap. 15, p. 149; al cap. 26, p. 292, è espressa la tesi che non è l'autorità dei filosofi, per quanto vera, ma quella dello Stato, a fare le leggi; al cap. 26, p. 282, è asserita la coincidenza di legge civile e legge di natura.

³⁹ Ivi, cap. 18, p. 188; cap. 14, p. 145; cap. 21, pp. 230-232.

Una costruzione estremistica per tempi estremi, di conflitto senza fine, in cui pare a Hobbes che la filosofia debba diminuire molto le richieste che si possono rivolgere alla politica: la cui finalità non può essere il bene, la virtù, la libertà, ma l'eliminazione del *summum malum*, della morte violenta, delle «miserie e delle orribili calamità che accompagnano una guerra civile»⁴⁰; insomma, la pace intesa come sicurezza. Che si ottiene con l'unità politica e religiosa – assicurata dalla rappresentanza sovrana, che garantisce che l'agire del sovrano sia *ipso facto* riconosciuto da ciascun cittadino come proprio agire. Una sola legge, una sola fonte della legge, un solo culto pubblico, quindi, ben al di là di categorie premoderne come il consenso e la concordia⁴¹, o anche della tolleranza, che è spoliticizzante solo di fatto ma non in linea di principio, quanto piuttosto sulla base dell'estremo assottigliamento del dogma politico, unitario e irrinunciabile, che Hobbes riduce alla confessione che *Jesus is the Christ*⁴². Di fatto, si introduce qui la differenza strategica fra la dimensione pubblica e quella dell'interiorità (il Leviatano non legge nei cuori: nell'intimo si può credere come si vuole), che si somma a quella fra politica sovrana e società dei privati (che coincidono di fatto, ma che sono due modi diversi di pensare l'unione civile), e a quella fra interno ed esterno, fra il regno della pace e del diritto e lo spazio della guerra come minaccia sempre possibile.

La guerra non ha alcun valore di giustizia, né tanto meno di religione: è, come possibilità, la condizione normale nello stato di natura, dal quale si può uscire solo con la costruzione di una pluralità di Stati che, isole di pace nel mare tempestoso delle relazioni internazionali (rimaste allo stato di natura), sono sempre in condizione di guerra potenziale l'uno verso l'altro, scrutandosi come gladiatori pronti a difendersi e a colpirsi⁴³. È la fine del *bellum iustum*, e il trionfo del *bellum utrimque iustum*, ovvero

⁴⁰ Ivi, cap. 18, p. 195.

⁴¹ Ivi, cap. 17, pp. 181-182.

⁴² Ivi, cap. 43, p. 628.

⁴³ Ivi, cap. 13, p. 132.

della guerra la cui giustizia non dipende da una causa giusta ma dal soggetto giusto (cioè adeguato, legittimo) che la dichiara e la combatte: lo Stato, uguale a ogni altro Stato (la dimensione del non-Stato è ovviamente esclusa o relegata nella dimensione coloniale). La guerra è un diritto di sovranità, in assenza di diritto internazionale e nella non cogenza del diritto delle genti. Benché almeno il pan-interventismo sia ovviamente escluso in linea di principio, Hobbes non tenta nemmeno di atteggiarsi a “consolatore”: il diritto di natura non tanto è “sottile” quanto piuttosto non esprime alcun legame inter-umano, ma è ridotto all’aggressività e alla paura dei singoli soggetti; gli Stati non hanno alcun sostrato comune, essendo collegati l’uno all’altro solo da trattati labili e implicitamente sottoposti alla clausola “*rebus sic stantibus*”, ovvero all’interpretazione sovrana delle contingenze storiche e delle utilità politiche.

Tutto ciò è possibile perché Hobbes colloca la politica moderna all’interno di un’epoca di assenza di fondazioni teologiche; e, paradossalmente, questa assenza è, per lui, il vero messaggio del cristianesimo, che istituisce un “tempo dell’attesa” fra l’Ascensione di Cristo e la sua seconda venuta in Terra; un tempo in cui l’umanità non può fare altro che obbedire a quel che resta del sacro, ovvero al comando divino (che è anche la prima legge di natura), di vivere in pace – un comando che si può obbedire solo attraverso il *pactum unionis* hobbesiano. La moderna teologia politica dell’assenza (l’interpretazione hobbesiana della secolarizzazione) trova qui il suo inizio più certo: lo Stato realizza in terra ciò che rimane della religione, cioè la pulsione ordinativa. Ogni finalità sostanziale è bandita, in attesa della pienezza dei tempi, il regno terreno di Cristo che si darà in un futuro indeterminato. Rettamente (razionalmente, scientificamente) interpretato (e Hobbes si cimenta in una memorabile disputa con Bellarmino), il cristianesimo è una religione senza qualità e senza trascendenza, o meglio, una religione che non prevede più alcun ponte o legame sostanziale e istituzionale fra il trascendente e la storia, e che quindi destina la Chiesa a una missione solo predicatoria e magistrale, privandola di ogni efficacia politica; insomma, è proprio il cristianesimo a comandare il disincanto del mondo, un tempo contro il paganesimo e oggi

contro il fanatismo protestante e contro il dogmatismo sostanzialistico cattolico⁴⁴. E che fa della guerra, quindi, solo un affare di Stato.

Insieme all'antropologia radicalmente negativa, è questa trasformazione del trascendente in trascendentale, di Dio come sostanza nella coazione formale all'ordine politico, ciò che differenzia Hobbes dagli altri autori considerati: i contenuti e le finalità sono in larga parte coincidenti – uscire dalla guerra civile, dare per scontata una decisa instabilità dell'agire umano, spostare il fulcro della politica tanto sull'individuo quanto sullo Stato, spolitizzare la religione, vedere nella ragione umana la chiave operativa della civiltà e nel cristianesimo reinterpretato il quadro generale di questa; manca però in Hobbes una dimensione universale di diritto perché la sua teologia politica negativa gli fa venir meno ogni fondamento sostanziale (la giustizia “spessa”) e la sua antropologia conflittuale nega la possibilità di ogni dimensione relazionale non interessata (giustizia “sottile”). Autore ultra-moderno, Hobbes non lascia spazio alla contraddittoria coesistenza di universalismo sottile e di sovranità, che di fatto la modernità registra: al di là di ogni compromesso teorico, di ogni timidezza speculativa, egli individua nella sovranità l'unica contingente salvezza pensabile e praticabile nell'età del disincanto e del pericolo. E di questa salvezza non fa parte, per lui, il diritto internazionale.

In un'altra fase della modernità sarà Hegel – che accoglie di fatto l'anti-giuridicismo internazionalistico hobbesiano come punto di partenza – a sviluppare, a partire dalla sovranità, un disegno di comunicazione fra i popoli e gli Stati, non primariamente attraverso il diritto ma grazie allo sviluppo storico dello Spirito: uno sviluppo che va oltre la tragica incomunicabilità interstatale disegnata da Hobbes⁴⁵. Ma nel suo svolgersi empirico la modernità, anche nei suoi esiti più tardi, resta segnata

⁴⁴ Sulla teologia politica di Hobbes si veda *Leviatano*, cit., libro III, capp. 33-43 (al cap. 42 la disputa contro la *potestas indirecta* di Bellarmino); cfr. Galli, *Forme della critica*, cit., pp. 67-73.

⁴⁵ Carlo Galli, *Hegel, lo Stato e la politica internazionale*, in *Pensiero politico e relazioni internazionali. Dalla Modernità al mondo globale*, a cura di Alessandro Campi e Michele Chiaruzzi, Soveria Mannelli, Rubbettino, 2025, pp. 381-402.

da un'alternanza tra fasi di relativa affermazione di un diritto internazionale sempre "orientato" (dopo lo *ius publicum Europaeum* è venuto lo *ius publicum Americanum*) e fasi di conflitto aperto per ragioni di potenza, nelle quali in realtà accanto al conflitto permane l'uso moralistico e discriminatorio dell'elemento polemico giuridico-universalistico.

Martti Koskenniemi

Legal Imagination and International Power: A History of Capitalism*

1. *Introduction*

Histories of international law have usually been framed as narratives about the expansion and eventual globalization of statehood. The actions and events have been described as actions and events in “state-life” – wars and diplomatic negotiations, treaty-making and other types of activity that can be interpreted as “state behaviour”. There are many reasons for this, not least of them is the manner in which the modern textbook tradition, born in the last decades of the 19th century, identified its subject-matter. This choice is still reflected in legal practice, including the list of sources in the Statute of the International Court of Justice that defines the material scope of international law in terms of treaties and customary forms of behaviour adopted by states as well as, more tentatively, «general principles of law recognized by civilized nations». As is well-known, the Permanent Court of International Justice abbreviated those sources in 1927 as manifestations of the “will” of sovereign states:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achieve-

* Parts of this essay reproduce sections in my *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300-1870*, Cambridge, Cambridge University Press, 2021.

ment of common aims. Restrictions upon the independence of States cannot therefore be presumed¹.

Now both this statement as well as the state-centrism that it reflects have been contested a thousand times, especially in the academy. It has been regarded as morally dubious, Eurocentric and sociologically questionable. One well-known challenge lay behind the rise of human rights law and human rights institutions alongside older diplomatic institutions. Perhaps surprisingly, however, the legal framework undergirding the expansion of trade relations across boundaries – the claims of property right and the ever-thickening network of international contracts – have only marginally touched on histories of international law. Grotius' advocacy work for the Dutch East India Company is well-known but rather more as the background for the war in the Indies than in itself an important part of international legal imagining. Histories of international law, even when they put to question the field's "Westphalian" origins, still concentrate on war, treaty-making and formal colonial conquest and tend to look away from hierarchies of ownership and relations of contract. Of course, "legal history" proper contains many illuminating discussions of international contracting and foreigners' property claims. But these often rather technical discussions have not had much influence in histories of international law. The formation of modern Europe has been studied overwhelmingly from a "political" angle, by focusing on the laws of sovereignty and public power. Even critical histories of international law's complicity in the expansion of European power since the late 15th century usually focus on sovereignty and the manner in which it was denied to non-European communities. These histories appear to suggest that law's predominant role in international relations lies in the way it organizes the political world by empowering or restraining sovereigns, and that the world of economic relations is best seen as the background to those political relations, at best a passive repertory of instruments that political actors may employ as part of their political or diplo-

¹ Case of the *S.S. Lotus*, Permanent Court of International Justice, 1927 P.C.I.J. (ser. A) No. 10 (1927), para. 44.

matic strategies. The world of ownership and contracting are relegated to the realm of “private” relations, a mere background for conducting state policies.

My intention here is not to deny the truth of these histories but to nuance and tweak them by suggesting the fruitfulness of adopting a more complex view of the role of law – of legal thinking and claiming – in the international world than one limited to the scrutiny of the public acts of states. State-centric histories reveal just one side of European power. They over-emphasize the role of public actors and institutions. A more complete image is received by focusing on the legal constellation in which the privileges of sovereignty have interacted with the powers of property at particular moments and in locally specific ways. After all, what is interesting is not so much how a specific understanding of “international law” has operated in the world but how “law” in its multiple variations has created, maintained and sometimes critiqued the hierarchies of power that extend beyond single communities. The distinction between the “political” and the “economic” is part of a modern framing of the world that may in fact hide the important sense in which a claim of “sovereignty” embodies a claim for the control of economic resources and that this must often have been quite obvious for everyone involved. Historians of colonialism have often focused on how “trade follows the flag” but also vice-versa, how private contracting and ownership claims require for their consolidation the imprimatur of a state. Surely it is important to bear in mind that alongside the globalization of a world of state-based international relations, European expansion has also meant the globalization of a certain combination of public and private power, sovereignty and property, that, for want of a better word, may be called “Capitalism”.

2. *The Theological Setting*

It has been often (and well) said that the European State was born with the consolidation of the domestic market. This was neither simple nor uncontroversial. While the political theory of statehood had a venerable pedigree in Aristotle’s *Politics*, and

the idea of *imperium* kept alive the ways of Roman rulership, the mundane business of buying and selling, and even more the connected motive of profit-seeking, was hard to fit within the government of a Christian commonwealth². The matter was reflected in the 16th century with great insight and influence by theologians of the “Salamanca School” who brought to their teaching the 14th century *Summa theologiae* of Thomas Aquinas that had much to say about both of sets of problems – the law and ethics of the government of the state and the basis, limits and lawful uses of the right of property. In addressing the latter issue in their teachings and their manuals to confessors, their perspective was wholly international, designed to cover both exchanges within and across Europe as well as contacts with non-European merchants³.

Francisco de Vitoria, Domingo Soto as well as their successors are well known to have developed a theological ethic in which the rights and duties of rulership are supplemented by extensive discussions of buying and selling, including the permissible limits of profit-taking as well as, for example, the moral and legal status of professional banking⁴. Using the vocabulary of *dominium* from the *Summa*, they regarded it obvious that both ruling and ownership had to do with a relationship of power between human beings, the powers of *dominium jurisdictionis* and *dominium proprietatis*. To explain these two forms of power, the Salamanca scholars were careful to explain both as creations of human law in response to conditions in the world as they

² Aristotle’s famous critique of acquisition of goods beyond what is needed for household management, that is «trade that depends on exchange», is in *Politics*, I,X (1258a38). And as Aquinas put it, «It is altogether sinful to have recourse to deceit in order to sell a thing for more than its just price, because this is to deceive one’s neighbor so as to injure him», *Summa Theologiae* (=ST), I-II, q. 77, art. 1, as reproduced at <<https://aquinas.cc/la/en/~ST.II-II.Q77>>.

³ See for example *El pensamiento económico de la escuela de Salamanca*, vol. 1, eds. Francisco Gómez Camacho, Ricardo Robledo, Salamanca, Ediciones Universidad de Salamanca, 1998. An especially influential work was Tomás de Mercado, *Suma de tratos y contratos*, Madrid, Editorial Nacional, 1975.

⁴ The standard source is Marjorie Grice-Hutchinson, *Early Economic Thought in Spain 1177-1740*, London, Allen & Unwin 1978. See further Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)*, Leiden, Nijhoff, 2013.

had come to know it. For, as Vitoria stated, «by natural law people were equal; and nobody was a king under natural law»⁵. However, human sinfulness had made it necessary to introduce supremacy and kingship in their communities. A similar explanation was given to private property. At creation, God had given the world in common to all humankind. But this would not work among fallen and egoistic individuals. As Aquinas had already explained, private property was justified for practical and utilitarian reasons, to create a «more peaceful state of things»⁶.

In a hugely significant manoeuvre, Vitoria and his followers divested natural law (or natural law in its *original* form) from its constraining power. Freedom and common ownership were not based on a binding prescription (*praescriptio*) but only a recommendation (*concessio*)⁷. They provided for common property but did not prohibit the *divisio rerum* – both in its public law form as independent communities and in terms of private property. This modification had taken place “*ex consensu omnium*”, not a “real” agreement but a “virtual” one, by the taking into use of pieces of land and others following suit⁸. Because this division was valid everywhere it could not have been based on the civil law of this or that state. It had to have been undertaken by *jus gentium*⁹. There was some variation. Were public and private power (civil sovereignty and property rights) “simply” positive law or perhaps a kind of “sociological” version of natural law, namely something that was “natural to humans as they exist”?¹⁰ This ambivalence has proven immensely useful for later generations of jurists as they have moved between positivist and naturalist vocabularies in an effort to give a normative account of particular rights-systems.

⁵ «[O]mnes homines de jure naturali erant aequales; nullus erat princeps de jure naturali», Francisco de Vitoria, *Comentarios a la Segunda secunda de Santo Tomás* [=ComST II-II], ed. Vicente Beltrán de Heredia, Salamanca, BAE, 1932-1952, vol. 3, q. 62, art. 1, § 21 (p. 77).

⁶ Aquinas, ST, II-II, q. 66, art. 2, resp., in Id., *Political Writings*, ed. R.W. Dyson, Cambridge, Cambridge University Press, 2007, p. 208.

⁷ Vitoria, ComST II-II (n. 26), q. 62, art. 1, n. 20, p. 77.

⁸ Id., q. 62, art. 1, n. 21, p. 78.

⁹ Id. (n. 26), q. 62, art. 1, n. 23, p. 79.

¹⁰ Koskenniemi, *To the Uttermost Parts*, cit., pp. 174-181.

Vitoria and his followers developed a vocabulary of Christian government and economic exchanges that would frame the contours of subsequent political and legal theory. The nominalist and humanist perspectives of the Salamanca theologians, their interest in on-going social developments, including the “conquest of the Indies” and the formation of novel systems of banking and credit made them frequently consulted experts by Castilian rulers and merchants, as well as intellectual influences across Europe. Historians have tended to focus on their political theories and their views on the laws of war and conquest, but attention has more recently turned to their economic writings as well. These had huge importance in justifying and consolidating the emerging market-morality. Their use of the vocabulary of *dominium* to address both rulership and the exchanges of property provided a realistic and flexible articulation to the emerging hierarchies of power in early modern Europe¹¹.

The religious wars encouraged further reflection about the nature and justification of rulership. The former Jesuit and papal diplomat Giovanni Botero wrote his widely read *Ragion di stato* (1589) so as to instruct Catholic princes on how to maintain and strengthen their states in a time of adversity. A strong sovereign, ready to take action at exceptional times, would not suffice, contrary to what jurists such as Jean Bodin appeared to suggest. Establishing a “firm rule over a people” required concrete action to direct subjects to productive work so as to make the state flourish¹². In Botero’s work, and that of such other Counter-Reformation writers as Scipione Ammirato and Ludovico Zuccolo a new type of knowledge was being developed, a technical knowledge of government that would focus on the “forces” of a state so as strengthen its internal coherence and external power¹³. «The ruler who has plenty of men will

¹¹ Ivi, pp. 181-198 and notes therein.

¹² Giovanni Botero, *Reason of State*, ed. Robert Bireley, Cambridge, Cambridge University Press, 2007, Bk I.1 (p. 4 note 2).

¹³ For useful specialist works, see Romain Descendre, *L’Etat du monde. Giovanni Botero entre raison d’état et géopolitique*, Genève, Droz, 2009, and Laurie Catteeuw, *Censures et raison d’état. Une histoire de la modernité politique (XVII-XVIII siècles)*, Paris, Albin Michel, 2013.

have plenty of everything which the ingenuity and industry of man can provide» – which is why the ruler should «encourage and promote agriculture and show his appreciation of those who make good use of their property and of those whose farms are well cared for»¹⁴. He should not forget manufacture and commerce, either: «From this comes an influx of money and of people who work, who trade the products of the work, or who supply material to the workers, who buy, sell, transport from one place to another the artful products of man's intelligence and skill»¹⁵. Overall, this new knowledge of *ragion di stato* would frame the state as a complex of unity of royal powers and the private worlds of production and commerce. The sovereignty of the prince and the property of the subject were inextricable. «The riches of a prince depend upon the wealth of individuals. Their wealth consists in their possessions and in the real exchange of the fruits of the earth and of industry, in imports and exports, shipping from one place to another either within a kingdom or from other countries»¹⁶.

Botero may have been wrong about the jurists' exclusive interest in sovereignty. In fact, Bodin substituted his view of sovereignty with a theory of "government" that had to do with the way the king would see to the subjects' productive and commercial lives. Not only did he hold the king bound by the subjects' property rights but he also advocated a special office ("censor") to survey and supervise the just use of domestic resources. For good government, he wrote, it was not enough to know the best form of the state; one also needed to know how to maintain it. Bodin was intensely interested in economic rulership, writing at length on monetary matters, taxation and inflation, for example. The sovereignty of the prince was hugely important, but so was the business of provincial parliaments that engaged in day-to-day administration of the commercial operations of subjects to the public utility¹⁷. But neither Bodin, nor Botero or

¹⁴ Botero, *Reason of State*, Bk VIII.4 (p. 134).

¹⁵ Id., Bk VIII.3 (p. 137).

¹⁶ Id., Bk I.15 (p. 23).

¹⁷ Jean Bodin, *Les six livres de la république*, IV I-III, and e.g. Thomas Berns, *Souveraineté, droit et gouvernementalité. Lectures du politique moderne à partir de*

the Spanish scholastics assumed the usefulness of anything like an independent concept of the economy juxtaposed to the work of public rulership. This would be the result of debates only in the 18th century.

3. *Ruling and Trading: Europe*

As long as something like feudalism captured the imagination of Europeans thinking about the nature of their social relations, any firm distinction between sovereign power over persons and rights of property over things would have smacked of alien abstraction, inapplicable in a hierarchical world of lordship and vassalage. International relations combined the personal affairs of sovereigns with expanding trading system whose practices were explained in texts of early economic writers such as Gerard Malynes, Edward Misselden and Thomas Mun. These men sought to demonstrate that the power of the (English) state was inextricable from the prosperity of Englishmen and that a nation's merchants, having too long laboured under a negative prejudice, were its most valuable asset. Discussing the day's commercial practices as *lex mercatoria* and a branch of the law of nations, Malynes insisted in 1629 that «of the six members of all the governments of monarchies and common-weales, [the merchants] are the principal instruments to increase or decrease the wealth thereof»¹⁸. And in 1664, Mun believed that the members of the «Noble Profession» of the merchant were «worthily called The Steward of the Kingdoms Stock» whose work, when «performed with great skill and conscience, that so the private gain may ever accompany the publique good»¹⁹. These

Bodin, Paris, Léo Scheer, 2005, pp. 103-212. The distinction between sovereignty and government, the latter largely the business of lower-level public authorities is discussed in Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy*, Cambridge, Cambridge University Press, 2015, pp. 10-12, 40-44.

¹⁸ Gerard Malynes, *Consuetudo vel lex mercatoria, or The Antient Law-Merchant*, London, Adam Islip, 1629, p. 62.

¹⁹ Thomas Mun, *England's Treasure by Foreign Trade*, in *A Select Collection of Early English Tracts on Commerce*, ed. John R. McCulloch, London, Political Economy Club, 1856, p. 122.

men possessed practical knowledge of long-distance commerce which is why they would be enlisted to provide advice on how it should be best directed to the benefit of the country. Their types of advice were eventually formalised in Boards of Trade where merchants and landowners would instruct the ruler on the administration of the Navigation Acts, colonial trade and how to direct monetary policies towards a favourable balance of trade²⁰.

Economic writers such as Malynes and Misselden were practical men who refrained from situating their views in larger frames of legal and political thought. It was for Hugo Grotius and the natural lawyers treading in his footsteps to articulate the expanding commercial practices within a more elaborate theoretical framework that would justify the consolidation of “fiscal military states” across Europe. An idea of the rule of law stood at the heart of this process²¹. The Dutch Golden age relied on a successful amalgam of sovereign power of the United Provinces and the property rights of Dutch commercial elites that accounted for the unprecedented prosperity envied across Europe. The country had become a kind of world entrepôt by offering a stable and efficient regime for protecting property and facilitating commercial exchanges. Grotius knew well that this required stability and quoted Quintilian on the need of owners to be secure in their possessions: «in the principle of confidence, so to speak, lies the origin of human society»²².

Grotius regarded the Dutch merchant class «a people surpassed by none in their eagerness for honourable gain»²³. He was particularly keen to celebrate the value of wholesale trade,

²⁰ Thomas Leng, ‘Epistemology’: *Expertise and Knowledge in the World of Commerce*, in *Mercantilism Reimagined: Political Economy in Early Modern Britain and Its Empire*, ed. Philip J. Stern & Carl Wennerlind, Oxford, Oxford University Press, 2014, pp. 102-116.

²¹ As I have argued in Martti Koskenniemi, *Imagining the Rule of Law: Rereading the Grotian ‘Tradition’*, «European Journal of International Law», 30, 2019, pp. 17-52.

²² Hugo Grotius, *Commentary on the Law of Prize and Booty (De iure praedae Commentarius)*, [1604-1606], ed. Martine Julia van Ittersum, Indianapolis, Liberty Fund, 2006 (=DIP), II (p. 28).

²³ Id., I (p. 9).

of which Amsterdam was the world centre. In comparison to the “humble” business of private shopkeeping, wholesale commerce, especially by maritime routes, provided such an indispensable service to societies everywhere that it was «absolutely necessary according to nature’s plan»²⁴. This mercantile ideology was underpinned by a faith in the providential design that commerce helped to sustain. Like the Spaniards, he supposed that God had given the world to humans in common, but that He had also given them the right to occupy and divide it into separate states and realms of private property. Subjective rights lay at the heart of the *De iure belli ac pacis*, namely contractual rights understood as *facultas* that could be enforced by courts and contrasted with dubious distributive ideas²⁵. What arose from his principal work was an ideal of a «Community of Rights and Sovereignty» in which «[...] every one should quietly enjoy his own, with the Help and by the united Force of the whole Community»²⁶ – an image like a golden era painting of a Dutch merchant family gathered in front of a fireplace to contemplate their earthly success.

The arguments in Grotius’ principal work produced a general view of statehood, war and commerce that he had rehearsed already in his famous defense of Dutch expansion in the “Indies”. A private company (such as the Dutch East India Company, the VOC), he argued, may engage in just war against a state (Portugal) and to take the property belonging to its subjects in order to compensate for the “injury” caused by preventing the free enjoyment of the rights of trade. Indeed:

[...] spoils are beneficial primarily because the individuals honourably enriched thereby are able to benefit many other persons, and because it is to the interest of the state that there should be a large number of wealthy citizens²⁷.

²⁴ Id., XII (p. 356).

²⁵ Id., *The Rights of War and Peace (De iure belli ac pacis)* [1625-1631], ed. Richard Tuck, Indianapolis, Liberty Fund, 2005 (=DIBP), I, IV (p. 138).

²⁶ Id., I, II 5 (p. 184).

²⁷ Id., DIP, XV (p. 464).

Gone are the Spaniards' doubts about the benefits of free trade. Commerce now has a providential function and the rights of private property and trade are both wished by God and defensible by war if necessary²⁸. Later, in Book II of *De iure belli ac pacis* Grotius provides an extensive justification of private property, its forms of acquisition, contracts and war as a means of reparation and punishment for the injury that is done to the owner by depriving him the rightful use of his property²⁹. In this way, not only was the public power of the State enlisted for support of access by private merchants to all parts of the colonial world but these merchants themselves were understood as representatives of the state and competent to undertake just war in both its "private" and "public" forms³⁰.

The arguments by Grotius to justify the aggressive trading policy of the VOC in terms of a right of just war, Tuck has written, «fundamentally revised Western political thought itself»³¹. The very wide notion of self-preservation to enforce private rights was only tempered by Grotius' view of sociability that he assumed humans had received at creation. Where Grotius still defined that sociability in terms of a natural love and fellowship, Samuel Pufendorf (1632-1694) and the later proponents of natural philosophy depicted it in artificial terms – as an inference self-loving humans had better to draw from their experience: what was it that they would need for their self-preservation and flourishing? The answer would be: commercial society³². Emer

²⁸ See further Ileana M. Porras, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' 'De iure praedae' – The Law of Prize and Booty, or "On How to distinguish merchants from Pirates"*, «Brooklyn Journal of International Law», 31, 2006, pp. 741-804.

²⁹ Grotius, *DIBP*, Preliminary discourse, XVIII (p. 94). See further Alfred Dufour, *Les "Magni hispani" dans l'oeuvre de Grotius*, in *Die Ordnung der Praxis. Neue Studien zur Spanischen Spätscholastik*, Hg. Frank Grunert, Kurt Seelmann, Tübingen, Niemeyer, 2001, pp. 351-380.

³⁰ See Grotius, *DIP* XII (private war) and XIII (public war) (pp. 300-436).

³¹ Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, Oxford, Oxford University Press, 1999, p. 81. For a very thorough elaboration of this point, see Martine van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights and the Rise of Dutch Power in the East Indies 1595-1615*, Leiden, Brill, 2005.

³² See further, Istvan Hont, *The Language of Sociability and Commerce*, in Id., *Jealousy of Trade: International Competition and the Nation-State in Historical*

de Vattel's (1714-1767) hugely successful view of the law of nations (1758) used this argumentative basis so as to liberate the nations to seek their own self-perfection by setting up a balance of power that would allow the uninterrupted pursuit of trade even in wartime³³. His natural law, Emmanuelle Jouanet has argued, operated with the tension between liberalism and providentialism that were once reconciled by theology but that has remained a recurrent theme in liberal legal and political thought³⁴.

The notions of individual freedom and private ownership that Adam Smith and classical economists received from the debates about *dominium* among scholastic theologians and the natural lawyers had originally no independence from the binding duty of rulers to govern their communities for the common good. On the contrary, the extent of royal power and the private rights of subjects were constantly adjusted by reference to a larger teleology assumed to govern human life. The assumption had been that although trade would be useful in a world of sinful humans, it would need to be reconciled with the search for spiritual good and protection against enemies. In the course of the 18th century, however, property rights and trade relations began be understood as parts of a self-contained or self-regulating "system" in which they would lead independent lives as legal ideas and social practices operating autonomously from a limited "public realm" of rulership³⁵.

Perspective, Cambridge Mass., Harvard University Press, 2005, pp. 176-184.

³³ See e.g. Isaac Nakhimovsky, *Vattel's Theory of the International Order: Commerce and the Balance of Power in the 'Law of Nations'*, «History of European Ideas», 33, 2007, pp. 157-173.

³⁴ Emmanuelle Jouanet, *Le droit international libéral-providence. Une histoire de droit international*, Brussels, Bruylant, 2010.

³⁵ On the emergence of a naturalized idea of economy in French 18th century thought, see Margaret Schabas, *The Natural Origins of Economics*, Chicago, The University of Chicago Press, 2005, pp. 7-12, 42-57.

4. *Colonialism as a Public-Private Relationship*

European States were never powerful enough to carry out their colonial projects in the Roman imperial manner. While the early Iberian projects were initiated and largely carried out under the auspices of the royal house itself, though financed by private creditors, Dutch, French and the English colonization was organized in complex public-private enterprises. Most ventures were undertaken by private entrepreneurs, merchants, companies, and financiers operating under a charter or a letter patent with only a nominal part of the proceeds to be returned to the crown in recognition of its supreme lordship. The first charter issued to the Virginia investors in 1606 set up two settlements in which the investors would enjoy authority over:

[...] all the lands, Tenements and Hereditaments which shall be within the Precincts limited for that Colony, as is aforesaid, to BE HOLDEN of us, our heirs and Successors as of our Manor of East Greenwich in the County of Kent, in free and common Soccage only, and not in Capite³⁶.

In the period between 1578 and 1732 the crown granted roughly 35 patents and charters in the Atlantic region with approximately similar provisions. Land held “in free and common soccage” involved some rent payable either in kind or in money, but did not involve personal service. The company would have full freedom to use the land and enjoy its product, including the right to administer it, to legislate for it, to alienate it in whole or in part as well as to create sub-tenures³⁷. The lands would be held “of the crown” – that is to say, the crown would have “ultimate” jurisdiction in a quasi-feudal manner – but most governmental activity would be allocated to the grantee or possessor

³⁶ First Virginia Charter, 10 April 1606. The Charter contemplated two colonies: one promoted by a group of London merchants, the other by merchants from Plymouth, Bristol and other cities. There was to be a governing council for each plus a council in London for general supervision. The second colony failed after its first year and the London council was abolished in 1609, however.

³⁷ See Alfred W. B. Simpson, *A History of the Land Law*, 2nd edn, Oxford, Oxford University Press, 1986, pp. 11-14. B.H. McPherson, *Revisiting the Manor of East Greenwich*, «American Journal of Legal History», 42, 1999, pp. 35-56, and further Simpson, *A History of the Land Law*, pp. 47-52.

of the charter³⁸. Their legislative powers would be limited only by the rather open-ended provision according to which it was not to be “repugnant” to English laws. Nevertheless, local conditions could still be reasonably taken into account³⁹.

When Grotius defended the Dutch passage in to the Indies in 1604 he sketched the Dutch East India Company both as a private actor, acting in its own name to “punish” a violation of its property right and a public actor, waging formal war against the Portuguese. In an effort to imitate the public-private character of the Dutch East India Company, Richelieu set up the French colonial government after the Dutch model. Eventually, by the time of the Revolution, at least 75 large companies had been chartered by the king, but financed from private resources (often from the royal family’s funds) to administer the French colonial realm from Canada to Pondicherry⁴⁰. According to advice received by Richelieu and his king, only private capital would allow French to compete with the Dutch and the Spanish in the colonies⁴¹. But French nobles had little enthusiasm or competence in the colonial ventures and were anyway not keen to invest in commercial activity that posed a threat to their noble status. It fell instead largely upon Richelieu and his followers themselves, together with the ruling family to become the principal

³⁸ See further, Koskenniemi, *To the Uttermost Parts*, cit., pp. 726-736. The charters usually empowered the company or the proprietor to allocate lands to the settlers. But this took time and left at any moment the status of territories open. In case of corporate colonies, the land could be understood as corporate land, but in proprietorships it was unclear whether that was royal demesne or owned by the proprietor himself. These matters were largely unresolved, but, Mancke writes, Stuart kings «asserted their prerogative to treat Crown lands in Virginia, and elsewhere in the Americas, a private preserves to grant to clients as they wished [...]». Elizabeth Mancke, *Chartered Enterprises and the Evolution of the British Atlantic World*, in *The Creation of the British Atlantic World*, eds. Elizabeth Mancke, Carole Shammas, Cambridge, Baltimore-London, The Johns Hopkins University Press, 2012, pp. 237-264: p. 243.

³⁹ Philip J. Stern, ‘Bundles of Hyphens’: Corporations as Legal Communities in Early Modern British Empire, in *Legal Pluralism and Empires 1500-1850*, eds. Lauren Benton, Richard J. Ross, New York, New York University Press, 2013, pp. 21-48: p. 29.

⁴⁰ See Koskenniemi, *To the Uttermost Parts*, cit., pp. 500-547.

⁴¹ See Isaak de Razilly, *Mémoire de Chevalier Razilly*, in Léon Deschamps, *Isaak de Razilly. Un colonisateur du temps de Richelieu*, Paris, Delagrave, 1885, pp. 15-35.

investors. Apart from the most profitable of the colonies, Saint-Domingue, the French efforts remained largely unsuccessful. An outright farcical effort was to outsource of the management of the Louisiana colony to one the king's principal financiers, Antoine Crozat in 1712. It soon became clear that the territory was too poor for cultivation. Nothing came of commerce with Mexico, either, as Spain kept tightly to its monopoly. Crozat had to conclude that what he had bought was «a land uncultivated, inhabited by savages and rascals without commercial prospects and administered by imbeciles»⁴². All effort to make the colony profitable proved vain. Eventually, Crozat would get rid of this burden as the Crown agreed to the return of Louisiana at the value of 2 million livres that was deduced from the extraordinary tax the French state would imposed for his illegal activity on one of its principal creditors⁴³.

5. *Separating the Two Forms of dominium*

The private-public partnerships that characterized colonial expansion and governance only mirrored the domestic reality of the French old regime. At the very moment when Louis XIV might have thought that *L'état c'est moi*, around 1661 when he began his "personal" rule, a correct response to the question of "what is France" might have been: «an entity consisting of over 50.000 venal officeholders who have bought their way into state office, holding it as private property so that it would inheritable by their sons». Louis may have felt at the height of his powers. But in fact he could not lift a finger without the help of the vast resources held as private property by the leading nobles and financiers to whom most of government had been outsourced⁴⁴. But even the oligarchs could not prevent the king's aggressive search for military *gloire* so that, by the end of the 17th centu-

⁴² Pierre Menard, *Le français qui possédait l'Amérique, La vie extraordinaire d'Antoine Crozat, escroc millionnaire sous Louis XIV*, Paris, Le Cherche Midi, 2017, p. 185.

⁴³ Ivi, pp. 229-232.

⁴⁴ Koskenniemi, *To the Uttermost Parts*, cit., pp. 380-382.

ry, French economy was in tatters. Official colonization, the system of venality and the insecure character of property rights came under fierce criticism. The Physiocrats – *les économistes* – insisted that a nation may prosper only by strictly guaranteeing the protection of property rights and rigorously enforcing contractual relations between farmers, manufacturers and landowners, the principal actors in the economic circle, otherwise isolating those relations from sovereign intervention. In his *Tableau économique*, Francois Quesnay depicted a natural system of economic exchanges that was supposed to operate best if left free from outside disturbance⁴⁵. In his tract on the “natural and essential order of political societies”, the leading lawyer among the Physiocrat coterie, Pierre-Paul Le Mercier de la Rivière twinned the notions of property and sovereignty as both needing to be conceived in as *absolute* a manner as possible – property so as to allow the full operation of the economic cycle, sovereignty so as to prevent any disturbance in it. All societies were constrained by these universally binding natural laws. Le Mercier even extrapolated from these laws the virtual existence of something like a federation of Europe. It just needed enlightened statesmen to realize the fact⁴⁶.

Adam Smith admired the Physiocrat calculus – and especially the works of Le Mercier de la Rivière – that separated the natural laws of the economy from the political business of government, expanding it into a theory of the wealth of nations that included the proposal to dismantle formal empire and move into a global trade free of monopolies and “bounties”, subsidies to domestic industries. The most famous work in classical political economy grew out of years of efforts to produce an empirical jurisprudence, the project Smith declared in the last page of his *Theory of Moral Sentiments*⁴⁷. Yet his principal work hid its legal natu-

⁴⁵ The best source on the Physiocrats is still Catherine Larrère, *L'invention de l'économie au XVIII^e siècle*, Paris, PUF 1992).

⁴⁶ Pierre-Paul Le Mercier de la Rivière, *L'Ordre naturel et essentiel des sociétés politiques*, London, Nourse, 1767. See also Martti Koskenniemi, *Declaratory Legislation: Towards a Genealogy of Neoliberal Liberalism*, in *International Law-making: Essays in Honour of Jan Klabbers*, eds. Rain Liivoja, Jarna Petman, London, Routledge, 2014, pp. 17–38.

⁴⁷ Adam Smith, *The Theory of Moral Sentiments*, ed. Patrick Moloney, New

ralism deep within its extensive critiques of the “mercantile system”. Smith did not view the economy as wholly separate from the public realm, however. The state had important tasks in providing for security at home and against foreign adversaries, as well as in guaranteeing working systems of education and poor relief. Nonetheless, Smith was clear that «[c]ivil government, so far as it is instituted for the security of property, is in reality instituted for the defence of the rich against the poor, or of those who have some property against those who have none at all»⁴⁸.

While Adam Smith was contemplating the nature of commercial societies in Glasgow, German law schools were seeking ways to develop an empirically useful policy-science to assist in the government of the estates of the lagging empire. A leading protagonist in this effort, Johann Gottlob Justi was counselling German princes and composing a huge number of thick works of *Polizeiwissenschaft* to argue that a wise government would understand the importance of enlisting the *Volk* in building up its industries and commerce. Such government would realise that it was in the nature of commerce to be free; there was no rational basis to subordinate trade to politics. This would only raise artificial obstacles to commercial dealings⁴⁹. In the end, the rise and fall of nations reflected the ability of governments to engage the skill and industriousness of their subjects, preferably under comprehensive plans⁵⁰. By the end of the century, Justi’s writings (and those of his colleagues) as well as the reception of Smith turned the indigenous Cameral-science in Germany into “national economy”, a new science that would conceive its field in as autonomous from other types of knowledge. «Here», the best historian of the period has written, «we encounter for the first time [...] a clear demarcation between state and civil society, in which the study of economic processes is the study

York, Barnes & Noble, 2004 [1759], p. 466.

⁴⁸ Adam Smith, *The Wealth of Nations*, ed. Andrew Skinner, London, Penguin, 1999 [1776], Bk V (p. 302).

⁴⁹ Johann Heinrich Gottlob Justi, *Die Chimäre des Gleichgewichts der Handlung und Schifffahrt*, Altona, Iversen, 1759, pp. 58, 71-72.

⁵⁰ Id., *Der Grundriss einer guten Regierung in fünf Büchern*, Frankfurt-Leipzig, Garve, 1759, § 212-223 (pp. 263-278).

of the self-organization of civil society and not of state administration»⁵¹.

Simultaneously, the revolutionary assemblies in France were affirming over again that property was a universal and absolute right belonging to every human being. But speakers disagreed about the degree to which public authorities could still to intervene to guarantee what Condorcet and the Jacobins had identified as “*secours publics*”, right to work and a basic standard of subsistence⁵². Eventually all such efforts were scrapped by Thermidor and the Code civil of 1804. Although the Code’s principal author, Jean-Etienne Marie Portalis, had tied the right of property to considerations of reciprocity and social interdependence, the famous Article 544 still consecrated a strong sense of its inviolability⁵³. That “bourgeois” notion would remain contested in the 19th century not only by “Babeuvian” radicals but soon by Europe-wide populations concerned over the “social question”. By mid-century, French social thought had inspired across the continent, including in Germany, new thinking, including *legal* thinking, about “society”, and even an “international society”⁵⁴. This notion was given by Hegel a predominantly economic colouring. “Society” or “civil society” would consist of those relations to which human beings participated neither through the emotional links among family members nor as citizens of the state. They would cover the “system of needs” at the heart of which was the right of property. It is true, Hegel wrote, inspired by Smith, that this right exists already as a (natural) “right in

⁵¹ Keith Tribe, *Governing Economy: The Reformation of German Economic Discourse 1750-1840*, Cambridge, Cambridge University Press, 1986, p. 170.

⁵² According to Article 17 of the Declaration of 14 August 1789: «La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n’est lorsque la nécessité publique, légalement constatée, l’exige évidemment, et sous la condition d’une juste et préalable indemnité ». Article 21 of the declaration accepted by referendum on 4 August 1793, it is stated that «Les secours publics sont une dette sacrée. La société doit la subsistance aux citoyens malheureux, soit en leur procurant du travail, soit en assurant les moyens d’exister à ceux qui sont hors d’état de travailler».

⁵³ Anna di Robilant, *The Making of Modern Property: Reinventing Roman Law in Europe and its Peripheries 1789-1950*, Cambridge, Cambridge University Press, 2023, p. 143.

⁵⁴ See Martti Koskenniemi, *The Law of International Society: A Road not Taken*, «University of Toronto Law Journal», 74, Supplement 1, 2024, pp. 107-127.

itself” and that as such, it may be studied by political economy – «one of the sciences which have arisen out of the conditions of the modern world»⁵⁵. But it was lawyers who were its masters in practice. For it «has attained its recognized actuality [...] through the administration of justice»⁵⁶.

6. *Sovereignty and Property in the 19th century*

The revolutionary period opened two parallel directions for a law beyond the limits the nation – one oriented towards sovereignty and public law, another to private property rights and contracting across borders. Both United States and restoration France sought (re-)admission in European diplomacy under the old regime model to which an influential articulation was given by Georg Friedrich von Martens *Précis de droit des gens moderne de l'Europe fondé sur les traités et l'usage* (Göttingen, Dieterich 1821). Martens was keen to re-establish the international order broken by the revolution without restoring its aspect of personal diplomacy. His law of nations grew from the Göttingen tradition of historically oriented *Staatsrecht* for which the law of nations would be part of (domestic) European public law (*äusseres Staatsrecht*). It existed in the treaties and customs that (European) nations adopted as part of their public diplomacy. The cosmopolitan utopia of the revolutionaries had been a mere façade for French expansion, he suggested. And for the first half of the century, most textbook writers would agree. Law of nations was a joint European public law that dealt with treaties and other official acts, as published in the *Martens Recueil* that provided a formalist image of a sovereign state-based international order⁵⁷. This is an image that is completely recognizable as the background of the 1927 Lotus case.

⁵⁵ Georg W.F. Hegel, *Outlines of the Philosophy of Right*, rev. ed., ed. Stephen Houlgate, Oxford, Oxford University Press, 2008 [1952], § 189 (p. 187).

⁵⁶ Ivi, § 208.

⁵⁷ Martti Koskeniemi, *Into Positivism: Georg Friedrich von Martens (1756-1821) and Modern International Law*, «Constellations. An International Journal of Critical and Democratic Theory», 15, 2008, pp. 189-207.

But diplomacy and treatymaking were not the only things taking place in the post-Napoleonic world of international action. Instead, classical economists were following Smith and the Physiocrats in stressing the need for liberating the world of economic transactions from excessive public regulation. The creation of wealth was to become an autonomous “science” whose basic axioms included unyielding respect of property right. Through their abstract universalism Mill, Ricardo and their followers would attack the Corn Laws and other public efforts to intervene in price formation on the basis of offer and demand. The 1820s and 1830s saw a massive conflict arise between the practitioners of the new science of political economy pushing for the abolition of tariffs and older elites sticking to the protection of domestic agriculture and vulnerable home-based industries. Nevertheless, commerce was growing at an international scale and the question arose: What rules should govern it? In the absence of a universal code such as proposed by Bentham, might there still be a “universal jurisprudence” to apply to exchanges of property and other transactions across several jurisdictions? This situation was contemplated in 1834 in Joseph Story’s influential work on the conflict of laws:

Commerce is now so absolutely universal among all countries; the inhabitants of all have such a free intercourse with each other; contracts, marriages, nuptial settlements, wills and successions are so common among persons whose domiciles are in different countries having different and even opposite laws on the same subjects, that without common principles adopted by all nations in this regard there would be an utter confusion of all rights and remedies; and intolerable grievances would grow up and weaken all the domestic relations as well as to destroy the sanctity of contracts and the security of property⁵⁸.

Story’s work intervened at a moment when academic writers were resuscitating the old vocabulary of “private international law” to deal with legal problems connected with increasing international commerce and travel⁵⁹. Like Story, many of these

⁵⁸ Joseph Story, *Commentaries on the Conflict of Laws*, vol. I, Boston, Hilliard, 1834, p. 5.

⁵⁹ See e.g. Jean-Louis Halpérin, *Entre nationalisme juridique et communauté de droit*, Paris, PUF, 1999, pp. 35-45.

writers were concerned with finding practical accommodations between the interests of the sovereigns whose laws might conflict and the expectations of the individuals caught in such situations. The very notion of “comity” brought forward by Story was a way to look for pragmatic solutions instead of fixating rigorously on either side. The main concern was to facilitate the conduct of personal and commercial exchanges and minimise unnecessary obstacles in a process of internationalization conceived as an interest of all humanity⁶⁰.

While “modern international law” was crafted following Martens’ re-characterization of European diplomacy – treaty-making and customs – as the management of an external public law of European states, the expansion of trade and foreign investment were pushing towards another kind of international law whose relations to the former remained unclear. Yet the two operated in concert. The abolition of the Corn Laws in 1846 and the high tide of British free trade policy did not signify withdrawal of public authorities from the world of commercial exchanges, to the contrary. As foreign secretary Lord Palmerston formulated the relationship between the two. «It is the business of government to open and secure the roads for the merchant»⁶¹. Free trade did not mean the crown’s giving up active involvement in expansion. In fact, offering sovereign protection to British merchants and investors from Africa and Latin America to China became a key part of imperial policy⁶². The Opium Wars demonstrated dramatically the extent of the British sovereign’s readiness to support the private interests of nationals. In 1843 the Parliament even enacted a “Foreign Jurisdiction Act” to enable the Crown to exercise enforcement jurisdiction in foreign territory «in the same and as ample manner as if her Majesty had acquired that jurisdiction by the cession

⁶⁰ See the discussion in Roxana Banu, *Nineteenth-Century Perspectives on Private International Law*, Oxford, Oxford University Press, 2018, pp. 184-189.

⁶¹ Quoted in Peter Cain, A.G. Hopkins, *British Imperialism: Innovation and Expansion 1688-1914*, London-New York, Longman, 1993, p. 100.

⁶² See the essays in *Protection and Empire: A Global History*, eds. Lauren Benton, Adam Clulaw, Bain Attwood, Cambridge, Cambridge University Press, 2018.

or conquest of territory»⁶³. The act allowed British officials to exercise their policing powers in foreign countries when it was felt that local courts of authorities would be ineffective or biased – the case of extraterritorial jurisdiction in Chinese Treaty ports, for example⁶⁴. In 1840 as Secretary of War, Thomas Macaulay would give an articulation to a policy that would later become Palmerston's signature:

Everyone in the scale of civilized nations should know that Englishmen were ever living under the protecting eye of their own country [...] although far from their native country, and then in danger in a part of the world remote from that to which they must look for protection, yet that they belonged to a state which would not suffer a hair of one of its members to be harmed with impunity⁶⁵.

Few claims were more prominent in legal world of the 19th century than those made by sovereigns to protect their subjects abroad – Christians against the Turks, settlers against the indigenous and merchants against ambitious foreign rulers. The right of intervention by European powers was formalized in doctrine and frequently resorted to in practice⁶⁶. It sometimes took a very detailed technical form as in the many claims commissions set up in Latin America since the 1860s to adjudicate the responsibility of Latin American states for losses caused by domestic disturbances to foreign businesses. As Tzvika Nissel has recently shown, the “US turn to arbitration” in the Southern Hemisphere was specifically designed a cost-effective instrument to provide protection to US commercial interests in an often-unsta-

⁶³ W. Ross Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century*, Durham NC, Duke University Press, 1973, p. 36.

⁶⁴ See ‘An Act to Remove Doubts as to the Exercise of Power and Jurisdiction by Her Majesty within Diverse Countries and Places out of Her Majesty's Dominion’ (Foreign Jurisdiction Act) 6 & 7 Vict., c. 94. C.R. Pennell, *The Origins of the Foreign Jurisdiction Act and the Extension of British Sovereignty*, «Historical Research», 83, 2009, pp. 465-485.

⁶⁵ Macaulay, HC Deb 07 April 1840 Hansard, 53 (1840), 719.

⁶⁶ For a recent discussion, see Marco Rossini, *International Law and the Principle of Non-Intervention: History, Theory and Interactions with Other Principles*, Oxford, Oxford University Press, 2024, especially pp. 28-69.

ble investment environment⁶⁷. In fact, much of the international law of the 19th century was about protecting (European) aliens and their property. The treaty port system in the Far East and the complex rules of European extraterritoriality form two important technical examples of such. Even the laws of war tended to concentrate on the protection of neutral trade above all⁶⁸. The same with the enforcement of foreign public debt – though Palmerston did remark to British holders of Spanish bonds, that helping investors to recover their losses was a sovereign privilege, not a right vested in the investors themselves⁶⁹.

By late-19th century, international claims by sovereigns and by private individuals could each have a hearing under the law of nations. By that time, private international law would be formalized alongside public international law in European and US law faculties and at the sessions of the *Institut de droit international*, set up in 1873 to give identity to these two fields of the legal profession⁷⁰. The universal powers of both property and sovereignty were sometimes derived from natural law, but more often assumed as basic facts of modern liberal society that a realistic legal discipline needed to accept as givens. Of course, neither went unchallenged. The emergence of the social question in mid-19th century had led to a wave of resistance to the overriding respect of property rights in the form of Marxist theory and various socialist movements. The formalism of property and contract was mitigated by legal doctrine integrating equitable concerns and ideas of social functionality in legislation and

⁶⁷ Tzvika Nissel, *Merchants of Legality: A History of State Responsibility 1870-1960*, Cambridge, Cambridge University Press, 2024, pp. 34-118. See also Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution*, Cambridge, Cambridge University Press, 2021.

⁶⁸ For example, John Westlake's textbook of 1907 devoted approximately the same number of pages to the conditions of protecting neutral trade as to the laws of land and maritime war in general. *International Law, vol II: War*, Cambridge, Cambridge University Press, 1907.

⁶⁹ *The Speech of Viscount Palmerston in reply to a Motion by Lord George Bentick, M.P.*, London Royal Exchange, 1848, and Koskenniemi, *To the Uttermost Parts*, cit., 791-792.

⁷⁰ I have dealt with this in *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge, Cambridge University Press, 2021, pp. 11-97.

jurisprudence⁷¹. In a parallel way, by 1919, many lawyers felt that excessive deference to sovereignty in the form of radical nationalism had been one of the causes that had led to the First World War.

7. *Imagining Property and Sovereignty in the Present*

The interwar period was a time of intense legal innovation. The formalism of property and sovereignty continued to be both questioned and reinstated over again. Sometimes, the two were treated as analogous in their respective fields of private and public law. Hersch Lauterpacht's London PhD *Private Law Sources and Analogies in International Laws* from 1927, suggested that much of what international lawyers said about treaty law, the laws of territory and succession, for example, were just analogous application of the respective private laws of contract, property and succession⁷². Among the flurry of legal realist writings in the United States, Morris Cohen argued in that same year that the two notions were functionally inseparable, that "property" actually meant something quite like a sovereign right against all those others who were prohibited from engaging with an object without the owner's permission. In his words: «There can be no doubt that our property laws do confer sovereign power on our captains of industry and even more so on our captains of finance»⁷³. Like the Spanish scholastics, he was arguing that property and sovereignty both had to do with a hierarchical arrangement of human relations – a position taken from wholly a wholly different, and even oppositional jurisprudential standpoint by Hans Kelsen⁷⁴.

⁷¹ For the rise of the anti-formalist and social functional currents in France, see e.g. Marie-Claire Belleau, *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth Century France*, «Utah Law Review», 2, 1997, pp. 379-424, and Jean-Louis Halpérin, *Histoire des droits en Europe*, Paris, Flammarion, 2004, pp. 142-149.

⁷² Hersch Lauterpacht, *Private Law Sources and Analogies in International Laws*, London, Longman, 1927.

⁷³ Morris R. Cohen, *Property and Sovereignty*, «Cornell Law Review», 13, 1927, pp. 8-30: p. 29.

⁷⁴ Hans Kelsen, *Introduction to Problems of Legal Theory*, transl. Bonnie L.

In such theories the aspect of power (or as Kelsen suggested, ideology) becomes visible in formal law, the formal privilege granted to some to command others to do or to refrain from doing something – feature highlighted also by the presence of the notion of *dominium* in the scholastic explanation of the nature of kingship and ownership. No wonder that both concepts are also at the heart of some of the most intense political controversies of the 20th and 21st centuries. But even as those controversies appear to take place in different arenas – the struggle over the concept and extent of private property rights in domestic society and the one on the foundation and limits of sovereignty in public diplomacy and international law – they are nonetheless interdependent so that any changes in one will automatically affect the understanding of the nature and limits of the other. This may not have been visible in the period immediately after World War II as the Cold War tended to fixate each camp with a concept of property rights that was in practice a core aspect of its very identity and the boundaries created by their respective sovereignty imagined as rigid as possible. Things began to loosen up in the 1960s when progressive jurists like Wolfgang Friedmann from Columbia University began to operate with a relative notion of sovereignty and denied the naturalness of *any* property regime. Instead, he advocated the need for reasonable compromises in the series of disputes that had pitted the developing countries against their former colonial rulers in the case of nationalization of foreign property⁷⁵.

The push for a *New International Economic Order* in the 1970s illustrated the problem that without sufficient access to property rights, especially over extractive resources, sovereignty remained but an empty shell⁷⁶. No great transformation followed that initiative, however. Instead, the neoliberal turn since the 1980s had an enormous effect on how to imagine the relationship of the state to property rights, including those of

Paulson, Stanley L. Paulson, Oxford, Oxford University Press, 1992, pp. 41-42.

⁷⁵ Wolfgang Friedmann, *The Changing Structures of International Law*, New York, Columbia University Press, 1964, pp. 78-79.

⁷⁶ For recent overview, see Umut Ötzu, *Completing Humanity: The International Law of Decolonization 1960-82*, Cambridge, Cambridge University Press, 2024.

alien investors and creditors. As a famous 1997 World Bank Report had it, the way to growth was through privatization while role of the state would be “facilitative”⁷⁷. The World Bank also houses today what has become the most important part of international law, the law of foreign investment. There are now some 3000 bilateral treaties around the world in which sovereigns have agreed to lift their disputes with foreign companies from the jurisdiction of their domestic law. These claims will instead be settled by international tribunals under a vague standard of “fair and equitable treatment” committing the sovereign host to maintain the legislative and administrative conditions pertaining as the investment was made. A violation of the company’s (property owner’s) “legitimate expectations” will give rise to liability to pay full compensation, including for lost profits. Over 1400 cases have been initiated by companies under these treaties and according to a recent investigation by «The Guardian», more than \$120 billion public money has been awarded to firms through ISDS courts, including at least \$84 billion to fossil fuel and \$7.8 billion to mining companies⁷⁸. Moreover, by directing claims at strategically important areas, corporations may produce precedents and interpretations affecting domestic laws across the world⁷⁹.

Investment law is only one area where the relationship between sovereignty and property right is constantly being negotiated through international processes. The broad language of global “governance”, notwithstanding the recent backlash, includes all kinds of contracting practices by private actors within large value chains that ends up creating something like transnational law⁸⁰. The struggle between corporate power and public

⁷⁷ *World Development Report 1997: The State in a Changing World*.

⁷⁸ For the statistics, see <<https://investmentpolicy.unctad.org/investment-dispute-settlement>>. The figures are likely to be much higher because 31% of cases where a payout or settlement was made, the size of the award was not disclosed. *Revealed: How Wall Street is making millions betting against green laws*, «The Guardian», 5 March 2025.

⁷⁹ See e.g. Julian Arato, *Corporations and Lawmakers*, «Harvard Journal of International Law», 56, 2015, pp. 229-296.

⁸⁰ See further my *The Laws that Rule Us: The Legal Infrastructure of Global Capitalism*, 154 «New Left Review», 154, 2025, pp. 15-48.

regulation is a principal platform for negotiating the relations of sovereignty and property today. Liberal legalism has tried to mitigate the intensely right-left character of that struggle by the introduction of compromise notions such as “social rights”, “equity”, *abus de droit* and other functionalist tropes designed to push towards reasonable compromises. Analytic jurisprudence has split both sovereignty and property into “bundles of competences”, sets of rights, powers and privileges allocated to the state or the owner by an overriding legal order, the contents of each such bundle negotiable on a contextual basis. But this has failed to undermine or even greatly reduce the appeal of both notions as undivided and essential totalities around which powerful political constituencies may be created.

The sovereignty/property tension also translates and upholds the contrast between politics and the economy in modern liberal societies. The existence of “economics” as a social system in its own right as a separate type of knowledge is of a very recent date. While politics still remains the art of the possible, economics has come to intervene in it, carrying premodern ideas about natural, law-like conditions of human relationships. The very power of the idea of a neutral and objective space of the economy has enabled it to conquer much of the space of politics, setting definite limits to what sovereignty may or should aspire to. One well-known offshoot of this has been the debate about the “ordoliberal” constitution in Europe, the suggestion of constitutionalizing the budgetary limits to the politics of sovereignty. Whether economics should or should not dictate the limits of the politically possible is one of the most important questions of rulership in Europe today, but also elsewhere⁸¹. It is good to bear in mind that because that debate has to do with the relations of sovereignty and property, two notions that have framed the conditions of legal imagining for centuries, nobody is in a better position to take informed positions in that debate than lawyers.

⁸¹ Out of the growing literature, see the very complete Guillaume Grégoire, *La constitution économique. Enquête sur les rapports entre économie, politique et droit*, Paris, Garnier, 2024.

Mark Somos

Not Every Road: Roman Law and History in Gentili's *De armis Romanis* and *De iure belli*

1. *Introduction*

Perhaps aptly, I find myself in the position of Picens, Alberico Gentili's (1552-1608) fictitious native of San Ginesio, who opens Gentili's *De armis Romanis* (Part I first published in 1590, Part II in 1599) in a state of bewilderment: how did apologists for the brutal Roman empire manage the pull the wool over the world's eye and convince contemporaries and posterity that Rome was a Good Thing?¹

This paper is an opportunity to exorcise a nagging feeling that contrary to all that legal historians hold dear, at some point ancient Rome, the emperor of sources and authorities for the law of nations, had lost its clothes. I have long been trying to suppress this conclusion in the face of sources and authorities I admire, ranging from Hersch Lauterpacht's point about public international law arising from private Roman law (a point that Gentili has also made a few times)², to Straumann's and Lee's compelling arguments that Gentili and Grotius ascribed even

¹ Walter C. Sellar, Robert J. Yeatman, *1066 and All That*, London, Methuen & Co., 1930.

² Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)*, London, Longmans, Green and Co., 1927. For a great analysis of Roman law's function in Lauterpacht's argument and the impact of Roman law writ large see Randall Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, «European Journal of International Law», 16/1, 2005, pp. 25-58. Compare Gentili e.g. at *De iure belli libri tres*, transl. John C. Rolfe, intr. Coleman Phillipson, Oxford, Clarendon, 1933, vol. 2, III.xxiv.427-428.

greater authority to Roman law than we have hitherto realised³. Nevertheless, a straightforward reading of Hugo Grotius (1583-1645), John Selden (1584-1654), Samuel Pufendorf (1632-1694), Christian Thomasius (1655-1728) and others yields an extensive catalogue of explicit rejections of ancient Rome's authority and/or relevance. Apart from the fact that Cicero, who is heavily cited in pro-Roman genealogies of international law, is not exactly "Roman law", and that even the supposedly pro-Roman Gentili in *De iure belli*, as well as both Picens and his Roman critic in *De armis Romanis*, mock Cicero often⁴, the ubiquitous adoration of Roman law in key seventeenth-century texts on the law of nations is simply not there – but the contrary position is.

To categorise and be categorical, the works of influential figures in the history of international law contain thousands of outright denials that the known actions and laws of ancient Rome, of whichever period, have any binding authority either

(1) due to their consonance with the laws of nature and/or nations,

(2) or due to their success in ordering Rome and its empire as a quintessential model of civilisation,

(3) or due to continuities with either European *jus commune* or Europe's superior grasp of the universal laws of nature and of its consanguineous but contingent cousin, the law of nations.

Selden's *Mare clausum* is one example. In it, the Roman Empire is one in a chain of previous maritime hegemony that includes Minos, Rhodes and Carthage, and culminates in Britain, the first global maritime empire that is eternal and irreplaceable, partly because Britain has become self-aware of its hegemonic status (in a Hegelian move, thanks to Selden himself) and has

³ Benjamin Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law*, Cambridge, Cambridge University Press, 2015; Daniel Lee, *Jean Bodin and the Law of Nations*, Oxford, Oxford University Press, 2021.

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 Lupher, Oxford, Oxford University Press, 2011, I.4.41. Also see the zingers at *De armis Romanis* II.11.299 and II.12.317.

duly and lawfully laid claim to the navigable world. Rome is one of many and aching far from the best link on this chain. Selden accepts or rejects various Roman precepts relating to high and territorial seas, but never treats them as having higher authority than e.g. Rhodes⁵. Hobbes and Pufendorf similarly go out of their way to specify all the republican and classical Roman provisions they disagree with, and to explain why.

This, to be clear, is not legal comparativism, for instance of the type we find in Carlo Sigonio (c. 1524-1584), one of Gentili's most cited modern sources (along with Guicciardini), who ingeniously revived Roman terminology in order to make ancient Athens, Sparta, the biblical Hebrew commonwealth, medieval Bologna and the Catholic church comparable for the purpose of legal, especially constitutional, analysis (Sigonio who, for my money, is the preeminent figure in the history of comparative legal analysis, is also the main source for modern history in *De armis Romanis*, and the only writer whom both Picens and his Roman opponent praise)⁶. Grotius himself indulged in comparative exercises, for instance in the juvenile *Parallelon Rerumpublicarum*, as did his friend Petrus Cunaeus (1586-1638) in the 1617 *De Republica Hebraeorum*. The republican James Harrington (1611-1677) is a perhaps less well-known seventeenth-century practitioner of the art of placing Hebrew, Greek and Roman, British and other laws on foundations that were designed to create a politically relevant kind of legal comparability. What this article explores is not, to repeat, the sort of historical relativisation of Rome that we find in these works. I am speaking of outright and downright Rome-bashing, at least

⁵ In addition, Selden also argues that local legal traditions, including the sui generis English common law, shape the law of nations to a far greater degree than Roman law. Furthermore, the law of nations must accommodate distinct legal traditions as they exist, as well as interstate treaties, both of which render ancient Roman law irrelevant at best.

⁶ Picens in *De armis Romanis* describes Sigonio as «most learned in antiquities». I.8.65. The Roman agrees: *De armis Romanis* II.11.305. On Sigonio's method see Mark Somos, *Sigonio in Anglo-American projects to reform the imperial constitution, 1751-1777*, in *The Renaissance of Roman Colonization: Carlo Sigonio and the Making of Legal Colonial Discourse*, eds. Arthur Weststeijn, Jeremia Pelgrom, Oxford, Oxford University Press, 2020, pp. 95-113.

as passionate and systematic as the ostensible influence of Cicero, according to scholars in the opposing corner, represents an all-consuming obsession with ancient Rome's enduring legal authority.

I realise that my claim that we have gone too far in attributing influence to ancient Rome over early modern and modern international law, and that we ignore plain evidence to the contrary, is stark and strange, and sits oddly with entrenched scholarship. I shall happily supply the catalogue of anti-Roman statements in Selden and Pufendorf, but in this paper I would like to discuss Gentili's approach to Rome, specifically in *De iure belli*. The paper also draws extensively on *De armis Romanis* since, as Diego Panizza has compellingly shown, much of the relevant action takes place there⁷.

2. *The status of Rome in De armis Romanis*

In a relevant aside, I disagree with the interpretation that Picens is Gentili's straw man, or that Book Two of *De armis Romanis* faithfully represents Gentili's admiration for Rome. A simple comparison with *De iure belli* shows otherwise: when Gentili in his own voice offers his own opinion in *De iure belli*, he often repeats Picens' views and exact sources. For instance, Picens repeatedly condemns Scaevola's plot to kill Porsenna and reprimands the Roman Senate for approving the plot. His Roman opponent full-throatedly defends Scaevola and the use of deceptions and lies against enemies. Gentili does not take the Roman's side in *De iure belli*, nor does he opt for an alternative legal analysis, for instance by recharacterising Scaevola's attempt as a lone wolf's, not constitutive of state responsibility. Instead, like Picens, Gentili warns his reader not to be fooled «by the authority of the Roman commonwealth» («magis auctoritas Romanae illius civitatis») into approving Scaevola's deceit as

⁷ *The Roman Foundations of the Law of Nations*, cit. The first part of *De armis Romanis*, which set out to prove the injustice of the Roman empire, was finished in 1590. The second part, in Rome's defense, was published in 1599 by Wilhelm Anton, after Anton's publication of *De iure belli* in 1598.

just⁸. Discussing the Romans' unjust pretense of supporting the Saguntines to declare war on Carthage, Gentili explicitly refers the readers of *De iure belli* to Book One of *De armis Romanis*, where Pícenus extensively castigates the Romans for this complex perfidy⁹. Pícenus in *De armis Romanis* and Gentili in *De iure belli* unanimously condemn Fabius' disingenuous promise to return half of the captured ships to Antiochus, followed by cutting all his ships in half¹⁰; the stratagem of signing a treaty with Gauls, getting them drunk and slaughtering them¹¹; and so on. Gentili disagrees with the Roman figure when the latter defends Roman conquests that took place after the enemy offered compensation, or without good-faith efforts toward peace before hostilities began¹². Pícenus and Gentili agree that kings cannot give away their kingdom, because they hold power on the people's behalf¹³. In *De iure belli*, Gentili comes close to condemning the early Roman abduction of women, one of Pícenus' chief proofs of Rome's innate wickedness¹⁴. One also wonders whether Gentili sympathised with the Roman's contempt for Socrates and Alexander¹⁵, or with Pícenus' claim that his countrymen defeated the Romans¹⁶, or with the view of Pícenus' Roman adversary¹⁷. *De armis Romanis* is a classical humanist dialogue with two well-argued sides, not dully framed propaganda.

Another fact in support of the proposition that *De armis Romanis* is not a simple piece of propaganda in defense of Rome is the set of rhetorical tricks that Gentili deploys. Pícenus

⁸ *De armis Romanis* I.4.41, *De iure belli* II.viii.168, 1612 ed. 274. Vs *De armis Romanis* II.4.188. In the interest of economy, in this paper I only cite the original Latin text when it carries connotations that the most accessible English translations may not fully capture.

⁹ *De iure belli* (=IB) I.xxii.105, II.xxii.265, *De armis Romanis* I.8.

¹⁰ *De armis Romanis* I.4.41, IB II.iv.146.

¹¹ *De armis Romanis* I.5.45.

¹² *De armis Romanis* II.9.267.

¹³ *De armis Romanis* I.11.97.

¹⁴ Cf. *De armis Romanis* I.2 and IB I.xiii.59 with the defense in *De armis Romanis* II.2.147f.

¹⁵ *De armis Romanis* II.12.323.

¹⁶ *De armis Romanis* I.5.45-47.

¹⁷ *De armis Romanis* II.5.203.

mistakenly calls Lactantius a countryman, which his Roman adversary (i.e., also Gentili) delights in correcting¹⁸, together with other historical errors¹⁹. Gentili makes Picens misleadily miscite the *Digest*²⁰, and makes the Roman character frequently berate Picens for truncating and distorting citations (which Gentili wrote for Picens)²¹. Having emphasised the importance of correct historical references, Gentili then puts words and citations in the Roman's mouth that were recognisably fabricated or false²². Finally, Gentili concludes *De armis Romanis* by citing Augustine, Ambrose, Jerome and Thomas Aquinas in support of the thesis that the Roman Empire was just – which in fact these authorities deny²³.

There are also cases, of course, when both *De iure belli* and *De armis Romanis* Book Two contradict Picens. Regarding Picens' righteous condemnation of Rome's deceit and destruction of Corsicans and Numantines²⁴, Gentili explains it away as justified by Rome's fear that these peoples would become rivals one day, and such reason of state justifies their destruction, as well as Carthage's, under the law of nations. Here Gentili also refers the reader to *De armis Romanis* for further details²⁵.

3. *What is at Stake: Ways of Rejecting Rome*

Yet my chosen prism of the Gentili-Grotius contrast to make the broader point about the existence of a voluminous and at least five-centuries-long anti-Roman tradition may seem unfit for purpose, since the gap between these two writers' positions on Rome is not nearly as wide as, say, between Bartolus

¹⁸ *De armis Romanis* I.3.35, II.3.171.

¹⁹ E.g. *De armis Romanis* II.10.293.

²⁰ E.g. *De armis Romanis* I.9.74n248,

²¹ E.g. *De armis Romanis* II.8.229, II.9.267-269, II.12.325.

²² See e.g. a cluster of erroneous references in *De armis Romanis* II.10.288.n479-481, as well as those at II.11.294n516, II.12.316n615, 617, and II.13.354n756.

²³ *De armis Romanis* II.13.353.

²⁴ *De armis Romanis* I.6.49. On Carthage and Numantia: *De armis Romanis* I.8.

²⁵ *De iure belli* III.vii.318.

de Saxoferrato and Marsilius of Padua²⁶ on the same issue in the fourteenth, Aeneas Sylvius Piccolomini (later Pius II)²⁷ and Nicholas Cusa²⁸ in the fifteenth, Francisco Vitoria²⁹ against Francisco Suárez³⁰ and Jean Bodin³¹ in the sixteenth, Simon van Leeuwen³² against Cornelius van Bynkershoek³³ in the seventeenth, or Christian Wolff³⁴ against Jean-Jacques Rousseau³⁵ and Edmund Burke³⁶ in the eighteenth centuries. Neither is the turn from Rome evidently due to the movement known as humanism: if anything, the *ad fontes* impulse and methods can foster a more precise worship of Roman law, not a principled

²⁶ Marsilius, *Defensor pacis* (1324): the will of the people trumps any Roman precedent or law in fashioning legal authority. Build the law of nations from local customs and laws and from interstate agreements, not on the erroneous assumption that Roman law embodies universal norms.

²⁷ See mostly Aeneas Sylvius Piccolomini, *De ortu et autoritate imperii Romani* [c. 1446], in *Three Tracts on Empire: Engelbert of Admont, Aeneas Silvius Piccolomini, and Juan de Torquemada*, eds. Thomas M. Izbicki, Cary Nederman (Bristol, Thoemmes Press, 2000), pp. 95-112: the Roman Empire provides a universal legal framework and a potential model for contemporary governance and interstate relations. Also see his letters on Roman law and principles as standards for governing Christianity and the emerging law of nations.

²⁸ *De concordantia Catholica*, 1433, preferring natural law and consent to Roman law, which was too limited and historically and culturally contingent.

²⁹ *Relectio de Indis* (1532): Roman law offers a universal and rational foundation for *ius gentium*.

³⁰ *De legibus ac Deo legislatore* (1612): natural law and interstate agreements trump Roman law, especially since Roman history and precedents have become largely irrelevant.

³¹ *Six Books of the Commonwealth* (1576): state sovereignty and local laws and customs have greater authority than Roman law. The law of nations is based on natural and the consent of sovereign states, and cannot be modeled directly on Roman law.

³² In *Het Roomsche-Hollands regt* (1664): Roman law is foundational to legal training and practice, and fills lacunae in Dutch law.

³³ *De foro legatorum*, and *Quaestiones juris publici*: international law is grounded in the actual conduct and interests of States, not on Roman law.

³⁴ *Jus gentium methodo scientifica pertractatum* (1749): Roman law continues to offer a rational and universal framework for interstate relations.

³⁵ *The Social Contract* (1762): ancient systems including Roman law cannot serve as a universal foundation. Popular sovereignty and the social contract rule domestically, while international law is based on the general will and agreements between free peoples.

³⁶ Local customs, historical context, wise statesmen, pragmatism, and respect for the diversity of legal traditions are the building blocks of the law of nations, not ancient Rome.

search for grounds to declare its irrelevance. There are, in sum, long traditions of arguing both for and against Rome. Exploring my claim of early modern Rome-bashing through the narrow Gentili-Grotius contrast may not seem the most straightforward way of going about this. It appears like a liminal case but, to my mind, it is the perfect study because their difference in method points to a greater problem in the early modern law of nations, namely that of methods, sources, and authorities.

At bottom, even if we suspend disbelief about my analytical claim willingly, the catalogues of explicit Rome-bashing texts surely tell a story about exemplarity, or analogising, or probability, or all three and their cognates. Surely the writers I listed, one could argue, from Marsilius to Rousseau, rejected Rome not as a source or an authority for the law of nations, but merely reacted against what they saw as invalid deployments of Roman examples, analogies, or generalisations based on probabilities of legal efficacy derived from an overly narrow focus on Roman sources by writers such as Bartolus or Vitoria or Wolff. In short, it must be a narrow technical dispute.

That is not the case. Grotius, Selden and Pufendorf rejected Rome as a superior authority and even as a uniquely privileged model for civilised nations in determining the content of the law of nations not because of methodological doubts, but because they believed that ancient Rome was not a serviceable source in a world of new local customs and traditions; religious violence of an intensity which, according to Gentili, Rome had never seen; with both latitude and longitude measurable; or in a world of financial complexity. Rome could be a hot potato in a poisoned chalice: it was hard to argue that natural law, interstate agreements or popular consent trump Roman law in order to serve Marsilius' preference for popular sovereignty and local customs, or Grotius' Batavian defense of Dutch independence, or Selden's fondness for a British Empire. It was similarly difficult, though doable, to claim that it was Protestants, not Catholics, who inherited Rome's mantle of authority, or that the sheer weight and density of interpretations of Roman law and history, regardless of their rival varieties, can support an early modern European or global consensus concerning the nature and con-

tent of the law of nations. But as Jean Barbeyrac (1674-1744) noted in his comments on Grotius' *De iure belli ac pacis*, after Lorenzo Valla's debunking of the Donation of Constantine – the forgery purporting to prove Emperor Constantine's transfer of authority to the Pope – even most Catholics ceased to believe in continuity between ancient Rome and the Papacy or the Holy Roman Empire³⁷. It is better to start anew, they agreed, from what was in front of them.

This was Gentili's stated ambition, but it's not what he ended up doing in *De iure belli*. The reason for the gap between his intention and result lies in the incomplete method he had for international law; some of the same incompleteness persists to this day, for instance in identifying customary international law³⁸. Gentili announced that he wished to take reason, natural law and State practice as sources and authorities for his system of international law, but these terms are meaningless without content, and while his principles for selecting content were innovative, but remained fundamentally inadequate.

The introduction and several chapters of the 2011 *Roman Foundations of the Law of Nations*, edited by Kingsbury and Straumann, expand the well-established *topos* that Gentili slightly adapted and fully applied ancient Roman law to his contemporary issues, from the immunities of ambassadors to the principle of prescription in the New World. Coleman Phillipson made the same point in his 1929 introduction to the Carnegie edition of Gentili's *De iure belli*³⁹. Later in the introduction, Phillipson tellingly reversed his position and argued that Gentili invoked Roman law only for illustrations, without legal

³⁷ On Gentili's misgivings about Constantine see *IB* III.xv.371-372: «It appears from History, that the Popes were not Sovereigns of the City of Rome, and its Dependencies 'till long after the Time of *Lewis the Debonnaire*. The Donation of *Constantine* is a Fable, as is owned by the most understanding and sincere Authors of the *Romish* Communion. Among others, see Laur. Valla's Oration, *De falsò credità & ementitâ Const. M. Imp. Rom. donatione*, published in 1517, and dedicated to *Leo X*». Phillipson, Intro to *De Iure Belli*, 24a; even though Bartolus habitually described Christians as *populus Romanus* united by the same protections and obligations as the people of ancient Rome. 42a, n4.

³⁸ Tom Sparks, Mark Somos, *Grotian Moments: An Introduction*, «Grotiana», 42/2, 2021, pp. 179-191.

³⁹ Carnegie *De iure belli*, Intro, 17a, 20a.

authority, and that thereby he «broke with the tradition which had lasted for several centuries»⁴⁰. In keeping with the revisionist and anti-Grotian agenda of the Carnegie series⁴¹, Philipson posited that it was not Gentili, but Grotius, who was «given to fallacious presumptions of analogy between the civil law and the law of nations»⁴². Yet when it came to specific doctrines, such as maritime jurisdiction⁴³ and the formal declaration of war⁴⁴, or a good-faith pause after the solemn declaration of war to allow for genuine peace negotiations before the start of armed hostilities⁴⁵, Philipson again readily admitted that Gentili wholly adopted Roman rules and terminology. Gentili indeed wrote all these things, and Philipson was self-contradictory in uncritically reproducing Gentili's self-contradictions.

Gentili denounced exclusive reliance on Roman law for determining the laws of nations, but his theory of testimonies and exemplarity, and simple attachment to Rome, pulled him back in, just when he thought he was out⁴⁶. Conversely, in a parallel contrast with the thinkers mentioned above, Grotius relegated Rome to relative insignificance not by shifting emphasis to reason, natural law or State practice (though all these matter), but by replacing testimonies with verisimilitude as the highest principle for selecting materials from which reason, natural law, State practice, and ultimately international law, can be built.

4. *Gentili on Method*

To reconstruct Gentili's working method that led to his self-contradictory position on the authority of ancient Roman law and history, my own working method is straightforward. Despite its self-contradictions about the authority of Rome, *De*

⁴⁰ Carnegie *De iure belli*, 20a-21a.

⁴¹ Mark Somos, Joshua Smeltzer, *Vitoria, Suárez, and Grotius: James Brown Scott's Enduring Revival*, «Grotiana», 41, 2020, pp. 137-162.

⁴² Carnegie *De iure belli*, 51a.

⁴³ Carnegie *De iure belli*, 27a.

⁴⁴ Carnegie *De iure belli*, 39a

⁴⁵ Carnegie *De iure belli*, 38a

⁴⁶ Al Pacino, *Godfather III*.

iure belli is a remarkably lucid and well-designed text. Gentili follows his methodological introduction with a scrupulously signposted series of arguments, many of them clearly defined, numbered, and recapitulated. To assess the role of Rome in *De iure belli*, I isolated the hundreds of legal arguments Gentili made, then reviewed the sources he deployed to arrive at his conclusions. In this I relied primarily on the list of sources that Gentili identified in the margins. I also made extensive use of the 1612 *De iure belli libri III*⁴⁷, the 1929 Carnegie translation (based on the 1612 edition) and the excellent 2008 Italian edition of *De iure belli* by Marchetto and Zendri⁴⁸; exchanges with colleagues; and my own identification of sources not named in any of these editions, for instance the satirist Lucian of Samosata. This is not to claim that I have identified all of Gentili's sources; rather that I treat Gentili's choices in indicating his sources as significant for understanding both his preferences and the pool and hierarchy of sources that he believed would best persuade his reader about the propositions he advanced concerning the law of nations⁴⁹. The word "persuade" is key, and we'll come back to it.

4.1 *Rome and Method*

In fact we find nothing in which the justice and utter virtue of the Romans does not shine forth⁵⁰.

IB famously begins with Gentili's description of his task as an explanation of the laws of war, which is based on natural law and cannot be found in the «books of Justinian»⁵¹. Gentili soon

⁴⁷ Alberico Gentili, *De iure belli libri III*, Hanau, the heirs of William Anton, 1612.

⁴⁸ Alberico Gentili, *Il diritto di guerra*, eds. Giuliano Marchetto, Christian Zendri, introd. Diego Quaglioni, transl. Pietro Nencini, Milan, Giuffrè, 2008.

⁴⁹ An important complication that anyone who'd like to write a book on this topic should bear in mind is that Gentili is equally meticulous in cross-referencing his own publications, which he seems to regard as amounting to a complete and closed system of thought.

⁵⁰ *De armis Romanis* II.7.219.

⁵¹ Carnegie *De iure belli*, I.i.3.

reiterates that Justinian «did not go beyond the boundaries» of Rome, and when Justinian discussed the law of nature and nations, he did so only from a limited, Roman perspective⁵². Commentators, such as Jean Bodin or Peter Faber, cite Roman law and history to prove contemporary points wrong-headedly, Gentili asserts, because they rely on *exempla*, which are so diverse and inconsistent that nothing can be proved from them. Moreover, discussions of *exempla* cannot amount to a comprehensive system of law⁵³. According to Gentili, interpreters of Roman law also confuse the laws of war with Roman military science, or simply ignore the law of nations that cannot be gleaned «from the law of Justinian alone»⁵⁴.

Another problem with working from Roman law, Gentili points out, is that only fragments remain; and Romans themselves ceased to manage and document their affairs systematically after the end of the republic⁵⁵. Moreover, non-Romans such as Aristotle and Plato also provide essential insights into the laws of nature and nations, and all ancient insights can become antiquated anyway⁵⁶.

Having shown several reasons for the inapplicability of Roman law to current problems, Gentili soon begins to treat of particular rules, such that war can only be waged by the sovereign. He writes in full frontal self-contradiction:

Moreover, the law of which is written in those books of Justinian is not merely that of the state, but also that of the nations and of nature; and with this last it is all so in accord, that if the empire were destroyed, the law

⁵² Carnegie *De iure belli* I.i.4.

⁵³ Carnegie *De iure belli* I.i.4. 1612 *De iure belli* p. 4: «Sane enim, si peccarunt antiquiores interpretes, quod solam, saepe alienam, civilis iuris disceptationem huc induxerunt: peccarunt & isti recentiores, qui nudam historiarum recitationem attulere: de quibus propter varietatem, & contrarietatem exemplorum, item & propter infirmitatem eiq. argumenti, quae plurimum ab exemplo esse videtur, non ius aliud facile, non constitues villo modo istud, quod naturale, ac certum censetur. Exempla, & facta expendenda sunt sua lance, & quasi pondera sunt sua trutina conficienda».

⁵⁴ Carnegie *De iure belli* I.i.4.

⁵⁵ Carnegie *De iure belli* 4-5.

⁵⁶ Carnegie *De iure belli* 5-6.

itself, although long buried, would yet rise again and diffuse itself among all the nations of mankind⁵⁷.

When Grotius treats of the exact same topic, the first authority he cites to show that war can only be waged by sovereigns is Plato's *Laws*, before he adds Justinian, then Augustine⁵⁸.

Compounding the confusion, Gentili next argues that the link between civil and international law is that Justinian's rules for individuals also apply to sovereigns, and therefore to their citizens, as well. This might seem similar to Lauterpacht's view of Grotius' derivation of international law from Roman private law, but it inarguably contradicts Gentili's prior assertions that Justinian passages on the law of nations are limited to the historically and culturally contingent Roman standpoint, and that the accumulation of particular examples cannot support universal conclusions anyway. When it comes to pairing the fate of hostages (making one liable for escape attempts by another), Gentili reverses position once more: «For men transfer agreements based upon rulings of the civil law to the principles of the law of nations; whereas both the nature and the method of investigation of the two subjects are different»⁵⁹. Later on, Gentili opines that acquisition through the use of force is perfectly lawful for princes, but that 'this reasoning' cannot apply to private individuals⁶⁰. Discussing whether kings are authorised to sell their subjects, Gentili writes:

⁵⁷ Carnegie *De iure belli* I.iii.17.

⁵⁸ «But a publick War not Solemn, may be made both without any Formality, and against mere private Persons, and by the Authority of any Magistrate whatever. And indeed if we consider the thing without respect to the Civil Law, every Magistrate⁶ seems to have as much Right, in case of Resistance, to take up Arms in order to execute his Jurisdiction, as to defend the People committed to his Protection. But since by War the whole State is endangered, therefore it is provided, by the Laws of almost all Nations, that it be undertaken only by the Order or with the Approbation of the Sovereign. There is such a Law in *Plato's* last Book *de Legibus*. And by the *Roman* Law he was reckoned guilty of High Treason, who without Commission from the Prince presumed to make War».

⁵⁹ Carnegie *De iure belli* II.xix.243. The 1612 ed.: «Nam à ciuilibus definitionibus ad has gentium argumentatur: quum ratio diuersa est, & obseruatio».

⁶⁰ Carnegie *De iure belli* III.iv.305. 1612, 497: «Quae ratio ad priuatos non pertinet».

These things, however, are a matter of natural right, like almost everything which is based upon the books of the *Digest* and the other works compiled and circulated by Justinian. Therefore you will find no disagreement on the part of the philosophers⁶¹.

These are not insignificant self-contradictions. When Gentili posits a link or even equivalence between Roman and international law, he derives binding obligations, including no harm, good faith, self-defense, permitting and engaging in commerce, among others⁶².

Leaving self-contradictions aside to focus on method: if not Rome, then what are Gentili's ostensible sources for identifying the law of nations? According to Gentili, relevant authorities agree that natural reason has established the law of nations, the authority and content of which is attested by universal adherence. Gentili's authorities for this definition, i.e. for the meta-authority on how to create binding laws of nations, are the *Digest* I.i.i.9, the *Institutes* I.ii, and Cicero's *Tusculan Disputations* I.xviii.30: all Roman.

To scope out the laws that enjoy universal adherence, Gentili draws on Baldus de Ubaldis to assert that there was no founding moment when all nations convened to agree on the law of nations. To establish consensus, a rough survey of the opinion and unwritten customs of most nations at most times would therefore have to suffice. The reason why Roman law and Cicero were nonetheless correct in describing this pseudo-consensus – which is sporadic and often unverifiable, according to Gentili, due to remote and lost sources – is because Rome, Alexander the Great, and the Parthians conquered and/or documented much of the known world, and therefore their views and their historical works capture the decisive majority of relevant human experience⁶³ (when Grotius reaches the same methodological point in his introduction, he argues that politics conquered by

⁶¹ Carnegie *De iure belli* III.xv.373.

⁶² Carnegie *De iure belli* 18.

⁶³ Carnegie *De iure belli* 8-9. In *De armis Romanis* II.8.247, the Roman denies that «there could be no law or pact without the right of self-defense».

Romans ceased to exist)⁶⁴. Since *De iure belli* contains practically no references to sources related to Alexander or Parthia, the only remaining empire that stands in for humanity's experience is Rome⁶⁵. Similarly, the Roman in Book Two of *De armis Romanis* argues that Parthia and Alexander pale in comparison with Rome, and God gave Rome «the sceptre of the world» to bring diverse customs, languages, and religions under «one set of laws»⁶⁶. The content of Gentilian law is Roman, not only the meta-authority that establishes which authorities and sources are valid for determining the law of nations.

Many of his peers invoked natural law at this juncture, but Gentili had no patience for it. The same goes for reason and instinct. While Francisco Suárez or Thomas Hobbes built their accounts of the genesis and enduring authority of international law upon theories of epistemology and instinct, and derived specific legal rules from universal propositions of divine providence or the impulse for self-defense and epistemic pride, respectively, Gentili at best paid lip service to epistemology and instinct, and grounded his definition of the law of nations and its sources on Roman views⁶⁷.

This is worth expanding and clarifying. Gentili acknowledged that instinct can reveal natural law, which in turn can justify rules for the law of nations⁶⁸, but the connection between natural law and the law of nations in *De iure belli* remains murky at best, and instinct is never used to justify or elucidate

⁶⁴ «We then exclude the Nations, who are brought under the Power of another People, as were the *Roman* Provinces; for those Nations are no longer a State, as we now use the Word, but the less considerable Members of a great State, as Slaves are the Members of a Family». Also: I.3.12.

⁶⁵ Interestingly, both halves of *De armis Romanis* agree that Rome conquered a representative sample of the world, even if the first half turns this into an accusation and posits Alexander as a worthy rival.

⁶⁶ *De armis Romanis* II.13.349, cited in intro, xix.

⁶⁷ Even when he invokes natural law for specific issues, such as piracy, where Gentili declares that «The question is not, what can be done with such men, or even what has usually been done, but what must be done», his next step is to draw on Roman law and civilians. *De iure belli* 23. The universal character of the instinct for self-defense is shown by... Roman law: *De iure belli* 59. It is broadened in *De iure belli* III.vi.312.

⁶⁸ Carnegie *De iure belli* 10.

any laws. As an indirect authority, instinct can serve to test what Gentili described as the third and fourth sources of international legal rules, namely the authority of wise men and cases in which the law of nations had been correctly applied. When wise men's pertinent adages, and the resolution of particular contentious cases, appear instinctively just to everyone, we get a sort of natural-law confirmation for that given law through our instinctive consensus, which we can recognise without understanding why we agree⁶⁹.

A similar indirect mechanism appears when Gentili argues that while Justinian's golden rule of not extrapolating rules from examples was correct, examples can trigger the same test of instinctive approval or rejection. Instincts are more important than reason, Gentili states, because human reason is a fallible part of nature and varies widely between places and periods. This is why Gentili's stated ambition in *De iure belli* is not to imitate mathematical demonstrations, but to *persuade* the reader. It is also the reason why much of Roman law is still applicable, Gentili explains: its wide acceptance, from ancient times to his day, is proof positive of its validity and truth content, especially when buttressed by the agreement of wise men, whose arguments we may also not understand (just as we don't understand Roman law), but whom we nonetheless find ourselves agreeing with⁷⁰.

Throughout this methodological exposition, Gentili switches freely between "law of nations", the "law of war" and "military law of nations"⁷¹. This terminological slippage, which reoccurs throughout *De iure belli*, leads to further self-contradictions, not least with regard to the role of reason. In addressing the fine points of prisoner exchange, for instance, such as the death of one prisoner already vouched in exchange for another, Gentili recommends observing the general principle of good faith because «as with the soldiers the law of nations is observed with-

⁶⁹ Gentili invokes wise men consistently as an authority for the law of nations throughout *De iure belli*; they deserve a separate study. *De iure belli* III.xiii.357.

⁷⁰ *De iure belli* 11, 150, 158.

⁷¹ *De iure belli* 11. 1612, 16: «de hoc iure sunt bellico gentium»; 17: «huius bellici iuris».

out the strictness of the civil code, according to the opinion of all the commentators. In fact, a soldier ought to know arms and not the law, and it is proper that military men should be ignorant of law»⁷². The application of good faith in the law of war in this case should defy the applicable law of nations, apparently because it happens to surpass the threshold of natural reason. This position, which I have not found in other civilians, may have been inspired by Gentili's professional exposure to the common law, which protects the standard of reasonableness (e.g., in "reasonable man" or "reasonable doubt") by taking the quotidian use of language as authoritative, distinguishing between non-lawyers' natural reason and the law's "artificial reason", and even prohibiting judges from explaining the standard of reasonableness to juries, lest juries' commonsensical grasp of language and of facts be spoiled⁷³.

4.2 *Elements of Method*

What are Gentili's devices for persuading readers of the aptness of his source and authorities? He likes testimonies, examples, and histories (roughly in that order), but not verisimilitude.

Gentili writes at length about examples and testimonies. The latter carry particular weight when provided by wise men or reliable witnesses. Witnesses can prove unreliable in many ways, for instance by injecting personal opinions into their testimony, or otherwise encroaching on the role of the judge⁷⁴. Accord-

⁷² *De iure belli* 204.

⁷³ James Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, New Haven-London, Yale University Press, 2008, pp. 116, 118, blames theologians' claims to specialised knowledge for making judges self-aware and worried about contradicting common sense. Findings of fact and law must compel everyone in conscience, and judges know too much to suppress their doubts in too many cases for practical purposes, which is why the onus of establishing facts and approving verdicts were shifted to juries. Uncomfortably, one of the things judges knew was just how unreliable witnesses and juries were; but they preferred to correct witnesses and juries as much as possible instead of taking on the moral and religious responsibility of passing judgement themselves. One wonders if Gentili's view of soldiers' ability to orient by their inner sense of good faith amounts to a similar shirking of responsibility by an international lawyer.

⁷⁴ *De armis Romanis* II.10.273.

ing to Gentili, the credibility of great men, such as Hannibal, is properly established by examining whether their reported statements meet the forensic standards of a faithful testimony⁷⁵. In his dedicatory epistle to the Earl of Essex for Book I of *De armis Romanis*, Gentili explains that the question of Rome's justice would be settled through the critical assessment of testimonies. This chimes with the Roman speaker's conclusion in Book II, in which ultimately it is testimonies that prove the glory of the Roman Empire⁷⁶. The published work, in short, begins and ends with a methodological discussion about the supreme value of testimonies.

Like testimonies, examples or cases are relatively straightforward, which is not to say that Gentili's use of them is unsophisticated. One can prove anything with *exempla* and, Gentili explains, given that one can find examples for just about anything, one can also render any issue in the law of nations open-ended or irresolvable by misrepresenting *exempla* as authoritative⁷⁷. Despite Gentili's explicit treatments of the inadequacies of *exempla*, they are the most frequently used method in *De iure belli*.

As we saw, Gentili provides detailed methodological guidance for specific uses of his devices of persuasion. With regard to the obligation to try to negotiate and settle disputes in good faith before the commencement of hostilities, for instance through arbitration, he notes,

But why do I multiply examples, as if any one could not call to mind a great number of such occurrences in every age? Why, to be sure, in order that those who avoid this kind of contest by arbitration and resort at once to the other, that is, to force, may understand that they are setting their faces against justice, humanity, and good precedent [...]⁷⁸.

Despite their methodological flaws, *exempla* clearly carry weight. In citing Roman authorities, in one case on expediency, Gentili asks,

⁷⁵ E.g., *De armis Romanis* II.8.239.

⁷⁶ *De armis Romanis* II.13.347.

⁷⁷ See e.g., *De armis Romanis* II.4.193.

⁷⁸ Carnegie *De iure belli*, 16. 1612: 24-25.

Am I tiresome to you in naming those authorities, who are not of our own country? Yet the agreement of many different authorities is a strong argument. We always consider every argument in connexion with the authority for it, and the authorities who have been cited are thoroughly pertinent to our subject [...]⁷⁹.

Yet tellingly, this methodological digression that aims to justify the piling-on of examples occurs in one of the few cases when Gentili cites only Roman sources.

Histories are of course a staple source for humanist lawyers. According to Gentili, the question of Rome's justice also ultimately comes down to the credibility of historians. *De armis Romanis* begins with Picensus calling most historians liars, since most historians praise Rome. By contrast, Picensus praises the poets, who faithfully reported Rome's failings and crimes⁸⁰. Picensus' Roman opponent responds that only Roman historians are acceptable sources because Greeks, victims of their own literary sophistication, invariably lapse into approximating princes to fictional figures⁸¹. Witness testimonies are most unlike good histories, he notes, because historians select material based on their trained powers of discernment, and they also add their judgement to descriptions of deeds and words⁸². Remarkably, Picensus and his Roman adversary agree to settle the debate by pitching the credibility of Livy⁸³ (and, contrary to the dismissal of Greeks, on Polybius) against Orosius⁸⁴. In laying down the rules for their contest, the Roman explains that the debate will be won by the party whose historians are proven to command greater verisimilitude⁸⁵. In this methodological section of *De armis Romanis*, Gentili's Roman uses verisimilitude as a hallmark of good historiography, which is effectively the opposite of the Aristotelian and Grotian definition of verisimilitude as a persuasive effect available only to poets and some philosophers.

⁷⁹ *De iure belli* 61.

⁸⁰ *De iure belli* I.5.49.

⁸¹ *De armis Romanis* II.12.309.

⁸² *De armis Romanis* II.1.127-129.

⁸³ Picensus v Livy: *De armis Romanis* I.10.89-91, I.12.107.

⁸⁴ Battle of historians: *De armis Romanis* I.13.115.

⁸⁵ *De armis Romanis* II.8.235.

In a restatement that conforms with Aristotle's, Lucian's, and others' taxonomy of representations, the Roman explains,

A biographer records particular events, even the most trivial, on the basis of which one can fully get to know the man whose portrait he paints, as it were. But a historian (so the ancient sages declared) has to imitate the other sort of painter, who, if he finds his model in real life flawed, does not express all of the defect in the painting⁸⁶.

In the same vein, the Roman describes historians as «accustomed to speak in accord with popular opinion» – which is often mistaken⁸⁷.

Expounding his rival theory of sources, Picensus remarks that even testimonies can fail if they have no verisimilitude, or if they are contradicted by other, equally credible testimonies. He sets out to prove the injustice of the Romans from the few surviving fragments of anti-Roman historians and plans to supplant the common view of Roman virtue with the truthful account of Roman injustice, even if it «does not seem credible or likely, in just the same way that many things are judged to be credible and likely which are in fact false» [with «verisimilar» ill-translated as «likely»]⁸⁸. Verisimilitude is Picensus' (and Bodin's) standard, not the Roman's.

It is not Gentili's, either: he consistently ranks verisimilitude lower than other standards of efficiency and veracity against which rhetorical devices are measured. Inverting Picensus' point in his dedication to Essex, Gentili notes that Aristotle and Quintilian are in agreement that verisimilitude often misleads people, who believe things that are verisimilar but false, just as there are many things that lack verisimilitude but which are in fact true. This problem does not arise with regard to the critical assessment of writers' competing opinions, especially if they are ancient writers, and their partisanship and bias no longer distort

⁸⁶ *De armis Romanis* II.10.289. Gentili here references Plutarch, but as the editors point out, Plutarch wrote no such passage.

⁸⁷ *De armis Romanis* II.10.275.

⁸⁸ *De armis Romanis* 14-15. «Et verum hoc est, verum, etsi credibile, aut verisimile non videtur: quemadmodum credibilia existimantur multa, ac similia veris, quae falsa sunt». In *De armis Romanis* I.7.59, I.13.109 Picensus adds pro-Roman histories as a source from which the true story of Roman injustice can be extracted.

our view. Similar to the assessment of competing ancient opinions is the exercise of judging testimonies, especially historians', who, like lawyers, often judge one another, and endow their statements with characteristics that enable the critical assessment of their testimonial value without the confounding effect of verisimilitude⁸⁹.

4.3 *Gentili in Practice*

Moving past his methodological creed, let us observe Gentili's method in action. *De iure belli* seeks to establish hundreds of legal rules, from lawful preconditions for the use of force through binding treaties of alliances to postliminy. Usually, Gentili demarcates the point he is arguing and the section where he expounds it with admirable clarity. He generally summarizes the point, then provides examples, testimonies and authorities in support, assesses counterarguments, and finally flags that he is finished, before moving on to the next, usually related point. Gentili's *De iure belli* is a wonderfully organised treatise, which in turn makes it easy to test the application of his professed method.

I isolated and numbered each distinct argument in *De iure belli* and noted Gentili's sources, whether legal, historical, biblical, or literary. Roman law and history feature prominently in almost every one of his arguments. In most cases, Gentili adds

⁸⁹ «There is a greater difficulty for us in assessing narratives than in deciding between opinions. For if the testimonies of the writers are in agreement, nothing is left for us by which we might choose a contrary position, unless it would be a method of conjectures, and this cannot be sufficiently secure, as not only the word "conjectures" warns us, but not even the most powerful of them has been allotted any superior power than the others, if Aristotle and Quintilian teach us the truth, for they assert that very often very many things that are false strike men as credible and verisimilar, while there are very many things that are true which seem profoundly unbelievable». «Est nobis in censendis narrationibus maior, quam in diiudicandis sententiis difficultas. Si enim testimonia auctorum conveniunt, nobis nihil relinquitur, quo contrarium disceptemus, nisi ratio coniecturarum: quam firmam non esse satis, cum nomen monet coniecturarum, tum quod ipsarum potissimaque nec coeteris vim meliorem sortitae sunt: si verum nos docent Aristoteles, et Quintilianus, qui multa hominibus credibilia, et *verisimilia* asserunt, quae falsa sunt frequenter; et vera esse plurima, quae incredibilia penitus videantur». *De armis Romanis* 358-361.

Greek and biblical sources, reports of barbarians, patristics, medieval incidents and laws, contemporary Turkish conduct and writings, and other legal and historical references. When Gentili wishes to set a new rule, he also makes sure to cite damnable violations from diverse sources. There are, however, about two dozen arguments, out of several hundred, in which Gentili draws exclusively on Roman sources.

One such argument concerns making war out of necessity (in this case to find wives)⁹⁰. Explaining the role of equity, Gentili draws on modern cases to lay out the problem, but only on ancient Romans to lay out the solution⁹¹. Cognate concepts, such as discretion and power, are also defined with reference to Roman law only⁹². Gentili relies exclusively on Roman law and history when he argues that private individuals can gather armed men to recover their own property when public measures prove slow or inefficient⁹³. Similarly, that individuals can defend themselves in an emergency⁹⁴, for instance if they find themselves in an undeclared war, is established exclusively from Roman references⁹⁵. The lawfulness and prudence of imposing heavy punishment, or executing spies, is also supported by Roman law and history alone⁹⁶. That commanders bind their sovereigns with military agreements made within the commander's purview is another such doctrine⁹⁷. When it comes to agreements between soldiers, Gentili reviews the controversy between Roman sources and later civilians, but keeps the discussion within Roman law boundaries⁹⁸. Book II chapters ix to xi form the only sustained cluster of Rome-only discussion in *De iure belli*, concerning agreements between sovereigns, commanders

⁹⁰ *De iure belli* I.xvii, 79f.

⁹¹ *De iure belli* 101.

⁹² *De iure belli* II.xvii.227-228.

⁹³ *De iure belli* 126. In *De armis Romanis* II.8.247, the Roman argues that tranquility is desirable for private citizens, but not for states – proved both by nature and countless examples.

⁹⁴ *De iure belli* 1612, 222: «ocasiones».

⁹⁵ *De iure belli* 137.

⁹⁶ *De iure belli* II.ix.173-175.

⁹⁷ *De iure belli* II.x.

⁹⁸ *De iure belli* II.xi.

and soldiers, as if it were a draft of a free-standing treatment that Gentili eventually decided to incorporate or turn into *De iure belli*.

In *De iure belli* II.xvi, Gentili denies that children born to slaves are automatically enslaved, through an analysis of only civilians' contradictory interpretations of relevant *Digest* provisions⁹⁹. In III.iii, only Roman law and history are cited to support the general principle (though not the particular provisions) that victors are entitled to compensation for their wartime expenses and damages¹⁰⁰. Arbiters' authority to extend the scope of their decision to things not covered by the agreement that constituted and authorised the arbiters in the first place is also supported by Roman law and civilian commentators alone¹⁰¹. Strangely, Gentili argues that slaves were not regarded as very different from free men in most legal systems, except for Rome; and while they should be treated as if they possessed relative equality, if Roman law were applied instead, «no injustice is done them; whatever others may think»¹⁰². Gentili asserts that arms are often taken from the conquered, but proves the lawfulness of this practice exclusively from Roman history¹⁰³. The Roman principle of regarding all peoples as conquered subjects unless they have signed a treaty of amity with Rome is, according to Gentili, a custom that should be followed in modern times, though he gives no other examples, authorities or sources¹⁰⁴. That privileges granted by a sovereign in return for service cannot be recalled, because they are more akin to contracts, is proven from Roman law, and civilian commentators on Roman law, only¹⁰⁵. If a sovereign enters agreements of friendship and alliance with several sovereigns, and they go to war with an-

⁹⁹ *De iure belli* II.xvi.208-210. Grotius draws on Roman law as well, but adds New Testament references. See e.g., IBP II.5.29.

¹⁰⁰ *De iure belli* III.iii.298.

¹⁰¹ *De iure belli* III.iii.300.

¹⁰² *De iure belli* III.ix.335.

¹⁰³ *De iure belli* III.xi.347.

¹⁰⁴ *De iure belli* III.xiii.353. This is of course the heart of the matter, and accordingly tremendously controversial. Cicero argued that Rome conquered the world on behalf of its allies (*De rep.* 3.35).

¹⁰⁵ *De iure belli* III.xvi.378.

other, only Roman law and examples can guide the correct decision¹⁰⁶. When in doubt as to which ally has breached a treaty with another ally, it is best not to assist either, as shown by the *Digest* and no other source¹⁰⁷. Furthermore, the defense of one ally against the assault of another is generally prudent¹⁰⁸. When it comes to innocent passage, the size and definition of an army are derived entirely from Roman law, history, and Cicero¹⁰⁹. The wisdom of renewing treaties with successors to deceased sovereigns is likewise shown from Roman examples alone¹¹⁰; and so are the rules for ratifying treaties¹¹¹.

Sometimes Rome is the only source of examples of what not to do, as is the case with breaches of faith through verbal deception in war, in murdering one's own soldiers who have honorably surrendered, or in imposing overly severe punishments to create deterrence¹¹². Several actions that violate treaties are defined from Roman law and examples alone¹¹³. Conversely, when the French and the English slaughter prisoners of war because they are so numerous that they cannot be guarded securely, Gentili condemns their actions as inhumane and unlawful; but when he recounts Romans doing the same, he finds it within the acceptable margin of martial discretion¹¹⁴. Likewise, Gentili condemns the practice of executing princes and commanders, but argues that the best-known Roman executions were justifiable¹¹⁵.

¹⁰⁶ *De iure belli* III.xviii.389, 394-395.

¹⁰⁷ *De iure belli* III.xviii.392.

¹⁰⁸ *Ibid.*

¹⁰⁹ *De iure belli* III.xx.405.

¹¹⁰ *De iure belli* III.xxii.418-419.

¹¹¹ *De iure belli* III.xxiii.420-421.

¹¹² *De iure belli* 146-7; 215; III.ii.295.

¹¹³ *De iure belli* III.xxiv.428-429.

¹¹⁴ *De iure belli* 218.

¹¹⁵ *De iure belli* III.viii.326-327.

5. *Rome Resurgent: Possible Explanations*

We have seen Gentili's objections to the authority of Roman law and to its use as a source of examples in determining the law of nations; and we saw how he directly and explicitly contradicted his own caveats. We have also read his programmatic statement concerning the use of examples, which, Gentili argues, must meet the impracticably high bar of listing enough examples to establish a critical mass of practice and *opinio iuris* across ages and cultures to confirm the (relative) universality of the laws – unless that critical mass is already captured by Roman law, which emerged from ruling, treating, and trading with much of the known world. We have also seen Gentili stopping himself, over and over again, from amassing examples endlessly; but also relying exclusively on Roman law to establish around two dozen rules, some of them despite the existence of contradictory rules indicated by a wide range of non-Roman sources. So... what is going on? Why does Roman authority resurface from under Gentili's principled objections?

Part of the answer may be that unlike many of his peers, Gentili believed that a residual legal continuity did survive from ancient Rome to the Europe of his day. Despite describing in *De iure belli* (1) the partition of the empire between East and West, (2) the transfer of the capital to Byzantium, (3) the barbarian destruction, and (4) the fact that for decades on end, no one even seems to have claimed continuity from Rome (even if such claims were implausible, Gentili notes that he would have found them significant), Gentili believes that the Roman Empire survives. The Empire, he relates, was like a field that multiple floods of varying severity have washed over, enduring and reemerging after the floods have subsided. Gentili also compares the Roman Empire to a sea or a river that remains the same even as its boundaries and trajectories change, hanging on as long as «it survives even in some tiny part»¹¹⁶. Near the end of *De iure belli*, Gentili calls Bodin's comments on the disrupted nature of

¹¹⁶ *De iure belli* 116-119, quotation from 118. Cf. Grotius, *IBP* I.3.17, on Rome as divided sovereignty during East-West. Same point made in *De armis Romanis* II.4.185.

Roman government «foolish», and reasserts its constitutional continuity from monarchy through republic to empire¹¹⁷. Curiously, Gentili refrains from drawing explicit legal implications directly from this supposed continuity, whether for Europe, parts of the world that have once belonged to or traded with the Roman Empire, or for the law of nations writ large. Book Two of *De armis Romanis* argues relatedly, but not identically to *De iure belli*, that even if the Roman Empire has disappeared, the empire of Roman law endures universally, even in the few parts of the world that Rome has never conquered¹¹⁸.

Another part of the answer may lie in refining the authority of Rome as a source of examples. One problem with the Greeks is their distinction between themselves and barbarians: a distinction that was starker, according to Gentili, than Romans' comparable distinctions, making Greek positions on the law of nations less generalisable¹¹⁹. Exceptional Greek philosophers and dramatists could, however, overcome this handicap and capture universal truths¹²⁰. Gentili and Grotius both invoked Euripides, «the philosopher of the stage», early and often¹²¹.

The third part of the answer may emerge from the occasions on which Gentili dismisses all prior laws and practices and strikes out on his own, usually in directions we would find praiseworthy today. Such is the case of the extraordinary *De iure belli* II.vi, where Gentili shows that all cultures and law-

¹¹⁷ *De iure belli* III.xxii.415-416.

¹¹⁸ *De armis Romanis* II.13.351 on how Roman law «persists to the present day even now that the empire has been extinguished and penetrates into all parts of the world, even those parts to which Roman arms did not reach. Picens, you possess what the world longs for, you possess what the world delights in – the world which, though deprived of that blessed good luck of our empire, nevertheless tenaciously hangs onto and thirstily gulps down Roman laws, with which it renews for itself the sweet memory of its ancient happiness under Roman rule and alleviates the sadness of these times by this little bit of pleasure that has been mixed in».

¹¹⁹ *De iure belli* III.ii.291-292. There are exceptions. That suppliants must be spared is a natural law, but its positive form was laid down by Athens and, according to Gentili, was accepted from Athens by other nations. *De iure belli* II.xx.250. 1612, 418-419: «Quae ab Atheniensibus indicata lex: & ab aliis excepta gentibus dicitur; & nunc ostenditur».

¹²⁰ And, frankly, different rules continue to apply to some barbarians: *De iure belli* III.ii.293.

¹²¹ *De iure belli* IB II.xx.248, III.ii.292-293.

yers have approved the use of poisons during war, then takes a categorical stance against this practice, without drawing further justification from natural or divine law. When he addresses targeted assassinations a few pages later, Gentili repeats the exercise of citing «many examples from all nations»¹²² but rejects the practice in the face of not only the plethora and weight of examples in favour of targeted assassinations, but also despite the theologians and civilians who approve of biblical and Roman uses of both assassination and poison¹²³. Another instance, albeit with a smaller set of examples and authorities, is the sale of prisoners of war into slavery, which Gentili finds in numerous instances across cultures, but disapproves of nevertheless¹²⁴.

Another important reason is found in Gentili's discussion of divine law, the relevance of which he repeatedly denies. Like other secularisers, Gentili is strong on epistemic humility and rejects the arrogance of claiming to understand divine law, as clearly and consistently as Grotius does. Gentili writes about religion,

Even the reason of our senses yields to it. Opinions depend upon probability, understanding upon reason; faith upon authority. Faith does not demand reason, but believes in advance of reason, because nothing is more contrary to reason than to attempt through reason to attain that which is superior to all reason¹²⁵.

«Opinions depend upon probability» is a key and mistranslated phrase. Gentili stated at the outset that his intention, and consequently his method, is to generate opinions about the law of nations, to persuade, to motivate to action. The single most important source in the Western tradition on persuasion and motivation is Aristotle's *Poetics*. If you wished to motivate, through any subject and genre, this is where you started. Indeed, in addition to Gentili's fulsome praise for Aristotle, the single

¹²² *De iure belli* 166.

¹²³ *De iure belli* II.viii.166-171.

¹²⁴ *De iure belli* II.xv.205.

¹²⁵ *De iure belli* II.xx.246-247. 1612 *De iure belli*, 402-403: «Etiam sensus concedunt. Opinio *verisimilitudini*, intellectus rationi, fides auctoritati innititur. Fides rationem non quaerit, sed ante rationem credit, quia nec quidquam sit magis contra rationem, quam per rationem illuc conati, quod supra omnem est rationem».

most frequently cited text on method in *De iure belli* itself is Julius Caesar Scaliger's *Poetices libri septem*, in which Scaliger provided a revised theory of persuasion and motivation based on his textual criticism of Aristotle's *Poetics*¹²⁶. Scaliger's most scathing criticism was directed at «grammarians» obsessed with particular data, leading them to ignore universals¹²⁷. Perhaps the most recurring phrase in *De iure belli* is that these examples are enough to prove a law, and we must move on¹²⁸. Gentili's contempt for heaping unnecessary examples on top of one another echoes Scaliger's point to a T.

6. *Unhinging Verisimilitude*

So how do we get to universals that compel us to action? Aristotle attributes this power to poets and philosophers who, unlike historians, move from universals to particulars. To simplify: for Gentili, Justinian occupied the rank of a philosopher, just as Euripides accurately and correctly captured principles of the law of nations in his capacity as a poet.

Once we have identified truths about the law of nations, figuring out how to most effectively present them to readers of *De iure belli* is a separate challenge altogether. Examples must be provided, but they must transcend particulars, which is impossible. What Gentili needs is examples imbued with some sort of exceptional power; and that is how he uses ancient Rome.

It has been previously argued that Heinsius' rearrangement of Aristotle's *Poetics*, and the methodological tract that Heinsius appended to his radically new edition, influenced Grotius' method¹²⁹. The work on Heinsius fails to note that Julius Caesar Scaliger's unpublished notes on Aristotle passed through his

¹²⁶ On Scaliger's revision of the Aristotelian theory of persuasion and expanded ways of representing things as they really are, and as they should be, see Sonja F. Witstein, *Funeraire poëzie in de Nederlandse Renaissance*, Assen, Van Gorcum, 1969, Part 1.

¹²⁷ *De armis Romanis* II.5.197.

¹²⁸ *De iure belli* 64, 150, 223 x2, 224, 343, 384, 411, 414, 423, 424.

¹²⁹ Mark Somos, *Enter Secularisation: Heinsius' 'De tragoediae constitutione'*, «History of European Ideas», 36/2, 2010, pp. 19-38.

son, the great Joseph Justus Scaliger, to Daniel Heinsius, and just how neatly Gentili's debt to Scaliger Sr. in *De iure belli* mirrors Grotius' debt in *De iure belli ac pacis* to Scaliger Jr. and Heinsius. Obviously, Gentili and Grotius had a more sophisticated understanding of legal methods, but these Aristotelian commentaries are both among the most important and, in many ways, the most illustrative texts for the early modern construction of compelling legal arguments. This is not to ignore the plethora of Aristotelian commentators and literary critics Gentili knew (including his brother, Scipio), but the fact remains that J.C. Scaliger is hands-down the most cited literary theorist in *De iure belli*¹³⁰, even though current scholarship on Gentili's rhetorical theory focuses almost exclusively on Virgil.

To somewhat oversimplify, the methodological flaws of *De iure belli* concerning ancient Rome are partly due to Gentili's endorsement of Scaliger's rejection of grammarian obsession with particulars at the expense of universals, and the incompleteness of Scaliger's constructive proposals for motivating action in a better way. Examples are not enough, but neither can international law be derived solely from poetry or philosophy (as, indeed, William Welwod famously criticised Grotius' *Mare liberum* for overreliance on tragedy). Gentili was caught between the encyclopedic hoarding of examples that could, as he himself noted, never amount to general rules; and a special sort of exemplarity that could bridge the gap between particulars and universals without lapsing into philosophy or poetry. Given the rhetorical apparatus for persuasion at his disposal, his best bet was to deploy Roman law as that bridge. He set out to do so in the multiple ways discussed above, from presenting Rome as an aggregator of the human experience, through hinting at ancient Rome's continued legal authority, to direct self-contradictions concerning the demonstrative potential of Roman exemplarity. What Gentili really needed, however, was a theory of verisimilitude which, as he wrote, was the key to creating opinions which, in turn, as he wrote in *De iure belli*'s introduction, was

¹³⁰ Gentili cites Alciato often, but usually as a civilian. References to Scaliger outnumber references to invocations of Alciato on legal epistemology.

the primary purpose of his book, since opinions trigger action. But a theory of verisimilitude Scaliger Sr. could not give him.

Verisimilitude, a key term we find in *De iure belli*, *De iure belli ac pacis*, Scaliger's *Poetices* and Heinsius' *De tragoediae constitutione*, is routinely mistranslated as probability. Indeed, Ian Hacking and Barbara Shapiro have given us seminal, but I would argue misleading, works on the seventeenth-century U-turn in understanding probability, and its new uses in juridical reasoning¹³¹. Our sense of mathematical probability is clearly around by the time we get to Pascal, Fermat and Huygens, but this is not what Heinsius and Grotius meant by verisimilitude (similarly, the first text that is often said to prefigure our mathematical sense of probability, namely Cardano's *De ludo Aleae liber*, written around 1564 but not published until 1663, seems to use "verisimilitude" once, in an auxiliary turn of phrase and nowhere near the Aristotelian sense). After Heinsius' 1610 reshuffling of the order of Aristotle's *Poetics*, verisimilitude became a practical tool for capturing a universal truth for which particulars may or may not exist. This is not even close to the idea that a universal truth can be captured by aggregating and mathematically manipulating many particulars. Grotius offers verisimilitudes for his legal arguments in *De iure belli ac pacis* by (1) deploying philosophy or moral science in ways that are wholly absent from Gentili's *De iure belli* (a point recently made by Martti Koskenniemi)¹³²; (2) by collecting examples from multiple cultures and periods; (3) by, unlike Gentili, not treating Rome as special; and (4) by drawing on tragedy and fables¹³³. Indeed, many of the sources Grotius added to the 1631 edition

¹³¹ Ian Hacking, *The Emergence of Probability: A Philosophical Study of Early Ideas about Probability, Induction and Statistical Inference*, Cambridge, Cambridge University Press, 1975; Id., *The Taming of Chance*, Cambridge, Cambridge University Press, 1990; Barbara J. Shapiro, *Probability and Certainty in Seventeenth-Century England: A Study of the Relationship between Natural Science, Religion, History, Law, and Literature*, Princeton, Princeton University Press, 1983.

¹³² Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300-1870*, Cambridge, Cambridge University Press, 2021.

¹³³ The best counterargument to my thesis is that Grotius' use of verisimilitude was inspired not by Heinsius but by Bodin's *Methodus*, which Gentili also had access to. For Bodin, verisimilitude was the key criterion for assessing good historiography.

are literary, not legal, in keeping with his praise of the potential of poetry in his 1630 preface to Euripides' *Phoenissae*¹³⁴.

7. Conclusion

Gentili's *De iure belli* and Grotius' *De iure belli ac pacis* are similar in many ways. The originality, the systematisation, the secularising effect, the structure, the list of topics, and fantastic methodological attention to sources, examples, and authorities all attest to this. As noted, Gentili rarely ever relied on Roman law and history alone; and that when he did, he sometimes did so to crystallise a rule that must be rejected. Much of this would have been understood by his readers as a bold departure. Yet Gentili also attributed the greatest authority to ancient Rome when it came to understanding the law of nations; regarded both Roman law and the Roman empire as living and breathing entities; and derived several rules of the law of nations from Roman sources alone. Perhaps Grotius popped open the jar for the genie of modern international law to emerge only because Gentili already loosened it; in any case, it is not *prima facie* implausible to talk of a Gentilian moment, the way Richard Falk, Boutros Boutros-Ghali, and so many others have spoken of a Grotian moment, whether with coherent semantic range or not, but certainly with a clear sense of originality¹³⁵.

I am not the first to point out that Grotius was dissatisfied, in Van Vollenhoven's words from 1925, «with the method of applying the Justinian system to every part of law»¹³⁶. Gentili's use of examples has also been discussed, recently by Christopher Warren and Francesca Iurlaro, though with less focus on the failure of Gentili's exemplarity, or the role of verisimilitude. Given practical constraints, my argument is also incomplete. It

¹³⁴ Also cited in Francesca Iurlaro, *The Invention of Custom: Natural Law and the Law of the Nation, ca. 1550-1750*, Oxford, Oxford University Press, 2021, p. 116.

¹³⁵ Sparks, Somos, *Grotian Moments: An Introduction*, cit.

¹³⁶ Cornelis van Vollenhoven, *Grotius and the Study of Law* [1925], in *Mr. C. van Vollenhoven's Verspreide Geschriften*, ed. Mari Frederik van Asbeck, Haarlem, Tjeenk Willink, 1934, vol. 1, p. 394 (see also p. 41).

would be fruitful, for instance, to trace Rome in other works by both authors, especially because Gentili is so clear and emphatic that his works are interconnected¹³⁷. It would also be lovely to examine his unpublished corrigenda and addenda to *De iure belli*, which Alain Wijffels has been examining in Oxford, including the hundreds of new references Gentili seems to have planned to incorporate in a future edition that never happened. Finally, a longer treatment would allow placing the Gentili-Grotius contrast on Rome into the broader context of this controversy that I alluded to in the introduction, which goes back at least to Marsilius against Bartolus, and probably earlier.

What I think is original in this brief sketch is the contrast between the two authors' methodological statements concerning Rome, and the proposition that the reinvention of verisimilitude – which is not the same as probability – freed the law of nations in *De iure belli ac pacis* from reliance on exemplarity, the weak connection between particulars and universals, and the burden of Rome.

¹³⁷ *De iure belli* III.xxiv.433: Gentili notes that in *On the Wars of the Romans* and in *On Embassies* he discusses «questions of a conjectural nature and of fact, which form the second part of a complete work, a part not less necessary than this one dealing with the law». 1612 *De iure belli*, 714: «Quamquam & nostrae sequuntur disputationes de armis Romanis, & libri nostri de legationibus: in quibus sunt plurima, quae omitta hic quis desideret. Illic sunt & quaestiones in coniecturali statu, & facti, quae altera est pars operis perfecti; nec necessaria minus, quam haec est iuris».

Arno Dal Ri Jr.

Rappresentazioni di Alberico Gentili nella scienza del diritto internazionale in Brasile

1. *Introduzione*

È prassi comune tra i protagonisti della scienza del diritto internazionale in Brasile citare nei propri manuali i contributi non solo degli autori loro contemporanei, ma anche dei cosiddetti “classici”, scritti che costituiscono le fondamenta della disciplina. Il loro obiettivo non è solo quello di rafforzare la struttura teorica dei manuali e dei trattati, ma anche, spesso, quello di cercare di conferire loro una maggiore legittimità. Anche nella dottrina internazionalista del grande paese sudamericano alcuni giuristi che si sono particolarmente distinti nel corso dei secoli sono stati elevati al rango di “fondatori del diritto internazionale”: il riferimento è soprattutto a quelli della prima Modernità, tra cui spicca in primo luogo l’olandese Ugo Grozio, che per lungo tempo ha detenuto quasi in solitudine il titolo di “padre” della disciplina. Alla generosa indicazione del giurista della città di Delft seguirono quelle di Francisco de Vitoria e Francisco Suárez, nonché di Alberico Gentili, giurista e ideologo umanista protestante italiano, che svolse un ruolo di rilievo nella cerchia dei consiglieri giuridici di Elisabetta I d’Inghilterra.

Gentili fu testimone degli ultimi episodi dell’umanesimo giuridico, nel momento di transizione tra Rinascimento e Modernità, e i suoi scritti sono considerati fondamentali nella transizione non solo tra due epoche, ma anche tra modi molto diversi di

concepire il diritto¹. Lo spirito rinascimentale che ha portato il pensiero dal teocentrismo all'antropocentrismo pulsava nel giurista italiano, riflettendosi nelle prime tensioni tra il già consolidato giusnaturalismo e il nascente contrattualismo.

Le rappresentazioni di Gentili nei testi che costituiscono la scienza del diritto internazionale in Brasile lo fa vittima di un fenomeno tipico di quella realtà: i grandi nomi che hanno fornito le fondamenta del diritto internazionale, per quanto le loro opere siano citate nei manuali e nei trattati, raramente sono stati oggetto di analisi approfondite.

Il riferimento a testi classici senza un'adeguata analisi nelle dottrine brasiliane emerge non solo riguardo a quelli più antichi, ma anche a quelli più recenti, come nel caso di Georges Scelle, Dionisio Anzilotti, Santi Romano, Heinrich Triepel o Lassa Oppenheim: citata la loro esistenza, essi sono scarsamente analizzati nelle pagine della nostra scienza del diritto internazionale. Ovviamente, il contesto si aggrava man mano che si raggiungono gli strati più profondi del pensiero internazionalista, facendo sì che gli scritti di Emer de Vattel, Samuel Pufendorf o Christian Wolff siano praticamente ignorati nei nostri manuali.

Le varie menzioni di Grozio, in particolare, e poi di Vitoria e Gentili, sono il risultato di un movimento differenziato in questo contesto. L'urgente necessità di legittimazione tramite l'uso di "linee genealogiche" che nobilitassero questo campo del sapere ha fatto sì che i gli internazionalisti non mancassero di ostentare i loro fondatori. È per questo motivo che i tre autori, così come i titoli delle loro opere, da oltre un secolo sono presenti nei manuali e nei trattati brasiliani come illustri sconosciuti, oggetto di analisi solo da parte di pochi studiosi².

L'opera principale di Gentili, pubblicata in latino nel 1598, è stata tradotta in portoghese e pubblicata in Brasile soltanto nel 2006. Vent'anni dopo rimane, ancora per molti, un autore ignoto. Il presente articolo si propone di esplorare il modo in

¹ Arno Dal Ri Jr., *Apresentação*, in Alberico Gentili, *O direito da guerra*, tradução de Ciro Mioranza, Ijuí, Unijuí, 2005, p. 10.

² Tra la ristrettissima cerchia di brasiliani che hanno scritto su questi autori, anche tra gli storici del diritto internazionale, spicca Paulo Emílio Borges, che si è dedicato soprattutto a Hugo Grotius e Francisco Suárez.

cui la riflessione di Gentili è circolata negli scritti dei protagonisti della scienza del diritto internazionale in Brasile. A tal fine, intende innanzitutto esaminare le strategie che, a partire dalla fine del XVIII secolo e rafforzandosi nel corso del XIX secolo, sono state messe in atto per recuperare e inserire nella letteratura specializzata il nome del giurista italiano come parte del triumvirato dei “fondatori del diritto internazionale”. Subito dopo, verrà esaminato il modo in cui i manuali e i trattati brasiliani di diritto internazionale lo presentano, insieme alla sua opera, evidenziando la presenza della strategia volta a elevarlo nel pantheon di questo campo della scienza giuridica anche nella nostra dottrina.

2. Una scienza alla ricerca dei suoi archetipi

Già dalla fine del XVIII secolo, i percorsi seguiti dal diritto civile e dal diritto penale hanno portato i teorici di entrambi a presentare questi rami del sapere giuridico non più come teoria, ma soprattutto come scienza. Il processo, inizialmente stimolato dalle scuole illuministe, ha acquisito forza con l'avvento delle nuove scienze tipiche del XIX secolo, come l'antropologia e la sociologia. La scienza del diritto internazionale nel Brasile del secolo XIX ha seguito percorsi diversi, molto più tortuosi di quelli percorsi dalle sue sorelle. Da quando in Brasile sono sorti i primi testi sul diritto delle genti, subito dopo il 1822 – anno d'indipendenza dal Portogallo –, e per molti decenni ancora, questo è rimasto un sapere eminentemente teorico, basato su dibattiti morali e filosofici, con una dimensione tecnica minima. Se da un lato è impossibile ignorare in alcuni ambienti già nel XVIII secolo la presenza di una ricerca della sua validazione come “scienza” dotata di carattere sistematico, dall'altro la lotta in Brasile per allontanarsi dalle costruzioni giusnaturalistiche – caratterizzate da discorsi su ideali astratti, eterni, immutabili e spesso religiosi – è stata spesso infruttuosa. Il pesante quadro teorico costituito da eruditi esercizi filosofici faceva sì che il diritto internazionale fosse spesso indicato come una conoscenza aristocratica, degno di elevate discussioni nei salotti filosofici,

ma privo della dimensione tecnico-scientifica che i nuovi tempi richiedevano.

Nei primi movimenti in cerca del riconoscimento come “scienza”, non solo in Brasile, le più svariate correnti dottrinali cercavano ossessivamente degli archetipi: giuristi da indicare come pionieri³, la cui opera fosse in grado di legittimare questo ramo del sapere giuridico anche come tecnico-scientifico⁴. Nasceva così, nel mezzo del movimento di una scienza che cercava il suo consolidamento⁵, una storiografia giuridica apologetica che mescolava postulati giusnaturalisti con frammenti di un evolucionismo naturale civilizzatore⁶ segnato dalle allora nuovissime sfumature antropologiche e sociologiche. Da questi venivano estratti elementi per comporre ogni nuovo personaggio, partecipi al mito dell’esistenza di “padri fondatori”⁷, le cui riflessioni – tra le prime a portare prospettive più tecniche, meno filosofiche e spoglie di carattere teologico⁸ – legittimavano l’esistenza di

³ Aoife O’Donoghue, *Bluntschli, C’est Moi? Storia giuridica internazionale e agiografia*, «Teoria giuridica transnazionale», 1, 2024, pp. 67-102. Vedi, inoltre, Claudia Storti, *Empirismo e scienza: il crocevia del diritto internazionale nella prima metà dell’Ottocento*, in *Constructing International Law. The Birth of a Discipline*, eds. Luigi Nuzzo, Miloš Vec, Frankfurt a. Main, Klostermann, 2012, pp. 51-145.

⁴ Luigi Nuzzo, Alberico Gentili “internazionalista” tra storia e storiografia, in *Ius Gentium, Ius Communicationis, Ius Belli. Alberico Gentili e gli orizzonti della Modernità*, a cura di Luigi Lacchè, Milano, Giuffrè, 2009, pp. 73-99; p. 77.

⁵ Claudia Storti, *Estados vs. Povos: Premissas e tentativas de construção de uma ciência do direito internacional na primeira metade do Século XIX*, «Revista de História e Ciências Sociais», 32, 2024, pp. 567-587.

⁶ Duncan Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, «Nordic Journal of International Law», 65, 1990, pp. 385-420; p. 390.

⁷ Sué González Hauck, *History of International Law*, in *Public International Law: A Multi-Perspective Approach*, edited by Sué González Hauck, Raffaella Kunz, Max Milas, New York, Routledge, 2024, pp. 3-21; p. 5.

⁸ Per quanto riguarda specificamente il ruolo di Gentili nel processo di “secolarizzazione” del diritto internazionale, cfr. Rafael Domingo Osle, Giovanni Minnucci, *Alberico Gentili and the Secularization of the Law of Nations*, in *Christianity and Global Law*, eds. Rafael Domingo Osle, John White Jr., Abingdon, Routledge, 2020, pp. 98-111; Karl-Heinz Ziegler, *Völkerrechtsgeschichte*, München, Beck, 1994, p. 148; Carlo Focarelli, *Introduzione storica al Diritto Internazionale*, Milano, Giuffrè, 2012, pp. 201 ss.; Aldo A. Cassi, *Dalla santità alla criminalità della guerra. Morfologie storico-giuridiche del ‘Bellum Iustum’*, in *Guerra Giusta? Le metamorfosi di un concetto antico*, a cura di Antonello Calore, Milano, Giuffrè, 2003, pp. 101-158, 145 ss.; e Giovanni Minnucci, *Da esule a civis angli. Alberico Gentili e la difficile condizione dello straniero: tra vicende personali e riflessioni dottrinali*, in *Soggettività contestate e diritto internazionale in età moderna*, a cura

una scienza del diritto internazionale. A questa strategia se ne aggiungeva una seconda, non meno significativa. La “paternità” doveva essere attribuita a giuristi nelle cui opere emergeva la difesa di un diritto internazionale umanitario, ancorato all’idea di pace⁹. Le scelte di Grozio¹⁰ e di Vitoria¹¹, così come quelle di Gentili, cercavano di consolidare un’immagine non solo lusinghiera per la nuova scienza, ma anche pragmatica¹², pacifista e civilizzata¹³, in accordo con gli ideali che caratterizzavano la fine del XIX secolo.

La ricerca di archetipi umanizzanti e pacifisti ha generato non poche polemiche tra i sostenitori dei vari nomi, dando vita a una corsa apologetica il cui spirito è stato ben colto da Luigi Lacchè¹⁴. L’immagine di un diritto internazionale guidato da questi valori era anche costante tra i movimenti che portarono alla fondazione dell’*Institut de Droit International*: i circoli

di Giuseppina De Giudici, Dante Fedele, Elisabetta Fiocchi Malaspina, «Historia et ius», 2023, pp. 13-33, <http://www.historiaetius.eu/uploads/5/9/4/8/5948821/de_giudici_ebook.pdf>.

⁹ González Hauck, *History of International Law*, cit., p. 6.

¹⁰ Randall Lesaffer, *The Grotian Tradition Revisited: Change and Continuity in the History of International Law*, «British Yearbook of International Law», 73, 2002, pp. 103-140; Martijn J. van Ittersum, *Hugo Grotius: The Making of a Founding Father of International Law*, in *The Oxford Handbook of the Theory of International Law*, eds. Anne Orford, Florian Hoffmann, Oxford, Oxford University Press, 2016, pp. 82-100.

¹¹ James Brown Scott, *The Spanish Origins of International Law: Francisco de Vitoria and His Law of Nations*, Oxford, Clarendon Press, 1934; Paolo Amorosa, *Rewriting the History of the Law of Nations. How James Brown Scott Made Francisco de Vitoria the Founder of International Law*, Oxford, Oxford University Press, 2025.

¹² Storti, *Early Italian Scholars of ‘ius gentium’*, in *A History of International Law in Italy*, ed. by Giulio Bartolini, Oxford, Oxford University Press, 2020, pp. 19-47; pp. 40 ss.

¹³ Inizialmente i dibattiti dottrinali si svolgevano nel mezzo di secolari polemiche sulla paternità del diritto della guerra, con protagonisti i difensori di Grotius, Vitoria e Suárez. Tuttavia, essi divennero ancora più intensi quando tra Italia e Inghilterra iniziarono tentativi più sistematici di inserire Gentili. Cfr. a questo proposito Aldo A. Cassi, *Lo ‘Ius in Bello’ nella dottrina giusinternazionalista moderna. Annotazioni di metodo e itinerari d’indagine*, «Quaderni Fiorentini per la storia del pensiero giuridico moderno», 38, 2009, pp. 1141-1168.

¹⁴ Luigi Lacchè, *Monuments of International Law: Albericus Gentilis and Hugo Grotius in Constructing a Discipline (1875-1886)*, in *Constructing International Law*, cit., pp. 147-208; p. 147; inoltre, Édouard Rolin, *La statue de Grotius, a Delft*, «Revue de Droit International et Législation Comparée», 18, 1886, pp. 502-505.

intellettuali attorno a Pasquale Stanislao Mancini, François Laurent, Gustave Moynier, Johann Kaspar Bluntschli, John Westlake e Tobias Asser cercavano non solo di rendere il diritto internazionale una scienza, ma anche di indicare modelli che lo nobilitassero. La retorica intorno a Gentili e Grozio, che proiettava immagini di paladini della pace, era funzionale a questa proposta.

La giovane scienza già nei suoi primi anni ha vissuto le conseguenze più estreme della corsa agli archetipi. Per i “padri fondatori” di questo campo del sapere rinnovato da nuovi metodi e principi, nella seconda metà del XIX secolo sono sorti dibattiti che hanno portato alla costruzione di monumenti a Delft, in Olanda, e a San Ginesio, in Italia. In una rara convergenza, il romanticismo nazionalista e l’apologia internazionalista hanno trasformato le piazze principali delle città dove sono nati Grozio e Gentili in templi a cielo aperto¹⁵. Come afferma giustamente Luigi Lacchè,

international law became a “science” not only through the renewal of method, concepts, purposes but also through of re-reading, re-expression, to a certain extent through the invention of traditions, centred around precursors, founders and followers; cosmopolitanism, universalism and nationalism; pacifist aspirations and colonial animal spirits; in short a contradictory intertwining of reasons, representations and symbolic elements that must not be neglected¹⁶.

I monumenti dedicati ai due internazionalisti che si dichiaravano avidi lettori di Jean Bodin, riportavano sul piano simbolico l’esaltazione della Modernità in contrapposizione alle “tenebre medievali”. Non venivano installate immagini di santi o re incoronati dai papi, ma di giuristi che avevano ridisegnato l’universo politico a partire dai dibattiti sull’idea di sovranità nazionale. Nel campo simbolico, invece, gran parte delle correnti giusnaturaliste venivano ignorate, se non addirittura esorcizzate. La posizione di patroni della nuova scienza che ricadeva sugli au-

¹⁵ Anche Salamanca ha eretto un monumento a Vitoria, il terzo grande nome del triumvirato che è passato alla storia in molti autori come uno dei “padri fondatori” del diritto internazionale, ma si tratta di un omaggio tardivo di quasi un secolo rispetto agli altri.

¹⁶ Lacchè, *Monuments of International Law*, cit., p. 147.

tori del primo contrattualismo faceva presagire l'antipatia degli internazionalisti del XIX secolo nei confronti dei loro predecessori¹⁷. La proposta di Bodin diventava il punto di riferimento¹⁸. Gentili discuteva nel suo libro non solo il concetto di sovranità¹⁹, ma anche quello di trattato di pace e di amicizia²⁰ – fenomeno ripreso da Grozio²¹. La familiarità del giurista italiano con la logica e gli strumenti contrattuali, derivante dalla sua formazione di civilista e romanista, ebbe un ruolo fondamentale in questa rilettura di Bodin, con la conseguente trasposizione dei concetti nel diritto internazionale. Fu così che il consigliere giuridico di Elisabetta I seppe rendere funzionali nella sua riflessione due idee chiave del professore francese: contratto e sovranità. Ciò in un momento politico in cui la politica inglese richiedeva una teoria che si opponesse all'egemonia cattolica nel diritto internazionale, propria del giusnaturalismo che fondava l'idea di *Res publica Christiana*. La chiara separazione tra teologia e diritto emerge nel mezzo di questo movimento, rendendo Gentili uno

¹⁷ Alphonse Rivier, *Note sur la littérature du droit des gens avant la publication du 'ius belli ac pacis' de Grotius*, Bruxelles, Hayez, 1883, p. 44.

¹⁸ Sull'uso che Gentili fa di Bodin, e in particolare dei *Six livres de la République*, ci sono alcuni studi specifici: Alain Wijffels, *De la lecture à l'écriture: les notes de lecture d'Alberico Gentili et leur emploi dans la rédaction de son œuvre doctrinale*, in *L'Écriture et des juristes. XVI-XVIII siècle*, dir. Laurence Giavarini, Paris, Garnier, 2010, pp. 93-109; Id., *From Perugia to Oxford: Past and Present of Political Paradigms*, in *Alberico Gentili: la tradizione perugina e la fondazione del diritto internazionale*, a cura di Ferdinando Treggiani, Perugia, Università degli Studi di Perugia, 2010, pp. 59-78; Diego Quaglioni, *The Italian 'Readers' of Bodin, 17th-18th Centuries: The Italian 'Readers' out of Italy - Alberico Gentili (1552-1608)*, in *The Reception of Bodin*, ed. Howell A. Lloyd, Leiden-Boston, Brill, 2013, pp. 371-386.

¹⁹ Claude Vergerio, *War, States and International Order: Alberico Gentili and Foundational Myth of the Laws of War*, Cambridge, Cambridge University Press, 2022, p. 54.

²⁰ Claudia Storti, *Foedus, Amicitia e Societas: Alberico Gentili tra tradizione e innovazione*, in *Alberico Gentili (San Ginesio 1552 - Londra 1608). Atti dei Convegni nel Quarto Centenario della Morte*, Milano, Giuffrè, 2010, vol. 2, pp. 335-376 e l'opera di Valentina Vadi, *War and Peace. Alberico Gentili and the Early Modern Law of Nations*, Boston, Brill, 2010.

²¹ Hugo Grotius, *De Iure Belli ac Pacis libri tres*, Parisiis, Nicolavm Bvon, 1625. L'opera è stata pubblicata in Brasile, in lingua portoghese, nella «Coleção Clássicos do Direito Internacional»: Hugo Grotius, *O Direito da Guerra e da Paz*, 2 voll., Ijuí, Unijuí, 2004.

dei pochi autori precedenti a Grozio considerati dagli internazionalisti del XIX secolo alla pari di quest'ultimo²².

Il posizionamento di entrambi nel circolo della "paternità" del diritto internazionale non è sempre stato oggetto di consenso nella dottrina. Italiani e inglesi, mossi da evidenti stimoli patriottici, davano la precedenza al consigliere di Elisabetta I²³. La revisione della letteratura che contrapponeva l'uno all'altro iniziò nel 1788, con Giovanni Lampredi che prese una direzione contrastante con quella che allora era l'opinione comune, emblematica nelle opere di Dietrich Ompteda²⁴, del 1785, e di Robert Ward²⁵, del 1795. Questi due ultimi autori indicavano il giurista italiano come un semplice precursore dell'olandese. Lampredi affermava senza mezzi termini che Gentili sarebbe

²² «Quelle que soit la valeur d'Ayala et de Belli, on ne peut les mettre, ni comme juristes ni comme auteurs, au même rang que le savant Albéric Gentil», in Rivier, *Note sur la littérature du droit des gens*, cit., p. 44, e Diego Panizza, *Introdução*, in Gentili, *O direito da guerra*, cit., pp. 15-45.

²³ Sul ruolo della dottrina inglese in questo recupero, vedi Giovanni Minnucci, *Gentili, On the Law of War*, in *Formation and Transmission of Western Legal Culture. 150 Books That Made the Law in the Age of Printing*, ed. Serge Dauchy et al., Cham, Springer, 2016, pp. 149-152: p. 150.

²⁴ Nel capitolo dedicato alla storia del diritto internazionale, dopo aver analizzato le opere di Johann Oldendorp (1486-1567), Fernando Vázquez de Menchaca (1512-1569) e Francisco Suárez (1548-1617), Ompteda ha esaltato Gentili affermando che questi era stato il più importante tra i precursori di Grotius: «Diesem nicht ganz unahnliche Gedanken hegte der mit Suarez zu gleicher Zeit lebende Albericus Gentilis (geb. 1551. + 1611.) ein geborner Italiener, der aber der Religion wegen sein Vaterland verließ, und nach Engelland gieng, wo er lange Jahre lebte, und als Professor iuris zu Oxford starb. Dieser ist der erste Gelehrte, der sich einige wahre Verdienste um die Völkerrechtswissenschaft erworben hat. Er schrieb, so viel in diese Wissenschaft einschlägt, *de iure maris*, *de iure belli* und *de legationibus*; und hat besonders die Materie vom Rechte des Kriegs und vom Gesandtschaftsrechte zu allererst auf eine der Sache ziemlich angemessene Art ausgeführt. Denn wenn gleich, was insbesondere das Recht des Krieges angehet, verschiedene andere, theils Theologen, theils Juristen, welche auch Grotius a) nennet, 3. E. Franciscus Victoria b), Heinrich von Gorcum c), Wilhelm Matthaei d), Johannes Carthagenae e), Johannes Lupus f), Franciscus Arias g), Johannes von Lignano b), Martin Garati), ms besondere aber Balthasar Ajala k) von eben derselben Materie schon vorhin geschrieben hatten, so war doch Gentilis zuerst der, der solche als einen Gegenstand des Völkerrechts abhandelte». In Dietrich H. L. Ompteda, *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts*, vol. 1, Regensburg, Erben, 1785, pp. 168-169.

²⁵ Robert Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe from the Time of the Greeks and Romans to the Age of Grotius*, London, Strahan & Woodfahl, 1795, vol. 2, p. 366.

stato il maestro di Grozio, il quale «scrivendo con maggiore eleganza e adornando il suo Trattato con raffinata e peregrina erudizione, fece quasi dimenticare il suo Maestro, di cui tuttavia seguì quasi totalmente il progetto»²⁶. Mezzo secolo dopo, una volta consumata l'unificazione dello Stato italiano, furono Pasquale Stanislao Mancini²⁷, Federigo Sclopis²⁸ e Augusto Pierantoni²⁹, Giuseppe Speranza³⁰ e, ancora, Ermelinda Armigero Gazzera³¹, a tessere lunghi panegirici a Gentili, identificandolo come uguale o superiore a Grozio³².

In questo periodo furono assunte diverse posizioni intermedie, privilegiando il contrattualismo ascendente secondo le linee di Gentili a scapito degli autori del giusnaturalismo divino. Nel corso del XIX secolo il giurista italiano fu elevato al rango di principale portavoce dell'olandese. Fu così che, nel tentativo di presentare un'analisi critica della storia del diritto internazionale³³, nel 1847 Carl von Kautenborn lo indicò come «la base di-

²⁶ Giovanni M. Lampredi, *Del commercio dei popoli neutrali in tempo di guerra*, Firenze, s.e., 1788, p. 6.

²⁷ Mancini cita Gentili più volte nei suoi scritti, ma lo eleva al rango di fondatore del diritto internazionale, insieme a Pietro Belli e Grotius, in particolare nella lezione *La vita dei popoli dell'umanità* del 1872, contenuta in Pasquale Stanislao Mancini, *Diritto internazionale. Prelezioni con un saggio sul Machiavelli*, Napoli, G. Margheri, 1873, pp. 163-220.

²⁸ Federigo Sclopis, *Storia della legislazione italiana*, Torino, Unione tipografico-editrice, 1863, vol. 2, pp. 594 ss.

²⁹ Augusto Pierantoni, *Storia degli studi di diritto internazionale*, Modena, Vincenzi, 1869, p. 20. Causa perplessità, d'altra parte, il fatto che Gentili sia stato citato una sola volta in un altro classico del diritto internazionale italiano della seconda metà del XIX secolo, solo per riportare il suo concetto di guerra: Ludovico Casanova, *Del Diritto Internazionale*, III ed., Firenze, Cammelli, 1876, vol. 2, p. 140.

³⁰ Giuseppe Speranza, *Alberico Gentili. Studi*, Roma, Pallotta, 1876.

³¹ Ermelinda Armigero Gazzera, *Alberico Gentili. Bibliografia*, Tolentino, Fidelfo, 1917.

³² Questa operazione di recupero e manipolazione della memoria era funzionale ai movimenti nazionalisti derivati dal romanticismo che permeavano il Risorgimento. Essa cercava, soprattutto, il consolidamento del Regno d'Italia come entità frutto di un processo culturale autonomo e indipendente, dotato di scuole di pensiero proprie nei vari ambiti del sapere. Alimentavano quindi un altro dei miti che circondavano il neo-unificato Stato peninsulare, rafforzando la lotta per l'affermazione della sua indipendenza non solo nei confronti delle potenze straniere, ma anche rispetto alle influenze del cattolicesimo romano, come forma per stimolare il patriottismo e l'anticlericalismo.

³³ Luigi Nuzzo, *Origini di una Scienza. Diritto Internazionale e colonialismo nel XIX secolo*, Frankfurt a. Main, Klostermann, 2012, p. 44.

retta di Grozio»³⁴. A tal fine, venivano sottolineate diverse coincidenze nelle opere di entrambi, mentre nel suo testo del 1848 lo dichiarava «vero precursore»³⁵ del giurista olandese e «il primo autore importante del diritto internazionale moderno»³⁶. In modi diversi, anche Martens³⁷, Klüber³⁸ e Wheaton³⁹ dedicarono alcuni paragrafi a Gentili. Sempre in modo superficiale e concentrando le loro analisi su Grozio, presentavano il giurista italiano come inferiore, la cui riflessione sarebbe stata perfezionata dall'olandese. Wheaton, in particolare, ha affrontato l'argomento con maggiore competenza rispetto agli altri, affermando che «Grotius acknowledges his obligations to Gentili»⁴⁰. Anche se la frase sopra riportata è una riproduzione di quella pronunciata alcuni anni prima da Henry Hallam⁴¹, il diplomatico statuniten-

³⁴ «Wir nennen diesen Schriftsteller noch vor Grotius, weil wir, in Uebereinstimmung mit Wheaton und Lampredi, ihn für die unmittelbare Grundlage des Grotius halten. Dies zeigen die ganz ähnlichen Ideen und Meinungen beider; dies beweist noch ganz besonders die formelle Uebereinstimmung seines Werkes *De jure belli* mit dem des Grotius *De jure belli ac pacis*, besonders schon in den Kapiteltiteln des ersten und dritten Buches, vorzugsweise aber, wie wir bemerkt zu haben glauben, auch aus der grossen Uebereinstimmung der Planlegung und Begründung ihrer Werke hier in den prolegomena, bei Gentilis im ersten Kapitel des ersten Buches. Uebrigens gesteht Grotius die Benutzung des Gentilis einigermaassen selbst ein. Es sind nun die Details des Gentilis in neuerer Zeit fast gar nicht berücksichtigt», in Carl von Kaltenborn, *Kritik des Völkerrechts nach dem jetzigen Standpunkte der Wissenschaft*, Leipzig, Mayer, 1847, p. 34.

³⁵ «Albericus Gentilis ist nur von Interesse aus dem Gesichtspunkte des internationalen Rechts, aber in Bezug hierauf von grosser Bedeutung und als der eigentliche völkerrechtliche Vorläufer des Grotius zu betrachten», in Id., *Zur Geschichte des Natur- und Völkerrechts sowie der Politik*, Leipzig, Meyer, 1848, p. 201.

³⁶ «Er ist der erste wichtigere Autor des modernen Völkerrechts», ivi, p. 228.

³⁷ «Les faibles essais que firent au 16 Siècle Oldendorp c), Hemming d) et autres, les progrès plus marques même d'Albericus Gentilis e) n'ont pu enlever à Hugue Grotius f) le nom glorieux et mérité de père de là science du droit naturel, et du droit des nations», in George F. von Martens, *Précis du droit des gens moderne de l'Europe, fondé sur les traités et l'usage*, Gottingen, Dieterich, 1821, p. 19.

³⁸ «Il parut, en effet, quelques livres imprimés traitant du droit des gens; mais les uns partirent de fausses prémisses et maximes [...] d'autres ne développèrent pas assez les idées justes qu'ils avaient conçues, tels que Albericus Gentilis (1598)», in Johann L. Klüber, *Droit des gens moderne de l'Europe*, Stuttgart, Cotta, 1819, p. 29.

³⁹ Henry Wheaton, *History of the Law of Nations in Europe and America*, New York, Gould Banks, 1845, pp. 50-54.

⁴⁰ Ivi, p. 51.

⁴¹ «A more remarkable work by Albericus Gentilis is his treatise, *De Jure Belli*, first published at Lyons, 1589. Grotius acknowledges his obligations to Gentilis, as

se ha dimostrato di conoscere la letteratura che attribuiva all'italiano la paternità del diritto internazionale⁴². La dottrina francese seguì la stessa direzione, con Laurent-Basile Hautefeuille⁴³ e Eugène Cauchy⁴⁴. Entrambi fecero austere menzioni al tema esaltando Gentili, ma mantenendolo sempre in una posizione secondaria rispetto a Grozio.

La dottrina belga, dal canto suo, fu un po' più generosa nel soffermarsi sulla posizione del giurista italiano nella nuova scienza. In questo spirito, Gustave Rolin-Jaequemyns gli dedicò due articoli nella «Revue de Droit International et Législation Comparée». Nel primo, elencava coloro che lo avevano già riconosciuto come "glorioso" precursore dell'olandese⁴⁵, mentre nel secondo, interpretando in modo più audace lo spirito dell'*Institut* che avrebbe contribuito a fondare, affermava che «Gentil et Grotius ne sont pas et ne doivent pas être deux gloires jalouses l'une de l'autre; ce sont deux étoiles, douées chacune d'une lumière qui lui est propre ou plutôt qu'elle emprunte à un

well as to Ayala, but in greater degree to the former. And that this comparatively obscure writer was of some use to the eminent founder, as he has been deemed, of international jurisprudence, were it only for mapping his subject, will be evident from the titles of his chapters, which run almost parallel to those of the first and third books of Grotius», in Henry Hallam, *Introduction to the literature of Europe, in the fifteenth, sixteenth and seventeenth centuries*, London, Murray, 1843, vol. 2, p. 81.

⁴² Lampredi, *Del commercio dei popoli neutrali in tempo di guerra*, cit., p. 6.

⁴³ «Le traité de Gentilis serait encore regardé comme un chef-d'œuvre de l'esprit humain, s'il n'avait donné naissance au traité du droit de la guerre et de la paix de Grotius», in Laurent-Basile Hautefeuille, *Histoire des origines, des progrès et des variations du Droit Maritime*, Paris, Guillaumin, 1858, p. 268.

⁴⁴ «Gentilis commence à tracer le cadre de la science du droit des gens. L'éclat dont brille celui de Grotius ne doit pas nous rendre injuste envers son précurseur et son émule dans la composition laborieuse de la théorie du droit des gens. Sous la plume érudite de Gentilis, cette science avait commencé à se transformer. D'une part, elle s'était étendue et élargie; d'autre part, elle s'était dégagée de son mélange avec des sciences étrangères, pour s'asseoir définitivement sur son propre terrain. En ce qui concerne l'ordre des chapitres et la distribution des matières, le cadre tracé par Gentilis dans son traité *De jure belli*, est satisfaisant et logique», in Eugène F. Cauchy, *Le droit maritime international considéré dans ses origines et dans ses rapports avec les progrès de la civilisation*, Paris, Guillaumin, 1862, vol. 2, p. 33.

⁴⁵ «[...] Tiraboschi, Lampredi, Carmignani, Mackintosh, plus récemment Romagnosi, Sclopis, Cantù et nombre d'autres auteurs signalent Gentil comme un glorieux précurseur de Grotius», in Gustave Rolin-Jaequemyns, *Albéric Gentil. Hommages à sa mémoire*, «Revue de droit international et de législation comparée», 8, 1876, p. 141.

foyer commun, celui de l'éternelle justice et de l'éternelle vérité»⁴⁶. Per Alphonse Rivier, «sans doute, Grotius doit beaucoup à Gentil»⁴⁷, mentre fu Ernest Nys a dare maggiore enfasi all'autore italiano. Senza troppi giri di parole, affermava che, anche se mancava di chiarezza e precisione⁴⁸, sarebbe stato comunque superiore a Belli⁴⁹, avendo i suoi scritti segnato la storia, anche se in generale «inférieur à Grotius, comme largeur de vues, il lui est supérieur en un point, c'est qu'il examine avec soin les faits qui se produisent dans le domaine de la politique»⁵⁰. La posizione conclusiva di Nys è positiva, considerando Gentili l'autore più importante della sua epoca, anche se «[...] a été diversement apprécié; louanges et critiques ont été également exagérées, et il convient de dire que si le livre de l'illustre professeur d'Oxford n'est pas précisément un chef-d'oeuvre, c'est du moins le premier travail systématique sérieux qui ait paru»⁵¹.

Nel mondo britannico, James Reddie⁵² e James Mackintosh esaltavano il genio di Gentili e ribadivano la sua posizione privilegiata tra i «padri fondatori», ma fu soprattutto con Thomas Holland che il movimento raggiunse il suo apice. Spesso associato alle iniziative dei suoi colleghi italiani, il professore di Oxford rilanciò con vigore, attraverso una conferenza tenuta nel 1874 nella più antica università inglese, l'idea della primazia di Gentili. L'esclusiva paternità di Grozio veniva quindi contestata da un'importante tribuna. Anche se nell'introduzione riconosceva la difficoltà di trovare informazioni precise sull'argomento, la conferenza svelava nel suo sviluppo la proposta di parlare «of one, indeed, who has some claim to dispute with Grotius him-

⁴⁶ Id., *Quelques mots sur les hommages projetés à la mémoire de Grotius et d'Albéric Gentil, et sur les dernières publications y relatives*, «Revue de droit international et de législation comparée», 8, 1876, p. 696.

⁴⁷ Rivier, *Note sur la littérature du droit des gens*, cit., p. 46.

⁴⁸ Ernest Nys, *Les origines du droit international*, Bruxelles, Castaigne, 1894, p. 11.

⁴⁹ Ivi, p. 177.

⁵⁰ Ivi, p. 132.

⁵¹ Ivi, p. 350.

⁵² James Reddie, *Researches, Historical and Critical, in Maritime International Law*, Edinburgh, Clark, 1844, vol. 1, pp. 95 ss.

self the title of ‘the father of International Law’»⁵³. Nella conclusione, essendo molto più cauto e moderato, affermava

I am by no means concerned to place Gentilis on a level with his undeniably greater follower; or to say that his writings do not exhibit, in some degree, the faults with which they have been charged. My object has been merely to call attention to a too much forgotten reputation; and to remind you that the first step towards making International Law what it is, was taken, not by Grotius, but by the Perugian refugee, the adopted son of Oxford, Albericus Gentilis⁵⁴.

La conferenza definì con precisione il nuovo “posto” che Gentili avrebbe occupato nella storia del diritto internazionale, che, con diverse sfumature, si stava consolidando anche nelle dottrine italiana, belga e tedesca. Ecco perché Paulo Emílio Borges de Macedo ha ragione quando afferma che, nella conclusione della lezione tenuta a Oxford nel 1874, Holland «retira, em definitivo, Grócio de seu pedestal e apresenta Alberico Gentili como o verdadeiro criador do direito internacional. O jurista de Delft teria sido apenas o seu discípulo mais importante e, certamente, o mais conhecido»⁵⁵.

L’accesa disputa per il podio della paternità non si esaurì così presto. Continuò accesa, protrahendosi per gran parte del XX secolo, con un’importante differenza: la latente corrosione del mito sull’esclusività di Grozio in questa posizione. Emblematici di questo movimento sono i lavori di Maurice Bourquin, che attribuiva la paternità a un ampio gruppo di pensatori⁵⁶,

⁵³ Thomas E. Holland, *An Inaugural Lecture on Albericus Gentilis*, London, MacMillan, 1874, p. 2.

⁵⁴ Ivi, p. 35. Per un’analisi approfondita degli argomenti utilizzati da Holland nella sua conferenza, cfr. Peter Haggemacher, *Grotius and Gentili: A Reassessment of Thomas E. Holland’s Inaugural Lecture*, in *Hugo Grotius and International Relations*, eds. Hedley Bull, Benedict Kingsbury, Adam Roberts, Oxford, Clarendon Press, 1999, pp. 133-176.

⁵⁵ Paulo Emílio Vauthier Borges de Macedo, *Modernità e medievalismo in Grozio: Il discorso sul metodo*, «Quaestio iuris», 2, 2014, p. 1012.

⁵⁶ «Le père du droit des gens, c’est une société en nom collectif, si j’ose ainsi m’exprimer; c’est une série de penseurs et de juristes, dont les uns ont précédé Grotius, dont les autres ont élargi et développé son œuvre, au cours du XVII^e et du XVIII^e siècles»: Maurice Bourquin, *Grotius est-il le père du droit des gens? (1583-1645)*, in *Grandes figures et grandes œuvres juridiques*, Genève, Georg, 1948, pp. 77-95 : p. 94.

di Rolando Quadri, che dissolse il dibattito in un universo più ampio inserendo Gentili «tra i primi rappresentanti della scuola inglese»⁵⁷, e di Truyol y Serra, che indicava il giurista italiano come «el más importante de los internacionalistas no españoles anteriores a Grocio»⁵⁸.

È stato grazie a questa operazione che il giurista italiano, con un austero risalto nei tentativi di ricostruzione storica elaborati per la disciplina fino al XVIII secolo, ha subito un cambiamento significativo nella sua posizione: «tra le pagine dei trattati di diritto internazionale e sin dall'immediato dopoguerra la sua presenza ha costituito una costante nei lavori che soprattutto la dottrina giuridica tedesca ebbe il merito di dedicare alla storia del diritto internazionale»⁵⁹. In diversi ambienti il suo nome è stato quindi spesso identificato come il principale predecessore di Grozio⁶⁰ o addirittura tolto dall'oscura posizione di precursore⁶¹, ed elevato a componente del triumvirato, insieme al giurista di Delft e al teologo di Salamanca⁶².

3. *Gentili in terre brasiliane*

Per molti decenni la scienza del diritto internazionale in Brasile ha avuto l'abitudine di aprire i suoi manuali e trattati con generosi capitoli storici organizzati su lunghi elenchi di nomi di

⁵⁷ Rolando Quadri, *Le fondement du caractère obligatoire du droit international public*, «Recueil des cours de l'Académie de droit international de La Haye», 1, 1952, pp. 580-633: p. 609.

⁵⁸ Antonio Truyol y Serra, *Fundamentos de Derecho Internacional Publico*, III ed., Madrid, Tecnos, 1970, p. 181.

⁵⁹ Nuzzo, *Alberico Gentili "internazionalista" tra storia e storiografia*, cit., p. 75.

⁶⁰ Ziegler, *Völkerrechtsgeschichte*, cit., p. 167; Truyol y Serra, *Fundamentos de Derecho Internacional Publico*, cit., p. 181.

⁶¹ Nuzzo, *Alberico Gentili "internazionalista" tra storia e storiografia*, cit., p. 89. Il posto occupato da Gentili nelle opere di Grozio è oggetto di analisi anche da parte di Haggemacher, *Grotius and Gentili*, cit., p. 135; Aldo A. Cassi, *Alle origini del diritto internazionale: Alberico Gentili*, in *Il contributo italiano alla storia del pensiero, Appendice VIII: Diritto*, a cura di Paolo Cappellini, Pietro Costa, Maurizio Fioravanti e Bernardo Sordi, Roma, Istituto della Enciclopedia italiana, 2012, pp. 181 ss.

⁶² Truyol y Serra, *Fundamentos de Derecho Internacional Publico*, cit., p. 64.

autori e titoli delle loro opere. Nell'universo bibliografico che ha costituito l'oggetto di questa ricerca, sono stati rari i manuali che, come quelli di Manuel de Souza Sá Viana, Hildebrando Accioly, Nelson Ferreira da Luz o Celso Albuquerque de Mello, hanno superato questi limiti. Non meno importante è un'altra constatazione: pur necessitando di un esame più approfondito, in questi elenchi non mancano affermazioni categoriche sull'importanza di tali autori per il "progresso" e l'"evoluzione" della scienza. La conclusione a cui si giunge è che gran parte delle opere "classiche" citate con eleganza nei manuali e nei trattati non sono mai state aperte.

Nel corso degli anni, i primi inventari sono stati oggetto di infinite copie, da manuale a manuale, da trattato a trattato, ripetendosi con piccole modifiche nella redazione. Il fenomeno non è, tuttavia, esclusivo delle dottrine internazionaliste, ma ricorre anche nei testi di diritto civile e penale. Tra le più svariate conseguenze che presentano vi è il fatto che, dotati di un carattere "progressivo", hanno eliminato gran parte delle contraddizioni e delle rotture tra le idee e le correnti, forzando una falsa sensazione di continuità. Hanno quindi funzionato come catalizzatori volti a giustificare il quadro contemporaneo in una chiara dinamica evolutiva. Nella migliore delle ipotesi – quando hanno comportato una minima analisi – sono diventati strumenti di legittimazione di tutto ciò che l'autore intendeva esporre come diritto internazionale del suo tempo.

Per quanto riguarda Gentili, una parte significativa degli autori brasiliani si è avvalsa di tre testi stranieri, che sono serviti da base per ripetute affermazioni dalla fine del XIX secolo fino alla seconda metà del XX secolo. In primo luogo, vengono riportati commenti o addirittura traduzioni dirette dal francese del capitolo di Henri Nézard nella raccolta pubblicata da Antoine Pillet nel 1904⁶³. Senza avere accesso al testo originale in latino o alle traduzioni italiana⁶⁴ e inglese⁶⁵, le citazioni seguivano la

⁶³ Henri Nézard, *Albericus Gentilis*, in *Les fondateurs du Droit International*, dir. Antoine Pillet, Paris, Giard, 1904, pp. 78 ss.

⁶⁴ Alberico Gentili, *Del diritto di guerra*, trad. di Antonio Fiorini, Livorno, Vigo, 1877.

⁶⁵ Id., *Three Books on the Law of War*, transl. John C. Rolfe, Oxford, Clarendon

stessa logica a cui era stata sottoposta la grande maggioranza dei protagonisti stranieri della scienza del diritto internazionale le cui idee approdavano in quel primo periodo nel grande paese sudamericano, ovvero attraverso la lingua francese⁶⁶. In altre parole, Gentili arrivò per primo nell'Atlantico meridionale con un forte accento francesizzato.

La diffusione del manuale di Arrigo Cavaglieri⁶⁷ e dell'opera di Albert de La Pradelle⁶⁸, più di due decenni dopo, ha cambiato questo quadro, facendo sì che le citazioni avessero altre fonti. Ancora mezzo secolo dopo, i riferimenti nei testi di La Muela⁶⁹, di Nussbaum⁷⁰ e di Mateesco⁷¹ hanno contribuito a rendere più pluralistiche le menzioni. Questo quadro ci porta a alcune conclusioni: per oltre un secolo i giuristi brasiliani hanno riprodotto nei loro testi rappresentazioni di Gentili elaborate da autori stranieri, senza aver consultato le opere dell'autore nella lingua originale e con analisi molto rare delle stesse.

Alcuni aspetti positivi, tuttavia, non devono essere ignorati. Rompendo con la tradizione del XIX secolo⁷², in cui erano

Press, 1933 («Carnegie Classics of International Law», vol. 2).

⁶⁶ Il francese era considerato non solo la lingua colta e dei rapporti diplomatici, ma anche la lingua franca del mondo accademico: salvo rare eccezioni, le opere di giuristi tedeschi, austriaci, olandesi e italiani diventavano oggetto di analisi solo se scritte o tradotte nella lingua di Domat. I testi dei francesi, dei belgi e degli svizzeri che scrivevano e pubblicavano in questa lingua, di conseguenza, erano molto più presenti nelle dottrine brasiliane.

⁶⁷ Arrigo Cavaglieri, *Corso di diritto internazionale*, Napoli, Gennaro Maio, 1925, p. 27.

⁶⁸ Albert G. de la Pradelle, *Maîtres et doctrines du droit des gens*, Paris, Éditions Internationales, 1939, pp. 93-99.

⁶⁹ Adolfo Miaja de la Muela, *Introducción al Derecho Internacional Público*, Madrid, Atlas, 1953, pp. 281-284.

⁷⁰ Arthur Nussbaum, *Historia del Derecho Internacional*. Adiciones sobre Historia de la Doctrina Hispánica de Derecho Internacional por Luis García Arias, Madrid, Revista de Derecho Privado, 1949, pp. 80-90.

⁷¹ Nicolás Mateesco, *Vers un Nouveau Droit International de la Mer*, Paris, Pedone, 1950, pp. 63-64.

⁷² Tra questi, José Maria de Avellar Brotero, *Princípios de direito público universal. Análise de alguns parágrafos de Vatel*, São Paulo, Typographia do Governo, 1837; Pedro Autran da Matta e Albuquerque, *Elementos do Direito das Gentes*, Recife, União, 1851; José Antônio Pimenta Bueno, *Direito Publico Brasileiro e analyse da Constituição do Imperio*, Rio de Janeiro, Villeneuve, 1857; Antônio Pereira Pinto, *Apontamentos para o direito internacional ou Collecção completa dos tratados celebrados pelo Brasil com diferentes nações estrangeiras*, Rio de Janeiro,

comuni trattati che copiavano intere pagine senza citazioni⁷³, legittimando il plagio – come nel caso di Johann Ludwig Klüber⁷⁴, la cui opera è stata interamente tradotta e pubblicata in Brasile da Pedro Autran da Matta Albuquerque⁷⁵, che se ne è appropriato senza fare alcun riferimento a Klüber⁷⁶ –, gli autori del XX secolo hanno effettivamente iniziato a presentare le fonti utilizzate. Un altro aspetto positivo riguarda il fatto che, basando i loro inventari sulle opere degli autori stranieri sopra citati, hanno evitato diversi pregiudizi e distorsioni costruiti nei periodi precedenti.

Il manuale di Lafayette Rodrigues Pereira sembra essere stato il primo, nel 1902, a menzionare il giurista italiano. In una nota a piè di pagina, lo inserì tra «os mais notaveis predecessores de Grocio», per poi affermare che il «professor de Direito Civil em Oxford desde 1582, publicou em 1583 um opusculo acerca das legações (*De legationibus*), e em Leão, 1589, um tractado sobre o direito de guerra – *De jure belli*», che sarebbe stato «di qualche utilità per Grozio, come si può vedere confrontando le epigrafi dei capitoli di Gentili con quelle dei capitoli 1.1 e 3 del *De jure belli ac pacis*»⁷⁷. Sempre in una nota a piè di pagina, alcune centinaia di pagine dopo, il suo scritto principale viene

Pinto & C., 1864; Antônio de Vasconcellos Menezes de Drummond, *Preleções de Direito Internacional*, Recife, Correio do Recife, 1867.

⁷³ Il fatto che gran parte della cultura giuridica del XIX secolo fosse immersa in prospettive tipiche del diritto naturale faceva sì che i protagonisti della scienza del diritto dell'epoca credessero che tutto ciò che era stato scritto fino ad allora sul *ius* dal punto di vista teorico e dottrinale appartenesse a una sorta di “patrimonio universale”, senza la necessità di fare riferimenti precisi ad autori specifici, e tanto meno che si sollevasse l'ipotesi di appropriazioni indebite.

⁷⁴ Johann Ludwig Klüber, *Droit des Gens Moderne de l'Europe*, Stuttgart, Cotta, 1819.

⁷⁵ Pedro Autran da Matta e Albuquerque, *Elementos do Direito das Gentes*, Recife, Tipografia União, 1851.

⁷⁶ Airon Ribeiro da Silva Jr, Pedro Autran da Mata e Albuquerque: *O papel de mediação de um jurista periférico na difusão do Direito Internacional*, in *Direito Internacional no Brasil. Pensamento e Tradição*, vol. 1, eds. George Rodrigo Bandeira Galindo, Rio de Janeiro, Lumen Juris, 2021, pp. 59 ss.; Airon Ribeiro da Silva Jr, *Brazilian Literature on International Law during the Empire Regime. Or the Diffusion of International Law in the Peripheries through Appropriation and Adaptation*, «Revista de Direito Internacional», 15, 2018, pp. 49-66.

⁷⁷ Lafayette Rodrigues Pereira, *Princípios de Direito Internacional*, Rio de Janeiro, Jacinto Ribeiro dos Santos Editor, 1902, p. 48.

citato proprio quando trattava del suo contributo al diritto delle ambasciate⁷⁸, tema sviluppato da Claudia Storti⁷⁹ e da Dante Fedele in tutta una serie di pubblicazioni⁸⁰.

Manuel de Souza Sá Viana⁸¹, nell'opera pubblicata nel 1908, è più minuzioso. Inizia inserendo il giurista italiano tra gli altri cosiddetti «precursores de Grotius», che avrebbero fatto sentire «acção de suas poderosas pesquisas nos séculos XV, XVI e XVII», essendo a loro dovuta «o preparo dos espíritos senão dos próprios princípios da sciencia para o apparecimento e comprehensão das doutrinas do notável mestre hollandez»⁸². A quanto pare, anche in questo caso non sono stati consultati gli originali in latino, ma sono stati ripresi solo i commenti contenuti nel capitolo scritto da Nézard⁸³ e nella traduzione francese del libro di John Westlake⁸⁴. Da quest'ultimo è riportata la comparazione con Vitoria, il cui «assim pensando, estava perfeitamente dentro dos princípios de sua fé e da sua philosophia.

⁷⁸ Ivi, cit., p. 442.

⁷⁹ Claudia Storti, *L'officium legationis in età moderna*, in *Reti di relazione e cultura politica. Alberico e Scipione Gentili nell'Europa di ieri e di oggi*, Atti del Convegno, Giornata Gentiliana in occasione del IV centenario della morte di Scipione Gentili, a cura di Vincenzo Lavenia, Macerata, eum, 2018, pp. 129-152.

⁸⁰ Oltre all'analisi dell'opera di Gentili, Dante Fedele utilizza gli scritti del giurista della prima modernità per confrontare i presupposti del pensiero giuridico medievale sul diritto delle genti, diventando un riferimento cruciale per la comprensione di quest'ultimo. Il confronto è riportato in Dante Fedele, *The Medieval Foundations of International Law. Baldus de Ubaldis (1327-1400). Doctrine and Practice of the Ius Gentium*, Leiden-Boston, Brill, 2021, pp. 13 ss., emergendo anche nel corso dei capitoli che compongono l'opera collettanea *Avant l'État. Droit international et pluralisme politico-juridique en Europe. XIII^e -XVII^e siècle*, eds. Dante Fedele, Randall Lesaffer, Pierre Savy, Roma, Historia et Ius, 2024. Nelle sue principali opere sul tema delle ambasciate, Gentili emerge come uno dei protagonisti più rilevanti: Dante Fedele, *Naissance de la diplomatie moderne (XIII^e-XVII^e siècles). L'ambassadeur au croisement du droit, de l'éthique et de la politique*, Baden, Nomos, 2007, 846 pp., e, inoltre, Id., *Between Private and Public Law: The Contribution of Late Medieval ius commune to the Conceptualisation of Diplomatic Representation*, «Clio@Themis. Revue électronique d'histoire du droit», 18, 2020, pp. 10 ss.; Id., *Indemnities in Diplomacy*, in *Encyclopedia of Diplomacy*, ed. Gordon Martel, Hoboken, Wiley- Blackwell, 2018, vol. II, pp. 889 ss.

⁸¹ Manuel Alvaro de Souza Sá Vianna, *Elementos de Direito Internacional*, vol. 1, Rio de Janeiro, Jornal do Commercio, 1908.

⁸² Ivi, p. 11.

⁸³ Nézard, *Albericus Gentilis*, cit., pp. 78 ss.

⁸⁴ John Westlake, *Études sur les principes du Droit International*, traduit de l'anglais par Ernest Nys, Bruxelles, A. Castaigne, 1895, p. 38.

Alberico Gentil, protestante, não estava nas mesmas condições e lançou novas idéas de modo que hoje é considerado como o fundador da Escola Positiva»⁸⁵. Se da un lato la presentazione lo fa apparire come una sorta di precursore di quello che sarebbe diventato il pensiero groziano, dall'altro gli viene attribuita la fondazione della «Escola Positiva», che avrebbe trovato «em J. Moser o que a Escola Philosophica teve em Puffendorf – o máximo exagero e, pela ordem natural das cousas, começou a ser modificada intelligentemente, sendo certo que prestou ao Direito Internacional esse real serviço»⁸⁶. Fondando questa scuola, Gentili avrebbe fornito «como factores importantes d'esta sciencia os usos, costumes e convenções»⁸⁷. Per spiegare cosa sarebbe la «escola positiva», Sá Viana si è basato sugli scritti di Andrés Bello⁸⁸, dividendo il diritto internazionale in due aspetti, il primo comprendente il «'Direito Internacional theoricico, natural ou racional', os principios geraes e absolutos que decorrem da razão, que são condição de existência da propria nação e no qual assentam todos os direitos essenciaes do Estado»⁸⁹; e, il secondo, il «'Direito Internacional positivo', que não pode deixar de inspirar-se naquelle, as regras que os Estados crêam voluntariamente em suas relações e que variam entre elles e são modificadas através dos tempos, segundo as necessidades o exigem»⁹⁰. L'incorporazione nel testo di questa divisione e la posizione di Gentili come fondatore della cosiddetta «escola» dimostrano che il giurista brasiliano aveva ben chiaro il ruolo svolto dall'umanista italiano nel processo di secolarizzazione del diritto e nell'inserimento dei primi elementi del contrattualismo nel *ius gentium*.

Nel capitolo dedicato all'origine e all'evoluzione del diritto internazionale, dopo un'analisi piuttosto approfondita dello *ius*

⁸⁵ Sá Vianna, *Elementos de Direito Internacional*, cit., p. 15.

⁸⁶ Ivi, p. 52.

⁸⁷ *Ibidem*.

⁸⁸ Bello, dal canto suo, delinea questi concetti basandosi sugli scritti di Vattel e von Martens. Cfr. Andrés Bello, *Principios de Derecho Internacional*, Lima, Morno e cia., 1844, pp. 19-20.

⁸⁹ Sá Vianna, *Elementos de Direito Internacional*, cit., p. 82.

⁹⁰ Ivi, p. 82.

gentium e dello *ius fetiale* nel diritto romano, Sá Vianna⁹¹ fa un salto diretto al Rinascimento. Sono quasi settanta le pagine dedicate all'esame delle istituzioni romane prima di entrare nel Medioevo – quando l'autore cerca di tracciare una storia politica dell'Europa occidentale, allontanandosi dall'esame dei fenomeni giuridici del periodo –, per poi arrivare ai postulati della scuola di Salamanca⁹², così come all'opera di Gentili. Vengono riprodotti lunghi paragrafi in latino dei giuristi dell'antica Roma, mentre sono scarsi i riferimenti ai medievali e al consigliere di Elisabetta I. Questi riferimenti rendono evidente la padronanza dell'autore della lingua latina “classica”, generando una certa perplessità: è possibile che Gaio, Plutarco, Ulpiano, Tito Livio, Ermogeniano, Paolo e Pomponio siano stati letti negli originali, ma, come sopra menzionato, l'opera di Gentili, scritta in un latino rinascimentale complesso, non è stata nemmeno consultata. L'accesso deve quindi essere avvenuto ancora una volta tramite Nézard⁹³, citato in una nota a piè di pagina⁹⁴. In essa, Sá Viana sottolinea che il «professor na Universidade de Oxford escreveu considerável numero de obras» e che «a variedade dos assumptos tratados exprime perfeitamente a grande capacidade do espirito do escriptor e a variedade dos seus conhecimentos. Seus estudos sobre a formação e fundamento do Direito Internacional, aos quaes já nos referimos, são interessantes»⁹⁵. Definendolo «filósofo» e riprendendo l'affermazione secondo cui sarebbe stato lui a fondare la «escola positiva», affermò che il giurista italiano

rompeu com todas as concepções a respeito do fundamento d'esta sciencia e lançou claramente os princípios da Escola Positiva, desenvolvendo depois por Moser e Rachel. Definindo a guerra – *bellum est publicorum armorum justa contentio*, reconheceo n'ella tres caracteres: *lucta pelas armas*, única que seria possível entre os Estados; *lucta publica*, por occorrer

⁹¹ Ivi, pp. 143 ss.

⁹² Sono citati i principali postulati teorici di Francisco de Vitoria, Domingo de Soto, Francisco Suárez e Balthazar de Ayala, in quest'ordine. Cfr. ivi, p. 223.

⁹³ Nézard, *Albericus Gentilis*, cit., p. 78 ss.

⁹⁴ Sá Vianna, *Elementos de Direito Internacional*, cit., p. 230, nota.

⁹⁵ Ivi, p. 228.

entre soberanos, e assim não reconhecia as de ordem privada tão comuns na idade media e lucta justa, feita segundo o Direito das contendoras⁹⁶.

A lui viene quindi attribuito il ruolo di fondatore di un nuovo modo di affrontare il diritto internazionale, che per sua natura sarebbe “positivo”. È un aggettivo che incontra l’idea di *ius positivum* in opposizione al diritto naturale: un diritto espressamente posto da fatti creativi esterni a quelli preordinati⁹⁷.

Nel capitolo sul diritto di legazione, Gentili viene nuovamente citato. Questa volta, tuttavia, la motivazione sembra provenire dagli scritti a Wheaton⁹⁸. Affermando che «a questão dos privilégios dos embaixadores, embora discutida desde longos annos, occupou os governos e mereceu estudo dos competentes», viene riportato come esempio il caso riguardante le violazioni del divieto di intervenire in questioni di politica interna perpetrate dall’allora ambasciatore spagnolo presso la corona inglese, Bernardino de Mendoza, sul quale il giurista italiano fu consultato, informato che «o embaixador, ainda em flagrante delicto de conspiração contra o paiz junto do qual elle estiver

⁹⁶ In una nota l’autore prosegue la sua presentazione affermando che «A justiça de uma guerra segundo elle depende da causa que a determina, e não considera justas as que se originam na differença das religiões nem as que são feitas contra infieis e heréticos, mas considerando que, qualquer que seja a religião, ella é sempre util, entendeu que é justificável a guerra feita aos que vivem a maneira dos animaes, irreligiosamente, para que sejam obrigados a se aproximar da comunidade social e possam gosar da protecção do Direito. Considerou que a negação dos direitos de navegação e commercio, emfim do intercurso constitue um attentado á sociedade e é justo motivo de guerra, bem assim a violação de um direito garantido pela lei humana, quando é obra dos principes ou dos povos e não de simples particulares, salvo si os attentados contra esse direito são contínuos e deixam de ser reprimidos pelo Estado. O acto de declaração de guerra é essencial e deve ser seguido de um praso, findo o qual começarão as hostilidades. Admittio os artificios e estratagemas, mas excluio a perfidia e o embuste nas combinações, o uso dos venenos e animaes ferozes, o assassinato e a espionagem. Discorreu, longamente, sobre muitos outros pontos relativos a guerra e tratou das embaixadas, sendo impossível acompanhah-o com a minúcia que aliás merece», ivi, pp. 228 ss.

⁹⁷ Roberto Ago, *Diritto positivo e diritto internazionale*, in *Scritti di Diritto Internazionale in onore di Tomaso Perassi*, Milano, Giuffrè, 1957, vol. 1, pp. 1-64 : p. 5; Id., *Science Juridique et Droit International*, «Recueil des cours de l’Académie de La Haye», 90, 1956, pp. 861 ss. I primi abbozzi di questo concetto si possono trovare già in Francisco Suárez, *Tractatus de legibus ac Deo Legislatore*, Londini, Dunmore, 1679, p. 11 [1612].

⁹⁸ Wheaton, *Éléments du droit international*, cit., p. 286.

acreditado, não pôde ser condemnado á morte, mas deve ser levado ao Estado a que pertence para ser ahi punido como merecer»⁹⁹.

Due decenni dopo, Raul Pederneiras, nel suo manuale del 1931, citava Gentili nel suo libro¹⁰⁰ inserendolo in una nuova nomenclatura. Ora non più semplice precursore di Grozio, ma annoverato tra i «Decemviro do direito internacional» e «adepto da escola histórica», che avrebbe cercato, nella sua opera principale, di «emancipar a doutrina da teologia, considerando o Direito Internacional o direito da comunidade dos Estados, obra da grande republica da humanidade»¹⁰¹. Le informazioni fornite sono ben fondate e riportano che la dottrina si basava soprattutto sulla «cooperação das nações, unidas numa comunidade universal, regidas pela razão e pelos princípios convencionaes que a prática aconselhasse». Apparentemente potrebbe essere stata la sensibilità storiografica di Pederneiras, che ha ricoperto il ruolo di professore supplente di Storia del Diritto presso la Facoltà Libera di Diritto di Rio de Janeiro prima di assumere la cattedra di Diritto Internazionale¹⁰², a far sì che Gentili fosse visto come membro di una presunta scuola storica. Tuttavia, non è stato questo il motivo che lo ha portato a tale conclusione. In realtà, l'affermazione si basa sul già citato Nézard, che contrapponeva una nascente «école historique» a un'antica «école philosophique»¹⁰³.

⁹⁹ Sá Vianna, *Elementos de Direito Internacional*, cit., p. 250. A proposito di questo episodio, vedi Francesca Cantù, *Alberico Gentili e lo ius legationis*, in *De l'ambassadeur. Les écrits relatifs à l'ambassadeur et à l'art de négocier du Moyen Âge au début du XIX^e siècle*, dirs. Stefano Andretta, Stéphane Péquignot et Jean-Claude Waquet, Roma, École française de Rome, 2015, disponibile su <<https://books.openedition.org/efr/2914>>.

¹⁰⁰ Raul Pederneiras, *Direito internacional compendiado*, Rio de Janeiro, Freitas Bastos, 1931, p. 36.

¹⁰¹ Oltre a Gentili, tra questi figurano Vitoria, Suárez, Grotius, Zouch, Pufendorf, Bynkershoek, Wolff, Vattel, de Martens.

¹⁰² Pedro Krause Ribeiro, *Prof. Dr. Raul Pederneiras. A invenção do homem "plurivocacional"*, «Ars Historica», 8, 2013, pp. 263-283: p. 277.

¹⁰³ La prima scuola verrebbe occupata da giuristi contrattualisti e, la seconda, da teologi giusnaturalisti, in Nézard, *Albericus Gentilis*, cit., pp. 38 ss. Pederneiras ha analizzato non solo gli stessi giuristi, nello stesso ordine, presentando coincidenze significative con le frasi dell'autore francese.

Infine, il giurista italiano viene citato nuovamente quando, nel capitolo dedicato al diritto marittimo, viene riportata la proclamazione fatta dal giurista olandese, nel 1609, secondo cui il mare sarebbe comune all'umanità, non potendo essere oggetto di proprietà di alcun paese¹⁰⁴. In questo episodio, rapidamente narrato, il consigliere di Elisabetta I avrebbe controbattuto le argomentazioni del suo interlocutore nei Paesi Bassi. Nelle parole del professore carioca, «a these provocou protestos dos paizes interessados sofrendo a contradicta de Gentilis (1613), pela Inglaterra», cosa che in realtà, secondo recenti studi di Diego Panizza¹⁰⁵ non sarebbe avvenuta, anche perché il giurista italiano era morto nel 1608. A differenza della prima menzione a Gentili, la base della riflessione contenuta in quest'ultima sembra essere autonoma rispetto ad altri testi stranieri.

Nel 1933, nella prima edizione del suo celebre *Tratado*, il primo di questo genere pubblicato in Brasile sul diritto internazionale, il diplomatico Hildebrando Accioly menzionava Pierino Belli (citato nell'opera come «Pietro Belli»), associandolo a Gentili. Oltre a sottolineare che «o segundo como de muito mais valor que o primeiro»¹⁰⁶, vengono fornite poche righe sulla biografia del consigliere di Elisabetta I e sulle sue due opere principali, *De legationibus* e *De jure belli*. Anche se si tratta di un riferimento rapido e succinto, in una nota a piè di pagina emerge una timida innovazione rispetto ai suoi predecessori: oltre a Nézard¹⁰⁷ viene citato come fonte anche il manuale pubblicato da Arrigo Cavaglieri nel 1925 in Italia¹⁰⁸. Si tratta della

¹⁰⁴ Hugo Grotius, *Mare Liberum siue De iure quod Batavis competit ad Indicana commercia*, Dissertatio, Lvgdvni Batavorum, Elzeviriana, 1609, p. 40.

¹⁰⁵ Diego Panizza, *La "Libertà del mare" e la "Cosmopoli moderna" nel 'De Iure Belli' di Alberico Gentili*, «Grotiana», 30, 2009, pp. 88-106. Sul tema, cfr. anche Stefania Gialdroni, *Il 'mare liberum prima' e dopo il 'Mare liberum'. La libertà di commercio e navigazione in Gentili, Grozio e Selden*, in Alberico Gentili e il diritto del mare. Spazi, potere sovrano e diritto internazionale tra gli 'Hispanicae advocacionis libri duo' e l'età contemporanea, Atti del Convegno. XIX Giornata Gentiliana, a cura di Luigi Lacchè, Vincenzo Lavenia, Macerata, eum, 2022, pp. 45-66.

¹⁰⁶ Hildebrando Accioly, *Tratado de direito internacional*, Rio de Janeiro, Imprensa Nacional, 1933, vol. 1, p. 93.

¹⁰⁷ Nézard, *Albericus Gentilis*, cit., pp. 37-93.

¹⁰⁸ Cavaglieri, *Corso di diritto internazionale*, cit., p. 27.

prima volta che viene utilizzato un commento in lingua italiana all'opera di Gentili, rompendo con l'uso fino ad allora esclusivo di testi in lingua francese o inglese. Il riferimento a Cavaglieri è sintomatico della recente diffusione di autori italiani nella dottrina brasiliana, iniziata con la pubblicazione dei *Princípios* di Lafayette Rodrigues Pereira nel 1902 e rafforzata dal manuale pubblicato da Clóvis Beviláqua nel 1910¹⁰⁹, che tuttavia non menziona Gentili.

Cinque anni dopo, Bráz de Souza Arruda utilizzò la rivista della Facoltà di Giurisprudenza di San Paolo per pubblicare una raccolta di brevi saggi frutto delle lezioni di diritto internazionale tenute durante il corso di dottorato. Tra le sue righe si possono evidenziare due tentativi: la genesi di un presunto manuale, ancora privo di organicità; e l'esame di temi attraverso un prisma critico, basato su questioni di fondo sociologiche e storiografiche, con l'allontanamento dalle correnti provenienti dal positivismo logico e dal giusnaturalismo. L'opera riveste un valore significativo in quanto, in diversi suoi passaggi, presenta un primo tentativo di storiografia critica del diritto internazionale.

Gentili figura in un ampio elenco di precursori di Grozio, in cui compaiono anche altri italiani finora non citati nei manuali

¹⁰⁹ Clóvis Beviláqua, *Direito Público Internacional. A synthese dos princípios e a contribuição do Brasil*, Rio de Janeiro, Livraria Francisco Alves, 1910. Tre motivi possono essere indicati per questa maggiore diffusione di opere in lingua italiana nella dottrina brasiliana: in primo luogo, gli autori italiani, che divennero noti per le nuove esperienze realizzate principalmente in campo penale, processuale e commerciale, spinsero molti ricercatori brasiliani a dedicarsi per alcuni anni allo studio della lingua di Dante nel tentativo di leggerli nei loro originali; inoltre, l'influenza nelle università brasiliane a partire dagli anni Trenta di diversi giuristi italiani di fama che vi si stabilirono, fuggendo dalle persecuzioni imposte dal fascismo: la presenza all'Università di San Paolo del processualista Enrico Tullio Liebman e del commercialista Tullio Ascarelli sono i nomi più significativi; infine, i figli e i nipoti di immigrati italiani che, con diversi gradi di conoscenza della lingua dei loro antenati, sono diventati migliaia come studenti e professori nelle facoltà di giurisprudenza di San Paolo, Porto Alegre, Curitiba, Florianópolis, Vitória e Belo Horizonte. Il filosofo del diritto Miguel Reale è molto probabilmente il miglior esempio di questo fenomeno in cui le origini familiari hanno fatto da tramite culturale alle dottrine giuridiche italiane. Cfr. a questo proposito Arno Dal Ri Jr., *La circolazione dei modelli giuridici italiani nella scienza del diritto internazionale in Brasile tra Impero e "Estado Novo" (1822-1945)*, «La Comunità Internazionale», 3, 2025, pp. 425-449.

brasiliani, come Machiavelli e Giovanni da Legnano, seguiti dai teologi spagnoli della seconda scolastica. Per Souza Arruda, il *De jure belli* sarebbe stato «o modelo de Grócio»¹¹⁰. Se da un lato la frase posizionava il giurista italiano come il principale interlocutore dell'olandese, dall'altro, riconoscendo il debito del secondo nei confronti del primo, esaltava quest'ultimo, che sarebbe stato «o maior e com justiça foi cognominado 'Pai do Direito Internacional'»¹¹¹. Ciononostante, la mancanza di consenso sull'argomento è stata sottolineata, riportando in una nota la contestazione di Cavaglieri riguardo all'esclusiva «paternidade do direito internacional» attribuita a Grozio¹¹².

Un'analisi un po' più approfondita dell'insieme degli autori italiani del periodo medievale e della prima modernità appare solo nel 1963, quasi trent'anni dopo, con il manuale di Nelson Ferreira da Luz. In contrasto con gli altri che lo hanno preceduto, l'analisi storica inizia con il trattato *De Monarchia* di Dante Alighieri¹¹³, seguendo una tradizione che trova nel poeta fiorentino una delle prime proposte di istituzione di un ordine internazionale generale. Subito dopo, con uno sguardo più austero, l'analisi si concentra su Bartolo e Baldo¹¹⁴, per poi passare a Marsilio da Padova¹¹⁵ e arrivare a Pierino Belli, il cui «livro é todo sôbre a guerra, seus motivos e suas consequências. Tratando da guerra justa»¹¹⁶.

¹¹⁰ Bráz de Souza Arruda, *Estrutura do direito internacional. Preleções para o curso de doutorado*, «Revista da Faculdade de Direito de São Paulo», 34, 1938, pp. 497-635: p. 537.

¹¹¹ *Ibidem*.

¹¹² Ivi, nota 140.

¹¹³ «[...] o grande florentino pretende a realização de um super-Estado monárquico», in Nelson Ferreira da Luz, *Introdução ao Direito Internacional Público*, Saraiva, São Paulo, p. 215.

¹¹⁴ «[...] o primeiro afirmou a autoridade do Imperador sôbre o mundo, embora advogasse a independência de cidades italiana», *ibidem*.

¹¹⁵ «[...] que defendeu a subordinação da Igreja ao Estado e, ainda, a sujeição das organizações políticas de mesma língua a um super-Estado», *ivi*, p. 225.

¹¹⁶ L'esame continua analizzando gli aspetti della dichiarazione formale di guerra «a posição das autoridades militares, o sôldo e outras vantagens dos soldados, o tratamento dos prisioneiros, as tréguas, as licenças, os prêmios das conquistas, os tratados com os habitantes dos países inimigos ocupados, a arbitragem. Quanto a isto, pensa que, se um soberano mostra desejo de socorrer-se dela, as medidas de beligerância devem ser suspensas, sob pena de ficar autorizada uma guerra injusta».

Il testo dedica particolare attenzione a Gentili: riportando informazioni sulla sua vita e citazioni dai titoli delle sue opere, elenca i suoi punti focali di analisi, ovvero «as embaixadas, o direito de legação, a inviolabilidade diplomática, a imunidade de jurisdição local, o direito de passagem nos territórios de outros Estados, os direitos e deveres dos diplomatas»¹¹⁷. Riporta anche le sue speculazioni sulla guerra, «*publicorum armorum justa contentio* e, classificando as suas causas, admite-as como naturais, humanas e divinas»¹¹⁸. In questo contesto, la pace sarebbe la conclusione della guerra, e le «suas condições não devem constituir vingança», con solo «os territórios ocupados pelos exércitos poderão ser adquiridos pelo vencedor»¹¹⁹, e la clausola *rebus sic stantibus* sarebbe sempre sottintesa nei trattati. Il riferimento a Bodin emerge subito dopo, con l'affermazione che Gentili condannerebbe l'idea di sovranità assoluta degli Stati¹²⁰. Allo stesso modo, viene ribadito il suo orientamento protestante basato sul postulato della negazione della «estrutura imperial do Papa e do Imperador» e sull'ammissione che l'esistenza di «uma comunidade de Estados, não a hierarquiza sob os dois poderes, aceitando-a como integrada de Estados soberanos, religiosos ou heréticos, solidários em nome da regra da sociabilidade e sujeitos, portanto, à lei natural». Infine, l'opera

¹¹⁷ Luz, *Introdução ao Direito Internacional Público*, cit., p. 230.

¹¹⁸ Il giurista brasiliano continua commentando le sfumature del diritto di guerra nel giurista italiano: «O estado dos infieis ou dos heréticos não autoriza uma guerra divina, pois as dissidências de ordem religiosa não devem causar a beligerância. É lícita a guerra que defende os direitos naturais como o de legítima defesa própria ou de outrem, a passagem livre, o comércio, a navegação; e também é lícita contra a violação de um direito garantido pela lei humana. Sobre a conduta na guerra, mostra-se o autor favorável à necessidade de declaração formal, repressão dos crimes, proteção dos prisioneiros, respeito às mulheres, crianças e população indefesa; quanto aos templos e obras de arte, devem ser poupados, a menos que isso impeça a vitória ou não haja reciprocidade de tratamento pelo inimigo, autorizando-se, assim, as represálias», *ibidem*.

¹¹⁹ Ivi, p. 230, dove nella stessa pagina, riferendosi alla proposta del giurista italiano, si afferma: «Se a paz fôr estabelecida em tratados, êstes implicam a boa-fé; em tais condições, a fraude e o erro são vícios que devem ser evitados».

¹²⁰ A questo segue un esempio basato sugli scritti di Gentili: «Se o príncipe não pode alienar o seu reino, deve estabelecer tratados de comércio com príncipes de outra religião, ou pactos de aliança com infieis contra infieis, mas não para submeter uns aos outros», *ivi*, p. 231.

di La Pradelle sembra essere stata la fonte privilegiata, citata testualmente quando ribadisce che il giurista italiano sarebbe stato «por vocação, o primeiro internacionalista que, passando do Direito Civil ao Direito das Gentes, expressou-se como ‘jurista’»¹²¹. In una nota sono citati come fonte anche gli scritti di La Muela¹²², di Nussbaum¹²³ e di Mateesco¹²⁴.

Una delle ultime menzioni più significative di Gentili nella dottrina brasiliana si trova nel *Curso* pubblicato da Celso Albuquerque de Mello¹²⁵. Il nome del giurista italiano emerge in due situazioni distinte. La prima nel capitolo che presenta i «Fundadores do DI» e la seconda quando viene esaminata la teoria della colpa nell’ambito della responsabilità internazionale. Nel primo caso, l’inserimento avviene subito dopo Vitoria, seguito da Suárez, Grozio, Zouch, Pufendorf, Bynkershoek, Wolff, Vattel e von Martens. Il titolo del capitolo, sia l’elenco degli autori che il contenuto presentato, non lasciano dubbi sulla fonte utilizzata: si tratta di una sintesi delle analisi di Nézard¹²⁶, anche se viene menzionata l’esistenza di altri materiali, come quelli pubblicati dalla Fondazione Carnegie o il volume di Pederneiras¹²⁷. Le informazioni sono succinte e prive di approfondimenti: citano i titoli dei libri e i loro temi, la posizione di consigliere della monarca inglese, la difesa della secolarizzazione del diritto internazionale e l’attenzione alla responsabilità, all’asilo politico e al diritto di caccia¹²⁸. Holland, Mancini, Asser e Phillimore sfilano davanti agli occhi del lettore come responsabili del recupero del-

¹²¹ La Pradelle, *Maîtres et doctrines du droit des gens*, cit., pp. 93-99.

¹²² De la Muela, *Introducción al Derecho Internacional Público*, cit., pp. 281-284.

¹²³ Citato nella traduzione in lingua spagnola: Nussbaum, *Historia del Derecho Internacional*, cit., pp. 80-90.

¹²⁴ Mateesco, *Vers un Nouveau Droit International de la Mer*, cit., pp. 63-64.

¹²⁵ «A mais antiga delas é a teoria da culpa, que, já existindo no D. Romano, foi levada para o DI por Gentil e desenvolvida por Hugo Grotius. Esta teoria se explica historicamente por duas razões: a) a reação contra a teoria da responsabilidade coletiva germânica; b) o Príncipe encarnava o Estado. A culpa do Estado era a culpa do Príncipe, daí se explicar a culpa (elemento psicológico) a uma pessoa jurídica (Estado)», in Celso Duvivier Albuquerque de Mello, *Curso de Direito Internacional Público*, Rio de Janeiro, Freitas Bastos, 1967, p. 265.

¹²⁶ Nézard, *Albericus Gentilis*, cit., pp. 78 ss.

¹²⁷ Mello, *Curso de Direito Internacional Público*, cit., p. 73.

¹²⁸ Ivi, p. 74.

la sua opera, che sarebbe stata dimenticata dalla dottrina fino al 1874.

Per quanto riguarda il tema della responsabilità, l'ipotesi avanzata è che sarebbe stata trasposta dal diritto romano a quello internazionale, in un'operazione che Grozio e i suoi successori avrebbero poi approfondito. La presenza di questa teoria in Gentili e il fatto che questi fosse stato prima di tutto professore di diritto romano, non lascia spazio a dubbi sull'affermazione di Albuquerque de Mello.

Il *Curso* di Albuquerque de Mello è stato l'ultimo grande testo ad offrire un'analisi su Gentili. Giunto alla quindicesima edizione, caratterizzata da revisioni e ampliamenti continui – l'ultima nel 2004 –, ha mantenuto in tutte le edizioni il riferimento e la semplice analisi dell'opera del giurista italiano. Anche la terza edizione di Hildebrando Accioly, pubblicata nel 2009 senza modifiche rispetto alla seconda edizione del 1956, ha mantenuto intatta la menzione di Gentili¹²⁹.

4. *Conclusion*

Un secolo e mezzo di distanza rende impossibile raggiungere con chiarezza gli obiettivi previsti da Holland quando tenne la conferenza all'Università di Oxford nel 1874. Le generose parole su Gentili, oltre a valorizzare il carattere umanistico, pacifista e civilizzatore del diritto internazionale, erano anche funzionali al nazionalismo britannico e all'apologia dell'ateneo di Oxford. Il consigliere di Elisabetta I, che fino ad allora aveva avuto una modesta rilevanza, vivendo all'ombra di Grozio e condividendo lo stesso spazio dell'ampio gruppo dei teologi della seconda scolastica, conobbe nuovi giorni di gloria. Indipendentemente dagli scopi della conferenza del 1874, essa ebbe effetti non solo nel Regno Unito, portando autori come Mancini a vedere in

¹²⁹ Alla fine del XX secolo, in un manuale di circolazione piuttosto limitata, Sebastião José Roque in un lungo paragrafo esamina Gentili senza apportare alcuna innovazione rispetto ai suoi predecessori. Difficilmente lo ha fatto dopo aver consultato il testo originale. Cfr. *Direito Internacional Público*, São Paulo, Hemus, 1997, p. 19.

essa la possibilità di investire fortemente in Gentili come icona dell'autonomia intellettuale e culturale della patria italiana appena unificata.

A livello internazionale, l'iniziativa ebbe altre conseguenze, non meno importanti. Trovò riscontro nel discorso ufficiale del neocostituito *Institut de Droit International*, anch'esso basato su idee umanistiche e orientato alla costruzione della pace mondiale. Le manifestazioni che si susseguirono nel circolo intellettuale che si riunì a Gand nel 1873, indicano proprio la ricerca di modelli nella prima Modernità che fungessero da archetipi nel tentativo di nobilitare la scienza che rappresentavano: giuristi di altri tempi la cui traiettoria fosse segnata dalla difesa della Pace e dallo spirito contrattualista, legittimando il movimento di fondazione di un nuovo diritto internazionale civilizzato e civilizzatore, umanista e pacifista. Mancini, ma anche Asser, Philimore, Rolin-Jacquemyns e, successivamente, altri nomi coinvolti nella fondazione e nel consolidamento dell'*Institut*, esaltarono Gentili come uno dei primi oracoli di quella scienza, che si voleva anche "positiva".

Gli echi di questo movimento hanno impiegato alcuni decenni per raggiungere la scienza brasiliana del diritto internazionale. E, quando lo hanno raggiunto, hanno subito oscillazioni significative: la diffusione del pensiero gentiliano non è stata uniforme, come apparentemente è avvenuto con i postulati di Grozio. Anche se a volte ignorata, altre poco esplorata, l'opera di Gentili ha avuto anche momenti di dialogo e persino di esaltazione nelle dottrine brasiliane.

Alcuni fenomeni ben definiti forniscono elementi per comprendere gli incidenti di percorso, primo fra tutti la difficoltà di accesso all'opera, scritta in un latino rinascimentale complesso, molto lontano dal classico insegnato nelle scuole brasiliane dell'epoca e con poche copie, quasi esclusivamente nelle biblioteche europee. I brasiliani hanno quindi iniziato a conoscerla in modo indiretto, attraverso testi stranieri che la citavano o la commentavano, condizionandone l'accesso. Rara eccezione a questo fenomeno fu il testo dell'italiano Cavagliere che, nel 1927, contestava la presunta superiorità dell'opera di Grozio rispetto a quella di Gentili, citato dai brasiliani in un episodio

frutto anche dell'avvicinamento alla scienza giuridica italiana a partire dai primi decenni del XX secolo.

In termini generali, per oltre un secolo i giuristi brasiliani sono stati prigionieri dell'intermediazione della letteratura straniera, generando continue ripetizioni, nella maggior parte dei casi prive di commenti innovativi e rendendo impossibili studi più approfonditi. Questa dinamica è cambiata radicalmente nel 2006, quando è apparsa sulla scena la prima traduzione direttamente in lingua portoghese, realizzata dalle abili mani di Ciro Mioranza e pubblicata nella collana «Clássicos do Direito Internacional», accanto a Grozio e Vitoria. L'umanesimo giuridico e l'internazionalismo pacifista di Alberico Gentili cessarono così di essere illustri sconosciuti per le università del grande paese sudamericano, diventando accessibili non solo ai giuristi laureati, ma soprattutto agli studenti e ai giovani ricercatori delle Facoltà di Giurisprudenza.

Sessione seconda

Il contributo degli internazionalisti nella costruzione e nello sviluppo del diritto internazionale

Attila M. Tanzi

Scholarly Institutions between Research and Authority

1. *Introduction*

Since September 2024, when the discussions on the occasion of the *XXI Giornata Gentiliana* took place, to the time the present written contribution went to press (June, 2026), so much has dramatically happened on the international scene that the spirit which informed this presentation has sensibly changed. The need for such discussions, however, has not diminished. On the contrary. And I am pleased – albeit with a certain sullen pleasure – to revisit the paper presented then in the light of subsequent events.

The developments since the inception of the second Trump presidency – and especially those relating to the US military operation in Venezuela, the US claims of sovereignty over Greenland, the attack on Iran – appear to have brought the international law discourse closer to the Realpolitik of Alberico's time. Fact is that going back to the same patterns represents a grave instance of backsliding. One regarded by many as threatening to undo the construction of the international law framework ever since then, with special regard to the achievements of the last century – including the ban on the use of force against the territorial integrity and independence of States, and the development of the bodies of human rights and environmental law. Concerns have gone so far as to encompass even the preservation of the basic pillars of the international legal architecture, from the principle of sovereign equality to its law-making corollaries, *consuetudo* and *pacta sunt servanda*.

The threat of a dimensional change of international relations imposed by the US, particularly since the military operation in Venezuela on 3 January 2026 and the territorial claims over Greenland, could make one wonder whether most of the reflections originally drafted for purposes of this publication have become outdated. Or whether they now pertain to the history of international law, rather than to contemporary international law, as if the course of international law that we have seen flowing for the last few centuries – and especially over the last eight decades, has come to an end.

I will revert in my concluding remarks to this point and to the role for scholarly institutions at this historic juncture.

2. A Statement of Perspective

By way of conceptualisation, the topic of the contribution of scholarly institutions to the construction and development of international law is unquestionably germane to the work and life of Alberico Gentili. He was a precursor in grasping and stressing the central function that internationalists have played in the building of the international legal system as a conceptual and linguistic tool for the purpose of the conduct of international relations. A linguistic tool, however, that would not give voice to an international divine, or natural, law but to the law made by States.

In a contemporary and potentially future prospect, some today, my-self included, would conceive that language, as finessed by scholarly systematisation of the international legal order, for purposes of the maintenance and conservation of its main structural pillars. Others would add the purpose of promoting change and reform. Others, still, would challenge that language with a view to promoting critical knowledge.

The latter approach, as I see it, provides a narrative on international law from the outside, albeit often propounded by insiders. I may appreciate critical analysis of the law from a sociological, historical, and philosophical standpoint, for its language does not appear to the present writer as one intended to serve as the linguistic conventional code through which the law

is made, changed, interpreted and applied. For good measure and methodological transparency, my standpoint identifies with the latter approach. One which has been conceived as mainstream until recently, and whose language is still now used in pleadings before international courts and tribunals and, most importantly, by the latter¹.

From such legal perspective, it is conceivable that international legal scholarship at times draws from historical, philosophical, sociological, economic, or even political categories in addressing legal issues, insofar as those categories provide factual premises or contextual background to the legal process and analysis. Social and political scientists may look at legal phenomena from the reverse perspective. However, from either perspective, legal academics and practitioners, we all partake, I believe, in an inevitable process marked by the fundamental tension between stability and change, construction and de-construction. The course of history reveals how the construction and development of legal and institutional scaffolding fostering cooperation and well-being may be disrupted by sudden and long ruptures. Suffice to recall World Wars I and II. Clearly, the role on international law scholarly institutions has been on the constructive side, or resilience in times of disruption. Namely, preservation with a view to revival.

Generally, in time of development of the international legal process by nation-states, publicists, particularly when operating through international scholarly institutions, appear to have engaged precisely with the systematisation of a normative process through legal categories aimed at calibration between stability and change, possibly avoiding identifying with individual sovereign concerns, but rather keeping in mind the collective dimension of the values of the legal discourse and its internal functional coherence. The more sovereign actors are aware of

¹ This stance aligns with that followed by Professor Christian Tams and expressed with elegant concision in the introduction to his contribution in the present volume whereby his approach to the topic «reflects a traditional understanding of the notion of “international law”, which excludes from view the manifold influences that scholarly interventions have had on the discourse about international law, and on the understanding of international law as a scientific discipline» (in this volume, p. 158).

the entanglement between their individual national interests and common concerns, the wider the latitude for legal advisers, publicists and scholarly institutions to have an impact on the international political process through legal discourse. The reverse is dramatically true. And this precisely translates into the degree of authority that international legal scholarship and institutions may enjoy at any given point in history. This will be the leitmotif of my short contribution.

3. *Research and Authority: Epistemic Authority vs. Political Authority*

History has made it abundantly clear that *auctoritas, non veritas, facit legem*². And *auctoritas* – intended as decision-making and law-making power – is still primarily vested in nation-states, despite organised civil society, including NGOs devoted to the international legal process, particularly in the human rights and environmental protection areas, have increasingly come to the fore in the international legal process over the last half-century. International law scholarly institutions – IDI and ILA, in particular – have been the precursors to this phenomenon. And, most importantly, following a generalist slant.

The last 150 years have shown that, next to sovereign *auctoritas*, an “authority of knowledge” has exerted a gentle but not negligible influence in the identification, interpretation and application of international law. Perhaps, one could then read “Research and Authority”, the binomial delimiting in the title the scope of this contribution, through the prism of “Epistemic Authority vs. Political Authority”, thus stressing the dialectical tension that binds and opposes them.

The epistemic authority of international law and lawyers has been tested, often successfully, through the capacity to influence and harness chains of command and choices made by decision-makers, at least requiring justification of their conducts through the language of international law. And we have seen

² Thomas Hobbes, *Leviathan, sive De materia, forma, et potestate civitatis ecclesiasticae et civilis*, [Amstelodami], [Blaev], 1668, part II, chap. XXVI.

international law scholarship engaged in a relentless work of domestication and humanisation of the international community, whilst the international society represents a space where force and competition operate in some kind of search for the mightiest power (*Thrasymachus*).

The distance between the epistemic and political authorities, has narrowed or widened throughout history in proportion to the degree of policy-makers' perception of political legitimacy as a variant of international legality, if only for purposes of political justification through legal language. This was the case during the two post-WWs periods. At worst, such language expressed arguments inspired by constructive ambiguity – if not constructive hypocrisy at times – while nevertheless upholding the rule of law, even when it was departed from in practice. This allowed, at a minimum, for the aspirational value of the international standards of law to survive in time of peace in the pursuit of reason. The inertia of the expansive propulsion of the generally shared relevance of international law for purposes of international policy-making and communication clearly lasted for a much longer period after the 2nd WW, i.e. for about half a century.

During such periods, the use of international law as a common language went hand in hand with the development of international rules and institutions. Suffice to recall the establishment of the League of Nations and of the Permanent Court of International Justice, the initial building blocks of the principles of peaceful settlement of disputes and ban on the use of force, as well as the first rules for the protection of national minorities, after the 1st WW.

This expansive process was accompanied and enhanced, at the same time, by the intense work of international scholarly institutions that were reviving and thriving in those years. As far as the ILA is concerned³, one may note that a large number of national branches were established in that period, precisely boosting and assisting the international governmental efforts in

³ See inter alia Arthur Eyffinger, *The International Law Association (1873-1973)*, The Hague-Boston, Kluwer, 1973.

the creation and development of the just mentioned normative, institutional and adjudicative intergovernmental architecture of international law: the Japanese branch was established in 1920, and the Canadian and the US ones in 1922; the Czechoslovakian French, German, Italian, Hungarian, Polish, Romanian, Spanish and Swiss ones were all founded between 1925 and 1927, while the Scandinavians (Sweden, Norway, Denmark, Finland) followed suit at the end of the 1920s (between 1928 and 1930).

As to the substantive ILA work carried out in the 1920s and 1930s, one is to recall its codification efforts on the law of treaties, with special regard to interpretation, validity and termination, which helped shape later intergovernmental codification of the topic⁴. The same applies to the ILA draft rules on maritime law contributing to debates later taken up at the 1930 Hague Codification Conference⁵; State responsibility and diplomatic protection⁶; international arbitration and dispute settlement, promoting legal mechanisms for the peaceful resolution of disputes, in line with the broader interwar movement toward institutionalised adjudication⁷. In addition, the Association contributed significantly to the clarification of nationality law and statelessness, producing studies and draft rules that informed discussions within the League of Nations framework⁸.

Having regard to the Institut de Droit international (IDI) during the interwar period, it adopted a series of influential resolutions and declarations, mostly, but not exclusively, on the same topics addressed by the ILA draft-resolutions. Its contribution added authority – also through its highly selective recruitment policy – to the latter, thus, strengthening the contribution by international scholarly institutions to the development of international law at the time, which paved the way for the revival of the process of intergovernmental codification of international law after the 2nd World War. Suffice to recall the 1926 Brussels

⁴ International Law Association, *Report of the Fifty-First Conference (1920s-1930s)*, Committee on the Law of Treaties.

⁵ Ivi, Committee on Maritime Law.

⁶ Ivi, Committee on Responsibility of States.

⁷ Ivi, Committee on Arbitration and Dispute Settlement.

⁸ Ivi, Committee on Nationality and Statelessness.

Resolution on the competence of domestic courts in regard to foreign States, which articulated early principles underlying the doctrine of restrictive State immunity, precisely at the inception of the customary process of formation of the commercial exception⁹; the 1927 Lausanne Resolution on State responsibility, clarifying the responsibility of States for injuries to foreigners and the obligation to provide reparation¹⁰; the 1928 Resolution on the regime of the territorial sea, addressing the breadth of territorial waters and coastal jurisdiction, and the Resolution on conflicts of laws relating to nationality, on the same session, dealing with dual nationality and statelessness¹¹; the 1929 New York Declaration on the International Rights of Man, a precursor to modern human rights instruments¹².

After such progress seemed to have been wiped away by the nazi horrors, the international law discourse revived since 1945 through the end of the last century. Within the United Nations as the multilateral institutional forum intergovernmental dialogue, using the common language of international law, the international society of States navigated the tensions of the Cold War, acknowledged the decolonisation process addressing the economic and political claims of developing countries, created the bodies of human rights and environmental law, amongst others.

This post-1945 revival and development of international law and institutions was supported further by the continuing work of the ILA and the IDI, which was built on the mentioned interwar achievements. Both bodies continued, on the less formal non-governmental level, to generate influential end-products, which helped boost and sustain the intergovernmental process.

⁹ Institut de Droit international, "Compétence des tribunaux à l'égard des États étrangers" (Brussels Session 1926), *Annuaire de l'Institut de Droit international* (1926).

¹⁰ "Responsabilité des États pour dommages causés sur leur territoire à la personne ou aux biens des étrangers" (Lausanne Session 1927), *Annuaire de l'Institut de Droit international* (1927).

¹¹ "Le régime de la mer territoriale" and "Conflits de lois en matière de nationalité" (Stockholm Session 1928), *Annuaire de l'Institut de Droit international* (1928).

¹² "Déclaration des droits internationaux de l'homme" (New York Session 1929), *Annuaire de l'Institut de Droit international* (1929).

Through formal resolutions in the case of the IDI and draft rules and declarations in the case of the ILA, these bodies operated as laboratories of international law for state delegations in intergovernmental negotiations shaping the establishment and evolution of a rules-based international order. On the one hand, new ILA national branches spread around the world¹³. On the other hand, amongst the most significant boosting efforts in the initial days of the second post-war period, one may mention the IDI's resolutions on State immunity (1954) and on the protection of human rights and the principle of non-intervention (1954)¹⁴, as well as the ILA's Helsinki Rules on the Uses of the Waters of International Rivers (1966) which paved the way for the ILC preparatory work that led to the 1977 UN Convention on the Non-navigational Uses of International Watercourses¹⁵. Of the later work, suffice to single out the foresight demonstrated by the IDI adoption of the Seoul Declaration on the Progressive Development of Principles of Public International Law (1986)¹⁶, so topical today in relation to the ongoing ILC work on General Principles of Law.

¹³ Argentina: December 23, 1949 (<<https://www.ila-hq.org/en/branches/argentina>>); Australia: August 20, 1959 (<<https://www.ila-hq.org/en/branches/australia>>); Belgium: June 4, 2006 (<<https://www.ila-hq.org/en/branches/belgium>>); Brazil: June 1, 1950 (www.ila-hq.org/en/branches/brazil); Chile: May 19, 2012 (<<https://www.ila-hq.org/en/branches/chile>>); Chinese (Taiwan): August 13, 1961 (<<https://www.ila-hq.org/en/branches/chinese-taiwan>>); India: April 22, 1950 (<<https://www.ila-hq.org/en/branches/india>>); New Zealand: November 16, 1996 (<<https://www.ila-hq.org/en/branches/new-zealand>>); South Africa: November 13, 1993 (<<https://www.ila-hq.org/en/branches/south-africa>>).

¹⁴ Institut de Droit international, "Compétence civile des États en matière internationale (immunités)" (Aix-en-Provence Session 1954), *Annuaire de l'Institut de Droit international* (1954); "Les droits de l'homme et le principe de non-intervention" (Aix-en-Provence Session 1954), *Annuaire de l'Institut de Droit international* (1954).

¹⁵ International Law Association, *Helsinki Rules on the Uses of the Waters of International Rivers* (1966). See, Joseph W. Dellapenna, *The Contribution of the ILA to the Development of International Water Law*, in *Au service du droit international. Les 150 ans de l'Association de droit international*, eds. Catherine Kessedjian, Olivier Descamps, Teodolinda Fabrizi, Paris, Éditions Panthéon-Assas, 2023, pp. 499-513.

¹⁶ International Law Association, *Seoul Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order* (1986).

During those periods, the epistemic authority of international lawyers became very close to political authority. At times, the two almost integrated with one another. This integrative process was mirrored in the composition of scholarly institutions, where a virtuous form of double-hatting often prevailed, when some, or many, of their members simultaneously held governmental positions, or served as international judges or as international officials in intergovernmental organisation. However, as stressed above, the main factor bridging the two dimensions of authority would consist of the degree of social perception of political legitimacy as a variant of international legality. And this does not depend on the law as much as on society and its values at any given point in history.

4. *Scholarship: "The Ultimate Guardian of the System"*

The above discussion of the relationship between the epistemic and political authorities, is reminiscent of the impassioned dispute between Kelsen and Schmitt over which branch of government could be considered the ultimate guardian of the Constitution. The former identified the judiciary, whereas, the latter, in the burning Weimar Republic, indicated the President of the Republic as the institution ultimately vested with the power to declare a state of exception, including the suspension of the constituted order. This construction is notably crystallised in the incipit of *Political Theology*, according to which «Sovereign is he who decides on the state of exception»¹⁷.

In the international legal system we find no institution close to formal checks and balances of the kind we see under domestic constitutions, at least, in those which apply the rule of law in times of social cohesion and reasonableness. The International Court of Justice cannot be said to perform this function, given the consensual nature of its jurisdiction, nor is the Security Council able to exercise centralised executive power, given its

¹⁷ Carl Schmitt, *Teologia politica. Quattro capitoli sulla dottrina della sovranità*, in Id., *Le categorie del 'politico'. Saggi di teoria politica*, Bologna, Il Mulino, 1972, p. 33 [*Der Begriff des Politischen*, 1934].

paralysis during the vast majority of international crises, because of the veto power. One could wonder whether it would even be desirable to place the function of supreme guardian of international rule of law solely in the hands of the Security Council. And the General Assembly falls well short of representing the role of an international parliament, due to the hortatory nature of its resolutions.

Against the decentralised landscape of the legal architecture of the international society, during the Cold War, through mutual deterrence between two military superpowers and the increasing political and economic relevance of developing countries emerging from a powerful process of decolonisation, international law became the common language for international dialogue, including for revising the rules of the game. There was clearly a diffused perception of the need for that language and that dialogue by the sovereign actors mainly distributed in three groups of States: namely, the Western Group, the Soviet Block and the G77.

Under such circumstances of diffused perception favourable to international law and its process, *the invisible college of international lawyers*, as Oscar Schachter coined it¹⁸, assumed a role close to that of authoritative guardians of the international legal system, or “gentle civilisers”, as elegantly put by Martti Koskenniemi¹⁹. It is fair to say that this was made possible by the generally shared acknowledgment of the necessity for that sacerdotal legal authority in the society of nation-states. Through legal common language, shared by States’ legal representatives, legal scholars would build bridges among nations, fuelling a cosmopolitanism that could bring societies and peoples closer together beyond conflicting national interests.

¹⁸ Oscar Schachter, *Invisible College of International Lawyers*, «Northwestern University Law Review», 72/2, 1977-1978, pp. 217-226.

¹⁹ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge, Cambridge University Press, 2001.

5. *Scholarly Institutions*

According to categorisations well-established in the legal literature²⁰, unlike the ILC, the UNCTAD and the ICRC, which represent “state-empowered bodies”, the already mentioned “twin institutions”, the ILA and the IDI, constitute private “expert groups”, alongside the Hague Academy of International Law, the Harvard Law Research Institute, the American Law Institute and the TMC Asser Institute. Despite their non-governmental nature, as already stressed, their members often held official positions with their governments, especially as legal advisors, or in intergovernmental organisations, or adjudicative bodies, either domestic or international. Such forms of combinations, contributed – and might still contribute – to enhance the authority of that *invisible college of international lawyers*, which is just another way to express the concept of “epistemic authority” referred to above.

In the scholarly institutions in question, authority is independent of sovereign mandates and rests on the quality of work and the personal scholarly authority of its members²¹. At the same time, similarities exist with the ILC and even the ICJ, justifying their inclusion in the broader family of international law bodies. A comparison of their respective membership requirements may be relevant to appreciate the point. Article 8 of the ILC Statute reproduces, in almost identical terms, article 9 of the ICJ Statute, which provides that «the persons to be elected to the Commission should individually possess the *qualifications required* and that in the Commission as a whole representation of the *main forms of civilisation* and of the *principal legal systems of the world* should be assured» (emphasis added). Similarly, the ILA shows the peculiarity of having a regional

²⁰ Sandesh Sivakumaran, *The Influence of Teachings of Publicists on the Development of International Law*, «International and Comparative Law Quarterly», 66/1, 2017, pp. 1-37: p. 17.

²¹ Fritz Münch, *L'influence de l'International Law Association sur la doctrine et la pratique du droit international*, in *The Present State of International Law and Other Essays Written in Honour of the Centenary Celebration of the International Law Association 1873-1973*, ed. Maarten Bos, The Hague-Boston, Kluwer, 1973, pp. 23-37.

structure as, at present, it counts sixty-six national or regional branches. According to paragraph 8.3 of the Constitution of the Association, «Branches are regional»²². The ILA's membership, around 4.500 members, shows a significant diversity in cultural and professional backgrounds as it ranges from lawyers in private practice, academia, government and the judiciary, to experts in legal matters related to the commercial, industrial and financial spheres, as well as representatives of bodies such as shipping and arbitration organisations and chambers of commerce.

Furthermore, the scientific activity of the ILA revolves around committees specifically established «to carry out research, surveys and investigations on selected areas of international law and to prepare reports for consideration by the membership and other interested parties at the biennial conferences and recommendations for adoption by the Conference Plenary». According to the ILA Committee Rules & Guidelines²³, a committee must be composed of «members with *relevant expertise*» (paragraph 1.1) and, more generally, «[p]ersons nominated for an International Committee must have *sufficient expertise* in the subject of the Committee in question, either as academics or practitioners» (paragraph 4.3), with the effect that «the Chair may reject a nomination for lack of *demonstrated expertise*; [...] the requirement of *balanced representation*» (emphasis added). The meaning of «balanced representation» can be inferred from the context, as in paragraph 5.1 the notion is associated with the composition of the committee's membership. The latter associates the notion with the composition of the committee's membership, which is expected to reflect a balance among «academics and practitioners, geographical regions, different legal systems, gender, and younger members».

²² International Law Association, «Constitution of the Association» (adopted at the 77th Conference, 2016).

²³ International Law Association, «ILA Committee Rules & Guidelines» (adopted by the Executive Council on 25 April 2015).

6. *An Empirical Assessment of the ILA Contribution to the Development and Codification of International Law, Based on International Judicial and Arbitral Practice*

The relationship between non-governmental scholarly institutions and intergovernmental related legal bodies, can be found to consist, not only in the occasional overlap in membership by individual lawyers, but also in some forms of mutual interaction of substance, as it has emerged above from the indication of the topics addressed by the twin institutions during the interwar period and after the 2nd WW. More recently, having specific regard to the ILA, this phenomenon has been systemically analysed in an essay published in the first volume of the *Yearbook of the ILA Italian Branch* (2024).

The article shows the influence of the ILA works over roughly the past twenty years, in international adjudication, with special regard to pleadings before several jurisdictions, including the ICJ, ITLOS and UNCLOS Annex VII arbitral tribunals, regional human rights courts like the IACtHR and the ECtHR, investment and commercial arbitral tribunals, as well as, to a very limited extent, municipal courts. Selected case law has been analysed in relation to five macro-areas: procedural law, human rights, investment protection, State jurisdiction to adjudicate, maritime boundaries delimitation and international watercourses. Except for the first topic, the analysis shows that international courts and tribunals are generally reluctant to openly cite the work of the ILA, as well as, more generally, other pieces of scholarship, even when they actually follow the arguments that a party has substantiated by reference to ILA documents. The ICJ's self-referential approach appears emblematic of the explanation of this attitude. International courts and tribunals seem to be indeed jealous of their own jurisdiction; and, except in rare cases, they are reluctant to endorse authority beyond their own, at least with regard to legal reasoning in areas already addressed by them.

Greater attention towards scholarly institutions appears to be paid by judges and arbitrators in their separate or dissenting opinions. As singled out in an earlier study by Helmersen

«[i]ndividual ICJ opinions contain a total of 191 references to “institutional” teachings: 85 to the IDI, 29 to the ICRC, 18 to the ILA, 15 to the American Law Institute and 14 to Harvard Law School»²⁴. It seems only natural that a judge or arbitrator, in differing from the majority view, would feel the need to go deeper in grounding his or her reasoning beyond the Court’s jurisprudence. As already foreshadowed, more frequently, it is counsel for the disputing parties who principally rely on authorities that go beyond the jurisprudence of the court or tribunal before which they are pleading. And that is easily explained by their need of completeness in their efforts at legal persuasion.

In contrast to this general picture stands procedural law, where ILA products have been cited relatively more frequently by international courts and tribunals. And this is understandable, first of all, if one takes into account the fact that in international arbitral proceedings (including commercial and investor-state arbitration), arbitrators have long been confronted with informal procedures and, consequently, in which they have often been called to face normative gaps²⁵. While they enjoy a certain margin of discretion in ensuring procedural efficiency, they have often felt the need to justify their choices by invoking external authorities, such as the ILA and the IDI, the body of international procedural law would continue developing through the International Bar Association, UNCITRAL, ICSID and the rules adopted by scattered arbitration centres.

Furthermore, while it is true that the benches of international courts and panels of arbitral tribunals are often composed of international law scholars, access to these positions is overall very limited. Conversely, the phenomenon of double hatting between scholarly members of the ILA and adjudicators is relatively more frequent in international investment and commer-

²⁴ Sondre Torp Helmersen, *Finding “the Most Highly Qualified Publicists”: Lessons from the International Court of Justice*, «European Journal of International Law», 30/2, 2019, pp. 509-535: p. 525. See, more generally, Id., *The Application of Teachings by the International Court of Justice*, Cambridge, Cambridge University Press, 2021.

²⁵ Alexis Mourre, *About Procedural Soft Law, the IBA Guidelines on Party Representation and the Future of Arbitration*, in *Liber Amicorum Pierre A. Karrer*, eds. Patricia Shaughnessy, Sherlin Tung, Dordrecht, Kluwer, 2017, pp. 239-250.

cial arbitration. It follows that in these areas, academics may be tempted and seek to accredit their own theses when serving as adjudicators, including when their views have been adopted in the end products of codification exercises by scholarly institutions in which they they have taken part.

As to the substantive purpose of the use that international courts and tribunals, and parties to the dispute, make of ILA works, it emerges that most frequently, the latter are invoked to clarify the scope of application of a norm of international law or its status among the sources of the international legal system. As an example of the former case, one may recall the decisions interpreting the principle of *res iudicata*²⁶. In other cases, the works of the ILA have been used to clarify the status of a norm, rather than its content. An emblematic example is given by the reference made by Germany before the ICJ in the *Jurisdictional Immunities of the State* case to disprove the existence of an established rule of international law on the right to reparation of victims of armed conflicts²⁷. Another significant instance is given by the *Grand River Enterprises v United States* NAFTA arbitration case, in which ILA work has been mentioned among the authorities supporting the customary nature of a rule prescribing the consultation of indigenous peoples on every project potentially affecting their rights²⁸.

Despite this general picture over the influence of international scholarly institutions on international adjudication, may appear somehow minimalistic, one should remember that juris-

²⁶ *Apotex Holdings Inc and Apotex Inc v United States of America* (Award, 25 August 2014) UNCITRAL (NAFTA) paras. 314-318, referring to International Law Association, *Final Report on Res Judicata and Arbitration* (2006).

²⁷ Christian Tomuschat, oral submissions for Germany, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Verbatim Record, CR 2011/17, 12 September 2011, 35-36, para 32. Germany's point was that the alleged individual right to reparation for WWII armed-conflict violations was not an established rule of international law at the relevant time. Professor Tomuschat argued that war reparations were traditionally handled inter-State, and that State immunity supported that substantive structure procedurally.

²⁸ *Grand River Enterprises Six Nations Ltd et al v United States of America* (Award, 12 January 2011) UNCITRAL (NAFTA) para 210 fn 55, citing International Law Association, Committee on the Rights of Indigenous Peoples, *Interim Report* (2010) 51.

prudence is only one of the parameters to test the scholarly influence in the international law making and assessment process, which, in fact, extends far beyond the judicial dimension. Most importantly, the end-products of the twin institutions' work have often provided an authoritative point of departure for the ILC based codification conventions and other instruments. Also, among «teachings of the most highly qualified publicists of the various nations» within the meanings of article 38(1)(d) of the ICJ Statute, ILA instruments are often cited alongside the works of the ILC and those of the IDI, *i.e.* the other two institutions that have traditionally contributed most to the codification of international law and its progressive development.

7. *International Scholarly Institutions in Times of Disruption*

The propulsive role of international scholarly institutions in time of peace and of revival of international law described in the above paragraphs, can best be read against the background of the significant role those institutions have played in sustaining the idea of a rules-based international order, thus contributing to its survival during the profound systemic disruptions caused by the First and Second World Wars.

During World War I, when the logic of total war and *raison d'État* appeared to eclipse legal constraints, those institutions continued to reaffirm and articulate foundational principles of international law, including the binding force of treaties, the legal relevance of neutrality, or the continued applicability of limitations on belligerent conduct²⁹. Although their formal activities were inevitably curtailed by the conflict, particularly at a time when digital communication had not yet emerged, their doctrinal output resisted the notion that war entailed a total annihilation of international legality, insisting instead on the continuity of international law even under conditions of extreme

²⁹ Institut de Droit International, "Resolutions adopted prior to and during World War I"; see also Antonio Cassese, *International Law*, 2nd ed., Oxford, Oxford University Press, 2005, pp. 11-15.

political necessity³⁰. In this sense, institutionalised scholarship functioned as a repository of legal memory, preserving normative frameworks that would later inform post-war reconstruction efforts, most notably within the institutional architecture of the League of Nations³¹.

A comparable and arguably even more consequential role was performed during World War II, when the assault on the international legal order extended beyond inter-state conflict to encompass genocide, mass atrocities, and the systematic denial of legal restraint. Scholars associated with the IDI and the ILA consistently rejected claims that sovereignty or necessity could justify unlimited violence, contributing to the doctrinal consolidation of concepts such as individual responsibility under international law and the non-derogability of certain fundamental norms of humanity³². This intellectual groundwork proved decisive in the immediate post-1945 period, when many of the same figures, which we found in the twin-institutions in point participated in the creation of the United Nations, the establishment of the ICJ and ILC, and in the progressive codification of core principles of international law, including the prohibition of the use of force and the repression of international crimes³³.

Whilst, obviously, neither institution could prevent the collapse of the legal and institutional scaffolding during deepest critical moments of global conflict, their sustained and organised scholarly engagement ensured that its normative foundations endured, thereby enabling post-conflict reconstruction on firm normative grounds³⁴.

³⁰ See Koskenniemi, *The Gentle Civilizer of Nations*, pp. 210-225.

³¹ See Georges Scelle, *Précis de droit des gens*, Paris, Sirey, 1932, pp. 42-47.

³² See Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, «British Yearbook of International Law», 21, 1944, pp. 58-71.

³³ See Alain Pellet, *The ILC's Influence on the Development of International Law*, in *The Law of International Responsibility*, eds. James Crawford, Alain Pellet, Simon Olleson, Oxford, Oxford University Press, 2010, pp. 75-94.

³⁴ See Bruno Simma, *From Bilateralism to Community Interest*, 250 «Recueil des Cours de l'Académie de la Haye», 250, 1994, pp. 217-384: pp. 245-250.

8. *Concluding Remarks*

This overview of the impact of scholarly institutions on the international legal process, with a special focus on the ILA, seems to confirm a number of assumptions in the scholarly discourse on our topic to date, including those expressed by Professors Forlati and Tams in this volume. Namely, the significant relevance of teachings in shaping the language and substance of international litigation, but also that of diplomatic bilateral and multilateral State practice, within and by intergovernmental organisations.

Under the licence of Article 38.1.d. of the ICJ Statute, international courts and tribunals, and counsel for the disputing parties before them, select pieces of scholarship as legal authorities to corroborate their arguments based primarily on the quality of the reasoning in their quotes, just as well as on the standing of the cited scholars. Particularly the existence of consensus among multiple highly reputed authors converging in a collective context, such as that of the scholarly institution under consideration, adds significantly to the authority expressed by the legal thinking of individual scholars, including when they may be a member of the scholarly body in question³⁵.

The diverse membership of the IDI through national groups from the four corners of the world, ILA national branches and the diversity in the nationality of the members of its thematic committees shows the two twin institutions' ambition to establish themselves as actors whose authority draws from its global representativeness, next to the standing and expertise of its members. As it is corroborated by the multiple references to its acts contained in the ongoing works of the ILC on subsidiary means for the determination of rules of international law³⁶, just over 150 years after its foundation, the ILA, along the lines of the IDI, whose reputation is proportional to the high degree of selectivity in recruitment of its, represent the main non-gov-

³⁵ Helmersen, *Finding "the Most Highly Qualified Publicists"*, cit., pp. 515 ff.

³⁶ ILC, "First report on subsidiary means for the determination of rules of international law, by Charles Chernor Jalloh, Special Rapporteur" (13 February 2023), UN Doc A/CN.4/760.

ernmental players in that community of international lawyers, which, though «dispersed throughout the world and engaged in diverse occupations, constitutes a kind of invisible college dedicated to a common intellectual enterprise»³⁷.

According to the premise put forward above in paragraph 2, the degree of “epistemic authority” that that invisible college of international lawyers may exert in relation to political *auctoritas* is proportional to policy-makers’ perception of political legitimacy as a variant of international legality, if only for purposes of political justification through legal language. The present time seems to be characterised precisely by a sense of irrelevance of the rule of law for political purposes by the State which currently purports to exercise a hegemonic power in international relations. At the same time, never has the dock of the ICJ been so crowded. A clear divide is emerging between those States for which international law is of diminishing importance and others – particularly medium-sized and smaller States – for which it is becoming increasingly significant.

Whether this tension will lead to the disruption of a rules-based international society depends on the political process going forward. Meanwhile, there is a visible community of lawyers and large parts of civil society worldwide – siding with law abiding nation-states – ready to do their utmost to preserve the roots of legality so that it may flourish again once the crisis has subsided.

³⁷ Schachter, *Invisible College*, cit., p. 217.

Christian J. Tams

Scholarly Interventions and their Impact on 20th Century International Law: Notes of Caution and Two Vignettes*

1. *Introduction*

It is a privilege to offer thoughts on the role of scholars in the evolution of international law. Can scholars contribute to international law's development? Should they? And how might such contribution play out? These are some of the questions that I intend to address.

My contribution complements those of Professors Attila Tanzi and Serena Forlati. Whereas Professor Tanzi looks at the influence of scientific institutions, notably the International Law Association (ILA)¹, my discussion centres on individual scholars (including where they make use of institutions to amplify their voice). Whereas Professor Forlati analyses the influence of scholarly works on the identification and determination of existing rules of international law², my aim is to inquire whether scholars can contribute to the formation of such rules. That said, while assessing the influence of scholarly works from different angles, our contributions seek to identify influences of the same kind: just as Professors Tanzi and Forlati, I inquire whether scholarly interventions have left a mark on the corpus of rules and processes that bind subjects of international law.

* This contribution is based on a presentation given during the XXI Giornata Gentiliana, on 14 September 2024 at San Ginesio. While revising the text and adding references, I have sought to retain the format of the presentation.

¹ See Attila Tanzi in this volume.

² See Serena Forlati in this volume.

This limitation reflects a traditional understanding of the notion of “international law”, which excludes from view the manifold influences that scholarly interventions have had on the discourse about international law, and on the understanding of international law as a scientific discipline.

A second limitation is equally relevant. My discussion in the following centres on 20th century international law, i.e a relatively recent period. The focus on the recent past brings with it more than just a temporal concentration. For it is generally taken for granted – including by Professor Caligiuri in his opening remarks – that scholars today play a reduced role, and the influence of their interventions on the development of international law has decreased significantly. We regularly credit the outsized influence of certain early modern scholars who exercised «a marked effect on the emergence of rules when their opinions were timely, reasonable, and well-crafted»: these scholars «acquired the prestige to have their opinions quoted and requoted almost as if they were oracular pronouncements, the oracle’s name each time invoked with greater deference and awe»³. To illustrate, to this date, authoritative restatements trace the doctrine of diplomatic protection to the “oracular” writings of Emer de Vattel, first published 250 years ago: the modern understanding of this fundamental doctrine remains premised on the “Vattelian fiction” according to which an injury to an individual as an injury to the individual’s national state, thus entitling the State of nationality to espouse claims⁴. By the same token,

³ Nicholas G. Onuf, *Global Law-Making and Legal Thought*, in *Law-Making in the Global Community*, ed. Nicolas G. Onuf, Durham, Carolina Academic Press, 1982, pp. 1-81: p. 21.

⁴ In its commentary to the 2006 “Draft Articles on Diplomatic Protection”, an influential restatement of the contemporary position, the UN International Law Commission recognised Vattel’s enormous influence in the following terms: «Diplomatic protection has traditionally been seen as an exclusive State right in the sense that a State exercises diplomatic protection in its own right because an injury to a national is deemed to be an injury to the State itself. This approach has its roots, first in a statement by the Swiss jurist Emmerich de Vattel in 1758 that “[w]hoever ill-treats a citizen indirectly injures the State, which must protect that citizen”, and, secondly in a dictum of the PCIJ in 1924 in the *Mavrommatis* case that “[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right – its right

few contemporary accounts of the law of the sea fail to mention the impact of Hugo Grotius' (even more oracular) writings: the continued recognition of relatively far-reaching freedoms of the seas continues to be evaluated against the backdrop of Grotius' postulates of a *mare liberum*⁵. And Alberico Gentili, in whose shadow we convene, is said to have influenced international law's understanding of the territorial sea and anticipated the development of a regime of *ius post bellum*, and more generally contributed to «the emergence of the law of nations as an autonomous discipline»⁶.

But all this is the past, and according to conventional wisdom, the halcyon days in which writers shaped crucial aspects of contemporary international law are over. Today's scholars may be standing on the shoulders of giants, but they seem to be dwarves – or in any event, have shrunk in size. Sondre Torp Helmersen's recent study on *The Application of Teachings by the International Court of Justice* reflects this conventional un-

to ensure, in the person of its subjects, respect for the rules of international law"» (*Yearbook of the International Law Commission* 2006, vol. II/2, 27: Commentary to Draft Article 1, para. 3). See Emer de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1758), transl. by Charles G. Fenwick, Washington D.C., Carnegie Institution, 1916, vol. 3, book II, chap. VI, p. 136; and further Annemarieke Vermeer-Künzli, *As If: The Legal Fiction in Diplomatic Protection*, «European Journal of International Law», 18, 2007, pp. 37-68.

⁵ See Hugo Grotius, *Mare liberum/The Free Sea*, transl. by Richard Hakluyt, reprint Indianapolis, Liberty Fund, 2004. Wolfgang Graf Vitzthum calls it the most influential contribution to the foundation of high seas freedoms («der [...] einflussreichste Beitrag zur Begründung der Meeresfreiheit»); see *Handbuch des Seerechts*, Munich, Beck, 2006, p. 33. William E. Butler captures the gist of the "Grotian heritage" in the law of the sea: «The principle of freedom of the seas expounded by Grotius has served and continues to serve as rhetorical reinforcement for the point of departure when deliberating about matters of maritime jurisdiction. Rather like the presumption of innocence in criminal proceedings, we invoke it constantly to remind ourselves that whatever developments in the law of the sea are to be contemplated, we should measure their validity and impact with reference to the freedom of the seas. Grotius left embedded in our consciousness a phrase and a standard of community awareness on the international level»: see *Grotius and the Law of the Sea*, in *Grotius and International Relations*, ed. Hedley Bull, Oxford, Oxford University Press, 1992, pp. 209-220: p. 220.

⁶ See the comments by Valentina Vadi, *At the Dawn of International Law: Alberico Gentili*, «North Carolina Journal of International Law and Commercial Regulation», 40, 2014, pp. 131-169: pp. 154 and 169.

derstanding. At the outset of a detailed empirical analysis of the ICJ's approach to scholarly writings (referred to as "teachings", as in Article 38(1)(d) of the ICJ Statute)⁷, he notes, almost casually, that «[t]eachings were more significant [...] in the past» – a fact that is also referred to as a «decline of teachings»⁸. In his analysis, Alexander Orakhelashvili proceeds from the same starting point when noting «[t]he relative demise of the role of scholars»⁹, a "demise" that does not only affect the present, but had clearly set in during the 20th century.

These comments suggest that the topic of 20th century scholarly interventions should be approached with some caution. They also raise questions, as the reasons for «the relative demise of the role of scholars» may not be obvious. Responding to these questions, I begin by setting out two explanations that largely confirm the cautious assessment offered by Torp Helmersen, Orakhelashvili and others, but at the same time nuance it (section 2). Following this exercise in "expectation management", I offer two vignettes that depict impactful interventions, by two 20th century scholars – which illustrate that the demise of scholarship is indeed, as Orakhelashvili notes, "relative" (not complete), and that scholars have at times been able skillfully to explore pathways towards lasting impact even during their era of "decline".

⁷ According to the provision, the ICJ is tasked to apply «the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law». For a detailed analysis see Forlati in this volume.

⁸ Sondre Torp Helmersen, *The Application of Teachings by the International Court of Justice*, Cambridge, Cambridge University Press, 2021, pp. 21-22. Later on, summarising his findings, the writer observes that «teachings are not entirely ignored by the ICJ judges» (p. 159).

⁹ Alexander Orakhelashvili, *The Relevance of Theory and History: The Essence and Origins of International Law*, in *Research Handbooks on the History and Theory of International Law*, ed. Alexander Orakhelashvili, Cheltenham, Edward Elgar, 2020, pp. 2-17: p. 3.

2. *The “Relative Demise” of Scholarship: Structural Explanations*

Permit me to start with an exercise in expectation management and explaining why indeed, as reflected in Torp Helmersen’s and Orakhelashvili’s observations quoted in the introduction, the influence of 20th century scholars on the development of international law differs from that of some of their ancestors.

The starting-point of this exercise is a comforting message. The “decline of teachings”¹⁰ in my view is not necessarily related to the quality of 20th century scholarship. I leave to a side whether 20th century international law has produced another Grotius or Gentili (Lauterpacht, Politis, or Kelsen might be candidates; but any list is subjective). Even if it had, their influence would not have been the same, for the simple reason that the structures of international law, and of international law-making, have changed, limiting the impact of scholarly interventions. Two structural changes in particular are relevant to the “relative demise”¹¹ of scholarship: first, the rise of legal formalism, reflected in the stratification of the traditional doctrine of sources; and second, the rise of a law-making machinery in the course of the 20th century. I will briefly outline these two structural changes before moving on to my two vignettes.

(a) *Positive International Law and the Doctrine of Sources.*

To begin with, the influence of scholarship has been affected by the rise of international legal positivism, reflected in agreement on a doctrine of sources¹². Espoused long before, international legal positivism rose to dominance during the 19th century. As part of a “positivist revolution”, it insisted on the cen-

¹⁰ Helmersen, *The Application of Teachings*, cit.

¹¹ Orakhelashvili, *The Relevance of Theory and History*, cit.

¹² The following account is highly condensed. For a selection of pieces offering more detail see e.g. Roberto Ago, *Positivism*, in *Encyclopedia of Public International Law*, ed. Robert Bernhardt, Amsterdam, North Holland, 1997, vol. 3, p. 1072; Richard Collins, *Classical Legal Positivism in International Law Revisited*, in *International Legal Positivism in a Post-Modern World*, eds. Jörg Kammerhofer, Jean d’Aspremont, Cambridge, Cambridge University Press, 2014, pp. 23-49; and Devika Hovell, *The Elements of International Legal Positivism*, «Current Legal Problems», 75, 2022, pp. 71-109.

trality of “positive law”¹³, i.e. «human-made law, law made by human fiat distinct from *ius naturale* and *ius divinum*»¹⁴. The concept of positive law was not new at all, in fact the term had been used since the Middle Ages. What was new was the claim that positive international law was the only proper law, which implied «the rejection of natural law» and resulted in a vision of international law that was “shorn of religious and moral and philosophical dogmas”¹⁵. This claim gained prominence in the course of 19th century debates about the identification of international law. A «central aspect» of these debates was their «close attention to questions of the sources of international law»¹⁶; put simply, a positivist approach that rejected natural or divine law had to define more clearly how the subjects of international law could “make law”.

The doctrine of sources, which gradually took shape in 19th century debates – culminating in the elaboration, soon after the First World War, of Article 38 of the Statute of the Permanent Court of International Justice – responded to this challenge¹⁷. It left international law with a relatively narrow set of sources of law that enshrined the primacy of States as law-makers. Specifically, each of the three principal sources of international law recognised in Article 38 – treaties, custom and general principles – placed States at the centre of the law-making process¹⁸: the positivist approach that they reflected stood «in symbiotic

¹³ Stephen C. Neff, *A Short History of International Law*, in *International Law*, 6th ed., ed. Malcolm Evans, Oxford, Oxford University Press, 2024, pp. 3-28: p. 13.

¹⁴ Jörg Kammerhofer, *Legal Positivism*, in *Max Planck Encyclopedia of Public International Law* (online edition, at www.mpepil.com) (January 2023), para. 5.

¹⁵ Neff, *A Short History of International Law*, cit., pp. 13-14.

¹⁶ Ivi, p. 14.

¹⁷ See in this volume the contribution by Forlati.

¹⁸ So pervasive was this understanding that positivism was regularly equated with a voluntarist system based exclusively on State consent (which is by no means a necessity). Roberto Ago's observation is reflective of this approach: according to him, «[t]he adjective “positive” [in positive international law] is used in the thought of the 19th century to indicate the particular part of international law in force which is produced by the consent of states, as opposed to that part for which the adjective “natural” or “necessary” is reserved»; this however, is, as Ago notes, a “myth”: Roberto Ago, *Positive Law and International Law*, «American Journal of International Law», 51, 1957, pp. 691-733: pp. 694 and 699.

relation with the [...] state system and its normative order»¹⁹. The sources doctrine, to be sure, did not exclude scholars altogether; in fact, as noted above, “teachings of publicists” were specifically mentioned among the subsidiary means for the determination of rules of international law. However, the doctrine was inspired by an instrumentalist vision that made it more difficult for scholars to shape the development of international law: «International law [...] was now regarded as a corpus of rules arising from, as it were, the bottom up, as the conscious creation of the States themselves»²⁰. This not only excluded any form of direct law-making by scholars – a proposition that today, can be treated as a given²¹. It further reduced the role of scholars who could no longer cast themselves in the role of “seers” of timeless postulates of natural or divine law. Rather, their articulation of legal rules now could be assessed against the “protocols” of Article 38 which set out the parameters for international law-making. Put simply, agreement on an agreed doctrine of sources that defined proper modes of law-making and recognised the primacy of States, made it less likely that “oracular pronouncements” by scholars could morph into law²².

(b) *A Law-making Machinery.*

Just as significantly, the role of scholars has been much affected by the practice of international law-making since the second half of the 19th century. The main trends are well known. In the past 150 years, and especially in the course of the 20th century, international law has expanded massively, and this expansion has primarily been brought about by the constant enactment of “positive law”, on the basis of its traditional sources,

¹⁹ Onuf, *Global Law-Making and Legal Thought*, cit., p. 2.

²⁰ Neff, *A Short History of International Law*, cit., p. 14.

²¹ In their joint separate opinion in the *Arrest Warrant case* before the ICJ, judges Rosalyn Higgins, Peter Kooijmans and Thomas Buergerthal reiterated the general view by noting that, under the existing doctrine of sources, scholarly writings «important and stimulating as they may be, cannot of themselves and without reference to the other sources of international law, evidence the existence of a [...] norm»: see ICJ Reports 2002, 63, p. 75.

²² Cf. Onuf, *Global Law-Making and Legal Thought*, cit., p. 21.

consciously used by professional agents of legal development. Three aspects deserve to be recalled.

The rise of concerted treaty-making: During the 20th century, treaties became the central tool of international law-making. The number of treaties, multilateral and bilateral, rose dramatically, as reflected in the ever-growing catalogue of the United Nations Treaty Series now running to 3200 volumes²³. By 2019, «more than 70,000 treaties ha[d] been registered with the UN Secretariat» covering vast fields of international relations, «from human rights to drugs and crime, from trade and development to the governance of outer space», compared to around 8,000 that had been in force a century earlier²⁴. Throughout this century²⁵, «treaty-making activity continue[d] at an unrelenting pace, with an average of 250 treaties and treaty actions—ratifications, accessions, withdrawals—registered every month»²⁶. As a result, international law not only expanded massively, but also became more dense. And this double extension was achieved primarily through resort to treaty-making – the very source that is most obviously a «bottom up, [...] conscious creation of [international law by] States»²⁷. In international treaties, States as treaty-makers gave international law a tangible reality that did not depend on any scholarly intervention or articulation; and they did so all constantly.

New agents of legal development: Just as it witnessed the dramatic expansion of international (treaty) law, so the 20th century saw the rise of new agents of legal development, which would contribute to the development of international law from positions of authority. International organisations are chief

²³ All available at <<https://treaties.un.org>>.

²⁴ *Introduction*, in *The Oxford Handbook of United Nations Treaties*, eds. Simon Chesterman, David M. Malone, Santiago Villalpando, Oxford, Oxford University Press, 2019, pp. 1-20: p. 2.

²⁵ There is debate about whether the treaty-making trend has peaked since the end of the 20th century: see Joost Pauwelyn, Ramses A. Wessel, Jan Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, «European Journal of International Law», 25, 2014, pp. 733-763.

²⁶ Chesterman, Malone, Villalpando, *Introduction*, cit., p. 2.

²⁷ Neff, *A Short History of International Law*, cit., p. 14.

among them. Having become a fact of international life during the 19th century, international organisations in the 20th century came to be key players in the development of international law, which, as noted by Martti Koskenniemi, «was definitely steered in an institutional direction»²⁸. From the inter-war era onwards, international law, notwithstanding constant assertions of State primacy, became a law with international organisations²⁹. The roles played by such organisations varied. World organisations with broad mandates (such as the League of Nations, the United Nations) were the natural sites of debate about international law, offering a «reliable, yet flexible forum for [treaty] negotiation»³⁰. The organs of these organisations applied international law to particular matters raised before them and adopted resolutions pronouncing on the law's proper construction³¹. More specialised organisations (among them the World Health Organisation and the International Civil Aviation Organisation), under their constitutive documents³², were vested with the power to enact secondary law, thus directly contributing to international law's expansion. Codification began in earnest, promoted by commissions tasked with international law's systematisation and development, typically established within the framework of

²⁸ Martti Koskenniemi, *History of International Law, World War I to World War II*, in *Max Planck Encyclopedia of Public International Law*, para. 3 (www.mpepil.com).

²⁹ For overarching perspectives on the trends sketched out in the text, see Paul Szasz, *Understanding International Institutions and the Legislative Process*, Leiden, Brill, 2021); José E. Alvarez, *International Organizations as Law-Makers*, Oxford, Oxford University Press, 2005.

³⁰ Chesterman, Malone, Villalpando, *Introduction*, cit., p. 4.

³¹ UN General Assembly resolutions are the obvious example: while outside institutional matters, such resolutions are not binding on member states, certain resolutions have come to be seen as «an authoritative interpretation [...] of the principles of the Charter» while others «can provide a basis for the progressive development of the law and, if substantially unanimous, for the speedy consolidation of customary rules»: James Crawford, *Brownlie's Principles of Public International Law*, 9th ed., Oxford, Oxford University Press, 2019, pp. 39-40.

³² See Articles 21, 22 of the World Health Organization Constitution (WHO); Article 37, 38, 54 and 90 of the International Civil Aviation Organization (ICAO) Convention and Article 39-42 of the UN Charter; and the helpful overview by Volker Röben, *International Law, Development through International Organizations, Policies and Practice*, in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com).

international organisations³³. Finally, international courts appeared on the scene: permanent institutions in whose proceedings international law became visible and whose publicly available decisions provided guidance on the proper interpretation of broad fields of international law³⁴. Institutionalisation (in its manifold forms) and judicialisation in turn greatly diversified processes of legal development and shaped the evolution of international law, without any need for a scholarly synthesis.

The emergence of international law bureaucracies: The expansion of international law and its institutionalisation and judicialisation in turn were complemented (and facilitated) by the rise of international law bureaucracies: networks of experts typically not based in academia, and tasked to monitor the application and interpretation of international law and work towards its development³⁵. At the national level, such experts would be based in the dedicated international law departments of government (in foreign offices and beyond). On the international plane, experts – drawn from academia and governments – would staff the legal directorates of international organisations, and sit on bodies specifically tasked to codify and progressively develop international law, such as the UN International Law Commission or UNCITRAL. In the field of dispute settlement, international courts of course required professional lawyers to function: the gradual judicialisation of international law resulted in the emergence of an international judiciary and, over time, of specialised advocates often referred to as the “international bar”³⁶. These

³³ Pursuant to Article 13 of the UN Charter, the General Assembly «shall initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification».

³⁴ For a much fuller discussion see the contributions to *The Development of International Law by the International Court of Justice*, eds. Christian J. Tams, James Sloan, Oxford, Oxford University Press, 2013; and Christian J. Tams, Alexandre Belle, *Erga Omnes Effects of Judicial Decisions: International Adjudication*, in *Max Planck Encyclopedia of International Procedural Law*, paras. 14-26 (www.mpepil.com).

³⁵ Onuf, *Global Law-Making and Legal Thought*, cit., p. 22, speaks of «jurists» and «state bureaucrats».

³⁶ See Eran Sthoeger, Michael Wood, *The International Bar*, in *The Oxford Handbook of International Adjudication*, eds. Cesare P.R. Romano, Karen J. Alter, Yuval Shany, Oxford, Oxford University Press, 2014, pp. 639-654.

experts would engage with international law as their daily business and occupy positions of authority in the discourse about it. Alexander Orakhelashvili describes the impact of these changes on the role of scholars: «[W]ith the bureaucratisation of foreign policy [beginning] in the nineteenth century, diplomat-bureaucrats replaced writers as an integrative feature of the system, jurists began to replace writers as law-making catalysts»³⁷.

* * *

These sketches depict (no doubt in very broad brushstrokes) important changes in the landscape of international law, and in the process of its development. Taken together, they reflect the maturing of a legal system that, in the course of the 20th century, expanded and deepened, and whose expansion and deepening depended on structured procedures for the formation, determination, adaptation, application and interpretation of legal rules, and on the involvement of professional castes of jurists. As a result of these various changes, legal development during the 20th century became a complex, multi-actor exercise, in which States, international organisations, expert committees, international courts, but also NGOs all played some role.

All of this by implication affected the role of scholars. Put figuratively, during the 20th century, scholars had to accept the arrival on the scene of new actors, many of whom (such as courts or international organisation) would participate in the development of international law with an insight or authority that scholars could not necessarily muster. «Gone [was]» – Nicholas Onuf notes, in a passage reminiscent of Orakhelashvili and Torp Helmersen – «the scholar's preeminent role in the articulation of a renewed legal order»³⁸.

Yet some role remained, even where structural changes affected the erstwhile preeminence of scholars. And in fact, there is an alternative to the perspective of “decline”, which focuses on remaining, and new, pathways to scholarly impact. Put sim-

³⁷ Orakhelashvili, *The Relevance of Theory and History*, cit., p. 3.

³⁸ Onuf, *Global Law-Making and Legal Thought*, cit., p. 44.

ply, in the more diverse processes of 20th century legal development, scholars could find new roles and retain their influence. Joining the ranks of international law-making bureaucracies, perhaps part-time and/or for fixed-term secondment, became a realistic option³⁹. Academic expertise, ideally coupled with a measure of judgment, could be channeled into careers as legal counsel, judge or arbitrator. And role-splitting or role-conversions aside, scholars could of course adapt to the new realities of legal development, and seek to initiate, and accompany, conscious law-making efforts: these might be driven by other actors (such as States, NGOs, or expert bodies), but scholars could likely find their place somewhere.

As is well-known, all of this happened. In the messier and more dynamic landscape of 20th century international law, with its blurred lines and cross-over between roles, scholars retained some place. The subsequent sections illustrate as much. They do so by offering two vignettes of scholars who, against the odds, managed to shape relevant areas of 20th century international law. Both did so within the structures of the contemporary regime of law-making, drawing on academic expertise, but applying it in fora and setting that might have eluded (or simply not been available to) the scholars of old. These vignettes are not meant to contradict the overall assessments of the “demise” of scholarship – but they highlight that the demise is but “relative”, and can perhaps serve as an antidote to gloomy reflections about the decline of scholarship.

3. *Raphael Lemkin and the Prohibition against Genocide*

My first vignette illustrates the impact of scholars as activists. It is a grim story in many respects, but also one that indicates how scholarly interventions – in fact: one scholar’s invention – can influence international law. It is a story of how international law responds to a horrific crime, defined initially as «the de-

³⁹ Even Onuf, *ivi*, p. 22, otherwise rather too dismissive, recognises that «by being a jurist or state bureaucrats can the scholar occupy his traditional place».

struction of a nation or an ethnic group»⁴⁰. In the history of humankind, such destructions have by no means been exceptional⁴¹. In response to particular egregious attempts to destroy ethnic groups during the 20th century, international law came to call the horrific crime by a new name: genocide. It did so in large measure because of the efforts of one scholar whose work was central in shaping the emerging international law regime against genocide. This scholar was Raphael Lemkin.

The prohibition against genocide is an important part of contemporary, 21st century, international law. Genocide is qualified as «the crime of crimes» and «the ultimate threat to the existence of ethnic groups»⁴²; allegations of genocide focus attention and polarise debates. Contemporary experts warn of the risks of singling out genocide, highlighting that at times, those refusing to qualify a particular atrocity as genocidal (and instead referring to it as a crime against humanity) are «condemned for trivialization of a humanitarian crisis»⁴³. But the existence of the legal prohibition is not in doubt; it is a core element of international law and a rule of «jus cogens – an overriding fundamental principle, at all times and without exception, for all humanity»⁴⁴.

(a) *A Crime without a Name.*

This certainty marks a significant change. In the 1930s, as States were preparing for a global war, «there was no word»⁴⁵

⁴⁰ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington, Carnegie Endowment for International Peace, 1944, p. 79.

⁴¹ In Jean-Paul Sartre's famous phrase, «[t]he fact of genocide is as old as humanity»; see Id., *On Genocide*, in *Crimes of War*, eds. Richard A. Falk, Gabriel Kolko, Robert Jay Lifton, New York, Random House, 1971, pp. 534-549.

⁴² See respectively, ICTR, Kambanda (ICTR-97-23-S), Judgment and Sentence, 4 September 1998, at para. 16; and William Schabas, *Genocide in International Law*, 3rd ed., Cambridge, Cambridge University Press, 2025, pp. 2-3.

⁴³ Ivi, p. 12 (citing the example of former President Carter's assessment of the atrocities committed in Darfur).

⁴⁴ Statement by the UN High Commissioner for Human Rights, Volker Türk, «75 Years of the Genocide Convention» (8 December 2023), at <<https://www.ohchr.org/en/statements-and-speeches/2023/12/75-years-genocide-convention>>.

⁴⁵ See Johann Justus Vasel, *In the Beginning, There Was No Word...*, «European Journal of International Law», 29, 2018, pp. 1053-1056.

to describe the specific evil of the genocide then underway. In Europe, National Socialists in Germany were beginning to put into action their plans for the extermination of the Jews of Europe. In retrospect it may seem abundantly clear how discrimination gave rise to systematic persecution, and systematic persecution then turned into plans for the «destruction of the European Jews»⁴⁶. Looking back, we identify way points: the purging of Jews from public employment from 1933, the Nuremberg Laws of 1935, Reichskristallnacht of November 1938, the Wannsee Conference of January 1942 where bureaucrats (two thirds of them lawyers by training) mapped out the “final solution”. But hindsight is always 20/20. Contemporary observers struggled to process the information: some felt they were witnessing «a crime without a name»⁴⁷; some refused to believe the rumors, many preferred not to ask questions; still others were complacent.

Raphael Lemkin was not complacent, but alarmed. He looked, listened and spoke where others chose to remain blind, deaf or mute. Born into a Polish Jewish family, from his childhood days onwards, he had studied historical examples of violence against groups⁴⁸. As criminal law practitioner and prosecutor with scholarly leanings, he sought early opportunities to mobilise criminal law against such violence. In March 1933, Lemkin presented a report to the third International Conference for the Unification of Penal Law, convened by a scientific as-

⁴⁶ See Raul Hilberg, *The Destruction of the European Jews*, Chicago, Quadrangle Books, 1961.

⁴⁷ See Prime Minister Winston Churchill's Broadcast to the World about the Meeting with President Roosevelt, 24 August 1941, available at <https://www.ibiblio.org/pha/timeline/410824awp.html>.

⁴⁸ For more on Lemkin, see, amongst many others, *Totally Unofficial. The Autobiography of Raphael Lemkin*, ed. Donna-Lee Frieze, New Haven, Yale University Press, 2013; John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, London, Palgrave MacMillan, 2008; Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, Philadelphia, University of Pennsylvania Press, 2016; and the more succinct accounts offered by Sergey Sayapin, *Raphael Lemkin: A Tribute*, «European Journal of International Law», 20, 2009, pp. 1157-1162; Vasel, *In the Beginning*, cit., p. 1053. Philippe Sands, *East West Street*, London, W&N, 2016, situates Lemkin in the post-war attempts to establish a system of international criminal justice.

sociation established in the League era⁴⁹. Independently of any Nazi policies, Lemkin's report suggested that international law should address a "crime of barbarity", which in his view was characterised by conduct directed against racial religious or social groups, massacres or pogroms, and submit it to a regime of universal criminal jurisdiction. This crime at the time did not exist under any of the recognised sources of international law. Lemkin sought to define it and propose it be addressed in a new convention – thus seeking to prompt an expert body to initiate the adoption, by States, of an international treaty. But the unification conference was unconvinced: the proposed crime was not sufficiently defined, the terms used were too vague, and there was insufficient practice⁵⁰. And so Lemkin's proposal was not taken up.

(b) *Axis Rule in Occupied Europe*.

Ten years later, things took a different turn. By then, following the German invasion of September 1939, Lemkin had fled his native Poland and relocated, via Sweden, to the United States where he took up a position at Duke University. From 1940 onwards, he collected data and information on the prosecution of minorities by German forces and Eastern European regimes that supported them. He published his findings in 1944 in a book entitled *Axis Rule in Occupied Europe*⁵¹. It is a sober work, running to 700 pages, which contain Lemkin's analysis of the legal rules put in place in Germany and countries under German occupation, reproduces national laws and regulations and assesses them against the backdrop of international law.

⁴⁹ See Raphael Lemkin, "Les Actes constituant un danger général (interétatique) considérés comme délits des droit des gens. Explications additionnelles au Rapport spécial présenté à la Vème Conférence pour l'Unification du Droit Penal à Madrid" (Paris 1933). For a clear summary see Lars Berster, *Article II*, in Christian J. Tams, Lars Berster, Björn Schiffbauer, *The Genocide Convention: Article by Article Commentary*, 2nd ed., Munich, Beck, 2023, pp. 85-86.

⁵⁰ For more on the fate of Lemkin's proposals see Daniel Marc Segesser and Myriam Gessler, *Raphael Lemkin and the International Debate on the Punishment of War Crimes (1919-1948)*, in *The Origins of Genocide: Raphael Lemkin as a Historian of Mass Violence*, eds. Dominik J. Schaller, Jürgen Zimmerer, London, Routledge, 2009, pp. 12 ff.

⁵¹ Lemkin, *Axis Rule in Occupied Europe*, cit.

Much of it is meticulous and perhaps pedantic, tracing in much detail this interference with property rights and that limitation on professional freedoms.

One passage stands out though: In Chapter IX, Lemkin steps back from the detail and advocates for a change in the law. The change he calls for is terminological as much as substantive. «New conceptions», notes Lemkin, «require new terms» – and he suggests that the practice surveyed in his book be referred to as “geno-cide”, amalgamating «the ancient Greek word ‘genos’ (race, tribe) and the Latin “cide” (killing)»⁵². Genocide, he claims, is specific and distinct: it denotes «the destruction of a nation or of an ethnic group»; it follows «a coordinated plan of different actions aiming at the annihilation of groups themselves». This focus on the target sets genocide apart: «genocide is directed against the group as an entity, and while the actions involved may target individuals, they are targeted not in their individual capacity but as members of the group»⁵³. Some of the “actions” could no doubt be classed as violations of existing rules, but not all could, notably not where genocide was committed in times of peace (as it could, as Lemkin expressly noted)⁵⁴. What is more, by disaggregating it into its component parts, the specific evil of genocide would be lost: «The entire problem of genocide needs to be dealt with as a whole; it is too important to be left for piecemeal discussion and solution in the future»⁵⁵. Such solution, in turn, would require a reform of the law. «An international multilateral treaty should provide for the introduction, not only in the constitution but also in the criminal code

⁵² Ivi, p. 79. Lemkin distilled the essence of this proposal in many shorter pieces: see e.g. his *Genocide – A Modern Crime*, «Free World», 9, 1945, pp. 39-43; Id., *Le crime de génocide*, «Revue de Droit International, de Science Diplomatique et Politique», 24, 1946, pp. 213-223. Id., *Le génocide*, «Revue Internationale de Droit Pénale», 17, 1946, 371-386; Id., *Genocide as a Crime in International Law*, «American Journal of International Law», 41, 1947, pp. 145-151.

⁵³ Id., *Axis Rule in Occupied Europe*, cit., p. 79.

⁵⁴ Ivi, p. 93.

⁵⁵ Ivi, p. 92. In his *Genocide as a Crime in International Law*, cit., p. 147, Lemkin would note that the various actions committed against individuals «are subordinated to the criminal intent to destroy or to cripple permanently a human group. The acts are directed against groups, as such, and individuals are selected for destruction only because they belong to these groups».

of each country, of provisions protecting minority groups from oppression because of their nationhood, religion, or race»⁵⁶. It was, one might say, a reform proposal driven by agony.

(c) *Silence at Nuremberg.*

Lemkin's analysis described a genocide that was ongoing. His reform proposals were not advanced to address future genocides, but to deal with the holocaust. Yet the first opportunity to put it into effect was largely missed.

One year after the publication of his work, the "Axis Rule" which Lemkin had documented in his book had been brought to an end. The main Allied powers and they set about prosecuting Nazi war criminals in Nuremberg. They did so based on the Charter of the Nuremberg Tribunal, whose Article 6 identified three crimes: the waging of a war of aggression, war crimes and crimes against humanity committed during war⁵⁷. Lemkin had encouraged the negotiators to include "genocide" among the list and address the repression of Jews as a self-standing crime, but this was not taken up: «Unless we have a war connection», noted Robert Jackson, «we have no basis for dealing with atrocities»⁵⁸. Notwithstanding this cautious approach, the term "genocide" had immediate resonance: it featured in the indictment (which charged the major war criminals with «deliberate and systematic genocide, viz., the extermination of racial and national groups»)⁵⁹ as well as in the exchanges between prose-

⁵⁶ Id., *Axis Rule in Occupied Europe*, cit., p. 93.

⁵⁷ See Article 6(a)-(c) of the Charter of the International Military Tribunal, annexed to the London Agreement of 8 August 1945, in *United Nations Treaty Series* 82, 280.

⁵⁸ See the remarks in Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, Washington, 1949, p. 331. Claus Kress speaks of a «decisive restriction [in] that there had to be a connection with a war of aggression or a war crime» and notes that "international criminal law [...] of the first generation [comprising the Nuremberg trial] was [...] inextricably linked to the existence of a war": see *International Criminal Law*, in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com, March 2009), at para. 23.

⁵⁹ See IMT, "Trial of the Major War Criminals", vol. II, Nuremberg, 1947, p. 60. Sands offers many details, highlighting Lemkin's «awkward persistence» as well as his capacity to annoy members of the prosecutorial teams: see *East West Street*, cit., pp. 183 ff.

cutors and defendants during the trial⁶⁰. And yet, the focus of the Nuremberg trial was on the waging of aggressive war, not on the Shoah. In the 338 pages of the judgment, the term “genocide” does not appear, not once. Lemkin is said to have been «upset»⁶¹ and «temporarily stunned»⁶² at this omission, which – given the boldness of other aspects of the Nuremberg judgment – is astonishing. However, despite this “crushing blow”, Lemkin he soon «opted to fight the battle on another front»⁶³, namely within the newly-established United Nations Organization.

(d) *Responding to the Challenge: The Genocide Convention.*

After the Nuremberg judgment things happened very fast⁶⁴. 32 days after the Nuremberg judgment, three nations (Cuba, India, Panama), “recruited”⁶⁵ by Lemkin to the cause, placed on the agenda of the General Assembly an item labelled «prevention and punishment of the crime of genocide». Within six weeks of that request, the General Assembly passed Resolution 96 (I), in which it affirmed «that genocide is a crime under international law which the civilized world condemns» and characterised this crime, very much in Lemkin’s way, as the «denial of the right of existence of entire human groups»⁶⁶. What is more, in the final paragraph, the General Assembly tasked ECOSOC, the UN’s newly-established Economic and Social Council, with

⁶⁰ For a detailed account and references see Schabas, *Genocide in International Law*, cit., pp 32-38; see further Berster, *Article II*, cit., pp. 89-90.

⁶¹ See the remarks by US prosecutor Henry T. King, reproduced in Henry T. King Jr., Benjamin B. Ferencz, Whitney R. Harris, *Origins of the Genocide Convention*, «Case Western Reserve Journal of International Law», 40, 2007-2008, pp. 13-14.

⁶² Cooper, *Raphael Lemkin and the Struggle*, cit., p. 78.

⁶³ See, respectively, Sands, *East West Street*, cit., p. 366; and Schabas, *Genocide in International Law*, cit., p. 44. Schabas describes Lemkin’s reaction to the Nuremberg judgment as «ambivalent» (p. 43). And indeed, in *Genocide as a Crime in International Law*, cit., p. 147, Lemkin wrote that «[t]he evidence produced at the Nuremberg trial gave full support to the concept of genocide».

⁶⁴ The following draws on the more detailed account given in *Introduction*, in Tams, Berster, Schiffbauer, *The Genocide Convention*, cit., pp. 6-12.

⁶⁵ Schabas, *Genocide in International Law*, cit., p. 44.

⁶⁶ General Assembly resolution 96(I) (The Crime of Genocide). As Sands, *East West Street*, cit., p. 377, notes, «[w]here judges feared to tread, governments legislated into existence a rule to reflect lemkin’s work».

«drawing up a draft convention on the crime of genocide»⁶⁷. The institutional law-making machinery had sprung into action.

The preparation of that Convention was not a straightforward task. The drafters disagreed on many aspects, from the definition of the crime to the scope of State duties to repress it. But momentum towards a treaty was strong, and, as Lemkin had predicted, sceptics in some «European delegations could not refuse to follow, especially after the recent holocaust»⁶⁸. The second opportunity to put Lemkin's proposal into effect was not to be missed. On 9 December 1948, less than two years after Resolution 96 (I), the General Assembly unanimously and without abstention approved the Convention on the Prevention and Punishment of the Crime of Genocide and opened it for signature⁶⁹. It is a complicated treaty, not without problems and gaps. Declaring genocide a crime, it fails to establish an international tribunal to deal with it, and in fact stopped short of proclaiming a universal duty of all States to prosecute génocidaires⁷⁰. Its definition of genocide set out in Article II is purposefully narrow and does not easily cover forms of «cultural genocide» (notwithstanding Lemkin's emphasis on the importance of protecting groups against the destruction of their culture)⁷¹ or preparatory acts that might over time result in the destruction of a group (which Lemkin seemed to have subsumed under his concept)⁷². To this day, international lawyers question the wisdom of the drafters' choices, and struggle with the requirement

⁶⁷ *Ibidem*.

⁶⁸ General Assembly resolution 260 (III) A (Prevention and Punishment of the Crime of Genocide). The Convention is annexed to the resolution.

⁶⁹ See the remarks in *Totally Unofficial*, cit., p. 122.

⁷⁰ See Article VI of the Convention.

⁷¹ See Tams, Berster, Schiffbauer, *The Genocide Convention*, cit., pp. 11-12. For details on the qualification of attacks on a group's cultural existence see Berster, *Article II*, cit., pp. 104-108; and further Schabas, *Genocide in International Law*, cit., pp. 325 ff.

⁷² Sands, *East West Street*, cit., p. 169, highlights Lemkin's broader approach, noting that he «followed the trail, the decisive steps that formed a pattern. The first step was usually the act of denationalization, making individuals stateless by severing the link of nationality between Jews and the state so as to limit the protection of the law. This was followed by dehumanization, removing legal rights from members of the targeted group. The two-step pattern was applied across Europe».

of establishing a perpetrator's «intent to destroy, in whole or in part, a national, ethnically, racial or religious group, as such»⁷³.

But there is a risk of missing the forest for the trees. While the Convention is anything but perfect, agreement on it was – and remains – a remarkable achievement, and one reached within a surprisingly short period of time. Less than five years after the liberation of Auschwitz, and two years after the Nuremberg judgment that would not mention the crime by name, genocide had been recognised as a crime, and regulated in an international treaty of universal reach – a treaty named after a term that had been invented barely four years earlier. «Rarely ha[d] a neologism had such rapid success»⁷⁴.

(e) *The Scholar as Prophet and Activist.*

Raphael Lemkin did not draft the Genocide Convention; even the early official texts were formulated by other authors. And yet, the Convention is widely regarded as his legacy. Even while the Nuremberg trials were ongoing, he had approached Eleanor Roosevelt, who was then presiding over the nascent UN Commission of Human Rights, and proposed that «the United Nations, and especially your Committee, [...] consider the creation of a machinery for preventing and for punishing the crime of genocide»⁷⁵. In the run-up to General Assembly resolution 96 (I), Lemkin proved a skillful lobbyist who rightly anticipated that non-European States could seize an opportunity to formulate a treaty that would overcome the limitations of the Nuremberg judgment. While State delegates dominated the drafting process (and as noted above, in relevant aspects moved away

⁷³ In two judgments rendered in 2007 and 2015 respectively, the International Court of Justice would insist that such specific intent to destroy could not easily be inferred from conduct: rather, «in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question»: see ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 3, at para. 148, and the same Court's earlier judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, para. 373.

⁷⁴ Schabas, *Genocide in International Law*, cit., p. 14.

⁷⁵ *Ibidem*.

from Lemkin's concept of genocide), Lemkin remained active behind the scenes: the prosecutor-turned-scholar «was reinventing himself once again, this time as a human rights activist»⁷⁶. As the activist's central goal was achieved, Lemkin collapsed. Sayapin notes that reporters, looking for Lemkin after the General Assembly's adoption of the Convention, «found him in a darkened assembly hall, weeping in solitude»⁷⁷. Lemkin himself, when recovering, said he suffered from «“genociditis”: exhaustion from the work on the Genocide Convention»⁷⁸.

Lemkin's later life was not a happy one, by conventional standards. He continued to make the case for the ratification of the Genocide Convention – but was not duly credited, and died lonely and poor in 1959. Only belatedly was his central role recognised. Looking back from the distance of eight decades, it is clear that without Lemkin, there would be no Genocide Convention. «Never in the history of the United Nations has one private individual conducted such a lobby»⁷⁹, it was later said.

Seen in this light, my first vignette affirms, but at the same time nuances, general views on the role of 20th century scholars. Operating within the framework of positive law and in the presence of a machinery of law-making, 20th century scholars could not pretend to make law of their own vocation. But they could be prophets, identifying areas in which new rules were required, and activists, putting moral and political pressure on the law-makers to adopt new rules. Lemkin was both – an “insistent prophet”⁸⁰ and an activist whose cause States simply could not refuse to enshrine in binding legal rules. His story is a grim one, but it shows how 20th century scholars can decisively shape the development of international law.

⁷⁶ Ivi, p. 44.

⁷⁷ As cited by Sayapin, *Raphael Lemkin: A Tribute*, cit., p. 1162.

⁷⁸ See *Totally Unofficial*, cit., p. 179.

⁷⁹ John P. Humphrey, *Human Rights and the United Nations: A Great Adventure*, New York, Transnational, 1984, p. 54.

⁸⁰ *Totally Unofficial*, cit., p. ix.

4. *Roberto Ago and the Systematisation of the Law of State Responsibility*

My second vignette highlights a different form of scholarly intervention, and it has a different protagonist. It does not involve a prosecutor turned scholar-activist, but a law professor whose advice was sought by many and who would eventually be elected a judge at the World Court. The hero is not a tragic one, who would die penniless and forgotten, but of a more classically heroic cast, perhaps even triumphant, who, for all intents and purposes, seems to have led a highly a highly successful professional life and throughout it seems to have been held in the highest esteem by his peers. The second vignette is about Roberto Ago and his reshaping of the international law of the law of State responsibility⁸¹.

Compared to the international law's speedy embrace of the concept of genocide, the story told in this second vignette covers a longer, and more complex, process of legal development. It is best told backwards, from 2001 to 1939, which the subsequent sections do in three steps.

(a) 2001: *Overdue Agreement on a General Regime.*

Responsibility is «a cardinal institution of international law»⁸², and indeed of any legal system. Allocating responsibility is a central «systemic function»⁸³ of legal systems and hugely relevant in the law's practical application. International law is no exception: responsibility is invoked on a daily basis, whenever one legal actor considers another one to have failed to comply with its obligations, and asks for this failure to meet with consequences.

⁸¹ For details see Nicolas Valticos, *Roberto Ago (1907-1995)*, «American Journal of International Law», 89, 1995, pp. 581-583; Piero Ziccardi, *Il diritto internazionale nell'insegnamento di Roberto Ago*, «Rivista di diritto internazionale», 78, 1995, pp. 305-323.

⁸² See James Crawford, *State Responsibility*, in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com, September 2006), para. 1.

⁸³ Robert Kolb, *The International Law of State Responsibility*, Cheltenham, Elgar, 2017, p. 2.

In another respect, international law is exceptional, though. Compared to other legal systems, for a long time it approached cardinal questions of responsibility on the basis of a casuistic approach, without distilling general principles. Until relatively recently, «responsibility was ignored or touched on only incidentally», and treated as an “by-product” to discussions about claims in particular fields of «substantive law, lacking any systematic order or basis»⁸⁴; with the result that responsibility appeared as an annex to, for example, claims concerning the treatment of aliens, an army’s conduct during war, shipping interdictions, and the like. The reasons for this “strange”⁸⁵ state of affairs is difficult to re-establish with precision: the absence of structured systems of dispute resolution (prior to the emergence of arbitration and adjudication from the 19th century onwards) and the fragmentary nature of international law’s substantive rules (which may have favoured a focus on particular areas rather than general concepts) are at times mentioned⁸⁶. But whatever the reasons, «[i]nternational responsibility was not a discrete subject for study until the late nineteenth century»⁸⁷; «the law of State responsibility», understood as a set of general principles, «was at best in its infancy»⁸⁸.

How things have changed. Contemporary international lawyers view responsibility as a core aspect of their discipline, and they no longer treat it as an annex to the substantive rules that govern particular areas. The basic framework of responsibility has been distilled into a widely available restatement, the Articles on State Responsibility, adopted in 2001, after decades of work, by the UN International Law Commission⁸⁹. These

⁸⁴ James Crawford, *State Responsibility: The General Part*, Cambridge, Cambridge University Press, 2013, p. 3.

⁸⁵ Kolb, *The International Law of State Responsibility*, cit., p. 2.

⁸⁶ *Ibidem*.

⁸⁷ Crawford, *State Responsibility: The General Part*, cit., p. 3.

⁸⁸ Kolb, *The International Law of State Responsibility*, cit., p. 2.

⁸⁹ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Yearbook of the International Law Commission 2001, vol. II/2, 31. The Articles have prompted an enormous amount of commentary. In addition to the works by Kolb, *The International Law of State Responsibility*, cit., and Crawford, *State Responsibility: The General Part*, cit., see e.g. *The Law of International Responsibility*, eds. James Crawford, Alain Pellet, Simon Olleson, Oxford, Oxford

Articles are not formally binding, but they are held to reflect customary international law in large measure. What is more, they have “encoded” a way of thinking about responsibility that has become part of the «mental landscape of international lawyers»⁹⁰. The basic features of the contemporary State responsibility “code” can be summarised in four basic propositions:

(i) Responsibility is a broad concept comprising «the general conditions under international law for the State to be considered responsible for wrongful actions or omissions»⁹¹. It applies in principle to all breaches of international law from «minor breaches of a bilateral treaty [...] to the invasion of Belgium»⁹², without any categorical distinction between treaty breaches and violations of other rules of international law⁹³. It does not, however, tell us what specifically these rules require: international lawyers seeking to find out will need to look to the respective treaty or customary rule, and seek to ascertain its meaning through interpretative analysis.

(ii) A State becomes responsible under international law whenever it engages in wrongful conduct; such wrongfulness does not necessarily depend on further elements such as fault, or the causation of damage, and is independent of any assessment of the domestic law of the State that has acted⁹⁴. It is by no means an open-ended notion, though: Responsibility only

University Press, 2010); the forthcoming *Article-by-Article Commentary of the Articles on State Responsibility*, eds. Pierre Bodeau-Livinec, Patricia Galvão Teles, Oxford, Oxford University Press, and the shorter reflections collected in *The ILC Articles at 20*, eds. Federica Paddeu, Christian J. Tams, Glasgow, Glasgow Centre for International Law and Security, 2021.

⁹⁰ See, respectively, James Crawford, *The International Court of Justice and the Law of State Responsibility*, in *The Development of International Law by the International Court of Justice*, eds. Christian J. Tams, James Sloan, Oxford, Oxford University Press, 2013, pp. 71-86: p. 81; and Id., *Revising the Draft Articles on State Responsibility*, «European Journal of International Law», 10, 1999, pp. 435-460.

⁹¹ See para. 1 of the ILC’s Introductory Commentary to the Articles on State Responsibility, cit.

⁹² Crawford, *The International Court of Justice and the Law of State Responsibility*, cit., p. 81.

⁹³ See commentary to Article 12 of the ILC’s text, cit., rejecting any principled distinction between responsibility arising ex contractu or ex delicto (at para. 5).

⁹⁴ See Articles 1-3 of the ILC’s text, cit.

attaches to conduct that can be treated as “State conduct”, and that is not covered by any defence or justification⁹⁵.

(iii) Wrongful conduct gives rise to general duties of cessation and reparation (as «the new legal relations that arise from the commission [...] of an internationally wrongful act»)⁹⁶ which seek to ensure a return to lawfulness and a re-establishment of the situation affected by the breach⁹⁷.

(iv) States affected by the wrongful conduct are entitled to ask for such cessation and reparation and can, under certain circumstances, take coercive measures to bring it about⁹⁸.

From this brief summary, it is clear that international law has overcome its “strange” delay in formulating a «fully fledged legal doctrine [of responsibility], firm in its lines and consolidated in its body»⁹⁹. And as most contemporary observers would readily acknowledge, these “firm lines” and “consolidated body” are set out in the ILC’s Articles on State Responsibility of 2001, whose 59 provisions are readily available online and comprise, in the official UN publication, no more than 14 pages in large print: these handy set of Articles “represent[s] the modern framework of state responsibility»¹⁰⁰.

(b) *Ago’s Influence: Writing the ILC’s “Code” of Responsibility (1963-1980).*

It may be counter-intuitive to begin a vignette that is meant to highlight the role of scholarly interventions on the development of international law with an account of the ILC’s work on State responsibility. If international law has belatedly overcome its strange reticence to think about responsibility as a general doctrine, then the immediate credit for this has to go to an expert body composed of (in the terminology used above)¹⁰¹ 34

⁹⁵ See Articles 4-11 and 20-27 of the ILC’s text, cit.

⁹⁶ Crawford, *The International Court of Justice and the Law of State Responsibility*, cit., p. 81.

⁹⁷ See Articles 28-37 of the ILC’s text, cit.

⁹⁸ See Articles 42-54 of the ILC’s text, cit.

⁹⁹ Kolb, *The International Law of State Responsibility*, cit., p. 2.

¹⁰⁰ Crawford, *The International Court of Justice and the Law of State Responsibility*, cit., p. 45.

¹⁰¹ *Supra*, section 2(b).

“international law bureaucrats” (among them scholars, but also government officials), operating under the aegis of the United Nations and regularly receiving comments and observations from governments. Indeed, it is possible to present the contemporary framework of State responsibility as an output of the law-making machinery established in the 20th century – the very machinery that, as noted above, has deprived scholars of their preeminent status. But that account would miss central elements, for the Commission is composed of individual members. These always leave an imprint on its work, and in the case of Roberto Ago, that imprint is enormous. In essence, Ago nudged the Commission to approach responsibility as a general concept, and his in-depth preparatory work shaped the architecture of the ILC’s text.

The story of the ‘Ago revolution’ has often been told¹⁰². It can be distilled into three key points.

First, Roberto Ago, a regular member of the Commission at the time, was instrumental in getting the Commission’s work on State responsibility off to a new start. From the 1950s onwards, the ILC had studied the law of responsibility, but focused on substantive rules governing a limited subject-matter, namely the treatment of aliens¹⁰³. It had made little progress, and within the Commission, members developed an appetite to restart the project. Restarted it was, but with a «complete shift of focus» and not without a «révolution conceptuelle»¹⁰⁴. After some de-

¹⁰² See e.g. Alain Pellet, *Remarques sur une révolution inachevée: le projet de la CDI sur la responsabilité des États*, «Annuaire Français de Droit International», 42, 1996, pp. 7-32: p. 9; and further Katja Creutz, *State Responsibility in the International Legal Order: A Critical Appraisal*, Cambridge, Cambridge University Press, 2020, pp. 81 ff. See also the instructive account offered by Giovanni Distefano and Robert Kolb who situate Ago’s work against the backdrop of the Italian academic debate: *Some Contributions from and Influence of the Italian Doctrine of International Law*, in *A History of International Law in Italy*, ed. Giulio Bartolini, Oxford, Oxford University 2020, pp. 433-467: pp. 442 ff.

¹⁰³ Daniel Müller offers a clear account: see *The Work of García-Amador on State Responsibility for Injury Caused to Aliens*, in *The Law of International Responsibility*, cit., pp. 69-74.

¹⁰⁴ See Creutz, *State Responsibility in the International Legal Order*, cit., p. 82; and Alain Pellet, *Les articles de la C.D.I. sur la responsabilité de l’État pour fait internationalement suite – et fin?*, «Annuaire Français de Droit International», 48, 2002, pp. 1-23: p. 3.

bate, the Commission set up a subcommittee, which proposed to «give priority to the codification of general rules governing the international responsibility of States»¹⁰⁵. In retrospect, it seems clear that on the journey towards the current law of responsibility, this was the decisive waypoint. Ago was one of four members advocating for this change of direction, and his input proved decisive. Like three of his colleagues, he proceeded from the assumption that, across international law's expanding scope, issues of responsibility raised general questions and were governed by common principles. A «general theory of responsibility [...] exist[ed]», and it awaited codification¹⁰⁶. This view prevailed, if narrowly, and Ago was appointed Special Rapporteur tasked to guide the Commission's on its new track.

Second, the re-start was not without problems, and the new track proved rather more winding than anyone involved in the revolution of 1963 might have anticipated. To distil the general theory of responsibility, the Commission took nearly 40 years – many of which it spent dithering, sometimes going round in circles and often chasing down rabbit holes. If in the end, the work was completed successfully, then this was due to two factors. One, in the final stages of its work, the Commission did get its act together and simplified and streamlined an overly complex text during a focused second reading, guided by Ago's final successor, James Crawford¹⁰⁷. And two, in the early stages of the work, the Commission benefited from the most erudite and

¹⁰⁵ As summarised in Roberto Ago, «First Report on State Responsibility», ILC Yearbook 1969, vol II, 125, 139. The subcommittee's deliberations, summarised by Roberto Ago, and the working papers submitted to it, are reproduced in ILC Yearbook 1963, vol. II, 227. For further details see Christian J. Tams, *Law-making in Complex Processes: The World Court and the Modern Law of State Responsibility*, in *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford*, eds. Christine Chinkin, Freya Baetens, Cambridge, Cambridge University Press, 2015, pp. 287-306: pp. 291-292.

¹⁰⁶ As noted in the working paper prepared by Mustafa Kamil Yasseen, reproduced in ILC Yearbook 1963, vol. II, 251.

¹⁰⁷ For personal reflections on this process see Bruno Simma, *The ILC's Work on State Responsibility: Personal Reflections*, in *The ILC Articles at 20*, cit., pp. 7-9. For more on Crawford's role, see Federica Paddeu, Christian J. Tams, *Encoding the Law of State Responsibility with Courage and Resolve: James Crawford and the 2001 Articles on State Responsibility*, «Cambridge International Law Journal», 11, 2022, pp. 6-23.

systematic exposition of the law. Roberto Ago did not live to witness the final push (and who knows, he may have disagreed with some of the streamlining). But supported by a team of collaborators, he offered a detailed and systematic analysis of the law on which the success of the work depended.

Between 1969 and 1980, Roberto Ago produced eight reports on State responsibility which developed the central conceptual propositions on which the contemporary law of responsibility rests, and distilled them into draft articles¹⁰⁸. While the Commission would later finetune some of Ago's proposals, and spend much time agonising over Ago's proposed distinction between classes of wrongs (ill-advisedly labelled "delicts" and "crimes")¹⁰⁹, a comparison between the final version of the Articles on State Responsibility and Ago's eight reports reveal striking similarities. To illustrate, Ago's reports enshrine the Commission's focus on responsibility as a general notion, described as a system of "secondary" (as opposed to "primary") rules that apply whenever a State violates any of its obligations – a move later described as a "Copernican revolution"¹¹⁰. They define responsibility as an objective concept independent of fault or causation of damage, that is premised on the existence of an international wrongful act (and on that basis, to be distin-

¹⁰⁸ See, respectively, Ago's First Report, ILC Yearbook 1969, vol. II, 125; Second Report, ILC Yearbook 1970, vol. II, 177; Third Report, ILC Yearbook 1971, vol. II, 199; Fourth Report, ILC Yearbook 1972, vol. II/1, 71; Fifth Report, ILC Yearbook 1976, vol. II/1, 3; Sixth Report, ILC Yearbook 1977, vol II/1, 3; Seventh Report, ILC Yearbook vol. II/1, 31; Eighth Report, ILC Yearbook 1979, Vol. II/1, 3, and ILC Yearbook 1980, Vol. II/1, 13.

¹⁰⁹ In Bruno Simma's phrase, *The ILC's Work on State Responsibility*, cit. p. 8, this was one of the «juridical time bombs» to be defused during the second reading. Whether the Commission succeeded in doing so is much discussed, and there is no need to rehash the long-standing discussion. The background to Article 19 is comprehensively assessed by Marina Spinedi, *International Crimes of State. The Legislative History*, in *International Crimes of States*, eds. Joseph H.H. Weiler, Antonio Cassese, Marina Spinedi, Berlin, De Gruyter, 1989, pp. 12-31; for a retrospective see Christian J. Tams, *Article 40*, in *Article-by-Article Commentary of the Articles on State Responsibility*, section III.

¹¹⁰ See Distefano, Kolb, *Some Contributions*, cit., p. 446. According to Ago's draft article 1 «Every internationally wrongful act of a State involves the international responsibility of that State»: see Third Report, ILC Yearbook 1971, vol. II, para. 48. This is indeed the «cornerstone» of the ILC's approach: see Distefano, Kolb, *Some Contributions*, cit., p. 450.

guished separate from forms of liability for lawful, but hazardous conduct), but not co-terminous with wrongfulness¹¹¹. They classify categories of such international wrongful acts (which can be continuing, non-continuing, composite, requiring prevention, etc.), but reject any principled distinction between contractual and non-contractual responsibility¹¹². They insist on the need and possibility of distilling general rules of attribution and identify categories of imputable “acts of State”¹¹³. Finally, they define generally available defences; and they assert general rules against complicity in wrongfulness¹¹⁴. If the Commission is credited with having «encoded the way we think about responsibility»¹¹⁵, then it was Ago who wrote the code.

Third, while Roberto Ago wrote the code as a member and Special Rapporteur of the International Law Commission, anyone engaging with his eight reports will recognise the law professor at work. Their academic character occasionally resulted in over-refinement (some of which was streamlined during the endgame of the Commission’s second reading)¹¹⁶, but at the same time, it suggests that, while “commissioned”, the reports should be categorised as a scholarly intervention. Another eminent member of the Commission, Alain Pellet, would later describe them as «une somme, à mes yeux inégalée (dans le genre) d’érudition, de raffinement de la pensée et d’intelligence

¹¹¹ See e.g. Ago, Second Report, ILC Yearbook 1970, vol. II, paras. 12 ff. and para. 6. Federica Paddeu considers the «conceptual differentiation between the notions of “wrongfulness” and “responsibility”» to be «the real genius of Ago’s framework for the responsibility project»: see her *Justification and Excuse in International Law Concept and Theory of General Defences*, Cambridge, Cambridge University Press, 2018, p. 40.

¹¹² See Ago, Sixth Report, ILC Yearbook 1977, vol II/1, at paras. 1 ff.; and Id., Fifth Report, ILC Yearbook 1976, vol. II/1, at para. 19.

¹¹³ See the initial exposition in Id., Third Report, ILC Yearbook 1971, vol. II, paras. 106 ff.

¹¹⁴ Id., Seventh Report, ILC Yearbook vol. II/1, paras. 51 ff.; Id., Eighth Report, ILC Yearbook 1979, Vol. II/1, paras. 48 ff.

¹¹⁵ Crawford, *The International Court of Justice and the Law of State Responsibility*, cit.

¹¹⁶ See Pellet, *Les articles de la C.D.I. sur la responsabilité de l’État*, p. 4 (noting the «pragmatisme anglo-saxon» that guided the second reading) and p. 5 (criticising the undue «simplification» of certain provisions adopted under the guidance of Robert Ago).

juridique tendue vers le progrès du droit international»¹¹⁷. And further, the work of «un théoricien [...] [dont l'] art a consisté à “imposer” sa propre théorie de la responsabilité international»¹¹⁸. And a quick glance at other literary works indicates how decisively Ago's theory has displaced alternative scholarly perspective on the law of responsibility, prevalent notably in the British scholarship that remained tied to thinking about the topic from the perspective of causes of action and remedies, and that for a long time wondering why it was useful to approach the law from the perspective of wrongfulness, that general notion situated somewhere «between illegality and liability»¹¹⁹. Over time, even British scholars would come round to the idea, to the point where all international lawyers working on State responsibility today do so on the basis of the ILC's master plan, designed by Roberto Ago: To cite Pellet again, «[a]près Ago, le droit international n'est plus tout à fait ce qu'il était avant lui; ses huit rapports ont été le véhicule efficace d'une pensée rigoureuse et attachante»¹²⁰.

(c) *Preparing the “Code”: Ago's Hague Lectures of 1939.*

There is a further reason why Ago's “revolution”, while imposed via the International Law Commission, qualifies as a scholarly endeavour. Like many revolutions, and like many other legal developments, the ILC's encoding of the law of State responsibility drew on much preparatory work. In addition to international courts and tribunals, whose decisions gradually came to articulate general principles on which the ILC's framework could be built, scholars did much of the conceptual groundwork. Dionisio Anzilotti's *Teoria generale della respon-*

¹¹⁷ Id., *Les rapports de Roberto Ago à la C.D.I. sur la responsabilité des États*, «Forum du droit international», 4, 2002, pp. 222-229.

¹¹⁸ *Ibidem*.

¹¹⁹ Pars pro toto (and quoting two authors whose conceptual approaches otherwise could not have been more different – but who were united in their scepticism vis-à-vis the ILC's approach) see Ian Brownlie, *System of the Law of Nations: State Responsibility. Part I*, Oxford, Oxford University Press, 1983; Id., *Causes of Action in the Law of Nations*, «British Yearbook of International Law», 50, 1979, pp. 13-41; and Philip Allott, *State Responsibility and the Unmaking of International Law*, «Harvard International Law Journal», 29, 1988, pp. 1-26.

¹²⁰ Pellet, *Les rapports de Roberto Ago*, cit., p. 229.

*sabilità dello Stato nel diritto internazionale*¹²¹ is widely seen as the breakthrough for conceptual, generalist thinking about State responsibility: an approach that scholars such as Karl Strupp, Edwin Borchard and others consolidated¹²².

But it was none other than Roberto Ago who, in his scholarly work and well before his time on the ILC, mapped out a general theory of responsibility. Ago's Hague Academy course on *Le délit international*¹²³, given in 1939, firmly approached responsibility as a general category, and identified the constitutive elements of what would later be referred to, in more anodyne terminology, an international wrongful act. Many of the sections of *Le délit* directly anticipate core categories later developed in Ago's ILC reports, among them (in the introduction to the course)¹²⁴ the conceptual distinction between wrongful conduct and its consequences (which paved the way for an engagement with responsibility as a general notion); the treatment of attribution and the rejection of fault as a general element (in chapter 3)¹²⁵; the categorisation of wrongful conduct (chapter 4)¹²⁶ and the outline of general defences, even then presented under the unattractive label of circumstances precluding wrongfulness (chapter 5)¹²⁷.

¹²¹ Dionisio Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale*, Florence, Lumachi, 1902. Pierre-Marie Dupuy refers to Anzilotti as the «father of the modern law of responsibility»: see his *A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility*, «European Journal of International Law», 13, 2002, pp. 1053-1081; p. 1056. Creutz captures the gist of the claim, noting that «Anzilotti [...] advanced the idea that responsibility can be generalized»: *State Responsibility in the International Legal Order*, cit., p. 83.

¹²² See notably Karl Strupp, *Das völkerrechtliche Delikt*, Berlin, Kolhammer, 1920; Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad*, New York, The Banks Law, 1916.

¹²³ Roberto Ago, *Le délit international*, «Recueil des cours», 68, 1939, pp. 415-554.

¹²⁴ See *ivi*, p. 421: «Pour délimiter plus clairement encore la tâche actuelle, on laissera rigoureusement de côté tout ce qui regarde les conséquences du délit plutôt que le délit lui-même».

¹²⁵ *Ivi*, pp. 450 ff.

¹²⁶ *Ivi*, pp. 499 ff.

¹²⁷ *Ivi*, pp. 532 ff.

As this brief account indicates, Ago's Hague Academy course can indeed be read as a precursor to his ILC reports: Distefano and Kolb are correct to note that the Hague course «contained in nuce [Ago's] future reports to the ILC»¹²⁸. Or, if literary comparisons are permitted: the Hague course was the Ur-Faust, which contained the gist, later to be unfolded – a scholarly achievement of real significance and a normative synthesis that would have lasting influence.

(d) *The Scholar as System-builder.*

Roberto Ago's contribution to 20th century international law is very different from that of Raphael Lemkin. Where Lemkin had a clear sense of how international law should evolve in a crucial, but discrete area of substantive regulation, and worked to the point of exhaustion towards this evolution, Roberto Ago shaped the contemporary law of responsibility by synthetising and distilling, mapping out a field that few had known existed as such. Where Lemkin openly called for the law to change, Ago aimed for an analytical re-orientation in the law, which he consciously sought not to present as a change of the law, but as a change of perspective. These different aims affected their *modus operandi*, and it seems obvious that Roberto Ago did not have to reinvent himself in the same way as Lemkin; his actions remained closer to traditionally scholarly pursuits. And yet, the contemporary doctrine of State responsibility did not solely depend on scholarly excellence. Just as Lemkin needed to be shrewd in "reading" the mood of early UN debates (where he kept like-minded governments on track and sought to neutralise opposition to the Genocide Convention), Ago had to navigate the complex politics of an expert commission that did not lack big egos (and yet seemed inevitably to fall in line with his proposed approach on responsibility)¹²⁹ and of government law-

¹²⁸ Distefano, Kolb, *Some Contributions*, cit., p. 447. See also *ivi*, p. 450: «Ago's eight reports to the ILC reveal his original approach delineated in 1939». But see Paddeu, *Justification and Excuse in International Law*, cit., pp. 41-43, who discusses changes (between *Le délit* and the later ILC reports) in Ago's treatment of circumstances precluding wrongfulness.

¹²⁹ See notably Pellet, *Les rapports de Roberto Ago*, cit., p. 224, who stresses Ago's «cunning» («roublardise») and underlines his use of «toute une panoplie de

yers closely following the Commission's work. Just as Lemkin, so Roberto Ago operated from within the structures of the 20th century law-making machinery.

5. Concluding Thoughts

Raphael Lemkin and Roberto Ago stand out, but are not unique. Their two vignettes do not exhaust the story of scholarly contributions to 20th century international law. From Antonio Cassese via Mohammad Bedjaoui to Rosalyn Higgins, many more examples could be given. But Ago's and Lemkin's vignettes yield more general lessons about scholarly contributions to legal development. They suggest that, despite the loss of their preeminent status, 20th century scholars could remain influential – if they retained the traditional academic quality of scientific expertise, understanding and vision and were willing and able to use their expertise within the complex law-making processes that had come to shape 20th century international law. Oracular pronouncements might still be useful, but no longer sufficient: the oracle needs to enter the arena and engage, even where this leaves its face marred by dust and sweat. Lemkin and Ago, for all their differences, did enter law-making arenas. As scholars-in-the-arena, they made lasting contributions to 20th century international law.

“tactiques de communication”, dont les “ficelles” peuvent paraître, parfois, un peu “grosses” avec le recul du temps mais auxquelles ses contemporains, dont on peut difficilement penser qu’ils s’en laissaient compter – la Commission était composée de Lachs, Jimenez de Arechaga et autres Reuter [...] –, ont eu l’élégance de se laisser prendre. Et d’abord celle-ci, qui consiste à donner à penser que lui, Ago, n’a rien inventé et que les points les plus délicats de ses positions viennent du tréfonds de la Commission unanime».

Serena Forlati

‘The Teachings of the Most Highly Qualified Publicists’ Today: Scholarship in the Work of the International Law Commission on Subsidiary Means for the Determination of Rules of International Law

1. *Introduction*

The recent work of the International Law Commission (ILC, the Commission) on the sources of international law, specifically the ongoing exercise on subsidiary means for the determination of rules of international law¹, offers some opportunity for reflection on the role of scholarship in present day international law. The First and the Third Report of Special Rapporteur Charles Chernor Jalloh² and the Draft conclusions provisionally

¹ As to the Commission’s previous work, see notably ILC, “Draft conclusions on the identification of customary international law”, *Yearbook of the International Law Commission* 2018, vol. II, part II, p. 91, Draft Conclusion 14; “Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries”, *Yearbook of the International Law Commission* 2022, vol. II, part II, p. 43, Draft Conclusion 9(2); and “General principles of law – Texts and titles of the draft conclusions adopted by the Drafting Committee on second reading”, Doc. A/CN.4/L.1018, 20 May 2025, Draft Conclusion 9. See further “Subsidiary means for the determination of rules of international law – Elements in the previous work of the International Law Commission that could be particularly relevant to the topic – Memorandum by the Secretariat”, Doc. A/CN.4/759, 8 February 2023.

² Charles C. Jalloh, “First report on subsidiary means for the determination of rules of international law”, UN Doc. A/CN.4/760, 13 February 2023 (second reissue 16 May 2023); Id., “Third report on subsidiary means for the determination of rules of international law”, UN Doc. A/CN.4/781, 29 January 2025. An extensive bibliography on subsidiary means (listing mainly, but not exclusively, works in English) is available in “Third report on subsidiary means for the determination of rules of international law by Charles Chernor Jalloh, Special Rapporteur. Addendum

adopted by the Drafting Committee in 2025³ are of particular interest in this regard.

The ILC's work on subsidiary means focuses on Article 38(1) of the Statute of the International Court of Justice, which identifies the sources of law that the Court shall apply when deciding «in accordance with international law such disputes as are submitted to it». This provision, which is also used as a first basis for the identification of the sources of international law more generally, draws a clear distinction between the sources listed in letters (a), (b), and (c) – namely, international conventions, custom and general principles of law – and the «subsidiary means for the determination of rules of law» mentioned in letter (d), that is, «[...] judicial decisions and the teachings of the most highly qualified publicists of the various nations». The materials listed in letter (d) are not, as such, formal legal sources although they may be used to ascertain the content of (international) legal rules⁴.

As is well known, a text almost identical to the one under discussion was included in the Statute of the Permanent Court of International Justice (PCIJ), amid concerns that, whenever neither treaties nor fully fledged customary norms could apply to a

- Preliminary selected bibliography on subsidiary means for the determination of rules of international law prepared by the Special Rapporteur”, UN Doc. A/CN.4/781/Add.1, 25 March 2025 (second reissue 14 May 2025). Special Rapporteur Jalloh's Second Report (UN Doc. A/CN.4/769 of 30 January 2024, reissued 22 April 2024) deals mainly with judicial decisions as subsidiary means for the determination of rules of international law.

³ ILC, “Subsidiary means for the determination of rules of international law – Texts and titles of the draft conclusions provisionally adopted by the Drafting Committee on first reading”, UN Doc A/CN.4/L.1019 of 26 May 2025 (hereinafter, “Draft conclusions on subsidiary means”). The Commission postponed the adoption of draft conclusions 1-13 «to the seventy-seventh session, owing to the unavailability of time for the translation and consideration of commentaries which had been prepared by the Special Rapporteur, as a consequence of the reduced length of the session», see “Report of the International Law Commission - Seventy-sixth session (28 April-30 May 2025)”, UN Doc. A/80/10, p. 75, para. 292. On the consequences for the ILC of the current cuts to the UN Budget see Mario P. Amoroso, *Codify and Progressively Develop in Times of (Liquidity) Crisis: The Importance of Time for the International Law Commission*, «EJILTalk!», 5 August 2025.

⁴ While the reference in article 38(1)(d) is to sources of law in general, the chapeau makes it clear that the provision deals with *international* law.

case, the new Court should be in a position to avoid a *non liquet*⁵ – while also refraining from a legislative role. At a time when international case law was relatively sparse, Lassa Oppenheim, one of the most authoritative international lawyers of the Anglo-Saxon world, had observed a few years earlier that «text-books of international law have so much more importance for the application of law than text-books of other branches of the law», as they could perform a role in ascertaining international legal rules which other systems typically reserved to judges⁶. It is perhaps no surprise that the proposal to include a reference to teachings in the PCIJ Statute came from the British and US members of the Committee, Root and Phillimore, rather than from the draft submitted by President Descamps to the Advisory Committee of Jurists preparing the PCIJ Statute. The latter text only mentioned «international jurisprudence as a means for the application and development of the law»⁷, and was the object of significant discussion. In particular, Lord Phillimore argued that doctrine «is universally recognized as a source of international law»⁸, while according to Ricci-Busatti States would not readily

⁵ The discussion mainly concerned the role of general principles of international law, but also informed the Committee's decisions on the role of scholarship. See PCIJ, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee – June 16-July 24 1920* (The Hague, van Langenhuisen Brothers, 1920) eg 14th Meeting p. 307 (Hagerup); 15th Meeting, *ivi*, p. 312 (De Lapradelle), p. 316 (Hagerup), pp. 318, 332. Cf. Ole Spiermann, *The History of Article 38 of the Statute of the International Court of Justice: "A Purely Platonic Discussion"?*, in *The Oxford Handbook of the Sources of International Law*, eds. Samantha Besson, Jean. d'Aspremont (eds.), Sevrine Knuchel, Oxford University Press, Oxford, 2018, pp. 165-178; pp. 171 ff. See further Jalloh, "First report" (n. 2), paras. 217 ff.

⁶ Lassa F. L. Oppenheim, *The Science of International Law: Its Task and Method*, «American Journal of International Law», 2, 1908, pp. 313-356: p. 315.

⁷ Advisory Committee of Jurists, *Procès-Verbaux*, (n. 5), 13th Meeting, Annex 3, p. Generally, on the drafting history of Article 38 ICJ Statute and the corresponding text of the PCIJ Statute see Alain Pellet, Daniel Müller, *Article 38*, in *The Statute of the International Court of Justice: A Commentary*, 3rd edn, eds. Andreas Zimmermann *et al.*, Oxford, Oxford University Press, 2019, pp. 819-962: pp. 826 ff.

⁸ Advisory Committee of Jurists, *Procès-Verbaux*, (n. 5), 15th Meeting, p. 333. See also *ivi*, Annex 1, "Speech by Baron Descamps on the rules of law to be applied", p. 323, who recalled the «characteristic words of the great Chancellor Kent to the effect that when the greater part of jurisconsults agree upon a certain rule the presumption in favour of that rule becomes so strong, that only a person who makes a mock of justice would gainsay it».

«accept rules which would be the result of the doctrine rather than of their own will, or of their usages»⁹. However, he also doubted «that it would be possible to find coinciding doctrines concerning points in relation to which no generally recognized rules existed»¹⁰. The final text takes into account this view, attributing to teachings a role of elucidation, rather than actual creation, of legal rules¹¹.

At least some authors posited that there is a difference in weight between judicial decisions and teachings for the purposes of Article 38(1)(d) PCIJ Statute. According to Fachiri, for instance,

in regard to relative weight the Court's decisions will come first, followed by the judgments of other international tribunals and of the highest national courts [...] and [...] the doctrines of learned writers on international law will come last, except perhaps in those instances in which they are unanimous in their views¹².

This hierarchy is not explicit in the text of Article 38(1)(d); moreover, both judicial decisions and the «teachings of the most qualified publicists» have played a vital role in the development of international law. As the contribution of Christian Tams also shows¹³, this does not apply only to authors such as Grotius or Gentili, who shaped the formative years of international law, or to the 19th Century scholars who consolidated the international legal science¹⁴. However, Jalloh considers that scholars'

⁹ Ivi, 15th Meeting, p. 333.

¹⁰ Ivi, pp. 333-334.

¹¹ On this aspect see again the comments of Ricci Busatti, *ivi*, 15th p. 334, and of President Descamps, *ivi* p. 336.

¹² Alexander P. Fachiri, *The Permanent Court of International Justice: Its Constitution, Procedure and Work*, London, Oxford University Press, 1932, p. 104. See further Jalloh, "First Report", paras. 335-336.

¹³ Cf. Tams in this volume. See also Jalloh, "Third report", *supra* note 3, paras. 95-96.

¹⁴ See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge, Cambridge University Press, 2009, *passim*. Cf. Luigi Nuzzo, Miloš Vec, *The Birth of International Law as a Legal Discipline in the 19th Century*, in *Constructing International Law: The Birth of a Discipline*, eds. Luigi Nuzzo, Miloš Vec, Frankfurt a. Main, Klostermann, 2012, pp. IX-XVII: p. IX.

stature appears to have somewhat diminished, no doubt in part, because States have increasingly regulated matters using international conventions, and where such may not exist or prove to be insufficient, may themselves resort to customary international law and general principles of law although the process of determining the existence and content of the applicable rules from those sources also usually benefit from consulting scholarly works. Courts and tribunals, independently of “the teachings” of “the most highly qualified publicists”, can also access with electronic means the extensive body of State practice through digests and other credible sources compiling such information. This appears to thereby limit the need for reliance on the work of “publicists”¹⁵.

Alongside a growing body of conventions and non-binding instruments, also the gradual process of “judicialization”¹⁶ of international law significantly has contributed to the elucidation and development of its rules and principles: international (and domestic) case law has been instrumental to a significant evolution of international law, which can now be considered as a basically “complete”, with an ever-growing set of primary rules being complemented by “secondary” and even “tertiary” rules¹⁷. While the role of international courts is well explored both in scholarship and by international judges themselves¹⁸, it is perhaps less easy to ascertain the relevance of “teachings” in this modified legal environment, where the concern for legal lacunae is less pronounced and scholarship is not frequently and

¹⁵ Charles J. Jalloh, “Subsidiary Means for the Determination of Rules of International Law”, Annex, para 29, in ILC, “Report of the International Law Commission - Seventy-second session (26 April–4 June and 5 July–6 August 2021)”, *Yearbook of the International Law Commission*, 2021, pp. 186 ff. For the recommendation to include the study of subsidiary means in the ILC’s programme of work see the same “Report”, para. 302.

¹⁶ On the phenomenon of “judicialization” of international law see only *The Judicialization of International Law: A Mixed Blessing?*, eds. Andreas Føllesdæl, Geir Ulfstein, Oxford, Oxford University Press, 2018.

¹⁷ The concepts of “primary” and “secondary” rules are used here in the sense suggested by Roberto Ago and accepted by the International Law Commission in its work on responsibility of States for internationally wrongful acts (see ILC, “Report of the International Law Commission on the Work of Its Fifty-Third Session”, *Yearbook of the International Law Commission*, 2001, vol. II, 2, p. 31). On “tertiary” rules see Francesco Salerno, *Sulle norme internazionali ‘terziarie’ a tutela dei diritti umani*, «Diritti umani e diritto internazionale», 2, 2008, pp. 21-49.

¹⁸ See only ICJ, *Legality of the Use of Nuclear Weapons*, *Advisory Opinion*, 8 July 1996, *ICJ Reports* 1996, 236, para 18.

formally relied upon in international decision making. Moreover, the distinction between scholarly assessment of the law *de lege lata* and proposals or stances *de iure condendo* is often problematic. As mentioned above, the work of the ILC on subsidiary means for the determination of rules of international law can help reassessing this relevance.

2. *The International Law Commission's Work on Subsidiary Means*

The very decision to include subsidiary means in the Commission's programme of work was not entirely straightforward. Indeed, some States doubted the wisdom of doing so: notably, the Netherlands opined that the ILC should «focus on issues that are more pertinent for international practice»¹⁹; doubts on the urgency of the exercise were expressed also by Austria and Thailand²⁰. While stressing the Commission's intention to «avoid any over-developing» of the topic, Special Rapporteur Jalloh nonetheless highlighted that «there are aspects of these subsidiary means and their interaction and relationship to the sources that are uncertain, confusing, and arguably even unsettled»²¹.

Actually, at least in some respects the ILC's current exercise can rely on the results of other aspects of its work – notably those concerning custom, *jus cogens*, and general principles of law²². The exercise on subsidiary means develops the analysis with the purpose of elaborating a further set of non-binding Conclusions, which take the previous sets of Conclusions on sources into full account and are generally consistent with, if not necessarily identical to, the relevant parts of those texts²³.

¹⁹ Jalloh, “First report” (n. 2), p. 129, par. 32.

²⁰ *Ibidem*.

²¹ Id., “Third report” (n. 2), para 6.

²² Above, n. 1.

²³ Notably, Draft conclusion 5 on subsidiary means indicates that teachings «are a subsidiary means for the determination of the existence and content of rules of international law» (emphasis added), while according to the preceding texts they “may” serve this function (see Draft Conclusion 9 on General Principles, Draft

More specifically, Draft Conclusion 3 [6], para. 1, on subsidiary means confirms that teachings are not, as such, sources of law, and only «assist with the determination of the existence and content of rules of international law». In this regard the ILC restates the stipulation of Article 38(1)(d) ICJ Statute, which is still reflected in international practice: as Special Rapporteur Jalloh notes, «[p]ractice confirms that courts, starting with the International Court of Justice, do not generally read the language of Article 38, paragraph 1(d), as requiring or obligating them to apply teachings. Quite the reverse. Courts use teachings in other ways to help them identify, interpret or determine whether a rule of international law exists, and if so, the scope and application of the rule»²⁴. This assessment is supported by comments submitted to the ILC by Ireland²⁵, Sierra Leone²⁶, and The United States of America²⁷.

conclusion 9(2) on *jus cogens*, Draft conclusion 14 on custom). The change aims «to ensure greater consistency of the draft conclusion in the present topic with the text of Article 38, paragraph 1 (d), of the Statute»: Jalloh, “Third report” (n 2), para. 83.

²⁴ Ivi, para. 79.

²⁵ Ireland’s judicial practice shows reliance on the «teachings of the most highly qualified publicists [...] to assist in determining rules of international law»: see “Submission by Ireland on the use of subsidiary means for the determination of rules of international law”, section 2.

²⁶ See “Submission of the Republic of Sierra Leone to the United Nations International Law Commission on the use of subsidiary means for the determination of rules of international law in the national courts of Sierra Leone”, 18 January 2023, para. 15, highlighting that an instance of explicit quotation of scholarship by its domestic courts «appears to supply additional reasons for the position already adopted».

²⁷ See “Submission from the United States to the International Law Commission on ‘the use of subsidiary means for the determination of rules of international law, in the sense of Article 38, paragraph 1(d), of the Statute of the International Court of Justice’” January 12, 2023, p. 4, stating *inter alia*: «In its pleadings before international courts and tribunals, the United States often cites to or quotes relevant non-binding decisions of courts and tribunals and the writings of the teachings of the most highly qualified publicists. [...] The United States relies on such documents as persuasive authority, not as an independent source of law».

3. *The Identification and the Function of ‘Teachings’*

The ILC work also addresses other aspects that prompt further reflection: that is, the identification of what amounts to “teachings”; their function; and the attempt to assess their weight. On the first facet, the ILC acknowledges that the concept of “teachings” is an open one and can have a wide range of forms: such role could be attributed, for instance, to *amici curiae* by private scholars²⁸ or, arguably, formal stances by learned societies on the existence and content of international legal rules, that have become more frequent in this time of deep turmoil for international law²⁹. Moreover, the concept of “teachings” cannot be limited to “writings”: already the commentary to Draft conclusion 14 on the identification of custom highlights that the term covers also «teachings in non-written form, such as lectures and audio-visual materials»³⁰. Thus, resources such as the United Nations Audio-Visual Library or the numerous podcasts discussing different areas of international law have become, together with blogs, key instruments in fostering dissemination and scholarly debate. Although they are not always expressly mentioned in the ILC’s works on sources³¹, qualifying them as

²⁸ On the practice of international criminal tribunals, including under Rule 103 of the Rules of procedure and evidence of the International Criminal Court, see Jalloh, “First report”, para. 319 ff. Human Rights Courts too allow for, or solicit, similar forms of intervention (for instance, under Article 36 European Convention on Human Rights: see Eva Brems, Ellen Desmet, *Academic Third-Party Interventions before the ECtHR in the Field of Asylum and Migration: The Experience of the Human Rights Centre at Ghent University*, «Refugee Law Initiative Blog», 22 August 2024, available at <https://rli.blogs.sas.ac.uk/2024/08/22/academic-third-party-interventions-before-the-ecthr-in-the-field-of-asylum-and-migration/>, last accessed 10 November 2025).

²⁹ See eg the positions of the American Society of International Law (<https://www.asil.org/resources/press-center>); the Italian Society of International and EU Law (<https://www.sidi-isil.org/home-sidi-isil/comunicazioni-2/>); the Société belge de droit international (<https://www.bgir-sbdi.be/autres-activites/>); the Société française de droit international (<https://sfdi.org/tribune-les-principes-du-droit-international-ne-sauraient-etre-sacrifies-sur-lautel-de-lopportunisme-politique/>). All the webpages were last visited on 10 January 2026.

³⁰ ILC, Draft conclusions on custom (n. 1), p. 151, par. 1.

³¹ See for instance Draft conclusions on *jus cogens* (n. 1), commentary to Draft conclusion 9, p. 47, para. 11, which mentions more generally «scholarly writings and other works».

“teachings” seems rather uncontroversial, and the current exercise on subsidiary means takes this into account³². Indeed, the ILC supports a broad reading of concept of “teachings”, which includes «any other dissemination format that might be developed in the future»³³, as long as it is «not produced by States, intergovernmental organizations, or courts and tribunals»³⁴.

In this regard, Special Rapporteur Jalloh suggested that «at least three different classes or categories of authors» may produce teachings: namely, individual authors³⁵; authors «organized into collectives or expert groups, whether permanent or *ad hoc*, typically created privately by a group of individuals»³⁶; and – in his view the most important category – «official bodies or institutions affiliated with the States or international organizations that created them»³⁷. However, only these last bodies’ «preparatory works, such as reports, [...] could be classified as “teachings” in their own right»³⁸, whereas the final outcomes of their work would fall outside the scope of this notion, due to the «role of both the body and their interaction with States»³⁹. In this and other respects some gray areas appear to be unavoidable, for instance as regards the institutional views of the International Committee of the Red Cross, which are sometimes classi-

³² See Jalloh, “Third report” (n. 2), para. 86, and the commentary to Draft conclusion 2 provisionally adopted at the Commission’s seventy-fourth session, in “Report of the International Law Commission on the A/78/10”, p. 83, n. 13.

³³ Jalloh, “First report” (n. 2), para. 307.

³⁴ Special Rapporteur Jalloh drew this criterion from Sondre T. Helmersen, *Scholarly-Judicial Dialogue in International Law*, «Law and Practice of International Courts and Tribunals», 16, 2017, pp. 464-482: pp. 472-473.

³⁵ Jalloh, “Third report” (n. 2), para. 92, noting that authors are usually scholars but «can also be practitioners». On the complex relationship between the role of ‘teacher’ and that of legal advisor, counsel or even judge see Manfred Lachs, *The Teacher in International Law (Teachings and Teaching)*, The Hague-Boston-London, Martinus Nijhoff, 1982, pp. 177 ff.

³⁶ *Ibidem*.

³⁷ *Ibidem*.

³⁸ *Ibidem*.

³⁹ Jalloh, “Third report” (n. 2), par. 130.

fied as “teachings”⁴⁰ but emanate from a body whose functions are at least in part mandated by States⁴¹.

Nonetheless, the demarcation line allows for a convincing distinction, and has led the ILC to exclude from the realm of “teachings”, among others, the work of expert bodies appointed by States or international organizations even if «consisting of experts sitting in their personal capacity»⁴², including the ILC itself⁴³. These materials are of more significant relevance than teachings for the assessment of existing law, since “public” bodies composed by experts sitting in a personal capacity are nonetheless a direct or indirect emanation of States, which are the main international law-makers, as the ILC highlighted also in its work on customary international law⁴⁴; that is particularly apparent today, in light of the numerous instances of backlash against international institutions, including judicial ones. Officially mandated expert bodies could certainly not replace States in their law-making function; still, and despite some opposition directed specifically at human rights treaty bodies⁴⁵, the ILC as a whole accepted that their works could serve as «other subsidiary means». Such residual category includes also «[r]esolutions and other texts produced by international organisations or at

⁴⁰ See United Kingdom, “Comments and observations on the topic Subsidiary means for the determination of rules of international law”, 1 February 2024, quoting the judgment in *Mohammed and others v Secretary of State for Defence; Rahmatullah and another v Ministry of Defence and another; Subnom Re Iraqi Civilian Litigation* [2015] EWCA Civ 843, para. 171.

⁴¹ On the hybrid nature of the ICRC see Jalloh, “First report”, para. 331.

⁴² According to the Special Rapporteur also separate opinions «have an official quality that makes it difficult to describe them just as teachings» (ivi, para. 97), whereas Draft conclusions on subsidiary means do not cover the work of bodies composed of State representatives (Jalloh, “Third Report”, n. 2, para. 126).

⁴³ For the discussion on this point within the Commission see ivi paras. 130 ff., ILC “Report - seventy-sixth session” (n. 3), paras. 331 ff.

⁴⁴ See Draft conclusions on custom (n. 1), Draft conclusion 4(1). Cf. only Giorgio Gaja, *The Protection of General Interests of the International Community*, «Hague Academy of International Law, Collected Courses», 364, 2011, pp. 9-185: p. 45.

⁴⁵ See notably the stance of China, as reported by Jalloh, “Third report” (n. 2), para. 57, according to which «human rights treaty bodies were not judicial bodies, their decisions could not be used as a subsidiary means for the determination of rules of international law». See also ILC, “Report on the 76th Session” (n. 32), Commentary to Draft conclusion 9, p. 83, no. 14.

intergovernmental conferences»⁴⁶; it is distinct from both case law and teachings and is meant to cover materials «that are generally used, including by courts and tribunals»⁴⁷, to assist in the determination of international legal rules. This approach is in line with the ILC Draft conclusions on *jus cogens*, notably with its Draft conclusion 9(2), which clearly distinguishes between the work of expert bodies and teachings, while including both kinds of materials among subsidiary means⁴⁸. It is also in keeping with the non-exhaustive nature of the list of sources included in Article 38(1) ICJ Statute⁴⁹.

Be that as it may, materials which could, in principle, qualify as “teachings” may serve the function of identifying the content and the correct interpretation of existing norms. This “interpretation function” of teachings is what matters specifically for the purposes of Article 38(1)(d) ICJ Statute: in an often quoted passage of the *Paquete Habana* judgment, the United States Supreme Court highlighted that the works of jurists «are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is»⁵⁰. While the collection of state

⁴⁶ Draft Conclusion 10 [9 and 10] states that these works «may serve as a subsidiary means for the determination of the existence and content of rules of international law», while Draft Conclusion 11 [9 and 10] lists a series of criteria to assess their weight, that are in part similar, but not identical to, the general criteria envisaged by Draft Conclusion 4[3]. Cf. already Draft conclusions on the identification of custom (n. 1), Draft conclusion 12. The qualification of relevant materials as «other subsidiary means would not preclude their use ‘for other purposes’» (see Draft conclusions on subsidiary means 3[6], para. 2 on).

⁴⁷ ILC, “Report on the seventy-fourth session” (n. 32), Commentary to Draft conclusion 2, p. 84, no. 18.

⁴⁸ ILC, Draft conclusions on *jus cogens* (n. 1), p. 43: «The works of expert bodies established by States or international organizations *and* the teachings of the most highly qualified publicists of the various nations may also serve as subsidiary means for determining the peremptory character of norms of general international law» (emphasis added).

⁴⁹ See ILC, *Report on the activities of its seventy-fourth session* (2023), Doc. A/78/10, p. 70, para. 110, and *ivi*, p. 47, no. 12. Notably binding acts of international organizations and unilateral engagements are also acknowledged as possible sources of legal obligations (see only Gleider Hernández, *International Law*, 3rd edn, Oxford, Oxford University Press, 2025).

⁵⁰ *The Paquete Habana, The Lola*, 175 U.S. 677. See also, among many others, Francesco Capotorti, *Cours general de droit international public*, «Recueil des

practice and other relevant elements may have become easier in the decades after this judgment was adopted, the role of scholars in their assessment and systematization is still acknowledged⁵¹.

However, teachings may also have what Special Rapporteur Jalloh calls a “persuasive function”⁵², insofar as they could influence State behaviour and induce, or at least advocate for, an actual change in the law⁵³. The ILC cautions that this kind of teachings «do not always distinguish (or distinguish clearly) between the law as it is and as they would like it to be»⁵⁴; they may also express national or personal views and greatly vary in quality⁵⁵. This was always a feature of international legal scholarship: as Aceves notes, already Grotius’ «writings on the law of the sea were influenced by his desire to promote free trade opportunities for Dutch companies overseas»⁵⁶. The current con-

Cours», 248/4, 1994, p. 125: «Les résultats les plus importants, en vue de l’application judiciaire des normes, sont ceux de la recherche au sens strict, c’est-à-dire de l’effort de vérifier le contenu des normes et la possibilité de leur combinaison».

⁵¹ See ILC, “Draft conclusions on custom” (n. 1), commentary to Article 14, para. 2.

⁵² This is actually also the case of the “other subsidiary means” which the International Law Commission identifies. For instance, the International Law Commission’s task is to contribute not only to the codification of international law, but also to its progressive development, in light of the express stipulations in both Article 13 UN Charter and Article 1(1) of the Commission’s Statute (Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981).

⁵³ Special Rapporteur Jalloh’s “First report” (n. 2) para. 310, also identified a third function whereby «teachings, especially those produced by a collective of experts, may lead the way in codifying or progressively developing the law or advocating reform of law even before States and other international actors may be willing to do so». This function of «codification and progressive development’ of international law», however, would appear to significantly overlap with the first two functions; it is not discussed again in the Special Rapporteur’s “Third Report” and the Draft Conclusions do not reflect it.

⁵⁴ ILC, Draft Articles on the identification of custom, commentary to Article 14, para. 3.

⁵⁵ *Ibidem*. For the proposition that “activist” scholars, «trying to convince judges, students or public opinion that the law is what it is not [...] will have departed from the threshold of being “highly qualified”», see Francisco Orrego Vicuña, *International Law in Search of Rebalance*, Leiden-Boston, Brill, 2025, pp. 136-137.

⁵⁶ William J. Aceves, *Symposium Introduction: Scholarship as Evidence of International Law*, «Loyola of Los Angeles International and Comparative Law Review», 26 (2003), pp. 1-5: p. 4, note 12.

text, where powerful states are in the process of undermining of key “constitutional” principles of the post-1945 world order, makes it apparent that this “persuasive function” can also take the form of advocating *resistance* to change. More generally, and as Schwarzenberger put it with regard to the state of world affairs in 1939,

[a] situation which calls forth such alarming statements from leading politicians on both sides of the Atlantic is a challenge not only to statesmen but also to students of international law and relations. It is their especial task to examine the connection between their own subject and the general social environment, to analyze the repercussions which such a movement may have upon their customary conceptions and values, to adapt these in the light of experience, to contribute to the deeper understanding of this critical situation, and, if possible, to find adequate means of escape from the impasse⁵⁷.

This “persuasive” function is key to understanding the role of scholarship in any given legal system; neat demarcations from the “interpretation” function can be difficult to draw. This adds to the difficulty of identifying the “teachings” which qualify as “subsidiary means”.

4. Assessing the “Quality” of Teachings

The idea that only a select group of teachings could aspire to be relevant for the purposes of Article 38(1)(d) is clear in its reference to the «most highly qualified publicists». In the preparatory works within the Advisory Committee of Jurists, De Lapradelle notably stressed the need «to make a classification: the different expressions of doctrine would be arranged according to their importance»⁵⁸. The ILC exercise does attempt to identify criteria to assess the weight of teachings, as of other subsidiary means, while at the same time addressing the con-

⁵⁷ Georg Schwarzenberger, *The Rule of Law and the Disintegration of the International Society*, «American Journal of International Law», 33, 1939, pp. 56-77: p. 58.

⁵⁸ Advisory Committee of Jurists, 15th Meeting, p. 336. Article 38 does not specify that the “publicists” in questions should be experts specifically of public international law.

cerns voiced in the comments of States such as Brazil, Belarus, and others, which criticized the tendency to rely only on scholarship coming from a limited group of States⁵⁹. This tendency is often remarked upon also in other contexts: for instance, Alain Pellet and Daniel Müller note in their commentary to Article 38 ICJ Statute

that, as unfortunate as it is, the main doctrinal production still comes from the North and more particularly from a handful of countries where international law has gained a rather high degree of sophistication; too much emphasis on the “teachings of publicists” by the Court would unavoidably throw light on this unfortunate situation while, at the same time, showing that “the different nations”, in principle required by the text of Article 38, para 1(d), are not so “different”⁶⁰.

In fact, the claim that high-quality scholarship is the province of only a few countries grows less tenable by the day, and the dearth of express references to teachings in the case law of the ICJ is not necessarily an indication that they are of little relevance: as Special Rapporteur Jalloh acknowledged, the «value of teachings, used as background materials, indicates that they may in fact carry greater influence than can be presumed from citation counts alone»⁶¹. Moreover, other international courts follow a different approach⁶². Still, statistics on explicit quotations of teachings, notably by the International Court of Justice, justify the concern that, in practice, the recourse to teachings as subsidiary means is still limited to only a “privileged few” authors⁶³. In the view of Special Rapporteur Jalloh, «[t]his issue may give rise to uncomfortable conversations. But [...] it should be addressed head-on instead of brushed under the carpet»⁶⁴. Indeed, one of the most interesting aspects of the ILC’s exercise is the attempt to identify criteria for the assessment of the weight of subsidiary means, including teachings.

⁵⁹ Jalloh, “First Report” (n. 2), paras. 35-26.

⁶⁰ Pellet, Müller, *Article 38* (n. 6), cit., p. 961. See also Jalloh, “First Report”, para. 332, and Id., “Third Report” (n. 2), paras. 98-99.

⁶¹ *Ivi*, para. 100.

⁶² Cf., on the practice of the ICC, Jalloh, “First report”, para. 320.

⁶³ Jalloh, “Third report”, (n. 2), para. 99.

⁶⁴ Id., “First report” (n. 2), para. 332.

In fact, both the Special Rapporteur and the Commission as a whole agree that «[b]esides authorship, and this is perhaps the most important part, it is really the content and the quality of the teaching that matter»⁶⁵. Already in 2018, the commentary to Conclusion 18 on the identification of custom highlighted:

The reference to “the most highly qualified” publicists [in Article 38 ICJ Statute] emphasizes that attention ought to be paid to the writings of those who are eminent in the field. In the final analysis, however, it is the quality of the particular writing that matters rather than the reputation of the author; among the factors to be considered in this regard are the approach adopted by the author to the identification of customary international law and the extent to which his or her text remains loyal to it⁶⁶.

While these stances are difficult to dispute in principle, they may on their own be of little help in the actual task of assessing the value of “teachings”. Scholars have widely diverging opinions on the content of international legal rules: perhaps more fundamentally, they take vastly different approaches to international law – and to the law in general⁶⁷. Indeed, one very influential role of teachings, that the ILC does not discuss specifically, has to do with the framing of the mindset of international lawyers, politicians and other individuals involved in international relations, and informing their view of the law, including international law. It is in this regard, perhaps, that the influence of experts other than international lawyers can be of particular significance⁶⁸, with different authors and legal traditions garnering influence in specific scientific communities while remaining virtually unknown or at any rate not particularly appreciated in others⁶⁹. This can result in very different views about the na-

⁶⁵ Id., “Third Report”, (n. 2), para. 89.

⁶⁶ ILC, Draft conclusions on custom (n. 1), commentary to Draft conclusion 14, para. 4.

⁶⁷ Alan Boyle, Christine Chinkin, *The Making of International Law*, Oxford, Oxford University Press, 2007, p. 163.

⁶⁸ See ILC, Draft conclusions on custom (n. 1), commentary to Article 14,

⁶⁹ By way of example, see Batiffol’s discussion of Roberto Ago’s reliance on the work of John Austin: «Saluons [...] cet intérêt pour une pensée qui a exercé pendant près d’un siècle une influence quasi-exclusive dans les pays anglo-saxons, et qui a été tellement ignorée jusqu’à une époque récente sur le “continent”» (Henri Batiffol, *L’apport d’un internationaliste à la notion de positivité du droit*, in *International*

ture and content of international law, within specific countries⁷⁰ and even more so at the global level⁷¹. This diversity of views and “thinking caps”⁷² permeates the international legal science and is in principle a richness for international law, but leads to question the very possibility of construing a single international legal system⁷³. In such an environment, the assessments as to the “quality” of teachings, in terms of their ability to persuasively assess existing law, will almost inevitably diverge. It is in this light that one can appreciate the ILC’s effort to identify more precise criteria for assessing the weight of subsidiary means in general, and specifically of teachings. As will be seen, an express reference to “quality” is present only in one of the proposed criteria (“quality of the reasoning”), but each of them can actually provide evidence of overall “quality” of the relevant materials for the purposes of Article 38(1)(d) ICJ Statute.

More specifically, Draft Conclusion 4[3], on «General criteria for the assessment of subsidiary means for the determination of rules of international law», reads:

Law at the Time of its Codification. Essays in Honour of Roberto Ago, vol. 1, Milan, Giuffrè, 1987, pp. 1-10: p. 4). This observation could certainly apply also to contemporary examples of intellectual influence, although such influence is less linked to geographical and national partitions than in Ago’s times.

⁷⁰ Cf. eg. Harold H. Koh, *American Schools of International Law*, «Hague Academy of International Law, Collected Courses», 410, 2020, p. 9.

⁷¹ See for instance: Enzo Cannizzaro, *La doctrine italienne de droit international dans l’après-guerre: entre continuité et discontinuité*, «Annuaire français de droit international», 50 2004, pp. 1-23; Lauri Mälkssoo, *Russian Approaches to International Law*, Oxford, Oxford University Press, 2015, especially pp. 77 ff.; Hanqin Xue, *Chinese Contemporary Perspectives on International Law: History, Culture and International Law*, «Hague Academy of International Law, Collected Courses», 355, 2012, pp. 41 ff.; Wang Tyea, *International Law in China: Historical and Contemporary Perspectives*, «Hague Academy of International Law, Collected Courses», 221, 1990, pp. 195 ff.

⁷² See Lachs, *The Teacher in International Law*, cit., (n. 35), p. 208: «With the rich background of life and events, the plurality of schools of thought cannot surprise, for their “thinking caps” are the product of the age. They are by no means an obstacle in the development of the science of international law or of law itself. For plurality [...] lay at the roots of international law and accompanied it and its science throughout history».

⁷³ Anthea Roberts, *Is International Law International?*, Oxford, Oxford University Press, 2017, *passim*.

When assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, *inter alia*: (a) their degree of representativeness; (b) the quality of the reasoning; (c) the expertise of those involved; (d) the level of agreement among those involved; (e) the reception by States and other entities; (f) where applicable, the mandate conferred on the body.

These criteria apply, “as appropriate”, also to teachings, as stated in Draft Conclusion 9; according to the Chair of the Drafting Committee, the

inclusion of the phrase “as appropriate” in addition to the reference to the general criteria contained in draft conclusion 4 [3] was sufficient to cover the key elements of the criteria, including quality and representativeness, among other factors. It also conveys that not all the criteria might necessarily be relevant when evaluating the weight of a teaching⁷⁴.

The commentary to Draft Conclusion 4[3] offers some further guidance, while restating that «which factors would be relevant, and to what extent, would depend on the specific subsidiary means in question and the prevailing circumstances»⁷⁵. The ILC also identified additional criteria, tailored specifically for teachings, in Draft conclusion 8[5]⁷⁶. According to this text, special weight should be given to teachings «generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world», while also considering «gender and linguistic diversity»⁷⁷. These indications reflect requirements that are mentioned already in Article 38(1)(d) ICJ Statute, albeit adapted to a contemporary language (the deletion of the “archaic” term “publicists”)⁷⁸ and socio-legal environment (particularly as regards the reference

⁷⁴ “Statement of the Chair of the Drafting Committee Mr. Mario Oyarzabal”, 30 May 2025, pp. 4-5.

⁷⁵ ILC, “Report, 74th Session” (n. 32), p. 85, no. 3.

⁷⁶ This is in line with the approach the ILC adopted for other subsidiary means: see again *ivi*, p. 4.

⁷⁷ See already ILC, Draft conclusions on custom, (n. 1) commentary to Draft conclusion 14, para. 4: «The reference to publicists “of the various nations” highlights the importance of having regard, so far as possible, to writings representative of the principal legal systems and regions of the world and in various languages when identifying customary international law».

⁷⁸ Jalloh, “First Report” (n. 2), para. 59.

to “gender diversity”). Notably the idea that the convergence of views between diverse teachings should be given particular relevance is of value today as in the past and enhances the legitimacy of any findings as to the existence of rules and principles of international law⁷⁹.

A special role in this regard is reserved to private expert bodies whose membership reflects both authoritativeness and diversity (including from the point of view of language, legal traditions, gender or national origin). Numerous such bodies are active at the regional and national level, including renowned research centres and learned societies. Among those, particularly the Institute of International Law (IDI)⁸⁰ – a Nobel Prize Laureate whose resolutions were expressly referred to already in the debates within the Advisory Committee of Jurists as materials which «would have to be taken into account to a considerable extent»⁸¹ – and the International Law Association (ILA) stand out even today not only for historical reasons and prestige⁸² but also for the diverse and truly global composition of their membership, coupled with their inclusive methods of work⁸³, which allow for views of individual scholars and professionals to be “sifted through” collective discussions and deliberations. Such methods certainly add to their level of representativeness and

⁷⁹ Id., “Third Report” (n. 2), para. 84. Ivi, para. 94, the Special Rapporteur notes that the reference to “teachings” in Article 38 «would appear to suggest that the intent was to draw on not so much one author as much as on the collective views of multiple writers».

⁸⁰ On the Institut de droit international’s manifold contribution to the codification and development of international law see the various contributions in *Institute of International Law, 150 Years of Contributing to the Development of International Law – Justitia et Pace (1873-2023)*, eds. Maarelco Kohen, Iris van der Heijden, Paris, A. Pedone, 2023. On the ILA see the contribution by Tanzi in this volume.

⁸¹ Advisory Committee of Jurists, *Procès-Verbaux* (n. 5), 15th Meeting, p. 336.

⁸² On the birth of these two institutions see Koskenniemi, *The Gentle Civilizer*, cit., (n. 14) pp. 11 ff.

⁸³ The Statutes and Rules of the Institut de droit international are available at <https://www.idi-iil.org/fr/a-propos/statuts-et-reglement/> (last accessed 10 November 2025). As regards the ILA, the “Committee Rules and Guidelines” of 2024, the “Diversity, Equality & Inclusion Policy” of May 2021, and the “Guidelines for Diversity of Conference and Panel Speakers” of 2020 are available at https://www.ila-hq.org/en_GB (last accessed 10 November 2025).

help balancing, at least in part, the phenomenon which Anthea Roberts captured in the idea of a “divisible college” of international law⁸⁴. In this regard, and notwithstanding their private nature, these learned bodies are often – if not always favourably – compared to the International Law Commission⁸⁵, insofar as they also contribute to the creation of a shared conceptual and language toolbox that helps building bridges across legal traditions and different approaches to international law⁸⁶. At the end of the day, this role may be as crucial for its consolidation as their work on specific topics or branches of this discipline, and a key factor of convergence influencing also state officials and policymakers as well other actors as international governmental and non-governmental organizations, international and domestic courts.

More generally, however, the criteria that the International Law Commission identified are useful guidelines to assess the authoritativeness of teachings. Formulations such as «regard should be had to, *inter alia*» (in Draft conclusion 4[3]), «especially» and «due regard should also be had to, *inter alia*» (in

⁸⁴ Roberts, *Is International Law*, cit., (n. 73), p. 2, challenging Oscar Schachter's idea of an *Invisible College of International Lawyers*, «Northwestern University Law Review», 72, 1977, pp. 217-226

⁸⁵ As Boyle and Chinkin note, «[i]n practice both the ILA and the Institut have in most cases taken a fairly conservative view of codification, rather more so than the ILC, for example. [...] [A]lthough long since overshadowed by the International Law Commission and the broader law-making activities of the UN, both institutions have survived. ILA Committees continue to produce some influential reports and recommendations». *The Making of International Law*, cit., n. 64, p. 164.

⁸⁶ For the opinion that «the Commission has contributed a great deal to the structure, the understanding, and the terminology of international law insofar as international law is a common language [...] it is a major contribution to have introduced words that we all understand, like countermeasures or treaty rather than international agreement. Just simple words that are well-understood and used in the same way around the world», see Michael Wood in Omri Sender, *Two Views of the International Law Commission: A Conversation with Professor Alain Pellet and Sir Michael Wood*, «Max Planck Yearbook of UN Law On Line», 27, 2023, pp. 16-41: p. 17. The other interviewee, Pellet, restated his much more critical assessment of the Commission's role, but acknowledged that «the outcome of the work of the Commission is always better than the work of the Special Rapporteurs individually. [...] the collective work is useful. Sometimes the outcome is not terrific, but it is always better than the work the best Special Rapporteurs, including Crawford or Sir Michael Wood, have done personally» (ivi, p. 22).

Draft conclusion 8[5]) indicate that they are not to be understood as a closed list; Draft conclusion 9 also emphasizes the need for flexibility in applying them. As the commentary to what is now Draft conclusion 4[3] clarifies,

[t]he idea is to signal that what follows is not meant to be a prescriptive statement or to establish an obligation to use a particular subsidiary means. Second, the use of the term ‘inter alia’, was also intended to convey that the list of criteria encompassed those that would likely be the most frequently encountered and could serve as a useful guide, but were illustrative instead of exhaustive⁸⁷.

This is arguably a wise choice, since why and how specific teachings garner the attention of States and other entities as a persuasive assessment of the law remains at least in part elusive and cannot be captured in rigid grids.

5. *Conclusions*

Hugh Thirlway described Article 38 ICJ Statute as a «rock not yet undermined or swept away by the crashing waves of international developments [which] remains geologically and structurally solid»⁸⁸. The work of the International Law Commission on subsidiary means, and the response of States to its outcomes so far, confirm that this is still true also as regards the role that Article 38 envisages for «teachings of the most highly qualified publicists». On the one hand, teachings remain no more than subsidiary sources; on the other hand, they do seem to retain their relevance for the purpose of ascertaining and interpreting the content of international legal rules despite the significant development of the international legal system, including through the “judicialization” of international law.

The Commission has also contributed to clarifying the notion of “teachings”, and distinguishing it from other materials, including the outputs of its own work, which are more appro-

⁸⁷ ILC, “Report on the seventy-fourth session” (n. 32), Commentary to Draft conclusion 3, p. 85, n. 4.

⁸⁸ Hugh Thirlway, *The Sources of International Law*, 2nd edn., Oxford, Oxford University Press, 2019, p. 239.

priately classified as «other means generally used to assist in determining rules of international law».

The most innovative part of the ILC's exercise probably concerns the attempt to develop a set of criteria to assess the weight of teachings for the purposes of identifying rules of international law. The references in Draft conclusion 9 to the «coinciding views of persons with competence in international law from the various legal systems and regions of the world» and to «gender and linguistic diversity» show a marked line of continuity with the language used in Article 38(1)(d); more broadly, the ILC has accepted, and adapted to present-day conditions, the idea that plurality still lays «at the roots of international law and accompanie[s] it and its science throughout history»⁸⁹.

⁸⁹ Lachs, *Teachers*, cit., (n. 35) p. 208.

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Nuova collana di pubblicazioni con eum, Edizioni Università di Macerata

1. *Alberico Gentili. «Responsibility to Protect»: nuovi orientamenti su intervento umanitario e ordine internazionale.* Atti del Convegno, XV Giornata Gentiliana, San Ginesio, 14-15 settembre 2012, a cura di Vincenzo Lavenia, “Studi Gentiliani 1”, eum, Macerata 2015.
2. *Alberico Gentili. Diritto internazionale e Riforma.* Atti del Convegno, XVI Giornata Gentiliana, San Ginesio, 19-20 settembre 2014, a cura di Vincenzo Lavenia, “Studi Gentiliani 2”, eum, Macerata 2017.
3. *Stefano Colavecchia, Alberico Gentili e l’Europa. Storia ed eredità di un esule italiano nella prima età moderna,* “Studi Gentiliani 3”, eum, Macerata 2018.
4. *Alberico e Scipione Gentili nell’Europa di ieri e di oggi. Reti di relazioni e cultura politica,* Atti della Giornata Gentiliana in occasione del IV centenario della morte di Scipione Gentili (1563-1616), San Ginesio, 16-17 settembre 2016, a cura di Vincenzo Lavenia, “Studi Gentiliani 4”, eum, Macerata 2018.
5. *Alberico Gentili. Libro di varie letture virgiliane al figlio Roberto,* a cura di Francesca Iurlaro, “Studi Gentiliani 5”, eum, Macerata 2020.
6. *Alberico Gentili e lo jus post bellum. Prospettive tra diritto e storia.* Atti del Convegno, XVIII Giornata Gentiliana, San Ginesio, 21-22 settembre 2018, a cura di Luigi Lacchè e Vincenzo Lavenia, “Studi Gentiliani 6”, eum, Macerata 2020.
7. *Alberico Gentili e il diritto del mare. Spazi, potere sovrano e diritto internazionale tra gli Hispanicae advocacionis libri duo e l’età contemporanea.* Atti del Convegno, XIX Giornata Gentiliana, San Ginesio, 10-11 settembre 2021, a cura di Luigi Lacchè e Vincenzo Lavenia, “Studi Gentiliani 7”, eum, Macerata 2022.
8. *Alberico Gentili ieri e oggi. Teologia, religioni e diritto internazionale.* Atti del Convegno, XX Giornata Gentiliana, San Ginesio, 16-17 settembre 2022, a cura di Luigi Lacchè e Vincenzo Lavenia, “Studi Gentiliani 8”, eum, Macerata 2024.

9. Diego Panizza, *Diritto, politica, religione nel pensiero di Alberico Gentili. Saggi e interventi 1969-2014*, a cura di Luca Scuccimarra, “Studi Gentiliani 9”, eum, Macerata 2025.

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1. *Alberico Gentili giurista intellettuale globale*. Atti del Convegno, 25 Settembre 1983, Giuffrè, Milano 1988.

2. *Alberico Gentili e la dottrina della guerra giusta nella prospettiva di oggi*. Atti del Convegno, III Giornata Gentiliana, 17 Settembre 1988, Giuffrè, Milano 1991.

3. *Il diritto della guerra e della pace di Alberico Gentili*. Atti del Convegno, IV Giornata Gentiliana, 21 Settembre 1991, Giuffrè, Milano 1995.

4. *Azione umanitaria ed intervento umanitario. Il parere del Comitato Internazionale della Croce Rossa - pensiero umanitario e intervento in Gentili*. Atti del Convegno, VI Giornata Gentiliana, 17 Settembre 1994, Giuffrè, Milano 1998.

5. *Alberico Gentili consiliatore*. Atti del Convegno, V Giornata Gentiliana, 19 Settembre 1992, a cura di Alain Wijffels, Giuffrè, Milano 1999.

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