

## Alberico Gentili's ius post bellum and Early Modern Peace Treaties

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**Gentili's *ius post bellum***  
**and early modern peace treaties**

Randall Lesaffer\*

1) *The growth of the ius post bellum*

Peace treaties played a crucial role in the formation of the political and legal order of Europe in the Early Modern Age (16<sup>th</sup>-18<sup>th</sup> centuries). They are important informative as well as formative sources for the classical law of nations as applied by the European States. Between the Late Middle Ages and the early 18<sup>th</sup> century, peace treaties expanded into extensive and elaborate legal instruments, often containing dozens of detailed stipulations.

Generally speaking, one can distinguish three categories of clauses in early modern peace treaties. First, there were the political concessions made and won by the signatories. In these, the claims for which the war had been waged were settled or reserved for future settlement by peaceful means. The treaty exhausted the former belligerents' right to resort to warfare over these issues in the future. The second group brought the state of war to an end and settled all claims arising from it. The third group regulated future relations between the former belligerents. Many treaties included detailed regulations concerning trade and navigation. From the 17<sup>th</sup> century onwards, it became even customary to supplement peace

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treaties with a separate 'Treaty of Friendship, Commerce and Navigation'.<sup>1</sup> This last category also included measures to guarantee the peace for the future and prevent the resumption of war. Clauses of the third category often combined these two functions.<sup>2</sup>

This evolution can be explained, apart from the intensification of trade relations, from the changing realities of warfare. The Military Revolutions of the Late Middle Ages and Early Modern Age had led to an increase in the scale and costs of warfare, making the mobilisation of and government control over a State's resources an ever more crucial factor for its international position.<sup>3</sup> This, together with the gradual monopolisation of war and of the armed forces by the State transformed warfare from a contest between dynasts and their allies and adherents to an all-out war between territorial States.<sup>4</sup> By the late 16<sup>th</sup> century, it had become customary at the inception of a war to take a series of measures putting an end to

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<sup>1</sup> Stephen C. Neff, 'Peace and Prosperity: Commercial Aspects of Peacemaking' in Randall Lesaffer, ed., *Peace Treaties and International Law in European History: From the End of the Middle Ages to World War One* (Cambridge, 2004), 365-81.

<sup>2</sup> On early modern peace treaty practice: Jörg Fisch, *Krieg und Frieden im Friedensvertrag. Eine universalgeschichtliche Studie über Grundlagen und Formelemente des Friedenschlusses* (Stuttgart, 1979); Randall Lesaffer, ed., *Peace Treaties and International Law in European History: From the End of the Middle Ages to World War One* (Cambridge, 2004). See the project of the *Institut für europäische Geschichte Mainz*, at <http://www.ieg-friedensvertraege.de>.

<sup>3</sup> On the Military Revolution(s): Jeremy Black, *A Military Revolution? Military Change and European Society 1550-1800* (London, 1991); Geoffrey Parker, *The Military Revolution: Military Innovation and the Rise of the West 1500-1800* (Cambridge, 1984); Michael Roberts, *The Military Revolution, 1560-1660* (Belfast, 1956).

<sup>4</sup> Jeremy Black, *European Warfare 1494-1660* (London and New York, 2002); idem, *European Warfare 1660-1815* (London, 1994); John A. Lynn, *Giant of the Grand Siècle: The French Army, 1610-1715* (Cambridge, 1997); Geoffrey Parker, *The Army of Flanders and the Spanish Road 1567-1659* (2<sup>nd</sup> edn., Cambridge, 1990); David Parrott, *Richelieu's Army: War, Government and Society in France, 1624-1642* (Cambridge, 2001); Guy Rowlands, *The Dynastic State and the Army under Louis XIV: Royal Service and Private Interest, 1661-1701* (Cambridge, 2002).

normal relations with the enemy, his vassals and subjects. These included an appeal to all subjects to harm the enemy and his subjects, the prohibition of trade and navigation, the seizure of all enemy property – public and private – within one’s own territory, the arrest or expulsion of enemy subjects, the revocation of all passports, the issuing of general reprisals or letters of marque against all enemy property found inside and outside the own territory.<sup>5</sup> Whereas before, in the Middle Ages, warfare did not disrupt all peaceful relations between the belligerents and their subjects, now it did. In the Late Middle Ages, wars could be considered as a string of separate acts of war. In Early Modern Europe, war was considered in terms of a state of war, distinct and different from the state of peace. To the state of peace, the law of peace applied; to the state of war, the laws of war applied and with time, for third States, the laws of neutrality. The Dutch humanist Hugo Grotius (1583-1645) was the first famously to define war as a state (*status*). By the time he wrote this, in 1625, the evolution towards war as an encompassing state of affairs was already well under way, as Grotius himself acknowledged.<sup>6</sup>

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<sup>5</sup> See the declarations and manifestos of war of the 17<sup>th</sup> and early 18<sup>th</sup> centuries published in Jean Dumont, *Corps universel diplomatique du droit des gens* (8 vols., The Hague, 1726-1731) or in *A General Collection of Treaties, Declarations of War, Manifestos, and other Publick Papers, Relating to Peace and War, Among the Potentates of Europe, from 1648 to the Present Time* (4 vols., London 1710-1732). See Bernd Klesmann, *Bellum solemne: Formen und Funktionen europäischer Kriegserklärungen des 17. Jahrhunderts* (Mainz, 2007); Stephen Neff, ‘Commercial aspects’, 365-70; idem, *War and the Law of Nations: A General History* (Cambridge, 2005).

<sup>6</sup> ‘Sed usus obtinuit ut non actio, sed status eo nomine indicetur, ita ut sit Bellum status per vim certantium quae tales sunt: quae generalitas omnia illa bellorum genera comprehendit’: Hugo Grotius, *De jure belli ac pacis libri tres* (Paris, 1625), 1.1.2.1: ‘But Custom had so prevailed, that not the Act of Hostility, but the State and Situation of the Contending Parties, now goes by the Name; so that War is the State or Situation of those (considered in that Respect) who dispute by Force of Arms’. Translation by John Morrice (1738) of the French edition by Jean Barbeyrac, reprinted as Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Natural Law and Enlightenment Classics, 3 vols., Indianapolis, 2005). Also 3.21.1.1.

The growing divergence between the state of war and the state of peace not only necessitated the elaboration of more complex and comprehensive body of law regulating the state of war – the *ius in bello* – but also of restoring peace – the *ius post bellum*. Between the 15<sup>th</sup> and 18<sup>th</sup> centuries, through peace treaty practice, this *ius post bellum* grew into a mass of customary principles, concepts, institutions and rules. From the Late Middle Ages runs a string of peace treaties that were copied, amended, supplemented and expanded into the great peace instruments of the mid 18<sup>th</sup> century. Prior to the great multilateral peace conferences such as Nymegen (1678/79), Ryswick (1697), Utrecht (1713), Vienna (1738) and Aachen (1748),<sup>7</sup> different ‘traditions’ of peace treaties developed according to the powers involved.

The emergence of the early modern *ius post bellum* began during the late 14<sup>th</sup> and the 15<sup>th</sup> centuries. Important traditions include the treaties between the Italian principalities and city-republics of the 15<sup>th</sup> century and the peace treaties and truces from the Hundred Years War (1337-1453) and the late 15<sup>th</sup> century, involving France, England and the Burgundian Netherlands. The treaties of commerce and navigation between the last two powers also projected a long shadow forwards in relation to commerce and maritime warfare. These traditions were further developed into a dominant tradition in the great peace treaties of the Emperor Charles V (1519-1556/8) and his son Philip II of Spain (1556-1598) with France.<sup>8</sup>

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<sup>7</sup> With the exception of the Treaty of Aachen of 1748, these multilateral conference produced a series of bilateral peace treaties between the belligerents. As such, the treaties from these conferences were not fundamentally different in terms of their form and the laws they applied from common peace treaties. Krystyna Marek, ‘Contribution à l’étude de l’histoire du traité multilatéral’, in Emanuel Diez et alii (eds.), *Festschrift für Rudolf Bindschedler zum 65. Geburtstag am 8. Juli 1980* (Bern, 1980), 17-39.

<sup>8</sup> The Peace Treaties of Madrid (1526) Cambrai (1529), Crépy-en-Laonnais (1544), Câteau-Cambrésis (1559) and Vervins (1598). Fisch, *Krieg und Frieden*, 536-7; Randall Lesaffer, ‘Charles V, *monarchia universalis* and the law of nations (1515-1530)’, *Legal History Review*, 71 (2003), 79-123; Heinhard Steiger, ‘Bemerkungen zum Friedensvertrag von Crépy en Laonnais vom 18. September 1544 zwischen Karl V. und Franz I.’, in Ulrich

As heirs to the Burgundian Netherlands, the Spanish Habsburgs fell heir to the 'northern tradition' of peacemaking, while both great powers had through their involvement in the Italian wars of 1494-1559 become exposed to the Italian diplomatic tradition and practices. After 1600, the Twelve Years Truce of Antwerp of 9 April 1609 between Spain, the Spanish Netherlands and the United Provinces, which had been mediated by the French and English and temporarily ended a drawn-out and complex war of secession, strongly contributed to the *ius post bellum* in relation to land warfare. Through the Peace Treaty of Munster of 30 January 1648 between Spain and the United Provinces, which was largely based on the Antwerp Truce, and thanks to the central role played by The Hague in late 17<sup>th</sup>- and early 18<sup>th</sup>-century diplomacy, the French-Spanish and northern traditions further merged and became the lore of the European *ius post bellum*.

By the time Alberico Gentili (1552-1608) published his *De iure belli libri tres* in 1598, the major provisions that would become standard clauses in the 17<sup>th</sup> and 18<sup>th</sup> centuries were already present in some form. Afterwards, many of these clauses would be further developed and elaborated into ever more detailed stipulations. Through the string of great peace conferences of the late 17<sup>th</sup> and early 18<sup>th</sup> centuries, clauses would then in turn become more standardised and abridged, many of their implications now being considered self-understood. The Treaty of Vervins of 2 May 1598 between France and Spain and the Peace Treaty of London of 28 August 1604 between England and Spain offer a good insight into the major concerns and clauses of peace treaties around the year 1600.<sup>9</sup>

Leaving the concessions settling the dispute underlying the war aside, first come the clauses putting an end to the state of war. The treaties stipulated an end to the hostilities

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Beyerlin, Michael Bothe, Rainer Hofmann and Ernst-Ulrich Petersmann, eds., *Recht zwischen Umbruch und Bewahrung: Völkerrecht – Europarecht – Staatsrecht. Festschrift für Rudolf Bernhardt*, ii (2 vols., Berlin, 1995), 249-65.

<sup>9</sup> Published in Dumont, v.1, 561-73 and v.2, 625-31.

(Vervins, Art. 2; London, Art. 2), a general amnesty and oblivion for all injuries committed during and because of the war (*idem*), the revocation of reprisals and letters of marque (Vervins, Art. 4, London, Art. 6), restitution of all seized realty without, however, income from that property lapsed during the time of their seizure (Vervins, Arts. 7 and 9-10), the revocation of all sentences rendered against absent enemy subjects (Vervins, Art. 8), the conditions under which to restore cities and fortresses (Vervins, Arts. 16-7), the suspension of prescription before the courts for the duration of the war (London, Art. 31), the mutual release of prisoners of war (Vervins, Arts. 21-23, London, Art. 30) and the inclusion of allies and adherents in the peace (Vervins, *in fine*; London, Art. 34). With regards to the restoration of peaceful relations for the future, the treaties stipulated perpetual peace and friendship among the principals and their subjects (Vervins, Art. 2, London, Arts. 1 and 3-4), free movement of persons (Vervins, Art. 3, London, Art. 9-10), the right to trade (Vervins, Art. 3, London, Arts. 9-10, 11-19, 22-27), the promise for equal treatment of one another's subjects before the courts (London, Art. 11), the promise not to grant new reprisals or letters of marque except for particular reprisals against the perpetrators of the injury in case of a manifest denial of justice (Vervins, Art. 4, London, Art. 6), the promise not to arrest the other's subjects or seize their ships at the beginning of a new war but to grant them time to depart (London, Arts. 27-28), and, finally, the recognition that an infringement by a subject would not break the peace but only lead to sanctioning the perpetrator himself (London, Art. 29).<sup>10</sup>

Before we move on to Gentili's doctrine of peacemaking and peace treaties, an important caveat should be made on the relation between treaty practice and doctrine. Scholarly doctrine did certainly not constitute the major source of inspiration for the diplomats who negotiated and wrote the peace treaties of the Early Modern Age. The *ius post*

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<sup>10</sup> See Randall Lesaffer, 'Peace Treaties from Lodi to Westphalia', in Lesaffer, *Peace Treaties and International Law*, 9-46.

*bellum* was developed through the cumulative endeavours of generations of diplomats, who first and foremost relied on older peace instruments.<sup>11</sup> Clauses from older peace treaties were often copied down and, with minor or major adjustments, inserted in the treaty. If a clause proved unsatisfactory, it was sometimes followed up on in an interpretative treaty. The clarifications from that text could then find their way into a later treaty between the same parties.<sup>12</sup>

However, legal doctrine certainly played a role, although somewhat more in the background. Diplomatic delegations to peace negotiations for the most part included, next to a nobleman and a prelate, a university-trained jurist. The prelate normally held either a degree in theology or canon law, or both. Some of the high-aristocratic diplomats had also studied at university and had been exposed to Roman law. Through their common training in the Roman law and often also in the canon law, the diplomat-jurists from different parts of Europe shared a juridical language which they could and did draw on to mould their compromises into legal stipulations. Whether they had during their studies been much exposed to the jurisprudential or theological writings relating to war and peace is harder to decide in general terms, although from the state practices it appears that the basic tenets of the just war doctrine were commonly known.<sup>13</sup>

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<sup>11</sup> E.g. in the Brussels General National Archives, are two files on the Vervins Treaty prepared for the Spanish negotiators at the Munster Peace Congress of 1648, *Papiers d'Etat et de l'Audience*, 429 and 429/1.

<sup>12</sup> See the Twelve Years Truce of 9 April 1609, the interpretative declaration of 10 January 1610 and the Treaty of Munster of 30 January, published resp. in Dumont, v.2, 99-102, v. 2, 119-120 and in Clive Parry, *The Consolidated Treaty Series* (231 vols., Dobbs Ferry 1969-1981), 1, 1-118.

<sup>13</sup> On diplomatic delegations: Lucien Bély, *L'art de la paix en Europe: Naissance de la diplomatie moderne XVIe-XVIIIe siècle* (Paris, 2007); Heinz Duchhardt, 'Peace Treaties from Westphalia to the Revolutionary Era', in: Lesaffer, *Peace Treaties and International Law*, 45-58, 51.

2) *Ius ad bellum, ius in bello, ius post bellum*

Through his *De iure belli libri tres* and his other work relevant to the law of nations, Gentili can be said to have contributed towards the emergence of the law of nations as an autonomous scholarly discipline, a slow and gradual process which started already in the 14<sup>th</sup> century and took to the second half of the 17<sup>th</sup> century.<sup>14</sup>

Before, the law of nations did not exist as a self-standing discipline with its own text canon, literature or logic. Scholarly writings on questions of war and peace as well as other matters, which with time would form part of the law of nations such as diplomatic or treaty law, were inextricably wound up with theology, civil law and canon law. The law of nations, the *ius gentium*, was part and parcel of the *ius commune*, that learned amalgam of Roman law, canon law and some feudal law. There were few learned treatises dealing exclusively with matters of war and peace. The relevant opinions of the great glossators and commentators, decretists and decretalists of the Late Middle Ages were dispersed over their glosses, commentaries and *consilia* (legal opinions). In matters of war and peace, as in almost any aspect of the law, the two great Italian commentators of the 14<sup>th</sup> century, Bartolus of Sassoferrato (1314-1357) and Baldus de Ubaldis (1327-1400) stood out among the civilians.

Nor was the *ius gentium* considered a law particular to a special category of political entities. As the State had not yet set itself up as an externally or internally sovereign body politic holding exclusive jurisdiction over its territory and monopolising its external relations, there was no need for a law exclusively applying to that single form of body politic. As there was no clear distinction of a public and private law sphere, there was no need to set the law of

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<sup>14</sup> Alberico Gentili, *De iure belli libri tres* (1598, edn. 1612, ed. and transl. Coleman Philippon and John C. Rolfe, 2 vols., The Classics of International Law, Oxford and London, 1933).

nations apart from the law at large. Rules and principles of private law need not yet to be applied to the endeavours of kings and princes through the process of analogy; they were directly applied.<sup>15</sup>

From the 14<sup>th</sup> century onwards, the writing of systematic, monographic treatises took of in jurisprudence, to become far more important during the 16<sup>th</sup> century, this partly under the influence of humanism. War too became a common subject for self-standing treatises. Before that, they were scarce and far in between. Around 1360, a student of Bartolus, Giovanni da Legnano († 1383) published a treatise on war, reprisals and duels. His work, as well as late-medieval treatises written in the vernacular, not only covered the laws of war, but also the art, customs and laws of military discipline and the art of warfare in general.<sup>16</sup> In the great collection of late-medieval and Renaissance juridical treatises *Tractatus Universi Iuris* from 1583-1586, several other treatises on war were published.<sup>17</sup> Two of the most famous 16<sup>th</sup>-century treatises on war, those of the civilians and military judges Pierino Belli (1505-1575) and Baltasar de Ayala (1548-1584) still covered, apart from the laws of war, the laws of military discipline as well as aspects of the art of war.<sup>18</sup> Ayala and Belli adapted much of the

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<sup>15</sup> For a good survey of the relevant literature on the laws of war and peace of the Late Middle Ages, see Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris, 1983), 11-441.

<sup>16</sup> Giovanni da Legnano, *Tractatus de bello, de represaliis et de duello* (1360, ed. and transl. by Thomas E. Holland and James L. Brierly, *The Classics of International Law*, Oxford, 1917).

<sup>17</sup> Most relevant are those of Johannes Lupus, Martinus Garatus Laudensis and Francisco Arias, which were all mentioned by Grotius, *De jure belli ac pacis*, *Prol.* 38. Francesco Ziletti, ed., *Tractatus Universi Iuris* (28 + 4 vols., Venice, 1583-1586), 16.

<sup>18</sup> Pierino Belli, *De re militari et bello tractatus* (1563, ed. and transl. Arrigo Cavaglieri and Herbert C. Nutting, 2 vols., *The Classics of International Law*, Oxford and London, 1936); Baltasar de Ayala, *De jure et officiis bellicis et disciplina militari libri III* (1584, ed. and transl. John Westlake and John P. Bate, 2 vols., *The Classics of International Law*, Washington 1912). See Haggenmacher, *Grotius et la doctrine de la guerre juste*, 39-41; idem, 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture', in Hedley Bull,

traditional legal ideas on war to the new reality of the emerging sovereign State, which through the Reformation and the collapse of the religious unity of the Latin West had all of a sudden achieved external sovereignty, but also set some steps towards cutting loose the laws of war from the embrace of the law at large. The genre of the self-standing treatise imposed its own rules, inducing them to isolate the relevant texts from the glossators, commentators and humanist jurists on the laws of war and military discipline from the rest. They by and large limited their references to these fragments, and left out direct references to rules of private law from the Justinian and canon collections and the glosses thereon with which the works of their medieval predecessors writing on the laws of war had abounded.<sup>19</sup> Rules and concepts of private law were still used, but now they were more consciously transferred to the newly emerging discipline of the *ius belli*.

In Gentili's *De iure belli*, we see the same step towards the emancipation of the laws of war being set. But Gentili took a second important step. His treatise was truly a treatise on the laws of war – in the sense of the laws regulating warfare between independent bodies politic, with the exclusion of the rules of military discipline. He thus contributed to the emergence of the *ius belli* as the hardcore of a future 'ius inter gentes'.<sup>20</sup>

Within medieval jurisprudence, the laws of peacemaking – the *ius post bellum* – like the laws of war, were fragmentarily covered in the glosses, commentaries and *consilia* of the civilians and canonists of the Late Middle Ages. Among the most relevant texts were Baldus *Consilium* 2.195 as well as the commentaries by the glossator Odofredus de Denariis († 1265) and Baldus on the *Pax Constantiae* (1183), a text which has found its way into the *Volumen*

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Benedict Kingsbury and Adam Roberts, eds., *Hugo Grotius and International Relations* (Oxford, 1990), 133-75, 158-9.

<sup>19</sup> For a good example thereof, see Baldus de Ubaldis, *Consilia* ii.195 (edn. Venice, 1575).

<sup>20</sup> Peter Haggemacher, *Il diritto della guerra et della pace di Alberico Gentili. Atti del convegno. Quarta Giornata Gentiliana 21 Settembre 1991* (Milan, 1995), 36-7.

*parvum* of the medieval version of the Justinian collection.<sup>21</sup> During the 15<sup>th</sup> century, the first self-standing treatises on peacemaking and peace treaties, the most famous being the treatise by the 15<sup>th</sup>-century Italian canon lawyer Martinus Garatus Laudensis, were written.<sup>22</sup> In their treatises, Ayala, and particularly Belli, had given the *ius post bellum* a place.

But to Gentili falls the merit of having given peacemaking a central place in the jurisprudence of war. Gentili made it the object of the third of the three books of which his treatise existed.<sup>23</sup> To the laws regulating the right to go to war – the *ius ad bellum* – and the rights and duties of belligerents during warfare – the *ius in bello* – he added the *ius post bellum*, the laws on the conclusion of war and the restoration of peace, as a third, logical complement. Grotius adopted this threefold division of the laws of war in his *opus magnum*, *De jure belli ac pacis*, although it was not reflected in the systematic arrangement of the material over three separate books.<sup>24</sup> In the works of the later writers of the laws of war and of

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<sup>21</sup> For Baldus's commentary, see his *Super usibus feudorum et commentum super pace Constantiae* (ed. Franciscus Patavinus, Rome, 1474); Gero Dolezalek, 'I commentari di Odofredo e Baldo alla pace di Costanza,' in *La pace di Costanza* (Bologna, 1985), 59-75.

<sup>22</sup> Martinus Garatus Laudensis, *De confederatione, pace et conventionibus principum* (ed. Alain Wijffels, in Lesaffer, *Peace Treaties and International Law*, 412-447); see also Alain Wijffels, 'Martinus Garatus Laudensis on Treaties,' in *Ibidem*, 184-97; Karl-Heinz Ziegler, 'The Influence of Medieval Roman Law on Peace Treaties,' in *Ibidem*, 147-61. The volume 11 of the *Tractatus Universi Iuris* contains two treatises *De pace & treuga* by Octavianus Volpelliuss and Nicolaus Moronus. In several treatises in the volume 10 *De feudis*, relevant remarks on peacemaking are to be found.

<sup>23</sup> Gentili's treatise was the revised and largely extended version of three separate 'commentaries' which he had published between 1588 and 1590, shortly after his appointment to the Regius Chair of Civil Law at Oxford, Diego Panizza, *Alberico Gentili, giurista ideolog nell'Inghilterra Elisabettiana* (Padova, 1981), 89-92.

<sup>24</sup> The most relevant chapter being 3.20. In 1620, a treatise on the *ius post bellum* by the Leuven law professor Petrus Gudelinus (1550-1619) was published entitled *De jure pacis commentarius*, (Leuven, 1620, edn. Cologne, 1663).

nations of the 17<sup>th</sup> and 18<sup>th</sup> centuries, the *ius post bellum* for the most part held a place, albeit a fairly marginal one. After Gentili and Grotius, Christian Wolff (1679-1754) and Emer de Vattel (1714-1767) dealt the most systematically, extensively and comprehensively with the *ius post bellum*.<sup>25</sup> They were not radically innovative with regards to content and heavily drew on Grotius and through him on Gentili, the Spanish neo-scholastics as well as older traditions. Their systematic approach, however, allowed them to lay out what one can consider the classical doctrine of peacemaking.

In recent years, Gentili has been styled a champion of the humanist approach to the laws of war. Richard Tuck has pitted two scholarly traditions against one another: a neo-scholastic theologian and a humanist and made Gentili into the voice of the latter.<sup>26</sup> In a recent paper, Diego Panizza has applied this dichotomy to some particular disputes concerning war and peace which were current at the time, posing Gentili against the Spanish Dominican Francisco de Vitoria (c. 1480-1546).<sup>27</sup>

One should be careful not to bring this classification too far. One should not reduce the debate to one between scholastic theologians and humanist jurists. The dichotomy makes it tempting to think in terms of mainly theologians and some jurists who continued in the tradition of medieval scholastic just war tradition and humanist jurists who broke free from

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<sup>25</sup> Christian Wolff, *Jus gentium methodo scientifica pertractatum*, 8.959-1040 (1749, edn. 1764, ed. and transl. Otfried Nippold and Joseph H. Drake, 2 vols., The Classics of International Law, Oxford and London, 1934); Emer de Vattel, *Le droit des gens ou principes de la loi naturelle*, 4.1-4 (1758, ed. and transl. Albert de La Pradelle and Charles C. Fenwick, 3 vols., The Classics of International Law, Washington 1916).

<sup>26</sup> Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford, 1999), 16-77.

<sup>27</sup> Diego Panizza, 'Political Theory and Jurisprudence in Gentili's *De Iure Belli*: The great debate between 'theological' and 'humanist' perspectives from Vitoria to Grotius', *International Law and Justice Working Papers* 15/5 (2005), at [www.ijl.org/publications/2005-15Panizza.asp](http://www.ijl.org/publications/2005-15Panizza.asp).

scholasticism and directly drew from the sources of ancient Roman law, philosophy, rhetoric and history. As Panizza indicates,<sup>28</sup> the reality is more complex than this. ‘Humanist’ writers of the laws of war such as Gentili, or Grotius and Gudelinus for that matter, did not completely break free from the medieval traditions of law and theology.

Gentili studied law at the University of Perugia, one of the bulwarks of Bartolism. By the time he took up his chair at Oxford, he had clearly been exposed to humanism and humanistic jurisprudence.<sup>29</sup> But this did not lead, as it did with few of the jurists who had been influenced by humanism of his time, to a complete break with the accomplishments of the scholastic jurisprudence of the Bartolist commentators. As so many jurists of the late 16<sup>th</sup> and early 17<sup>th</sup> centuries, Gentili was a representative of moderate humanism, a *via media* between Bartolism and humanism. He partook in the modernisation and remodelling of a jurisprudence that had fallen under the influence of humanism but did not take its critic of Bartolism to its ultimate consequences.<sup>30</sup>

Gentili did not reject the writings and opinions of the great glossators and commentators of civil and canon law of the Middle Ages. To the contrary, he heavily leaned on them. Next to humanist jurists such as Andrea Alciato (1492-1550), Gentili often quoted and referred to medieval jurists. For the subject of peacemaking, in particular in its more technical aspects, Baldus stands out.<sup>31</sup> Although Gentili was a fierce defender of the primacy

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<sup>28</sup> Panizza, ‘Political Theory and Jurisprudence’, 5-9.

<sup>29</sup> Panizza, *Gentili*, 43-6.

<sup>30</sup> Randall Lesaffer, ‘An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice’, *Journal of Legal History*, 23 (2003), 223-52; for a divergent view, Alain Wijffels, ‘Early modern Literature on International Law and the Usus Modernus’, *Grotiana*, N.S. 16-17 (1995-1996), 35-54.

<sup>31</sup> Gentili in particular referred to *Consilium* 2.195 and *Lectura Codicis*.

of law over theology in the field of relations between princes and republics, he also heavily drew on Biblical and theological sources and traditions.<sup>32</sup>

Apart from direct references to humanist jurists, the influence of humanism on his work was felt in four ways. First, Gentili broadened his canon of textual sources to include rhetorical, philosophical, literary as well as historical texts from Antiquity, chiefly among them works from the orator Marcus Tullius Cicero (106-43 BC), the Stoic Lucius Annaeus Seneca (4 BC-65 AD), the epic poet Marcus Annaeus Lucanus (39-65) and the historian Publius Cornelius Tacitus (c. 55- c. 120). Second, to argue and illustrate his points, Gentili quoted many historical examples, mainly from Biblical, ancient Greek and Roman history, but also more recent ones. Third, from these two sources, Gentili drew ideas and opinions about the autonomy both of the body politic and the *societas humana* which served the humanist political agenda Tuck and Panizza laid out in their recent works. Gentili, a protégée of the anti-Spanish and pro-colonial party at the court of Queen Elisabeth I (1558-1603) offered juridical ammunition to his political protectors in some of the most heated political debates on international policy of the 1580s and 1590s. The major points of his political agenda were the rejection of religious warfare, the justification for the Dutch Revolt and the English intervention to sustain it,<sup>33</sup> the justification of preventive war in the face of the Spanish ambitions for universal monarchy and of colonial expansion in the New World.<sup>34</sup>

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<sup>32</sup> Panizza, *Gentili*, 55-87.

<sup>33</sup> There is a familiarity between the line of argument used in the official justification for the English intervention in the Low Countries of 1585 and Gentili's later writings: *A Declaration of the Causes Mooving the Queene of England to give aide to the defence of the People afflicted and oppressed in the lowe Countries* (London, s.d.).

<sup>34</sup> Pauline Croft, 'The State of the World is Marvellously Changed: England, Spain and Europe 1558-1604', in Susan Doran and Glenn Richardson, eds., *Tudor England and its Neighbours* (London, 2005), 178-202; Paul E.J. Hammer, 'The Crucible of War: English Foreign Policy, 1589-1603', in *Ibidem*, 236-66; Panizza, *Gentili*, 46-48,

Fourth, Gentili took more critical distance from the authority of his sources than his Bartolist predecessors. The scholastic jurists of the Middle Ages, the glossators and commentators, attributed absolute authority to the Justinian collection, as did the canon lawyers to the medieval canonical collections which would later be codified in the *Corpus iuris canonici*. It partook in the timelessness and absoluteness of revealed truth. Over time, the *Glossa ordinaria* of Accursius († 1263) and the writings of Bartolus and Baldus had reached a somewhat similar status as authoritative interpretations of Roman law. Humanism led to a more relative approach to the authority of the text canon. The humanist jurists acknowledged that the laws contained in the *Corpus iuris civilis* were the products of a historical civilisation and had to be understood within their historical context and evolution. The humanists continued to study the Justinian texts, not as bearers of a timeless and absolute truth, but as the heirlooms from a revered civilisation. Their universal validity was challenged, their authority scaled down from that of absolute truth to a historical example to be emulated. The humanists and jurists influenced by them did not start from the assumption that the laws of the ancient Romans were absolutely and universally valid and could be applied directly to current cases. Under the scholastic paradigm, the Justinian texts equalled ‘written wisdom’ (*ratio scripta*); under the humanist paradigm, they only contained it, offering a particular, historical and thus imperfect expression of *ratio scripta*. They offered a looking-glass through which some general, universal and timeless principles of rational justice and good statecraft could be arrived at. As the products of the greatest juridical minds that ever were, the Roman law texts contained the closest man had ever come to justice in law. It was, however, up to the contemporary students of the texts to search for that wisdom and abstract it from its historical context. In order to be able to do this, their authentic historical meaning first had to be

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89-92; Alan Stewart, *Philip Sydney: A Double Life* (London, 2000), R.B. Wernham, *Before the Armada: The Growth of English Foreign Policy, 1485-1588* (London, 1966), 369-77.

understood. The ‘humanist’ demarche was therefore a double demarche. First, one had to search for the authentic meaning of the source by relating it to its historical context. Second, one had to identify the general, universal and immutable principles of law and justice which underlay the historical law. All this meant that scholars such as Gentili, without engaging in the historical interpretation of the texts themselves, could engage much more freely into a debate with their sources than their late-medieval predecessors could have, accepting or rejecting positions and opinions on the basis of their own rational thought. They saw them not as direct witnesses of timeless truths but as the fallible human expression, reflection and application of an underlying principle of justice.<sup>35</sup> All this also applied to the writings of the most authoritative medieval civilians. Moderate ‘humanist’ jurists such as Gentili continued to include the writings of medieval jurists such as Bartolus and Baldus among their ‘sources’, not any longer as authoritative interpretations, but as valuable, possible interpretations of Roman law.<sup>36</sup>

Before turning to Gentili’s doctrine of peace, a word should be added on the inherent idealism of Gentili as a jurist. A conception of the jurist, to use the phrase of the Roman jurist Ulpian, as ‘sacerdos’, a priest in the service of justice, and of the law as an instrument to

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<sup>35</sup> On humanist jurisprudence: Donald R. Kelley, *History, Law and the Human Sciences: Medieval and Renaissance Perspectives* (London, 1984); idem, ‘Law’, in John H. Burns, *Cambridge History of Political Thought 1450-1700* (Cambridge, 1991), 66-94; Guido Kisch, *Studien zur humanistische Jurisprudenz* (Berlin, 1972); Richard J. Schoeck, ‘Humanism and Jurisprudence’, in Albert Rabil, ed., *Renaissance Humanism: Foundations, Forms and Legacy*, iii (Philadelphia, 1988), 310-26, Peter Stein, ‘Legal Humanism and Legal Science’, *Legal History Review*, 54 (1986), 297-306. See also David Kennedy, ‘Primitive Legal Scholarship’, *Harvard International Law Journal*, 27 (1986), 1-98, 57-71; Benjamin Straumann, *Hugo Grotius und die Antike: Römisches Recht und römische Ethik im frühneuzeitlichen Naturrecht* (Studien zur Geschichte des Völkerrechts 14, Baden, 2007).

<sup>36</sup> At one instance, Gentili genuflected to authority to Baldus, although, in truth, he often rejected his views: ‘All these views are those of Baldus, which I follow in cases of doubt’, *De iure belli* 3.24.708.

discern the just from the unjust permeates his whole oeuvre.<sup>37</sup> Although the law, for Gentili, was supreme in its rule over man's political and social relations and superseded theology in this field, Gentili did not relegate it strictly to its external effects. Throughout his work, Gentili did refer to *ius naturale* and *ius gentium*, but he did not distinguish them clearly and used the terms variably. He did not separate the external law of human behaviour from an internal law of conscience. By consequence, he did not consider the natural law of conscience and the external law of nations two separate bodies of law.<sup>38</sup>

### 3) *Gentili's general conception of peace*

Gentili devoted the third book of his *De iure belli* to the *ius post bellum*. His general conceptions of war and peace were interwoven in two ways. First, Gentili indicated peace as the purpose of all war. Making reference to Saint Augustine (354-430) – as well as to Cicero – he adhered on this point to the theological tradition of the just war. In the classical rendering of the just war doctrine by Thomas Aquinas (1225-1274), the desire for a just peace was the

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<sup>37</sup> D. 1.1.1.1.

<sup>38</sup> Panizza, *Gentili*, 5-14. See Alberico Gentili, *Lectioinum & Epistolarum quae ad ius civile pertinent*, 2.1.1-4 (London, 1583); Gentili, *De iure belli*, 1.1. Jeremy Waldron, in his contribution to the volume, sustains that Gentili equated natural law and the law of nations, but he also indicates three instances of Gentili's awareness of the terms referring to two different if not separate dimensions of law. From a more historical rather than theoretical perspective, it seems safe to accept that Gentili was well aware of the different distinction tradition made between natural law and the law of nations but did not operate the terms to refer two distinct bodies of law. They both referred to one mass of law which was to be found in common state practice and at one and the same time referred to the idealist principles they had to embody.

third, necessary condition for a belligerent to wage a just war.<sup>39</sup> But Gentili also gave this traditional idea a more pragmatic twist. From its very inception, belligerents should be careful not to jeopardize the chances for peace in the future. In Gentili's view, the *ius post bellum* tied in with the *ius ad bellum* as well as the *ius in bello*. Both in starting and waging the war, belligerents should refrain from actions which could prevent the return of peace. At several instances in his work, Gentili called for moderation in order not to induce the enemy with a desire for vengeance.<sup>40</sup>

Second, Gentili's general conception of peacemaking flew logically from his conception of war. In their works, Tuck and Panizza have pitted Gentili's conception of war against the Spanish neo-scholastic theological conception. Vitoria and the other Spanish neo-scholastics adhered to the classical just war doctrine, but adapted it to the challenges the emerging sovereign State and colonial expansion put to the old international legal order. Under the just war doctrine, war was perceived of as an instrument of justice.<sup>41</sup> It was the forcible self-help of a wronged party against the perpetrator of an injury (*executio iuris*). Under the just war doctrine, war was discriminatory. Only one side had a right to wage war; only he could benefit from the *iura belli*, such as the right to loot, conquer or to hold and be held for ransom. At the end of just war came just peace. This peace too was discriminatory. The just belligerent should see the rights for which he had fought vindicated and could seek compensation for the losses and costs from the war, even inflict a punishment.<sup>42</sup> This at the

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<sup>39</sup> *Summa Theologiae*, II-II, q. 40, a. 1. Haggemacher, *Grotius et la doctrine de la guerre juste*, 401-11; Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge, 1975), 258-71.

<sup>40</sup> E.g. *De iure belli* 2.4-6, 8 and 23. See Gianluca Lucchese, *Le concept de paix dans le De iure belli d'Alberico Gentili: finalité et méthode* (Geneva, unpublished thesis, 1995), 35-9.

<sup>41</sup> Francisco de Vitoria, *De iure belli relectio* (1539, edn. *Political Writings*, ed. and transl. Anthony Pagden and Jeremy Lawrance, Cambridge Texts in the History of Political Thought, Cambridge, 1991), 295-327.

<sup>42</sup> Vitoria, *De iure belli*, 1.4, 3.2 and 3.7.

same time set a limit to the extent of the conquest or captures he could make. In the words of Vitoria, the victor 'must not pass sentence as the prosecutor, but as a judge'.<sup>43</sup> Justice, not victory should dictate the terms of peace. All this did not imply that one assumed that victory always went to the just side.<sup>44</sup>

Vitoria's major contribution to the traditional just war doctrine concerned its discriminatory character. The Reformation overhauled the most essential pillar of the international legal order of Europe: the 'universal' authority of canon law, the ecclesiastical courts and the Pope. This and the rise of some important dynastic States and empires explain for the fact that halfway through the 16<sup>th</sup> century, the princes and republics of Europe had achieved external sovereignty. The discoveries and conquests in the New World opened up a new sphere of international relations to which the old *ius commune* was irrelevant.<sup>45</sup> In the absence of a higher authority and a common framework of law and in the face of the loss of authority of the *ius commune* – and particularly its canon law part – the discriminatory character of the laws of war, which already for a long time had been problematic in practice, now became even more so.<sup>46</sup> Vitoria devised a solution which allowed him to adjust the just war to the new realities, while saving as much of it as he could. Whereas he clung to the view

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<sup>43</sup> Vitoria, *De iure belli*, par. 60.

<sup>44</sup> On the just war doctrine in the Middle Ages: J. Barnes, 'The Just War', in N. Kretzman *et alii*, eds., *The Cambridge History of Later Medieval Philosophy* (Cambridge, 1982), 750-84; Haggemacher, *Grotius et la doctrine de la guerre juste*; Neff, *War and the Law of Nations*, 45-68; Russell, *Just War in the Middle Ages*.

<sup>45</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2005), 13-30; Randall Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law', *British Yearbook of International Law*, 73 (2002) 103-39, 110-15; Heinhard Steiger, 'From the International Law of Christianity to the International Law of the World Citizen', *Journal of the History of International Law*, 3 (2001) 180-93; Karl-Heinz Ziegler, 'Völkerrechtliche Aspekte der Eroberung Lateinamerikas', *Zeitschrift für Neuere Rechtsgeschichte*, 23 (2001) 1-29.

<sup>46</sup> Haggemacher, *Grotius et la doctrine de la guerre juste*, 279-84; Neff, *War and the Law of Nations*, 68- 71.

that a war could, objectively speaking, not be just on both sides, he acknowledged that each side could be excused, on the basis of an invincible error, from believing in good faith that he was waging a just war. Thus Vitoria introduced the ‘bellum iustum ex utraque parte’ (war just on both sides) on the subjective level. Through the application of two concepts from Roman contract law – *bona fides* and *error* – Vitoria opened the door to a non-discriminatory conception of war, in which both sides had a right to wage war and enjoy the benefits of the laws of war.<sup>47</sup> He thereby set doctrine on the path of a dual conception of war: a conception of a discriminatory, just war at the level of conscience – *in foro interno* –, and a conception of equal war at the level of external, human behaviour – *in foro externo*.

Gentili too considered war an instrument of justice. But whereas the Spanish neo-scholastics saw war as the unilateral act of law enforcement of the just side against the unjust side, Gentili defined it as ‘a just and public contest of arms’, a ‘contest for victory between two equal parties’.<sup>48</sup> He likened war to a duel. Gentili referred to the Roman term ‘hostis’, which he claimed held a notion of equality.<sup>49</sup> Gentili stated that a war could be just on both sides. For this, he referred to the commentator Raphael Fulgosius (1367-1427) and to the humanist jurist Andrea Alciato.<sup>50</sup> Gentili saw two explanations for this. *Primo*, there was human fallibility. Here, Gentili referred to the neo-scholastic doctrine of invincible ignorance, making among others a genuflection to Vitoria. But whereas in Vitoria’s thinking, invincible

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<sup>47</sup> Vitoria, *De iure belli*, 2.4-5.

<sup>48</sup> ‘Bellum est publicorum armorum iusta contentio’ and ‘quod inter duas partes aequales de victoria contenditur’: Gentili, *De iure belli*, 1.2.17-8.

<sup>49</sup> Gentili, *De iure belli*, 1.2.18.

<sup>50</sup> Gentili named both authors in the text; in the marge he only referred to Andrea Alciato, *Commentarii in Pandectas* (Lyon, 1550), 1.1.5 and *Paradoxorum iuris civilis* 2.21, in *Opera Omnia* (4 vols., (Basel, 1549), iii: ‘utraque parte optimo iure belligerari arbitramur’ (‘we find that it possible to wage war with the best of right on both sides’, my transl.), so he might have taken his reference to Fulgosius from Alciato.

error was somewhat construed as an exception to the rule, Gentili put human fallibility at the heart of his system.<sup>51</sup> *Secundo*, Gentili acknowledged that a war could be just or unjust on both sides, objectively speaking. Therefore, as far as war was an instrument of justice, it was so for both sides, and it was a fallible one. Gentili likened war to a civil trial. Although only one side might have right on his side, both sides had a right to bring their case to court and defend it there.<sup>52</sup> Therefore, both sides enjoyed the benefits from the laws of war. As in a trial, the outcome was uncertain. Nothing guaranteed the victory of the just side – if there was (only) one.<sup>53</sup> For a belligerent to benefit from the laws of war, he had to, apart from being sovereign, formally declare war.<sup>54</sup>

Vitoria and Gentili both departed from the same basic tenets of the just war, but they approached them from different angles. As a theologian, Vitoria was foremost concerned with the question whether war and the participation therein constituted a sin. Through the device of invincible error, he could excuse both princes and their subjects from the sin of waging an unjust war, while retaining the framework of it on the objective level. Gentili, as a jurist, focused on the legal, external effects of his definition of war. To him, it mattered most that regardless of the objective justice underlying the war – which man in his weakness could often not discern – a war could be fought by all parties according to the rules of the *ius in bello* and ended according to the rules of the *ius post bellum*. For this, it needed to be non-

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<sup>51</sup> Gentili, *De iure belli*, 1.6.48.

<sup>52</sup> Others, as Gentili acknowledged, had made the comparison. It was most clearly made by Alciato, see *In Pandectas*, 1.1.5 and *Paradoxa* 2.21: ‘Duo coram iudice litigaturi anta latam sententiam iuste agunt, iuste excipiunt’ (Both parties, while taking their case before the judge and before he has rendered a verdict, are acting justly when they state their claims or forward their exceptions’). See also Raphael Fulgosius, *In Pandectas* 1.1.5 (Lyon, 1544).

<sup>53</sup> Gentili, *De iure belli*, 1.6.47-52.

<sup>54</sup> Gentili *De iure belli*, 2.1.

discriminatory. For a war to be so, therefore, it sufficed that it was waged between sovereigns and that it was formally declared.<sup>55</sup>

Gentili construed his conception of ‘war as a duel’ using conceptions and ideas from ancient Roman law, history and philosophy as well as from medieval theology and law. The notion of war as a contention with arms between equal ‘hostes’ went back to ancient Roman law<sup>56</sup> and had already been taken up by some of the commentators, such as Bartolus.<sup>57</sup> Thereby, Bartolus gave a doctrinal foundation to the indiscriminatory application of the *iura belli* to all sides in a war. Fulgosius and Alciato tied it in with the *ius ad bellum*, but stating that a war could be just on both sides. In this, Fulgosius was somewhat more radical than Alciato, who underscored that the cause should not be manifestly unjust and thus implicitly presumed good faith on the parts of the belligerents.<sup>58</sup>

Gentili’s conception of war as a duel determined his conception of peace. Because war was a contention for victory between equals, victory and not justice dictated the terms of peace. This had two major consequences.

First, it caused Gentili to distinguish between two major ways in which war could be terminated: through the victory of one side over the other, or, in the absence of a clear victory, through an agreement. Gentili ordered his chapters on the *ius post bellum* accordingly. After an introductory chapter, he first dealt with the *ius victoriae* (Chapters 2-13), then to go on the law of peace treaties, which I propose to call the *ius ad pacem* (Chapters 14-27).

Second, regardless of this dichotomy, it was the *ius victoriae* which dominated Gentili’s conception of peace. As war was a contention between equal partners who could not

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<sup>55</sup> ‘inter summos Principes, populosve liberos’: Gentili, *De iure belli*, 1.3.22.

<sup>56</sup> D. 49.15.24 and 50.16.118.

<sup>57</sup> Bartolus, *Digestum novum in tertium tomum Pandectarum commentaria Secunda super Digesto novo* (Basel, 1562), ad. D. 49.15.24; Haggenmacher, *Grotius et la doctrine de la guerre juste*, 280-1.

<sup>58</sup> Alciato, *Paradoxa*, 2.21; see Haggenmacher, *Grotius et la doctrine de la guerre juste*, 203-12.

objectively determine right or wrong and could only enforce their claims through war, victory was the logical and desired outcome. A compromise was a failure. Gentili thus strongly thought of restoring peace in terms of the Roman 'debellatio' and 'deditio': the surrender of the enemy who threw himself up on the mercy of Rome, which then dictated the terms of peace.<sup>59</sup>

Although victory granted the vanquisher the right to dictate the terms of peace to the vanquished, it did not cut him completely loose from the demands of justice. Victory and justice interacted with one another on two levels.

First, Gentili defined peace as 'an ordered settlement of the war', which implied 'the assignment of his own to each man'.<sup>60</sup> In case of victory, this meant that the victor had to be guided by two interacting principles: his just desire for vengeance and the need to lay down a stable and sustainable peace. The key to this all was to strike a balance between finding 'solace for injury and security for the future'.<sup>61</sup> Both could be attained through enacting punishment, the second could also be attained through leniency and compassion.<sup>62</sup> With this, Gentili brought both justice as well as expediency into the equation of peacemaking after victory. But all this remained framed within the context of his basic conception of war as a duel. Seeking justice and security for the future were guidelines for the victor, but his was the

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<sup>59</sup> Joseph Plescia, 'The Roman *Ius Belli*', *Bullettino dell'Istituto di diritto romano*, 3<sup>rd</sup> series, 31-2 (1989-1990), 497-23, 517-20; Karl-Heinz Ziegler, 'Kriegsverträge im antiken römischen Recht', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 102 (1985) 40-90.

<sup>60</sup> 'compositionem belli ordinatam' and 'tributionem cuique sui': Gentili, *De iure belli*, 3.1.472-3.

<sup>61</sup> 'iniuriae solatium, & in reliquum securitatem': Gentili, *De iure belli*, 3.13.576, with reference to Seneca, *De clementia*, 1.21.1. One of the tenets which Renaissance thinkers took from Seneca and to which Gentili adhered here, was the congruency of justice and usefulness. See Peter Stacey, *Roman Monarchy and the Renaissance Prince* (Cambridge, 2007), 61-3.

<sup>62</sup> Gentili, *De iure belli*, 3.2.473-4 and 3.14.576-7.

right to decide. In terms of its legal effects, an unjust and unstable peace was as much a peace as a just and stable one.

Second, war was a last resort in the absence of a means to decide the justice of the opposing claims made by sovereigns. Its outcome did not decide the objective justice of the victor's claims, but granted him the right to vindicate them and enact punishment upon the vanquished, as if he were in the wrong. If victory went to the unjust side, than this could, according to Gentili, not be helped and must be suffered.<sup>63</sup>

With this, Gentili developed a theory of peace that was at one and the same time close to and far removed from the early modern European peace treaty practice. His distinction between a *ius ad pacem* and a *ius victoriae* reflected two existing realities: that of European and that of outer-European practice. Among sovereign European powers, with extremely few exceptions, peace treaties were construed as political compromises, making no allowance for the dictates of justice. No blame was attributed to either of the sides, not for having waged the war, and not for the way it had been waged. Treaties were silent in relation to the justice of the belligerents' cause for war. The treaties were vested on the assumption that both sides had held the right to wage the war. Peace treaties did not operate the language of just war or just peace. They brought an end to a war that was considered, if not just for all sides, than at least legal for all sides – meaning in terms of its external effects. As just war had its logical complement in just peace, formal or legal war – or solemn war in the terms of Grotius – had its logical complement too – which I propose to call formal peace.<sup>64</sup> In early modern peace

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<sup>63</sup> Gentili, *De iure belli*, 1.6.52.

<sup>64</sup> As Gentili did, Ayala and Grotius also forwarded two conditions for a war to be legal – meaning for the laws of war to apply to a belligerent: that he be a sovereign power, and that the war had been formally declared. These conditions were also reflected by State practice. Ayala, *De iure et officiis bellicis*, 1.2.34; Grotius, *De iure belli ac pacis*, 1.3.4.1, 3.3.4-5 and 3.3.12-13. For practice: Klesmann, *Bellum solemne*; Randall Lesaffer, 'Defensive Warfare, Prevention and Hegemony. The Justifications for the Franco-Spanish War of 1635', *Journal of the*

treaty practice, concessions were made and won on the basis of the outcome of the war and the negotiations, and not in consequence of the acclaimed justice of one of the former belligerents. Peace treaties almost always held a clause of amnesty. This implied the prohibition to bring forward any claim on account of losses or damages suffered because of the war. With this, all injuries against the laws of war were passed over.<sup>65</sup> Gentili's *ius ad pacem* lived up to this reality. Within his system, a war ended without victory constituted a kind of failure, or premature interruption, of the process – the trial the war was a substitute for. The terms of peace were now in the hands of the former belligerents, who remained equal in peace as they had been in war. There was no decision on the claims underlying the war to be drawn from the war itself. The *ius ad bellum* was cut out of the peacemaking process, as it was in the practice of Early Modern Europe.

During the Early Modern Age, there were few wars in Europe which ended in a clear victory for one or the other side. Even if they did, the treaty signatories did not operate the language of punishment or justice, but treaties were construed as political agreements freely

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*History of International Law*, 8 (2006), 91-123 and 141-179; Stephen C. Neff, *War and the Law of Nations: A Historical Survey* (Cambridge, 2005), 54-68 and 96-119; Pärtel Piirimäe, 'Just War in Theory and Practice: The legitimization of Swedish intervention in the Thirty Years War', *The Historical Journal*, 45 (2002), 499-523; idem, 'Russia, The Turks and Europe: The legitimations of war and the formation of European identity in the early modern period', *Journal of Early Modern History*, 11 (2007), 63-86; Anuschka Tischer, 'Der Wandel politischer Kommunikation im Kriegsfall: Formen, Inhalte und Funktionen von Kriegsbegründungen der Kaiser Maximilian I. und Karl V.,' *Militär und Gesellschaft in der Frühen Neuzeit*, 9 (2005), 7-28.

<sup>65</sup> E.g. the Treaty of Vervins, Art. 2: 'oubliant toutes choses ci-devant mal passées quelles qu'elles soient, qui demeureront abolies, & éteintes, sans que jamais ils en passent ressentiment quelconque'; Fisch, *Krieg und Frieden*, 92-6; Lesaffer, 'Peace Treaties from Lodi to Westphalia', 38-9; Klaus Neitmann, *Die Staatsverträge des Deutschen Ordens in Preußen 1230-1449: Studien zur Diplomatie einer spätmittelalterlichen Deutschen Territorialstaates* (Cologne and Vienna, 1986), 381-96. Treaties between sovereigns and vassals sometimes did contain attributions and recognitions of fault for the war, Fisch, *Krieg und Frieden*, 97-102.

entered by all parties. Gentili's *ius victoriae* was thus largely irrelevant for the intra-European peace practice of his day. But it had a field of application outside Europe, in the relations between the European powers and the indigenous peoples in the 'Indies'. In the Eastern as well as in the Western Indies, the European powers, including England, often styled peace treaties as unilateral grants of peace. The treaties laid the blame for the war, which was often labelled a rebellion, at the doorstep of the indigenous peoples. Amnesty was a unilateral act of mercy, which often had to be paid for through cessions and tributes.<sup>66</sup> To this, Gentili's *ius victoriae* with its support for the rights of victors over the vanquished enemy's property and persons was most relevant.<sup>67</sup>

#### 4) *Gentili's ius ad pacem*

##### a) Lasting peace

In Gentili's system, peace by agreement was only arrived at through a chain of human failings. If war was a substitute for adjudication in the face of man's failure to discern right from wrong, peace without victory was a failure thereof. Under this scenario, there was nothing to it but for the belligerents to negotiate and reach an agreement. What they agreed, would be binding upon them. In the Gentilian scheme of things, peace through agreement was far removed from the ideal workings of justice. This allowed Gentili to deal with peace treaties in rather 'positivist' terms and push concerns of justice to the background. As such, his *ius ad pacem* approached the realities of early modern peacemaking.

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<sup>66</sup> Fisch, *Krieg und Frieden*, 139-204.

<sup>67</sup> Gentili, *De iure belli*, 3.3-6, 8; Panizza, 'Political Theory and Jurisprudence', 28-47.

But Gentili did not limit his aspirations to mapping the practices of peacemaking of his day and age. He aspired at laying out the principles and rules belligerents ought to respect in making peace. According to the Oxford professor, the first duty of peace negotiators was ‘to make an agreement about peace lasting’.<sup>68</sup> This was the guiding principle for his whole doctrine of peacemaking.

Gentili devoted the first chapter of his *ius ad pacem* to matters relating to the perpetuity of peace treaties. For a peace to be lasting, it was of the utmost importance that all disputes between the former belligerents should be settled. If not, there was a danger that they would cause a new war. Gentili referred here to Baldus’ metaphor that ‘[e]verything ought to be carefully weighed, since in disease it is what remains after the crisis that usually causes death’.<sup>69</sup>

In this context, Gentili referred to ‘perpetual peace’,<sup>70</sup> a common term in the peace treaties of the Early Modern Age.<sup>71</sup> Gentili stated that a peace treaty which did not settle all disputes underlying the war, was nothing but a truce. A truce, however long its duration did not end a war but only suspended it. At another place, he pointed out that if a new war broke out between the treaty partners for a new cause, this did not constitute a breach of the peace.<sup>72</sup> With this, Gentili did little else than restate traditional views going back to Baldus and beyond.<sup>73</sup> From all this, one could deduce *a contrario* that a peace settlement exhausted the

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<sup>68</sup> ‘ut perpetua pacis conventio esse possit: Gentili, *De iure belli*, 3.14.589.

<sup>69</sup> ‘Trutinanda omnia, quoniam quae in morbis relinquuntur post crisis, ea subversionem facere consueverunt’: Gentili, *De iure belli*, 3.14.590. Like Gentili himself, Baldus was a physician’s son.

<sup>70</sup> Gentili, *De iure belli*, 3.14.591: ‘pax perpetua’.

<sup>71</sup> E.g. Treaty of London, Art. 1: ‘Pax perpetuo duratura’.

<sup>72</sup> Gentili, *De iure belli*, 3.14.590-1, also 2.12.302-5 and 3.24.708-11.

<sup>73</sup> Accursius, *Gl. Lacesant* ad D. 49.15.19.1; Baldus, *Consilium* 2.195; Belli, *De re militari et de bello*, 10.2.27-8, 35 and 53, 5.2.3; Garatus Laudensis, *Tractatus de confederatione*, q. 9 and 16.

right of the former belligerents to resort to armed force in the future over the disputes settled in the peace. But it would take [Pufendorf](#), Wolff and Vattel to state it so straightforwardly.<sup>74</sup> This was indeed the real significance of the term ‘perpetual peace’ in practice.

Gentili took offence at Baldus’s view that a peace treaty was ‘a contract of strict law’.<sup>75</sup> According to Gentili, peace treaties were nominate contracts and were – like all dealing between sovereigns – ‘based upon good faith’, as Baldus himself seemed to acknowledge at other instances.<sup>76</sup> They should therefore be interpreted and applied according to the dictates of fairness and justice (‘ex bono, & aequo’). The treaty partners should not seek to hide behind ‘fine points of the law’ or ‘subtle legal exceptions’, either of form or of substance. At this point, Gentili went into some cases from recent history.<sup>77</sup>

Here, Gentili addressed the traditional question whether a prince could invoke the exception of duress for a peace treaty. With Baldus, Gentili rejected this on the grounds that in matters of war and peace fear was natural.<sup>78</sup> Using a phrase from Cicero, the Oxford professor also argued that fear was not becoming to a soldier. He added that a law professor, who was supposed to know the law, could neither plead ignorance from it.<sup>79</sup> Gentili also went into the *cause célèbre* of Francis I of France (1515-1547), who after being taken captive at Pavia (1525) was brought to Madrid where Charles V forced him to accept the Treaty of Madrid of 14 January 1526. On this point, Gentili let concerns of justice take over. Using a

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<sup>74</sup> [Samuel Pufendorf](#), *De jure naturae et gentium libri octo*, 8.7.4 (1688, ed. and transl. [Walter Simons and C.H. and W.A. Oldfather](#), 2 vols., The Classics of International Law, 1933); [Vattel](#), *Le droit des gens*, 4.2.19; [Wolff](#), *Jus gentium*, 8.987.

<sup>75</sup> Gentili, *De iure belli*, 3.14.591; see Baldus, *Consilium* 2.195.8.

<sup>76</sup> [‘est tamen nominatus contractus, & quidem principum: quorum contractus omnes sunt bonae fidei’](#).

<sup>77</sup> Gentili, *De iure belli*, 3.14.591-5.

<sup>78</sup> Baldus, *Lectura Codicis*, 7.16.

<sup>79</sup> Cicero, *De officiis*, 3.30.110; Gentili, *De iure belli*, 3.14.595.

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somewhat distorted interpretation of Jean Bodin's (1530-1596) views, Gentili argued that captivity did not constitute duress, at least if one was taken captive by a just belligerent.<sup>80</sup> In the rest of the chapter, he addressed some other traditionally debated questions such as the validity of treaties made by a minor and the binding character of an oath made in captivity.

At the inception of the second chapter devoted to the *ius ad pacem* (3.15), Gentili listed the provisions which were normally to be found in peace treaties. The list included 'law, liberty, territories, places, buildings, friendships, arms, armies, fleets, citadels, garrisons'.<sup>81</sup> These he would cover in the Chapters 16 to 18, 20 and 21. In between, he also addressed whether it was lawful to make a treaty with nations from a different religion (3.19). The final three chapters dealt with matters of treaty law, in general or as applied to peace treaties. In these, Gentili addressed the questions of the binding character of peace treaties for successors of the principals (3.22), of ratification and the consequences of treaties for different categories of persons (3.23) and of the violation of treaties (3.24).

Gentili's selection was dictated by traditional civilian doctrine. He went into the casuistry which Baldus and other civilians had developed, often on the basis of the late-medieval practice of Italian principalities, city-republics, seigniories and all different kinds of legal entities. Whereas Gentili now limited the discussion on these questions strictly to the context of war and peace between sovereigns, this casuistry pertained to a legal context in which the *ius gentium* had been inextricably wound up with the law at large.

Gentili devoted a lot of attention to matters of military concern. Whereas military provisions were not absent from peace treaties, they were rather limited. Mostly, they were restricted to the conditions under which fortresses and cities were to be restored and to

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<sup>80</sup> Jean Bodin, *Les six livres de la République* 5.6 (1576, Corpus des œuvres de philosophie en langue française, Paris, 1986); Gentili, *De iure belli*, 3.14.596.

<sup>81</sup> 'de legibus, libertate, agris, locis, edificiis, amicitis, armis, exercitibus, classibus, arcibus, praesidiis': Gentili, *De iure belli*, 3.15.600-1.

restrictions about the right for ships to enter the ports of the treaty partners.<sup>82</sup> At the heart of Gentili's discussion of military affairs stood the question whether building fortresses and assembling troops near the border constituted a breach of the peace. These were the questions the much-quoted *Consilium* 2.195 of Baldus had turned on. In the two chapters on these issues, Gentili indulged in the same casuistry Baldus and other civilians had developed, taking the issue way beyond what was practical for his own time.<sup>83</sup>

Gentili's enumeration did not include most of the main provisions common to early modern peace treaties, such as amnesty, reprisal, commerce, the release of prisoners.

b) Enemy property, conquest and restitution

Provisions about enemy territory and property occupied, seized or looted during the war took up a large part of most early modern peace treaties. Gentili had devoted several of the chapters on the *ius victoriae* relevant to these issues (3.3-6). Under the *ius ad pacem*, he dealt much more briefly with these matters (3.17: 'Of territory and postliminium').

Under the *ius victoriae*, Gentili, first, addressed the question whether the victor could exact compensation for the expenses made and losses suffered during the war. Although victory did not always fall to the just side, according to Gentili the victor had a right to compensation. This, he said, was common practice. Gentili supported this by arguing that the victor had won the right to judge on the justice of the belligerents' cause, and that he naturally would never recognise the justice of his enemy's claims. Nevertheless, the victor, so he counselled, should assume 'the character of a just judge and not a partisan' and thus act with

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<sup>82</sup> E.g. Treaty of Vervins, Art. 16-7.

<sup>83</sup> Gentili, *De iure belli*, 3.20-2.

moderation. Gentili stated that the compensation for costs and damages was due by the vanquished, even if the treaty did not stipulate it.<sup>84</sup> In this context, Gentili also went into the traditional question whether a prince could give away the property of private subjects. Gentili argued that he could do so under the ‘*ius gentium*’ (the law of nations), but not under the ‘*ius civile*’ (municipal law). Therefore, he had to compensate his subjects for it.<sup>85</sup>

Gentili unequivocally stated that the enemy’s ‘land and other possessions may be acquired under the title of war’.<sup>86</sup> It thus fell within the victor’s right to exact tribute or claim the lands and property of the enemy. Although wars should not be waged for the sake of expansion or the lust for dominion, conquest at the end of it was justified as a way of weakening the enemy and of strengthening one’s own security for the future. Gentili rejected the claims to the contrary by the Romans Lucan and Seneca, as well as by writers from ‘modern times’.<sup>87</sup> He thereby rendered support to the conquest of the European powers,

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<sup>84</sup> Gentili, *De iure belli*, 3.3.485-9.

<sup>85</sup> Gentili, *De iure belli*, 3.3.489.

<sup>86</sup> ‘belli tamen titulo non minus quam alio quovis & agros, & res alias quasvis posse quaeri’: Gentili, *De iure belli*, 3.4.495.

<sup>87</sup> Gentili, *De iure belli*, 3.4.496. Panizza and Straumann differ on the interpretation of this fragment. Panizza argued that this was a direct attack against the more moderate views of the Spanish neo-scholastics. If it was, it was somewhat more guarded than he suggested. As Straumann also points out, the words ‘Inepti, inquam, isti Hispanici, neque ex Hispanico praesenti stomacho, qui ...’ (literary: These inept Spaniards, not having a present-day Spanish stomach, who ...) do not refer to the Spanish neo-scholastics, but to the Romans Lucanus and Seneca whose opinions Gentili had just refuted and who were both originally from Spain. Nevertheless, in the following lines Gentili also referred to those in ‘modern times’ (‘etiam hodie’) who found ‘such seizure (...) unnatural and unjust’. Gentili did not explain who these were, but they probably referred to *some* of the Spanish neo-scholastics. The least one could say, with Panizza, is that Gentili acknowledged that, in his own time as in Roman times, it was a contentious subject. As Straumann claims, it was even so among the Spanish neo-scholastics. Panizza, ‘Political Theory and Jurisprudence’, 34; Benjamin Straumann, ‘Comments on Diego

including Spain, in the New World and the Indies at large.<sup>88</sup> All this, so Gentili went on, also extended to the property of private individuals. On this point too, Gentili refuted several authors, including Alciato. Yet again, the victor should act with moderation and justice, the guideline being the prevention of danger and the safeguarding of security for the future.<sup>89</sup>

In sum, Gentili granted the victor of a war the right to dispose of an enemy's lands and property, his own as well as his subjects'. He urged the victors to act with justice and moderation, but it was not justice that determined the legality and the binding character of their decisions, but their victory. Victory constituted title. As Tuck and Panizza have stressed, with this Gentili broke free from the traditional constraints of the just war doctrine and parted roads with Vitoria.<sup>90</sup>

Gentili somewhat laid the bridge from the *ius victoriae* to the *ius ad pacem* in the fifth Chapter of his third Book, where he turned to the question whether the *ius victoriae* applied to all enemy lands and property, or only to those which were actually in the power of the victor. Arguing on the basis of *exempla* from ancient history, Gentili proposed that the *ius victoriae* was 'universal' if the victory was 'universal', i.e. if the enemy's State had been completely overthrown. If it was not, and victory was only 'particular', then the victor acquired only what

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Panizza, "Political Theory and Jurisprudence in Gentili's *De Iure Belli*", at <http://www.iilj.org/centers/documents/Straumann.Panizza-comments.doc> as well as Straumann's contribution to this volume.

<sup>88</sup> Anthony Pagden, *Lords of all the World: Ideologies of Empire in Spain, Britain and France c. 1500 – c. 1800* (New Haven and London, 1995), 96; Tuck, *Rights of War and Peace*, 16-50.

<sup>89</sup> Gentili, *De iure belli*, 3.4.497-9.

<sup>90</sup> On Vitoria and other neo-scholastics regarding the conquests in the New World: Anghie, *Imperialism, Sovereignty*, 13-31; Jörg Fisch, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Stuttgart, 1984), 209-25; James Muldoon, *Popes, Lawyers and Infidels* (Philadelphia, 1979); Pagden, *Lords of all the World*, 63-102; Tuck, *The Rights of War and Peace*, 51-78; Ziegler, 'Völkerrechtliche Aspekte'.

he had effectively occupied or taken. If one took this to its consequences in relation to peace by agreement, this would mean that peace should be made on the basis of the status quo *post bellum*. If the outcome of war, not justice, determined the conditions of the peace afterwards, then logically the same would hold true for an undecided war.<sup>91</sup>

Gentili did apply this logic. He opened the relevant chapter on enemy lands and property under the *ius ad pacem* by stating that, except if the peace treaty stipulated otherwise, each party would hold what he had at the time peace was made. The status quo, or the rule of *uti possidetis* – Gentili did not use this term – applied as the general rule.<sup>92</sup> Gentili made reference to *Digest* 49.15.20.<sup>93</sup>

With this reference, as well as through entitling his chapter ‘Of territory and postliminium’ (*De agris & postliminio*), Gentili placed the question of enemy property in the traditional context of a discussion on the Roman institution of *postliminium*. Under classical Roman law, *ius postliminii* restored a Roman who has been taken captive by the enemy to his freedom, his citizenship, his rights and property upon his return. By the time of Justinian, the *ius postliminii* had become restricted to prisoners of war.<sup>94</sup>

One of the questions which civilians debated with regards to *postliminium* was the matter of *ius postliminii in pace*. There are two important fragments in the *Digest* which refer

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<sup>91</sup> Gentili, *De iure belli*, 3.5.500-3.

<sup>92</sup> Gentili, *De iure belli*, 3.17.623.

<sup>93</sup> D. 49.15.20.1 actually stated that lands recaptured from the enemy were returned to their original owners, and were not confiscated by public authority.

<sup>94</sup> Luigi Amirante, *Captivitas e postliminium* (Naples, 1969); Maria Floriana Cursi, *La struttura del 'postliminium' nella Repubblica e nel Principato* (Naples, 1996); Jean Imbert, *Postliminium. Etudes sur la condition juridique du prisonnier de guerre* (Paris, 1944); Alberto Maffi, *Ricerca sul postliminium* (Milan, 1992); Plescia, ‘The Roman *Ius Belli*’, 520-1; Karl-Heinz Ziegler, ‘Das Völkerrecht des römischen Republik’, in: Hildegard Temporini, ed., *Aufstieg und Niedergang der römischen Welt: Geschichte und Kultur Roms im Spiegel der neueren Forschung*, i (Berlin and New York, 1972), 68-114, 105-6.

to *postliminium in pace* – a text by Pomponius (mid 2<sup>nd</sup> century) in D. 49.15.5.2 and one by Tryphoninus (early 3<sup>rd</sup> century) in D. 49.15.12 pr., the interpretation of which has been subject to scholarly debate since the Middle Ages. Under one interpretation, which seems to be the one several medieval and early modern jurists built on, it meant that a prisoner of war who returned after the war had ended but before a treaty had regulated his position, benefited from *postliminium* and thus regained his former status.<sup>95</sup>

During the Middle Ages, *postliminium in pace* was extended to captured and seized property, implying that the property, once recovered from the enemy, would return to its original owners. But many authors attached more far-reaching consequences to *postliminium in pace* for property, similar to those for prisoners of war laid out above. According to Accursius, *postliminium in pace* meant that prisoners, towns and fortresses were automatically released or restored when peace was made.<sup>96</sup> Others even read this to mean that, apart from a general release of prisoners, also the general restitution of all captured property falling under *postliminium* was implied in a peace treaty, even without an express stipulation to that

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<sup>95</sup> Fernand De Visscher, ‘Droit de capture et Postliminium in pace’, *Revue Internationale des Droits de l’Antiquité*, 3<sup>rd</sup> series, 3 (1956), 197-226. For other interpretations: Ferdinando Bona, ‘Postliminium in pace’, *Studia et Documenta Historiae et Iuris*, 21 (1955), 249-75; Cursi, *La struttura*, 126-36; H. Lévy-Bruhl, *Quelques problèmes du très ancien Droit romain. Essai de solutions sociologiques* (Paris, 1934); Maffi, *Ricerche*, 151 and literature there.

<sup>96</sup> Accursius, *Ad Digestum novum*, D 49.15.12 pr.: ‘contrarium ut statim sequitur, si ergo tempore pacis sit pactum quod capti in bello non beneficent postliminium, valet pactum’ (‘as from this follows contrariwise that if it has been agreed that prisoners of war will not benefit from *postliminium* in time of peace, the agreement is valid’, my transl.). For fortresses and cities, ad. D. 49.15.5.2; Imbert, *Postliminium*, 54-8.

effect.<sup>97</sup> By adhering to the general principle of the status quo, Gentili for his part unequivocally rejected this interpretation of *ius postliminii in pace* with regards to property.<sup>98</sup>

Gentili went in somewhat deeper on the question whether *postliminium* in general also applied for property next to prisoners. For medieval and early modern jurists, applying *postliminium* to property meant that it would return to the original owner upon recovery from the enemy. According to the Oxford jurist, immovables certainly fell under the *postliminium*. He argued that one could never be reproached for having surrendered his lands to the enemy as they could not be taken to safety. *Postliminium* only covered losses suffered involuntarily during the war. Therefore, deserters did not benefit from *postliminium*.<sup>99</sup> For other goods, Gentili adhered to the view proposed by Alciato and others that movables which were recaptured before they were brought behind enemy lines, or which had not been for a night in the enemy's possession also returned to the original owner. He concurred with Alciato that this applied whether the war was just or not.<sup>100</sup> At another place, he rejected Alciato's view that an express provision in a treaty for general restitution – a return to the status quo *ante bellum* – also extended to movables looted at the end of the war. Hereby, Gentili seemed to imply that restitution clauses did not apply to movables,<sup>101</sup> thus bringing his doctrine into line

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<sup>97</sup> For a more elaborate discussion on the issue, Gudelinus, *De jure pacis*, 4.3-5. Vattel still acknowledged this interpretation, but rejected its application to property. He applied it, however, to prisoners of war, *Le droit des gens*, 3.14.216-7; see also Wolff, *Jus gentium* 8.1019.

<sup>98</sup> By referring to D. 49.15.20 at this place, Gentili suggested that he considered *postliminium* only relevant to property with regards the question whether property recovered from the enemy returned to its original owner or not, as it would indeed appear from the rest of the Chapter 3.17 (see below). See also for another interpretation, Belli, *De re militari et bello*, 3.1.8-10.

<sup>99</sup> Gentili, *De iure belli*, 3.17.626-7; D. 49.15.2 pr. and 1.

<sup>100</sup> Gentili, *De iure belli*, 3.17.627-8.

<sup>101</sup> Gentili, *De iure belli*, 3.17.600.

with standard practice: the exclusion of movables, as well all incomes, fruits and interest on realty lapsed during the war, from the general clauses of restitution.

The rest of the relevant chapter Gentili devoted to four particular questions arising from historical cases and which had been debated by medieval civilians and canonists such as the extension of territorial dominion over sea and the designation of borders.<sup>102</sup> Here, Gentili cut through the detailed ins and outs of historical casuistry. At one time, he did so with the claim that the law of nations did not know the various kinds of possession from municipal law, which made it unnecessary further to delve into the question to what kinds of possession it extended.<sup>103</sup>

Gentili's *ius ad pacem* in relation to enemy property was consistent with his general views of war and peace, and with the *ius victoriae* on the matter. The outcome of war decided the belligerent's rights. In the absence of explicit provisions, the status quo would thus apply in case of an undecided war. But apart from stating this general principle, which indeed answered to state practice, and, more importantly, referring to the discretion of the treaty parties, Gentili remained aloof from the concerns of contemporary practice. In practice, treaty parties commonly made quite detailed provisions for the return of conquered – public – lands and the restitution of confiscated private property. Gentili did not go into these. In fact, only in passing did he refer to the general exclusion of personal from restitution clauses, and then in a very indirect and implicit way. Instead, he preferred to dwell on more traditional questions pertaining to the effects of the general rule and on some historical casuistry pertaining to the effects of explicit treaty provisions, even if he clearly felt that these cases did not answers to the law of nations as he saw it. In brief, Gentili did not attempt at a systematic or comprehensive treatment of problems which commonly arose from treaty practice.

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<sup>102</sup> Gentili, *De iure belli*, 3.17.629-32.

<sup>103</sup> Gentili, *De iure belli*, 3.17.630.

c) *Treaty law*

In the final three chapters of *De iure belli*, Gentili covered three major aspects of treaty law as applied to peace treaties. Chapter 3.22 discussed whether peace treaties were binding upon the successors of the princes who acceded to the treaties themselves. This was a matter of great importance during the Late Middle Ages and the 16<sup>th</sup> century. Until the early 17<sup>th</sup> century, it was customary to stipulate *expressis verbis* that the treaty would apply to the signatories, their heirs and successors. On the one hand, he suggested that it was not self-evident that the treaty applied automatically, but that, on the other hand, the signatories could commit their heirs and successors to the treaty. In fact, these stipulations were a remnant from practice of the late 15<sup>th</sup> century, when the binding of successors had even been less evident. Late medieval and early Renaissance treaties had sometimes provided for the express ratification of the treaty by the future prince, mostly within a certain interval after the death of his predecessor.<sup>104</sup>

Gentili opened the discussion by stating that a prince could not commit his successors any further than he could commit himself. So the alienation of land, property or rights which the prince could not decide by himself – that is, without the consent of the people – would not bind the prince's successor. Gentili here, again, made reference to the case of the Peace of Madrid, whereby Francis had been obliged to cede the Duchy of Burgundy. Princes who held more absolute power, such as the Ottoman Sultan, could, if they made the treaty for their realm, make their commitments binding upon their successors.<sup>105</sup>

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<sup>104</sup> Wilhelm G. Grewe, *The Epochs of International Law* (Berlin and New York, 2000), 196; Lesaffer, 'Peace Treaties from Lodi to Westphalia', 20-2.

<sup>105</sup> Gentili, *De iure belli*, 3.22.675-7.

But in general, Gentili accepted that peace treaties were binding upon the successors of the principals. If the decisions of a guardian were binding upon a ward, so a prince, who was father to his people, could all the more bind them and his successors. Gentili also argued this from the need to have stable peace. Ultimately, the powers of a prince to commit his people and successors depended upon the laws of the land itself.<sup>106</sup> In opposition to what the French jurist Charles Dumoulin (1500-1566) had held, treaties of alliance and friendship also committed the successors of the treaty partners. For once, Gentili referred to contemporary and recent practice to argue his point, indicating that some treaties had stipulated that they would endure until one year after the death of a treaty partner – indeed an existing, even if somewhat older practice from the late 15<sup>th</sup> and early 16<sup>th</sup> centuries.<sup>107</sup> In the rest of the chapter, the Oxford professor went in to all kinds of casuistry in relation to the issue, drawing on Roman and recent history as well as late medieval and humanist jurisprudence.

In Chapter 3.23, Gentili moved to problems relating to ratification and the consequences of peace treaties on ‘private citizens, pirates, exiles, and adherents’. Under late-medieval treaty law, the binding of a treaty on the subjects and vassals of the principal signatory parties was a complex matter. Until the early 16<sup>th</sup> century, the language used in treaties indicates that princes adhered to treaties, not as agents of an abstract body politic, but in their own name. They did so, as it was phrased in most treaties, for themselves as well as for their heirs, successors, lands, subjects, vassals, allies and adherents.<sup>108</sup> As principals treaty partners, the princes promised to impose the treaty upon their lands, subjects and vassals. The binding of the successors, subjects and vassals to the treaty was thus conceived of as indirect.

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<sup>106</sup> Gentili, *De iure belli*, 3.22.677-9.

<sup>107</sup> Gentili, *De iure belli*, 3.22.679-80. E.g. Treaty of Etaples of 3 November 1492, Art. 1, Dumont, iii.2, 291.

<sup>108</sup> E.g. ‘pro se, suisque filiis, & haeredibus, ac Colligatis, Adherentibus, Recommendatis, & Subditis’, Treaty of Lodi of 2 April 1454, Preamble, Dumont, iii.1, 202; ‘pro se, suis Haeredibus, Successoribus, Patriis, Dominiis, Vasallis’, First Treaty of Westminster of 25 July 1474, Preamble, Dumont iii.1, 485.

To make it direct, treaties often stipulated that successors but also some of the foremost vassals and subjects – all or not through their representative bodies – would co-ratify the treaty. Other than a pledge to enforce the treaty upon their own suzerain, this co-ratification by subjects tied them directly to the treaty. All this belonged still very much to the feudal world wherein princes acted more as suzerains than as sovereigns, and ‘public’ authority resulted from a myriad of interpersonal feudal relations. It also belonged to a context wherein sovereign princes had not yet succeeded in monopolising external relations and wherein important subjects could still play an independent role at the external level, engaging in direct juridical relations with foreign powers.

Halfway through the 16<sup>th</sup> century, co-ratifications had largely disappeared or had shed their original implications. The language of the treaties changed as princes now were increasingly perceived to act as the sovereign representative of the State, directly binding all its parts and members. Ratifications and registrations in representative and judicial bodies gradually lost their external significance and now were only part of the constitutional process of binding the State to its international obligations.<sup>109</sup>

At the time Gentili wrote,<sup>110</sup> the State’s monopoly over its external relations, and the transformation this wrought to treaty practice, was at best a recent and precarious achievement. Gentili’s work reflected this. Although the answers he gave were sometimes modern ones, the questions he raised were old. He stuck to the framework of traditional doctrine – again, referring to Baldus – and went deep into the casuistry relating to all kinds of

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<sup>109</sup> Lesaffer, ‘Peace Treaties from Lodi to Westphalia’, 17-22; Neitmann, *Staatsverträge des deutschen Ordens*, 276-81.

<sup>110</sup> In his treatise, Pierino Belli devoted an extensive chapter to related issues, *De re militari et bello*, 10.2

categories of persons and subjects and their specific relation to the prince. Also feudal relations and law were discussed.<sup>111</sup>

Gentili argued that subjects were bound by the treaty their ruler had contracted, even ‘before the ratification’.<sup>112</sup> From the context, it appeared he meant their ratification, although one cannot be certain. If the subjects of one side were so bound, those of the other were also bound as the peace was a mutual contract. Moreover, an injury against a subject equalled a wrong inflicted upon that subject’s prince.<sup>113</sup> Gentili asked whether, apart from ‘the people as a whole’, individual subjects were subject to the treaty if they were not expressly mentioned. By the time Gentili wrote this, statements about the prince making the treaty for his subjects and vassals had disappeared from the preambles and main articles. Gentili found that they were not bound. This might seem to contradict his previous claim, but it did not. With it, Gentili only meant that the individual action of a subject against the peace, if it were not commanded or condoned by the prince, did not break the peace. This was in line with contemporary treaty practice. Peace treaties often stipulated that only the perpetrator of an injury against the treaty would be held liable for it.<sup>114</sup> Fighting pirates could never constitute a breach of peace, even if these were associated to the other peace treaty partner. They were ‘scorners of the law of nations’ and could thus find ‘no protection in that law’.<sup>115</sup>

Since the 15<sup>th</sup> century, it had become customary in peace treaties for the principal signatories to include their allies and adherents. This would remain standard practice until the

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<sup>111</sup> This time Gentili referred to Baldus’s commentary on the *Pax Constantiae*. He also went into some discussion of feudal law and relations, *De iure belli*, 3.23.695.

<sup>112</sup> ‘ante ratihabitionem’: Gentili, *De iure belli*, 3.23.690.

<sup>113</sup> Gentili, *De iure belli*, 3.23.690-1.

<sup>114</sup> E.g. Treaty of London, Art. 29; Gentili, *De iure belli*, 3.23.691-2. This also, as Gentili acknowledged, went back to Baldus, *Consilium* 2.195.13.

<sup>115</sup> ‘contemptores iuris gentium’ and ‘in iure nihil habere praesidii’: Gentili, *De iure belli*, 3.23.696-7.

end of the *ancien régime*. Although the terminology was loosely used, in principle ‘allies’ indicated sovereign powers, while ‘adherents’ referred to all kinds of individual persons – local lords, nobles, prelates – and communities which had supported the cause of one signatory party although they were vassals of or subject to another prince, possibly even the enemy one. The exact implications of these inclusions are not always clear and could differ from case to case. Rarely, the inclusion amounted to a real accession to the treaty.<sup>116</sup> In general, it implied that the one signatory and the other’s allies and adherents would uphold peace and friendship between them. Friendship, *amicitia*, entailed a promise not to harm one another or one another’s subjects in any way and to uphold normal, peaceful relations. Sometimes, the inclusion amounted up to more, sometimes to less. According to Wolff and Vattel, the inclusion of allies entailed a promise by the signatory not to attack or seek retribution in any way against his former enemy’s allies and adherents for their support in the war. This assumed these had not openly broken with their ally’s enemy and had only acted as auxiliaries.<sup>117</sup> In reality, these commitments were normally mutual.<sup>118</sup>

Gentili at two instances indirectly referred to the practice of including ‘adherents’. Although one cannot be completely certain, the context and the logic as well as the further language suggest that he did both refer to foreign subjects and vassals with this term as well

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<sup>116</sup> Johannes H.W. Verzijl, *International Law in Historical Perspective*, 6 (Leyden, 1973), 203, mistakenly defended the opposite.

<sup>117</sup> Wolff, *Jus Gentium*, 8.1009; Vattel, *Le droit des gens*, 4.2.15.

<sup>118</sup> Randall Lesaffer, ‘*Amicitia* in Renaissance Peace and Alliance Treaties’, *Journal of the History of International Law*, 4 (2002), 77-99; idem, ‘Peace Treaties from Lodi to Westphalia’, 34-7; Duchhardt, ‘Peace Treaties from Westphalia to the Revolutionary Era’, 55-6; Giovanni Soranzo, ‘Colligati, raccomandati, aderenti negli Stati italiani dei secoli XIV e XV’, *Archivio Storico Italiano*, 99 (1941), 3-35; Heinhard Steiger, ‘Der Westfälische Frieden – Grundgesetz für Europa?’, in: Heinz Duchhardt, ed., *Der Westfälische Friede. Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptionsgeschichte* (Munich, 1998), 33-81, 45-8.

as to third, sovereign powers. At one time, the Oxford professor compared the relation between the principal and adherents with one between kindred, suggesting equality. On the other hand, he refrained from using the term ‘war’ but preferred to speak of ‘enmity’, thus leaving the door open for the rules to apply to non-sovereign powers.<sup>119</sup> It does not appear that he included a power’s own subjects and vassals under it, as the rule he applied to adherents was in direct opposition to the rule he applied to subjects.

First, Gentili stated that if an injury was committed against ‘adherents’ before they had ratified it, the peace was not violated. Gentili’s reading of peace treaty practice on this point was accurate. In many cases, inclusion clauses expressly stipulated that the allies and adherents would have to ratify the inclusion – or, sometimes if the inclusion constituted a real accession, the treaty itself – to indicate their acceptance. Second, he stated that ‘promise made for them’ would not end enmities existing among the adherents. With this, Gentili implied that a provision for ‘adherents’, an inclusion, would end the enmity between the enemy principal and the ‘adherents’ of the other side, but not among the ‘adherents’ from both sides. This was in accordance with general practice. Furthermore, the obligations between the one treaty partner and his former enemy’s allies and adherents were indeed mutual. Because of this, the allies and adherents were often asked to accept and ratify the inclusion.

The final chapter of his treatise, 3.24, Gentili devoted to the violation of treaties. First, he stated that a treaty was not violated if one had a ‘legitimate reason’ not to abide by it. Gentili took this principle from the Roman contract of *societas* (partnership) and applied it to treaties.<sup>120</sup> Under this ‘legitimate reason’, Gentili classified necessity and superior force. Gentili took the analogy to contract law further, invoking the *exceptio non adimpleti contractus*. The non-compliance to the treaty of the one partner gave the other the right to end

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<sup>119</sup> ‘consanguineis’ and ‘inimicitis’, Gentili, *De iure belli*, 3.23.691.

<sup>120</sup> With reference to D. 17.2.14-6.

the treaty. But with regards to treaties, this was conditional on the non-compliance concerning ‘a matter of some importance’. The ‘justice of the law of nations’ and the seriousness of war demanded this. To state otherwise, would be giving in to the ‘syllables and fine distinctions of the pettifoggers’.<sup>121</sup> On the other hand, a treaty was to be considered indivisible, so that non-compliance with one clause invalidated the whole treaty.<sup>122</sup>

Non-compliance to a peace treaty only broke the peace if it constituted an offence, an injury, against the other side. Moreover, the offence ‘should be similar to the former one which occasioned the war’. This was an application of the principle that peace treaties only pertained to the causes underlying the particular war they ended and did not prevent the treaty partners from going to war over other causes in the future.<sup>123</sup> In this respect, Gentili refuted the opinion of Charles Dumoulin. The French jurist had held that if the treaty contained a general promise not to offend – which most peace treaties did – than any offence, even a new one, would break it.<sup>124</sup> If there was doubt whether the new offence resulted from a new cause or not, the presumption was to the former, Gentili held. The offender, a sovereign after all, was thus presumed not to have violated the peace treaty.<sup>125</sup> If a peace treaty stipulated that a violation of the treaty would be sanctioned against the offender, and if the sanction was

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<sup>121</sup> ‘illud quid principale est’, ‘aequitas (...) iuris gentium’ and ‘Leguleiorum ... in syllabis, & apicibus’: Gentili, *De iure belli*, 3.24.702-3.

<sup>122</sup> Gentili, *De iure belli*, 3.24.704.

<sup>123</sup> It is on this point that Gentili wrote ‘Baldus, whom I follow in cases of doubt’, with reference to Baldus, *Consilium* 2.95 and *Lectura Codicis*, 4.58.4; Gentili, 3.24.704-9.

<sup>124</sup> Charles Dumoulin, on Decio, *Consilia et responsa iuris analytica* (2<sup>nd</sup> edn., Lyon, 1570), 81; Gentili, *De iure belli*, 3.24.709-10.

<sup>125</sup> Gentili, *De iure belli*, 3.24.711.

enforced, then the peace was not broken. Many early modern peace treaties included provisions to that extent.<sup>126</sup>

## 5) *Conclusion*

To Gentili falls the merit of having made the *ius ad bellum* into a logical third part of the laws of war, after the *ius ad bellum* and the *ius in bello*.<sup>127</sup> After him, most treatises on the laws of war or later, on the laws of nations, included some reflection on the subject, although few as extensive as Gentili.

The influence of humanist jurisprudence and thought certainly told on Gentili's treatise on the laws of war. He had expanded the classical text canon of the civilian to include classical philosophical, rhetorical and historical literature as well as the writings of modern authors, particularly humanist jurists. He took critical distance from his sources. He did not take them any longer on authority, but used them to extract the underlying general principles of justice from the particular circumstances of the texts and the law they contained. Nevertheless, Gentili should be considered a representative of the *via media* of moderate humanism. He did not eject the great medieval scholastic glossators and commentators of

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<sup>126</sup> E.g. Treaty of London, Art. 29; Gentili, *De iure belli*, 3.24.711-4.

<sup>127</sup> As Jeremy Waldron remarked during the debate on this paper, making the *ius post bellum* a part of the *ius belli* also constrains it and to some extent prevents it from exhausting the law of nation's potential at securing peace. This indeed comes most clearly to the fore in the notion of 'perpetual peace' as defined by Gentili and other writers. As the war is always about a certain object of contention, peacemaking does not easily go beyond the concern of excluding war for that selfsame object for the future.

Roman and canon law from his work, but lavishly used them and critically engaged with them, as he did with the classical sources, including the Justinian texts.<sup>128</sup>

As far as the *ius ad pacem* was concerned, particularly in its more technical dimension, the relevant parts of Baldus's commentaries and *consilia* formed his main sources. Although at several instances, Gentili showed regard for recent and contemporary evolutions and practices of peacemaking – as in relation to restitution, co-ratification and inclusion – by and large he followed the agenda set by Baldus and other medieval commentators. Traditional jurisprudence determined the selection of topics Gentili discussed. Gentili often invoked classical literature and historical *exempla* to argue or illustrate his points, but this rarely sufficed. Most often he argued by taking sides, or construing his own side in debates among medieval and humanist jurists. He often indulged in the casuistry of his medieval predecessors, to the point of surpassing what was relevant for contemporary practice. All this did not stop Gentili from covering many questions and issues which were relevant to contemporary practice, but it did stand in the way of covering it comprehensively, systematically or straightforwardly. Some important aspects of peace treaties, such as amnesty clauses or trade regulations, he overlooked.<sup>129</sup>

The integration of the *ius post bellum* into the laws of war caused Gentili's concept of peace to be determined by his concept of war. It was this and the modernity of his concept of war that made for the novelty of Gentili's doctrine of peace. Gentili broke away from the classical just war doctrine with its view of war as a unilateral instrument of justice. Building on notions from medieval and humanist civil jurisprudence, he defined war as a contest for victory between equal parties. Absent the possibility to decide who had justice on his side, war was degraded from an instrument of justice into an instrument of enforcement through

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<sup>128</sup> Giovanni Minucci, *Alberico Gentili tra mos italicus e mos gallicus* (Bologna 2002).

<sup>129</sup> The first early modern jurist to cover this in some depth was Gudelinus, *De jure pacis commentarius*, 3.

victory, without any guarantee that victory would be delivered to the just side. Victory bestowed upon the victor the right to enforce his claims and dictate the terms of peace. If there was no clear victor, then war had failed its purpose. Peace through agreement was thus a solution by double default, through the failure of man to discern justice, and through the failure of achieving victory.

All this brought Gentili to distinguish two bodies of laws, which together made up the *ius post bellum*: the *ius victoriae* and the *ius ad pacem*. This scheme of things allowed Gentili to grant legal force to all that the victor or the treaty partners decided. In this sense, Gentili gave a legal basis to the practices of the European States without – the *ius victoriae* – and within – the *ius ad pacem* – Europe.

But Gentili was no positivist or consensualist. Rather than describing all the particular practices of States in making peace, he defined the general rules they ought to apply in making peace. Here he brought justice back into the equation, for its own sake as well as for the sake of making peace stable and sustainable. However, the logic of justice was more dominant in his *ius victoriae* than in his *ius ad pacem*. This is unsurprising. Under Gentili's system, peace through agreement was one step further removed from the ideal workings of justice than peace through victory.

In his *De iure belli libri tres*, Gentili had designed a general theory of peace, which answered the needs of his day and age. His system put the legal force of the agreements of States, regardless the justice of their content, beyond doubt, while at the same time restoring a place to justice, both on its own terms and as an instrument of statecraft. It allowed him to silence the voice of justice where it most clashed with contemporary practices, as in relation to the important questions of conquest – under the *ius victoriae* – and restitution – under the *ius ad pacem*. In short, he construed a doctrine of legal war and formal peace which reflected

the intra-European practices of his day and age and grasped some of the main legal principles and rules of the contemporary customary *ius ad pacem*.

But to some extent, Gentili also failed to grasp the current of events. Compared to the solution of the neo-scholastics, his system represented the path not taken. By distinguishing between objective and subjective justice, the neo-scholastics offered another way out of the dilemma of justice and sovereignty. Whereas in Gentili's work, there was only one legal order and one concept of war wherein legality and justice worked together, the neo-scholastic demarche inspired another approach: that of distinguishing two separate spheres of law – that of internal and of external law, that of the natural and the positive law of nations – and two concepts of war, just war and legal war, or solemn war in the words of Grotius.<sup>130</sup> It was Grotius who laid out this scheme but it took Wolff and Vattel fully to consummate it in their dual system of the necessary and the voluntary law of nations, of just war and war in due form, of just peace and peace as political compromise.<sup>131</sup> The dualistic outlay of the system, Grotius took from the neo-scholastic tradition, but for the concept of solemn war and for his doctrine of peace treaties, Grotius took inspiration of the civilian tradition and from its two foremost, recent representatives, Ayala and Gentili.<sup>132</sup> The success of the dualistic approach to war and peace can, at least in part, be explained from the fact that it answered to the practices of States in Early Modern Europe. When making war (the field of the *ius ad bellum*) – in their declarations and manifestos of war, in their alliance treaties –, States continued to operate the language of the just war, and particular the classical just war doctrine. When waging war and making peace (*ius in bello* and *ius post bellum*), all this was forgotten as States turned to the logic of solemn war, or to the Gentilian logic of war as a contest between equal parties.

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<sup>130</sup> Grotius, *De jure belli ac pacis*, 1.3.4.1, 3.3.4-5 and 3.3.12-13.

<sup>131</sup> See Randall Lesaffer, 'A schoolmaster abolishing homework? Vattel on Peacemaking and Peace Treaties', in: Peter Haggemacher and Vincent Chetail, eds., *Le droit international de Vattel vu du XXIe siècle* (forthcoming).

<sup>132</sup> With reference to both Ayala and Gentili in Grotius, *De jure belli ac pacis*, 3.3.12.