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# Disenchanted Gentili

## Chapter 3: Italian Lessons. *Ius Gentium* and Reason of States

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### 1 Introduction

Much like barbarism, imagination also ‘begins at home’. It begins with our own cultural preconceptions, and our tireless attempts to turn them into universalistic claims. Martti Koskenniemi’s *To the Uttermost Parts of the Earth* discusses legal imagination among the various chapters not just as a topic, a *fil rouge* that keeps the narrative together; rather, in this book, legal imagination emerges as the very argumentative fabric of international law.

Alberico Gentili deserves a special place in Koskenniemi’s long story of legal imagination. Recent scholarship has emphasized Alberico Gentili’s prolific engagement in this imaginative activity, which Koskenniemi, by using a concept from Lévi-Strauss, calls one of ‘persuasive bricolage’. Indeed, for Gentili, ‘law was not about declaring truths. It was an interpretative craft that called upon imaginative reflection on the many meanings that could be given to facts and thus to rehearse the special service that law could offer to diplomacy and efficient statesmanship’.<sup>1</sup> This topic is explored by Koskenniemi in this chapter along three lines of inquiry: first, Koskenniemi addresses Gentili’s account of the indeterminacy of natural law; second, he explores the reasons behind this indeterminacy in Gentili’s Italianness, and the political culture of dissimulation and ‘virtuous statecraft’ he was exposed to; and, third, by hinting at a fundamental intuition that would have perhaps deserved more attention, Koskenniemi suggests connecting Gentili’s natural law and *ius gentium* together through the language of ‘reason of states’.

From all these arguments, Koskenniemi draws the following conclusions, formulated as two fundamental critiques to Gentili.<sup>2</sup> First, Koskenniemi argues that Gentili’s refusal to engage with theology made his doctrines abstract and tone-deaf to the political landscape of his times; and, second, that his lack of a clear state theory resulted in no firm notion of legal obligation (*ius gentium* not being an obligation, but

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<sup>1</sup> M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (2021), at 243.

<sup>2</sup> *Ibid.*, at 268.

rather ‘a virtuous statecraft’). In what follows, I will briefly recall Koskenniemi’s arguments, and emphasize their importance within the narrative of the chapter (and more broadly within Gentili’s scholarship), while disagreeing with the conclusions he draws from such arguments.

## 2 The Obscurity of Natural Law: Disenchanted Gentili’s Normative Claim

According to Koskenniemi, Gentili’s doctrine of natural law was meant to break new ground. Natural law would serve as a unifying force to bring ‘fearful, greedy, ambitious’ sovereign princes together. However, ‘what natural law said at any moment was up to those princes to determine’. Gentili precisely gives ‘clear juridical articulation’ to this otherwise vague and theoretically elusive legal structure.<sup>3</sup> More specifically, Koskenniemi claims that ‘Gentili’s natural law was not to be proven by abstract demonstrations’, but by appealing to the senses or sound reason.<sup>4</sup> However, according to Gentili’s evocative formulation, natural reason is evident per se, and every further attempt at determining its content has the fate of making it obscure (‘si probare tentes, obscuras’).<sup>5</sup> Koskenniemi reads this claim along the lines of a tradition of interpreters highlighting the secularizing stance of Gentili’s *ius gentium*. However, at further inspection, the indeterminacy of Gentili’s natural law is not based on scepticism, as Koskenniemi seems to suggest. Instead, I believe that Gentili’s reference to ‘obscurity’ shares resemblance with Philip Melanchthon’s treatment of natural law in his *Philosophiae moralis epitome* (1538), which in turn heavily relies on a theological conception of the law. In making a similar claim about natural law, and by upholding its substantive overlap with *ius gentium*, Melanchthon argues that although divine law is impressed upon the human soul, our reason is incapable of fully grasping it because of our ‘imbecility’. Despite this deficiency, however, reason understands that God is the creator, that he is just and that it is imperative to obey him; thus, it is the role of philosophy (and *iurisprudencia* for Gentili) to make sure that we act virtuously even upon those things that seem obscure to us.<sup>6</sup> Natural law is not the product of human rational faculties. Instead, ‘it is the product of divine agency on a passive human intellect: the knowledge of natural law is actively inscribed on human minds by God in accordance with the eternal norms in the divine intellect, and simply present there’.<sup>7</sup> If this theological paradigm holds true for Gentili as well, it becomes crucial to

<sup>3</sup> *Ibid.*, at 228.

<sup>4</sup> *Ibid.*, at 230.

<sup>5</sup> See Gentili, *De iure belli libri tres* (1598), at 14, book I, chapter I.

<sup>6</sup> *Philosophiae Moralis Epitome*, Philippo Melanchthone autore (1538), at 10–11.

<sup>7</sup> M. L. Jensen, *A Humanist in Reformation Politics: Philip Melanchthon on Political Philosophy and Natural Law* (2020), at 99; Svensson, ‘Philip Melanchthon in the Reception of Aristotelian Natural Law Theory in the European Reformation’, in A. N. Garcia Martínez et al. (eds), *Natural Law: Historical, Systematic and Juridical Approaches* (2008) 109, at 109–126; Brett also mentions Gentili’s vague reprisal of Melanchthon, in A. S. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (2011), at 83.

reappraise the merits of his secularizing enterprise. While natural law appears to be deeply rooted in divine revelation and in the human capacity to intuitively grasp universal law, Gentili conceives of *ius gentium* as the tangible, secularized, historical proof of natural law's existence.

Gentili's account of justice rests upon a deep faith in the power of human reason to grasp justice and universal law, despite the apparent obscurity of the latter. This faith unravels the fundamentally normative value of Gentili's doctrine of *ius gentium*. By no means the fact that it relied on natural law's divine origins meant that it could not be manipulated, or that it was not a fully human creation. Instead, Koskenniemi argues that lack of engagement with theology left Gentili's *ius gentium* in a historical vacuum: 'no larger understanding of the magnitude of European transformations is visible in his work'; he similarly rejects the importance of the Stoic-humanist ideal, because, in his view,

[T]his would omit consideration of the constant stress in Gentili on the gap between rhetoric and action, perception and reality, the sense in which the 'weakness of human reason' leads us to perceive matters of justice only uncertainly. If natural law applies everywhere, it is not because all nations would have come together; the 'world' has no institutional representative.<sup>8</sup>

Koskenniemi explains that if we are to take Gentili's invectives against Spain's tyrannical pretences ('dressing greed in the garb of theological liturgy') seriously, 'then there is no reason to remove "Stoic cosmopolitanism" from the list of pieties that were perfectly capable of shielding whatever abominable crimes ambitious princes might be inclined to commit'.<sup>9</sup>

Gentili was perfectly aware that 'humanitarian' intervention might hide non-humanitarian interests, but for him this cannot be the end of the argument. Gentili quotes Guicciardini's *Historia d'Italia*, where Guicciardini writes that sovereigns never intervene in favour of peoples, unless they are moved by considerations of interest.<sup>10</sup> Gentili then refutes Guicciardini's by enlisting Montaigne's critique that Guicciardini, of all the events and motives he examines, has systematically excluded those arising from virtue, religion and conscience, as if those aspects of human life had been totally erased from the world ('comme si ces parties-là étaient du tout éteintes au monde').<sup>11</sup>

Montaigne's normative critique of Guicciardini's obsession with profit and interest allows Gentili to move to the second argument, crucial to his doctrine of *ius gentium*. There is no problem, he argues, if we have a patent interest in defending our friends and neighbours. This is the famous *propinquitatis* argument already deployed by Cicero: 'we were born in such a way that among all of us exists a certain social vinculum, which gets stronger the closer we get one another; therefore, citizens are preferable to strangers, neighbours to distant peoples'.<sup>12</sup> While Gentili is aware that in

<sup>8</sup> Koskenniemi, *supra* note 1, at 266.

<sup>9</sup> *Ibid.*, at 267.

<sup>10</sup> Gentili, *supra* note 5, at 111–112. Here Gentili refers to Francesco Guicciardini, *L'istoria d'Italia*, book I, chapter 15 (1561).

<sup>11</sup> M. de Montaigne, *Les Essais*, ed. P. Villey and V.-L. Saulnier, book II, chapter 10 (1965), available at <https://artflsrv03.uchicago.edu/philologic4/montessaisvilley/navigate/1/4/11/>.

<sup>12</sup> Cicero, *On Duties*, Loeb Classical Library 30, ed. J. Henderson, trans. W. Miller (Harvard University Press, 1913), at 338–340, book III, para. 69.

this way reason appears more utilitarian than natural ('sic utilis ratio latens'), in his view this does not contradict the validity of the obligation itself. In addition, in cases when neighbouring peoples are in danger we are more than authorized to intervene in their favour, as the injuries they suffer can involve us as well for reasons of proximity.

Koskenniemi provides the reader with an accurate depiction of Gentili's historical method.<sup>13</sup> Gentili's elaboration of the justice of *ius gentium* relies on two fundamental conceptual pillars: first, on a Ciceronian account of international justice, based on the Roman imperial model; second, on the teleological argument that justice manifests itself in history. Power went hand in hand with its historical manifestations, and it received normative legitimacy from them. Koskenniemi thus concludes that

Gentili was certainly no pacifist and did not think of war as a judicial process. Although not a natural feature of human life, war was often a necessary means to discipline ambitious or unjust rulers or to check violations of natural law. It constituted a form of expression of virtuous statecraft.<sup>14</sup>

Indeed, war might have not been as peaceful as a judicial process, although Gentili expressly defines it as a trial; however, historiographical method certainly worked, for Gentili, as a trial-like model of knowledge, one that was constitutive to the making of *ius gentium*. It was like a process *in absentia*, with historians presenting their evidence to convince the court of their future audience, a process that might lead to contradicting results, because it had no agents but historians of the past and their future interpreters, with both parties unable to communicate bilaterally; evidence could be tainted by the historians' partisan zeal, as much as by the interpreter's own conception of justice.

I suspect that here Koskenniemi's intent is to disenchant Gentili – to use a very Gentilian move against Gentili – in the attempt to make space for the open-endedness of his thought and revive it in the present. Despite Gentili's 'efforts to bring self-interest together with larger humanist principles of the general good',<sup>15</sup> what Koskenniemi powerfully seems to suggest is that all these theories did not really matter, or at least they do not seem to mean much to us. As he evocatively writes, 'legal reasoning was not about true facts or correct metaphysical derivations. It was instead about remembering examples and retelling stories from classical authors'.<sup>16</sup> Koskenniemi suggests that Gentili's *ius gentium* is ultimately based on the discretion of sovereigns and jurists – and once the normative surface of legal arguments is scraped, it is ultimately up to international lawyers to say the very last word, precisely as judges in the Hegelian tribunal of history. Here is where Koskenniemi's legal imagination goes meta to vindicate the power of international law as an imaginative discipline. For Gentili, the process of selection of evidence was as important as the outcome of the trial, because *ius gentium* was thought of as a proper historiographical discipline. It was not just about conjuring up ideas of empire and universal justice so they could serve a normative

<sup>13</sup> Koskenniemi, *supra* note 1, at 239–243.

<sup>14</sup> *Ibid.*, at 258.

<sup>15</sup> *Ibid.*, at 245.

<sup>16</sup> *Ibid.*, at 242–243.

purpose; these ideas were intrinsically generated by the historical discourses with which the jurist was engaging. The process of their cultural production and textual transmission was quintessential to the making of *ius gentium*. But, while acknowledging the political salience of this activity of bricolage, Koskenniemi appears unconvinced by Gentili's method, and dismisses it as ultimately unreliable and incoherent. This poses a larger question concerning Koskenniemi's own method, and his contribution to the history of international law as a discipline. One is left wondering, why bother telling all these stories, if contemporary international lawyers can no longer be persuaded by their cultural processes of production? If international law's language is so intimately related to historical imagination, then why doesn't it become a theory of history?

### 3 The Poetic of Gentili's Italianness: *Ius Gentium* as Reason of States

Koskenniemi turns to Gentili's Italianness to close the circle: 'Gentili's Italian baggage included awareness of the paradoxical relationship between the stability of human nature and the endless variation of human affairs.'<sup>17</sup> This aspect is captured masterfully by Koskenniemi when he describes the relationship between dissimulation and poetic and dramatic fiction, and the relations and networks of patronage that guaranteed success to Gentili, but also made his reputation as an Italian at Oxford particularly vulnerable. While history was a process of selection of *auctoritates*, one that could be subject to criticisms because of its potential partiality, poetry was an invention of poets, an authentic act of human creation that only had to respect a general rule of verisimilitude, as Aristotle showed in his *Poetics*. However, as showed by Gentili's acrimonious debates with the Puritan John Rainolds, the Italian culture of dissimulation associated with fiction ended up nurturing the suspicion he might still have an aura of Italian Catholicism around him. But Gentili's Italianness becomes even more evident in the most inspiring, but underdeveloped, claim of the chapter – the question of 'reason of states' – only addressed more extensively towards the end. Koskenniemi opens the chapter by reporting a passage from Guicciardini, where 'to "speak not as a Christian" meant that Bernardo knew well that the Pisans had no obligation to submit but were simply expected to yield to Florence's greater power'.<sup>18</sup> Since Guicciardini was here referencing the Christian custom prohibiting the killing of prisoners,<sup>19</sup> he thus appears to have 'used the notion of "reason and practice of states" to refer to action taken in order to deviate from the normal requirements of law and morality'.<sup>20</sup> Koskenniemi's intuition about the relationship between *ius gentium* and reason of states is a very under-explored one, and one that could have deserved extra textual

<sup>17</sup> *Ibid.*, at 246.

<sup>18</sup> *Ibid.*, at 213.

<sup>19</sup> On this custom, see F. Iurlaro, *The Invention of Custom: Natural Law and the Law of Nations, ca 1550–1750* (forthcoming 2021).

<sup>20</sup> Koskenniemi, *supra* note 1, at 275.

attention, considering it is also evoked in the title of the chapter. I suspect that this is a result of Koskenniemi's distrust towards Gentili's idea that processes of knowledge production are a quintessential mode of production of *ius gentium*.

As contemporary readers, we tend to follow Meinecke's interpretation of reason of state – much like Guicciardini – as opposite to law: instead, in the words of Scipione Ammirato, Koskenniemi argues, 'reason of state did not wish to do away with law and legality but lay down the conditions for its application', with the two (reason of state and law) 'easily be made to collapse into each other'.<sup>21</sup> But, although Gentili does not explicitly mention the term in his *De iure belli*, he is extremely familiar with the reason of state literature. My intuition is that Gentili navigates this ambiguity by using the idea of 'ragion di stato', against Guicciardini, in a normative sense, although he never mentions the expression explicitly (nor has he ever published in Italian vernacular, unlike his brother Scipio). The reason behind this different interpretation might lie in the textual transmission of a Ciceronian passage with which Gentili engages extensively.<sup>22</sup> While scholars have suggested that there might be some connection between the Latin 'ius gentium' and the Italian expression 'ragion di stato', we still lack textual evidence as to what kind of textual transmission might authorize such juxtaposition.<sup>23</sup>

One possible narrative might be to trace 16th-century Italian vernacular translations of Cicero's *De officiis* to test the hypothesis that the wording 'ragione delle genti' might be the Italian vernacular rendition for 'ius gentium'. While Gentili concedes a fundamental comparative-empirical role to Roman law that authorizes its application even in modern times,<sup>24</sup> he rejects the exact identification between the two. In fact, Gentili writes, quoting Cicero's *De officiis*: 'what can be considered civil law, it should not necessarily also be *ius gentium*'.<sup>25</sup> On the contrary, Gentili claims that what can be defined *ius gentium* must necessarily amount to civil law, apparently contradicting his prior description of *ius gentium* as closer to natural law.

Cicero's quote is, however, compared and integrated by Gentili, in the marginal reference, with a quote from *Digest* 1.1.6: *ius gentium* might have *some* elements of civil law, but it does not overlap with it completely because each commonwealth has different domestic laws whose application cannot be universalized. However, as the general principles of Roman law are ultimately based on natural reason, *ius gentium* should be considered as a manifestation both of natural law, and of the consensus of the majority of the world. This consensus takes the name of custom. It constitutes the backbone of Gentili's account of *ius gentium*, as the latter could not 'be introduced otherwise' than by the cumulative historical progression of learned opinions and Roman law institutes.

<sup>21</sup> *Ibid.*, at 278.

<sup>22</sup> Cicero, *On Duties*, *supra* note 12, at 338–340, book III, para. 69.

<sup>23</sup> See P. Burke, 'Tacitism, Scepticism and Reason of State', in J. H. Burns and M. Goldie (eds), *The Cambridge History of Political Thought 1450–1700* (1991) 477.

<sup>24</sup> In this sense, it has a quasi- 'constitutional' value, as claimed by B. Straumann, *Crisis and Constitutionalism* (2016), at 274.

<sup>25</sup> Cicero, *On Duties*, *supra* note 12, at 338–340, book III, para. 69.

A quick look at Italian translations of *De officiis* from 1500 to 1550 shows that, whenever ‘ius gentium’ is mentioned,<sup>26</sup> Italian translators tend to translate it as ‘ragione delle genti’. To my knowledge, the first occurrence in an Italian edition of Cicero is Federico Vendramin’s translation (Venice 1528). The term ‘ragion di stato’ then appears in Giovanni Della Casa’s *Oration to Charles V for the restitution of Piacenza* (1549). Recent research has shown that the first manuscript version of the oration presents ‘ragione degli stati’ in the plural, thus suggesting an alternative translation for *ius gentium*.<sup>27</sup> In this famous oration, Della Casa suggests that Charles V restores Piacenza because there is no difference between ‘ragion di stato’ and ‘ragion civile’; and those who think otherwise talk ‘little like Christians, and with little consideration of humanity’. This is almost an exact replica of Guicciardini’s ‘to speak not as a Christian’. After della Casa, we still find in Giovanni Botero’s later *Della ragion di stato* the difference between ‘ragion di stato’ and ‘ragion civile’, in both cases in the context of a criticism of the justice of Roman empire. For the sake of completeness, the term ‘ragione delle genti’ is used as a translation of *ius gentium* already in Jacopo Nardi’s translation of Livy (1511); the term can also be found in Lodovico Domenichi’s 1545 edition of Polybius. The textual story of the transition from ‘ragione delle genti’ to ‘ragione degli stati’, however, still needs to be told.

Finally, and interestingly enough, a poetic use of the expression ‘ragione delle genti’ is attested in Torquato Tasso’s *Gerusalemme Liberata*. Gentili’s brother Scipio comments extensively on this text in his *Annotazioni sulla Gierusalemme liberata*. Again, this hints at the imaginative power of poetry and fiction to create legal arguments – one that was very well engrained in the Gentili family.<sup>28</sup>

As I write this review, Paul McCartney’s last *McCartney III Imagined* album has just come out. In it, McCartney ‘presents a re-sequenced, alternate-universe version of the record as overseen by an eclectic cast of alt-rock icons, current indie darlings, and modern pop phenoms’ the most successful of whom ‘work in service to the song rather than themselves’.<sup>29</sup> Writing reviews is no remixing, but it is most effective when it serves the writing, rather than the reviewer’s agenda; when the author is a true icon, however, be it McCartney or ‘a rockstar of international law’, as Koskenniemi has been described,<sup>30</sup> the reader is invited to engage in a further act of imagination – with the myths the rock stars have smashed on stage and the new images they leave behind.

<sup>26</sup> See, e.g., *ibid.*

<sup>27</sup> Albonico, ‘La prima redazione della Orazione a Carlo V di Giovanni della Casa’, 12 *Filologia Italiana* (2015) 79.

<sup>28</sup> Torquato Tasso, *La Gerusalemme Liberata* (1581), Canto II, para. 97; and Scipio Gentili’s commentary in his *Annotazioni sulla Gierusalemme liberata* (1586), at 1, 18, 88, 93, 253.

<sup>29</sup> Berman, ‘Paul McCartney III Imagined’, *Pitchfork* (17 April 2021), available at <https://pitchfork.com/reviews/albums/paul-mccartney-mccartney-iii-imagined/>.

<sup>30</sup> See Nijman’s ‘Foreword’, in M. Koskenniemi, *International Law and The Far Right* (2019) v–x, at v.

