Introduction

When the sixteenth-century jurist Alberico Gentili was pulled back from the dead and celebrated with great fanfare amongst English and Italian international lawyers in the 1870s, not everyone was entirely on board with the festivities. Gustave Rolin-Jaequemyns, a prominent Belgian lawyer who had been at the forefront of the efforts to codify the laws of war and to professionalize the discipline of international law since the late 1860s, was skeptical. He expressed some strong reservations about the narrative his peers were weaving around the man who had once been a controversial character of his time, the Oxford-based Protestant who defended absolutist rule and Catholic Spain's interests in the midst of the Dutch Revolt. "We doubt," he cautioned, "that it is rigorously accurate to represent the wise lawyer of the Spanish embassy as a sort of inspired apostle of peace."[1] Palpably frowning between the lines, he further warned his colleagues about the risks of making Gentili a founding father for their own nineteenth-century endeavors: "[T]o drape a great jurist from three centuries ago into such ultra-modern garments is not a good example for the artist who will be in charge of his statue."[2] Rolin-Jaequemyns certainly had a point, but he turned out to be a lone voice of reason amidst what has been described as the *Gentilimania* of the 1870s.[3]

Alberico Gentili (1552–1608) was an Italian jurist who, persecuted for his Protestant faith, fled to England, where he had a flourishing career both as a professor of law at Oxford in the 1580s[4] and as a practicing lawyer in London in the 1590s and until his death in 1608.[5] To his admirers,

[1] Rolin-Jaequemyns, "Albéric Gentil," 142. ["Nous doutons… qu'il soit rigoureusement exact de représenter le savant avocat de l'ambassade d'Espagne comme une sorte d'apôtre inspiré de la paix."]
[2] Ibid. ["Revêtir un grand juriste d'il y a trois siècles d'un costume aussi ultra-moderne, n'est pas d'un bon exemple pour l'artiste qui sera chargé de sa statue."]
[3] I borrow this term from Luigi Lacchè in "Monuments of International Law. "
[4] He held the title of Regius Professor of Civil Law until his death but was mostly active as a scholar in the 1580s.
[5] I will provide a fuller biographical summary of Gentili at the start of Chapter 2.

he was a prescient hero of their own humanitarian efforts to formalize the regulation of warfare, and potentially the "true founder of international law," as opposed to the more well-known Grotius. Most importantly to them, Gentili – unlike Grotius – had established that war was a public matter, and thus the sole legal prerogative of sovereign states. Grotius had putatively remained "medieval" in his definition of war, including private wars in it as well, while Gentili's now famous definition from his *De iure belli* of 1598: *bellum est publicorum armorum iusta contentio*[6] – war is a just contest of *public* arms – had brought the regulation of warfare into modernity. This understanding of Gentili seemed to dovetail perfectly with the broader narrative that had emerged about the rise of the modern international states-system in the seventeenth century and particularly with the 1648 Peace of Westphalia. A seamless line could be drawn between, on the one hand, Gentili's 1598 definition of war and, on the other, the story of the emergence, exactly fifty years later, of a system of sovereign states concentrating authority in the hands of distinct territorial entities that acknowledged no higher authority and recognized each other as legal equals. According to this narrative, the allocation of the legal right to wage war only to sovereign states, penned by a humanitarianly minded Gentili and implemented in practice through the seventeenth century, became one of the core stabilizing factors of the new states-system in the aftermath of the cataclysmic wars of religion.

Today, this narrative holds a remarkable degree of traction, notwithstanding the thorough debunking of the so-called myth of Westphalia, the highly popular but misleading claim that the modern states-system emerged in 1648.[7] The ideas that war became "modern" once the right to wage it was restricted to sovereign states, that this restriction was put in place in order to limit the horrors of warfare, and that this development hinged in large part on the work of Gentili is a widely shared assumption amongst scholars of international relations and international law. It appears across diverse areas of scholarship broadly interested in analyzing war and international order in historical perspective, from the musings of the English School to the profoundly influential work of scholars investigating the decline of interstate warfare and the rise of "new" wars.[8] The new wars thesis, in particular, hinges on a description of the "old wars" as armed conflict between sovereign states, and though the chronology varies from one author to the next,

[6] Gentili, *De iure belli*, Book 1, Chapter 2, §18.
[7] See most notably Osiander, "Sovereignty, International Relations, and the Westphalian Myth"; Teschke, *The Myth of 1648*.
[8] See *infra* notes 10–12 for examples from these various areas.

scholars generally place the origins of this form of warfare in the seventeenth century as well.[9]

The emphasis on the specific importance of Gentili is striking across these diverse fields. One finds it spelled out just as much in the classic works on the history of international law,[10] in foundational texts on international relations,[11] and in contemporary writings on the "new wars" and the legal challenges of counterinsurgency.[12] Even in the latter, the links between Gentili and our modern way of conceptualizing and regulating war are – curiously, considering these works are hardly of a historical bent – drawn in an explicit manner. To cite but one example, in *The Rule of Law in War: International Law and United States Counterinsurgency Doctrine in the Iraq and Afghanistan Wars*, a contemporary, practice-oriented text, we are told that "the present epoch of LOAC [law of armed conflict] dates back to Albericus Gentili's 1598 *De Jure Belli*."[13]

This narrative is used widely because it is a seductively simple story about modernity, the rise of the state, and the taming of war in the international system. As a shared set of assumptions about the emergence of the modern world, it deeply influences the way both scholars and practitioners think about the changing role of war in international relations. With the emergence of the modern states-system still widely understood as a positive, stabilizing development in international relations, the restriction of the right to wage war to sovereign states has also been deemed to possess some intrinsic normative value, to be a sort of humanitarian principle. Specifically, scholars argue that the purpose

[9] These scholars sometimes revert to a much vaguer claim according to which the process of restricting the right to wage war to sovereign states began in the fifteenth century and reached completion in the late eighteenth century; see Münkler, *The New Wars*, 41; Kaldor, *New and Old Wars*, 15. When pressed for a more specific chronological anchor, however, it is the inevitable 1648 benchmark that comes up. For instance, Münkler explains that international law established the broad principle that only sovereign states could legally wage war in Europe from the "mid-seventeenth century," with the principle then gaining "general acceptance there for several centuries." Münkler, *The New Wars*, 63–64. For a similar statement, with an emphasis on 1648 specifically, see also Van Creveld, *Nuclear Proliferation and the Future of Conflict*, 126.

[10] Grewe, *The Epochs of International Law*, 211–14; Schmitt, *Nomos of the Earth*, 158–59.

[11] See, for instance, Bull, *The Anarchical Society*, 29. Bull considers Gentili as the only "early internationalist" to have come to terms with "the idea that is the foundation of later attempts to accept war between states as an institution of international society." Before him, others "do not do more than grope towards the modern doctrines that only public authorities are entitled to wage war, and that only states can be regarded as such authorities." See also, for instance, Knutsen, *A History of International Relations Theory*, 71–72.

[12] Münkler, *The New Wars*, 64.

[13] McLeod, *Rule of Law in War*, 36–37.

and effect of this restriction of the right to wage war was the promotion of order in the international system.[14]

This powerful narrative has long informed the development of the laws of war in practice: The idea that only sovereign states should have the legal right to wage war has been one of the foundational pillars of the laws of war since their codification in the late nineteenth century, and it remains central to our way of regulating armed conflicts to this day. Widening the ambit of this legal right to include nonstate actors, the story suggests, would essentially take us back to medieval forms of violence and perhaps risk the complete collapse of the international order. As Hedley Bull once put it, "[w]e are accustomed … to contrast war between states with peace between states; but the historical alternative to war between states was more ubiquitous violence."[15]

The aim of this book is to challenge this story about modernity, states, and the taming of war by exposing how it was constructed and eventually popularized in the disciplines of International Relations and International Law. Its core argument is that the narrative about Gentili and the emergence of "modern war" is largely a myth. It was first elaborated in the late nineteenth century, when the modern sovereign state actually triumphed in international law, and then went on to be repeated, inflated, and enshrined through the works of twentieth-century scholars, notably those of Carl Schmitt. The book tells the story of the construction of this myth and shows the power it continues to hold over our collective imagination.

In doing so, its broader goal is to open the way for scholars to put forward alternative explanations and chronologies of the process through which the legal right to wage war became the exclusive prerogative of sovereign states. Based on the recent literature on the myth of Westphalia and the prominence of composite polities, hybrid private/public actors, and other entities that looked nothing like the "modern" territorial sovereign state throughout the early modern period,[16] the time seems ripe to revisit our old narrative. There is already an extensive debate about the monopolization of external violence by states in

[14] See, for instance, Luard, *War in International Society*; Holsti, *The State, War, and the State of War*; Bull, *The Anarchical Society*; Schmitt, *Nomos of the Earth*; Pejcinovic, *War in International Society*; Bartelson, *War in International Thought*.

[15] Bull, *The Anarchical Society*, 178–79.

[16] Historical IR scholars have now debunked the idea that the modern states-system emerged at the time of the Peace of Westphalia; see notably Osiander, "Sovereignty, International Relations, and the Westphalian Myth"; Teschke, *The Myth of 1648*; Osiander, *Before the State*; Nexon, *The Struggle for Power in Early Modern Europe*; Branch, *The Cartographic State*. Both in certain parts of Europe (e.g., the Holy

practice,[17] but much less has been written about the question of when states became the only entities legally allowed to wage war.[18] While sometimes conflated,[19] these are two empirically distinct questions, and reassessing the legal one could have important repercussions. One could, for instance, hypothesize that the restriction of this legal right to sovereign states happened not in the seventeenth century but around the late nineteenth century, when concepts such as demi- and semi-sovereignty came to be considered anomalies in international law,[20] and when Gentili was actually celebrated on the basis of his newly discovered prescience. This chronology would associate the restriction of the legal right to wage war not with a period of greater stability after the devastating early modern wars of religion, but with the dawn of what many consider the bloodiest century in human history, the period spanning high imperialism and the two world wars.

Putting forward these alternative histories could perhaps be done without a sense of what exactly might be wrong with our existing

Roman Empire) and in the extra-European world, sovereignty was understood to be divisible, meaning that entities not considered full sovereign states could possess certain prerogatives of sovereignty, including, presumably, the legal right to wage war. Benton, *A Search for Sovereignty*; Keene, *Beyond the Anarchical Society*; Nexon, *The Struggle for Power in Early Modern Europe*; Stern, *The Company-State*; Cavanagh, "A Company with Sovereignty and Subjects of Its Own?"; Phillips and Sharman, *International Order in Diversity*; Learoyd, "Configurations of Semi-Sovereignty in the Long-Nineteenth Century"; Sharman and Phillips, *Outsourcing Empire*.

17 "External violence" in this debate refers to violence conducted by the state against both state and nonstate actors *outside* its geographical boundaries. Tilly, "War Making and State Making as Organized Crime"; Tilly, *Coercion, Capital, and European States, AD 990–1992*; Thomson, *Mercenaries, Pirates, and Sovereigns*; Newman, "The 'New Wars' Debate"; Percy, *Mercenaries*; Colás and Mabee, *Mercenaries, Pirates, Bandits and Empires*; Berdal, "The 'New Wars' Thesis Revisited"; Scheipers, *Unlawful Combatants*.

18 The main exception remains Lesaffer, *Peace Treaties and International Law in European History*; Lesaffer, "Peace Treaties and the Formation of International Law." However, while Lesaffer examines the right to wage war through the more practical lens of peace treaties, he dismisses the remarkably important Holy Roman Empire as a mere exception, and he does not examine treaties between Europeans and non-Europeans, although Europeans at times signed even more treaties with non-Europeans than amongst themselves over the course of the early modern period. On the underestimated importance of the Holy Roman Empire, see Wilson, *Heart of Europe*. On the numerous treaties signed between Europeans and non-Europeans, see Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies*; Alexandrowicz, *The European-African Confrontation*; Keene, "The Treaty-Making Revolution of the Nineteenth Century"; Alexandrowicz, *The Law of Nations in Global History*; Pitts, *Boundaries of the International*. Other recent works in IR on the historical relationship between war and international order have paid virtually no attention to the laws of war; see notably Pejcinovic, *War in International Society*; Phillips and Sharman, *International Order in Diversity*.

19 Van Creveld, *The Transformation of War*, 41; Münkler, *The New Wars*, 64; Kaldor, *New and Old Wars*, 19.

20 Learoyd, "Configurations of Semi-Sovereignty in the Long-Nineteenth Century."

narrative. Exposing its genesis, however, is a crucial step in the context of how the history of international law has long been conceptualized, researched, and taught. The very idea of what "the history of international law" consists of has been nebulous at best, and more often than not, scholars have reduced it to a history of ideas, or sometimes a history of doctrine. In recent years, there has been a strong call to instead tell this history as one of international legal practices.[21] To put the practice argument bluntly, we are likely to get a much better sense of how international law actually impacted international relations – or how interpolity law impacted interpolity relations, to put it in less anachronistic terms – if we examine the legal tools that were used on the ground in settling interpolity disputes rather than the meditations of a few canonized jurists. Of course, some of the famous jurists were practitioners as well – Grotius' employment by the Dutch East India Company is perhaps the most famous case in point – but even in those cases, it is often their more theoretical work we turn to, without much evidence that these theoretical considerations had a tangible impact on the ground. As such, the new emphasis on practice has made a powerful case for telling the history of international law either without the usual handful of famous treatises or by supplementing their analysis with extensive empirical evidence of concrete legal practices. This is a very important call, but it is currently undermined by the resilience of the old, canon-based stories we tell about the development of international law.

Indeed, it is clear that despite these recent injunctions, much of the field continues to tell the story of international law through the canonical writings of the usual suspects, sometimes with a few creative additions.[22] This is particularly striking within the specific area of the history of the laws of war, which continues to primarily navigate from Francisco de Vitoria and Pierino Belli – a somewhat lesser-known sixteenth-century jurist and soldier remembered for his 1563 treatise *De re militari et de bello* – to Gentili and Grotius through Pufendorf and Bynkershoek before delving into textbooks and conventions once we get to the nineteenth century.[23] Even more concerningly, while one could imagine a certain complementarity between the histories of international law that emerge through studies of practices and studies of

[21] See especially Benton and Ford, *Rage for Order*; Wallenius, "The Case for a History of Global Legal Practices."

[22] See, for instance, Kadelbach, Kleinlein, and Roth-Isigkeit, *System, Order, and International Law*.

[23] Neff, *War and the Law of Nations*; Bartelson, *War in International Thought*. For a recent exception and an insightful set of reflections on the matter, see Tischer, "Princes' Justifications of War in Early Modern Europe."

ideas, what is regularly the case is that these two types of narratives clash in the chronologies they put forward and the turning points they identify.[24] As a result, an area like the history of the laws of war that is still almost exclusively based on a history of ideas ends up being so adamantly committed to a particular historical narrative that it precludes the emergence of the alternative chronologies that could come out of more practice-based studies. To truly make space for a new history of the laws of war, it is thus necessary to begin showing the flimsy character of the pillar this old approach rests on.

This is not to say, of course, that ideas do not matter in the history of international law. There is an inevitable dialectic between ideas and practices, and this book is not intent on making some general directional argument one way or the other. What it does want to highlight, though, is the extent to which the ideas that matter in practice are not necessarily the ones we take for granted. Ideas need to be mediated by those intent on using them, and in that sense they sometimes come to have a much greater impact when reformulated – or downright remodeled – by comparatively unknown receivers than they do in their more famous original form.

In order to examine this phenomenon and the broader emergence of our narrative about Gentili and modern war, the book follows a two-step approach. First, it examines what Gentili intended to achieve in his own time with his famous 1598 treatise of the laws of war, *De iure belli* (*DIB*), and how his work was received then, delving into the world of the late sixteenth and early seventeenth centuries. It then homes in on Gentili's late nineteenth-century canonization and the subsequent path-dependent developments that led contemporary scholars to inherit the famous narrative about Gentili, modern war, and the emergence of the states-system. This two-part approach stems from a simple rationale: By having some sense of what the text was intended to achieve in its original context, we can have a much better grasp of the extent to which its meaning was distorted by its later readers, whether intentionally or unintentionally, for often the most compelling distortions are the ones that are unintentional and built on a kernel of truth. It also helps us move away from a mere acknowledgment that a distortion took place and try to grasp the form that this distortion took. The aim of this approach is to go beyond simply showing that a disciplinary canon is a retrospective construction and instead to shed light on the specific ways in which an author and his text were appropriated by his later readers, allowing for a

[24] See, for example, the case of the "Standard of Civilization" discussed in Wallenius, "The Case for a History of Global Legal Practices," 11–18.

more critical analysis of the development of disciplinary canons and of broader "traditions" of thought. It presupposes, not uncontroversially, that we can at least partly recover authorial intention, and that it can be used as a benchmark against which to compare later interpretations of the text. I discuss this more at length in Chapter 1, drawing on the insights of both Skinnerian contextualism and reception theory.

Based on this approach, the story at the heart of the book centers on the revival of Gentili and the emergence of the now ubiquitous story about modernity, the rise of the states-system, and the taming of war. Chapters 4, 5, and 6 are about the period from the 1870s onward. However, reading Alberico Gentili in his own context, the task of Chapters 2 and 3, provides some essential insights into what was at stake in his work back in the late sixteenth century, which was then erased during his nineteenth-century revival. At the forefront of Gentili's mind were debates about the locus of political authority and the legitimacy of rebellion. He came to occupy an extremely awkward position in England as one of its staunchest absolutist intellectuals in the late sixteenth century and, in the final years of his life, as a lawyer for the dreaded Spanish crown. As is often the case with famous thinkers,[25] he was hardly representative of the zeitgeist of the early modern period, let alone of the late sixteenth century. If anything, he was a controversial figure, both in his own lifetime and in the decades following his death. I contend that his famous treatise on the laws of war can in large part be read within the broader debate about the locus of political authority and through the prism of his contentious absolutist ideas. Within these debates, he advanced certain claims about the "public" character of war, before touching on the question of who could be deemed a "public" actor in relatively piecemeal fashion. Clearly, he did not imagine the world as one of the sovereign territorial states in the so-called Westphalian sense of the term.

After his death, Gentili nearly fell into the dustbin of history in light of his polemical writings, remaining a relatively minor figure – when he is mentioned at all – in the international law treatises of the next two and a half centuries.[26] Tellingly, the few lengthier entries about him, for instance in Pierre Bayle's famous *Dictionnaire* of 1697, mention his works on war and embassies in passing, and then focus on his controversial absolutist writings.[27] He remained occasionally cited as a secondary figure, sometimes being rather demeaningly presented as

[25] Keene, "International Intellectual History and International Relations," 344–45.
[26] Haggenmacher, "Grotius and Gentili," 134.
[27] Bayle, *Dictionnaire Historique et Critique*, Vol. 7, 66.

someone whose writings on war were "not useless to Grotius."[28] It is only with his revival in the 1870s that he came to be seen as one of the founders of international law, and more specifically of the modern laws of war. In order to understand why Gentili rose to fame and why his name became so deeply entwined with the story of the emergence of the "modern" concept of war, one thus needs to travel forward in time to the late nineteenth century and to understand the context in which his writings were reappraised. Most importantly, Gentili's revival in the 1870s took off in the midst of international law's transformation into a formal "science" and at a remarkable time for historical thinking, two crucial developments which I will briefly outline here.

The late nineteenth century was an era that saw history acquire an unprecedented amount of clout, becoming, in certain respects, the ultimate authority of the time, "the paradigmic form of knowledge to which all others aspired."[29] Following a spike of interest after the French Revolution and the professionalization efforts of the likes of Leopold von Ranke (1795–1886),[30] what had long been an "amateur activity,"[31] a branch of rhetoric practiced mostly by dabblers and dilettantes,[32] now became a formal academic discipline. From the 1830s and 1840s, universities, which until then had only taught classics, started putting history in the curriculum.[33] This new discipline's primary function was to be at the service of the state, providing genealogies for nation-states at a time when their centralization throughout Europe was often being met with resistance.[34] Suddenly, excavating the past was no longer an amateur hobby but rather an essential exercise for those interested in shaping the present. This new historical fervor was characterized by two more specific developments, both of which are essential to the story I am about to tell.

First, the nineteenth century marked the emergence of various linear narratives of progress. Whether these teleological metahistories were about the victory of liberal ideas, the imminent revolt of the working

[28] Ibid.
[29] Bann, *Romanticism and the Rise of History*, 3. This is not to say, of course, that history was not important prior to the nineteenth century. Simply, its importance reached an unprecedented intensity in the nineteenth century with the emergence of more linear and teleological narratives about the past. I will in fact also discuss the sixteenth-century "turn to history" in Chapter 2, drawing on the work of Donald Kelley, for example, "The Rise of Legal History in the Renaissance."
[30] Doran, "Choosing the Past," 4.
[31] White and Rogne, "The Aim of Interpretation Is to Create Perplexity in the Face of the Real," 72.
[32] Doran, "Choosing the Past," 3.
[33] White and Rogne, "The Aim of Interpretation Is to Create Perplexity in the Face of the Real," 72.
[34] Ibid. See also Lorenz and Berger, *Nationalizing the Past*.

class, or the inevitable triumph of the white race, they all sought to order the past as a logical sequence inexorably moving toward the achievement of a clear goal. This teleological thinking also became central to the telling of the history of international relations. It is this period that witnessed the emergence of the idea that the seventeenth century – and often specifically the 1648 Peace of Westphalia – had marked the emergence of the modern states-system, that is, an international system composed of formally equal sovereign states.[35]

Second, the nineteenth century also witnessed an unprecedented search for founding fathers and their corresponding genealogies. The period saw the ascent of the romantic idea of the genius and the canonization of various men (for they were almost invariably men) across disciplines, most notably within music and the arts. This view of history became most famously embodied by Thomas Carlyle's famous claim that "the history of the world is but the biography of great men."[36] The broader "great men theory" associated with him, according to which "great men" were the decisive factor in shaping the course of history owing to their unique genius, was embraced by the likes of Kierkegaard, Hegel, and Weber and would become a dominant form of historical writing until World War II. The two trends often converged: Along with this romantic conceptualization of the genius came the attempt to tie specific individuals to breakthroughs within teleological accounts of modernity. The most famous example is perhaps that of Leonardo da Vinci, who came to be understood as the universal genius par excellence, the "first modern man" who unleashed "the dawn of modern art."[37]

International law did not escape the zeitgeist and witnessed a strong shift toward historicization as well, unleashing a newfound enthusiasm for identifying founding fathers and telling stories of the inevitable rise and rise of modernity.[38] The seeds were planted in the closing years of the eighteenth century, when international lawyers began to "envisage their project in distinctively historical terms," writing the first historical accounts of international law as a discipline and inaugurating what

[35] Keene, *Beyond the Anarchical Society*, 19–29; Pitts, "International Relations and the Critical History of International Law," 286; Devetak, "Historiographical Foundations of Modern International Thought."
[36] Carlyle, *On Heroes, Hero-Worship, and The Heroic in History*, 34.
[37] Bullen, "Walter Pater's 'Renaissance' and Leonardo da Vinci's Reputation in the Nineteenth Century," 270.
[38] Naturally, this process was not entirely linear and some figures had already been at least partly canonized earlier. The most obvious case is that of Hugo Grotius, although the actual chronology of his canonization is now rather debated. For some time, Grotius was understood to have been canonized in the eighteenth century within the realm of moral philosophy, long before the broader rise of historicism in the