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Review

*The Wars of the Romans: A Critical Edition and Translation of De armis Romanis.* By Alberico Gentili. Edited by Benedict Kingsbury and Benjamin Straumann. Translated by David Luper. Oxford, New York: Oxford University Press, 2011. Pp. xxix, 388. Indexes. \$120. ; *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire.* Edited by Benedict Kingsbury and Benjamin Straumann. Oxford, New York: O ...

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*The American Journal of International Law*, Vol. 105, No. 4 (October 2011), pp. 839-844

Published by: [American Society of International Law](http://www.asil.org)

Stable URL: <http://www.jstor.org/stable/10.5305/amerjintlaw.105.4.0839>

Accessed: 22/11/2011 00:47

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approach. He is explicitly disturbed by the suffering of those enduring acute material deprivations and by the seeming detachment of Western patterns of thinking from any sense of responsibility to act on the basis of human solidarity. As always, his views are nuanced and balanced, never shrill, and take account of positive as well as negative characteristics of this Western legacy. His overall outlook is well expressed by the following words: "The *raison d'être* of the socio-economic rights is to mitigate the cruelty of the capitalist market economy, which, despite increasing total economic well-being in the society, can violate essential values and interests of individuals" (p. 414). I think that Onuma is correct here to note that Western liberal individualism is less civilizationally equipped to respond to this challenge to our common humanity than are non-Western civilizations that have a stronger feeling for collective rights and community responsibility and have more existential understandings of material hardships and psychological hardships precisely because of having endured Western domination. But there is a danger here of romanticizing non-Western thought and practice, which also has its own culturally validated forms of extreme indifference to human well-being (honor killing, bride burning, untouchability, female mutilation, extreme patriarchy) that cannot be attributed to Western dominance.

We should be grateful for Onuma's challenging, elaborately reasoned, and moving assessment of our West-centric tradition of international law. I find the central thesis of the book to be persuasive and hope that it will lead in the future to greater multi-civilizational sensitivity in approaching the concerns of international law. A first step in this direction would be an acknowledgment in all scholarship, including that coming from the West, of the civilizational foundations of worldviews and interpretations. All international law scholars and practitioners need to free themselves from an Enlightenment rationalism that not only acts as if the rational mind can address societal issues free from cultural bias but also holds to the related fallacy that power relations can be suppressed in the legal analysis of international problem areas and conflicts.

The most important responses to Onuma's argument on behalf of a transcivilizational perspective would be a series of academic contributions from non-Western international scholars steeped in indigenous educational and cultural traditions. Let me offer an anecdote in conclusion. The present foreign minister of Turkey likes to tell the story that when he was a young professor teaching a course on international relations in Malaysia he was using a reader in which only Western authors were represented, while every one of his students was Asian. He promptly compiled a new reader bringing together a series of non-Western authors, and felt that the course was much more meaningful for his students and himself. I think that Onuma is sending a similar message, although intoned not as a matter of pedagogic precept but directed more to the international community of scholars and diplomats. Another way to consider this Onuma enterprise is to treat it as a call for a multi-civilizational version of Oscar Schachter's celebration of the global community of international jurists as constituting an "invisible college." I believe that its time has come, and let us hope that Onuma will take advantage of cyberspace, taking as a first step the convening of a virtual transcivilizational college devoted to international law and providing all enrolled with an appropriate curriculum!

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*The Wars of the Romans: A Critical Edition and Translation of De armis Romanis.* By Alberico Gentili. Edited by Benedict Kingsbury and Benjamin Straumann. Translated by David Luper. Oxford, New York: Oxford University Press, 2011. Pp. xxix, 388. Indexes. \$120.

*The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire.* Edited by Benedict Kingsbury and Benjamin Straumann. Oxford, New York: Oxford University Press, 2010. Pp. xiv, 382. Indexes. \$120.

Readers of this *Journal* are undoubtedly aware of the methodological turn that the discipline of international law has experienced over the past twenty years. Less noticeable, perhaps, has been a

renaissance of interest in the history of international law. New literature is emerging every year on this topic, covering all historical periods and geographic regions that are relevant not only to the development of the law of nations but also to virtually every doctrinal realm of our subject (including, most prominently, the laws of war, treaty practice, and human rights). Most gratifying, at least from this reviewer's perspective, is that the new historiography of international law is more ambitious than traditional models might dictate and seeks to do more than "merely" explain the evolution of significant doctrines in our field (although such writing certainly has its merits). Rather, the new international legal history scholarship has sought to emphasize the intellectual, social, and cultural trends and conditions that have made a global order and rule of law possible.<sup>1</sup>

Benedict Kingsbury, the Murry and Ida Becker Professor of Law at New York University, and Benjamin Straumann, the Alberico Gentili Fellow at NYU School of Law, have made an extraordinary contribution to this new intellectual history of international law by offering two volumes that explore the development of the law of nations at the dawn of modernity. The first is a critical translation of *De armis Romanis* (*The Wars of the Romans*) (1599),<sup>2</sup> a hitherto overlooked work written by Alberico Gentili (1552–1608). (The translation from the original Latin was skillfully undertaken by David Lupher, professor of classics at the University of Puget Sound.) The second volume, *The Roman Foundations of the Law of Nations*, is an edited collection of eclectic contributions broadly focused on how early modern writers of international law employed "the legal maxims and methods [and] the principles" of Roman law and practice "about the justifications

of Rome's wars and imperial expansion, and a rich tradition of *ius naturae* and *ius gentium* deriving from Greco-Roman sources" (*Roman Foundations*, p. 1). Both of these works will be reviewed here, as it is apparent that they were conceived as a common enterprise with the support of NYU's Institute for International Law and Justice and the Centro Internazionale Studi Gentiliani.

Gentili was an influential and formative figure in the early modern period of political thought and jurisprudence of international relations, a cerebral bridge between a medieval tradition of international law and "new" approaches to the subject reflected in the writings of Grotius, Hobbes, Pufendorf, Locke, Wolff, Bynkershoek, Vattel, and Kant. Born and educated in Italy, Gentili and his family were avowed Protestants and escaped to England ahead of the Inquisition in 1580. There he took up a post at Oxford as a professor of Roman and civil law and began a remarkable career as a scholar. His major works included *De legationibus libri tres* (*The law of embassies*) (1585) and *De iure belli libri tres* (*The laws of war*) (1598). He was also a tireless advocate before the civil law courts in England, especially the High Court of Admiralty, where he often represented (ironically enough) Catholic Spain.

Kingsbury and his associates are hardly the first to recognize Gentili's significance in the law of nations' intellectual development.<sup>3</sup> But they are certainly the first to give credit to the importance of Gentili's *De armis Romanis*. This tome was organized by Gentili as a two-part debate. The first part offers a savage attack of Roman imperialism and argues that the Roman empire was fundamentally unjust. The second part is a very lengthy rebuttal, clearly reflecting Gentili's own views, and carries the day in maintaining that the Roman empire satisfied all criteria for justness and that Roman wars

<sup>1</sup> For a clarion call for this sort of scholarship, see John Fabian Witt, *A Social History of International Law: Historical Commentary, 1861–1900*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 164, 164–67, 186–87 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

<sup>2</sup> It should be noted that parenthetical page references made to Kingsbury and Straumann's edition of *De armis Romanis* will use its translated title (*Wars of the Romans*) and that textual references to Gentili's original work will use the original Latin title (*De armis Romanis*).

<sup>3</sup> See Thomas Erskine Holland, *An Inaugural Lecture on Albericus Gentilis at All Souls College* (Nov. 7, 1874); GESINA H. J. VAN DER MOLEN, ALBERICO GENTILI AND THE DEVELOPMENT OF INTERNATIONAL LAW: HIS LIFE, WORK AND TIMES (2d ed. 1968); Peter Haggemacher, *Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 133, 134–41, 167–76 (Hedley Bull, Benedict Kingsbury & Adam Roberts eds., 1990).

were initiated and conducted in accordance with just-war theories. Kingsbury and Straumann observe in their trenchant introduction to Gentili's text that

both the indictment of Roman imperialism in Book 1 of *The Wars of the Romans* and its defense in Book 2 are predicated on the assumption that it is apposite to judge the expansion of the Roman empire by way of warfare according to certain moral normative criteria—indeed, denying or affirming the justice of the Roman empire is precisely what *The Wars of the Romans* is all about. (*Wars of the Romans*, p. xi)

Gentili's defense of Roman imperialism was two-pronged. The first defense was an examination of just-war theory under Roman law (especially as received from Cicero), including compliance with the procedural requisites of the *ius fetial*—the elaborate ceremonial in which the Romans demanded redress for an international wrong. The second defense was based on a “civilizational” claim: that peoples subjugated by the Romans actually benefited from being part of the Roman empire, especially in the acquisition of coveted Roman citizenship. Rome established “public tranquility and . . . the health of a single well-joined body” (*Wars of the Romans*, p. 129). Gentili's defense of Roman imperialism thus stands in contrast to the tradition of Tacitus and his infamous observation, placed in the mouth of the British chieftain Calgacus: “To plunder, butcher, steal, these things they [the Romans] misname empire: they make a desolation and they call it peace.”<sup>4</sup>

Gentili was mindful of the profound resonances between the Roman empire and the imperial aspirations of two contemporary polities in early modern Europe: Spain and the Ottoman Turks. And while Gentili was laudatory of the Roman empire and its civilizational goals, he was scathing of Spanish imperialism. As noted by Diego Panizza, professor emeritus of political thought at the University of Padua, in his contribution to the edited volume, Gentili's views in *De armis Romanis*, as

amplified in *De iure belli*, offer a clear critique of “European expansion in the New World, and . . . the nature and impact of religious warfare on the structure of political order in Europe itself” (*Roman Foundations*, p. 55). Likewise, in the chapter by Noel Malcolm, a senior research fellow at Oxford, Gentili's contradictory views on treaty relations with the Ottomans are revealed. Despite his appreciation of *ragion di stato* (reason of state) theory, made popular by Niccolò Machiavelli and Jean Bodin, Gentili denounced military alliances with the Turks. It did not matter to Gentili that such agreements were required for the maintenance of European balance-of-power diplomacy or military necessity. That agreements with “barbarians” were also a staple of Roman imperial practice was irrelevant for Gentili.

As Kingsbury and Straumann observe (borrowing from the work of Richard Tuck, Harvard professor of government) in the introduction to their edited volume, “early modern international political thought had ‘extremely deep roots in the philosophical schools of the ancient world’” (*Roman Foundations*, p. 2). That view also holds true inasmuch as Gentili selected particular sources for his arguments in *De armis Romanis* and *De iure belli*. One major tradition advanced by Gentili was his employment of the Roman civil law, as expressed in the Justinianic sources of the *Digest* (the compendium of Roman law compiled by order of the Roman emperor Justinian I in the sixth century), as a way to articulate rules of conduct between sovereigns. Whether this application made Gentili an early exponent of positivism in developing a basis of obligation between nations is hotly disputed, which the contributions to the volumes under review here reflect. In *De armis Romanis*, Gentili amalgamates the *ius gentium* (law of nations) with the *ius naturae* (natural law): the “original source of the law of nations . . . is that of human fellowship” (*Wars of the Romans*, p. 147). “Human fellowship” can express natural reason, but does not necessarily mean—according to Kingsbury and Straumann—that the law of nations is purely positivist in conception, an intellectual approach that “Gentili did not pursue” (*id.*, p. xxi).

This precise point is the subject of a spirited debate between the contributions of Straumann

<sup>4</sup> CORNELIUS TACITUS, *DIALOGUS, AGRICOLA, GERMANIA* 221 (William Peterson trans., Macmillan 1914) (c. AD 98).

and Jeremy Waldron, a legal philosopher at NYU and Oxford. Straumann takes the position that Gentili supported the use of Roman civil law, as reflected in the *Digest*, but only to the extent that such was not a *lex specialis* and was otherwise declaratory of natural law. This perspective essentially “collaps[ed] the distinction between *ius gentium* and *ius naturale*” (*Roman Foundations*, p. 115), leaving no role for positivism. But Waldron observes that Gentili’s conception of the law of nations as reflecting natural law may have more to do with a strong empiricism than with any idea of rationality. This empirical thrust for the law of nations would have to be based on state practice and an appropriate role for custom. As Gentili wrote, “That which is true by nature acquires force also through custom” (*Wars of the Romans*, p. 137). Gentili’s empirical emphasis—after all, the entirety of *De armis Romanis* is really a narrative and gloss of that polity’s state practice—is certainly suggestive that he might have been a proto-positivist in his approach to international law.

The reason that Gentili avoided any direct invocation of positivism as the basis of obligation for the law of nations was his fear, as noted by Anthony Pagden, professor of political science at UCLA, that such expression would make it changeable and indefinite, subject to the vicissitudes and vagaries of international relations. Gentili’s challenge, according to Pagden, was to reconcile these different strands of rational and empirical thinking about international law, while simultaneously distinguishing between “good” imperial projects (those of the Romans) from “bad” ones (those of Catholic Spain). Likewise, Randall Lesaffer, dean of the law faculty at Tilburg, in his chapter on Gentili’s discussion of a *ius post bellum*—rules governing the return of peace to belligerent parties—questions whether Gentili was much concerned with the actual practice of states, as reflected in the rich tradition of peace treaties that concluded the many conflicts of the early modern period in Europe. “Gentili was no positivist or consensualist,” Lesaffer concludes (*Roman Foundations*, p. 239).

The last major thrust of the contributions to *The Roman Foundations* manifests a peculiar pre-occupation of the intellectual history of interna-

tional law: to precisely situate Gentili in various schools of thought about the law of nations. Obviously, this inquiry is more nuanced than simply deciding (if such even matters anymore) who is the putative “father” of international law—Grotius or some other worthy contender. Kingsbury and his colleagues are thus continuing a discussion begun by Tuck in his influential work *The Rights of War and Peace*. In Tuck’s historiographic schematic, Gentili falls at the orbital margins of two “sharply differentiated” intellectual traditions: the “scholastics,” who rely on church writings, canon law, and medieval philosophy, and the “humanists,” who, consistent with Renaissance intellectual conventions, employ a variety of classical sources, values, and tropes in their writing. Tuck places Gentili firmly in the humanist camp.<sup>5</sup> And, indeed, the entire conception of *De armis Romanis* seems consistent with such a characterization given that the book is, after all, a disputation on Roman history as largely received from classical sources. Elsewhere, Gentili was very critical of the role of medieval theological models in discussing international law. In *De iure belli*, he caustically questioned whether the theologians had any business opining on matters of international relations. “*Silete theologi in munere alieno*,” he wrote: “Let the theologians mind their own affairs.”<sup>6</sup>

But if one looks more closely, the neat humanist/scholastic divide begins to blur, at least as applied to Gentili. In one passage in *De armis Romanis*, Gentili offers this caveat concerning Roman justifications for recourse to conflict: “That which is not allowable according to the law[,] necessity makes allowable. Necessity has no law, but it itself makes law” (*Wars of the Romans*, p. 151). Quite apart from his implicit nod to realist “reasons of state” as a justification for war, Gentili’s citation of authority for this rule of necessity is quite significant. Rather than mining the rich veins of classical historical, philosophical, and (even) jurisprudential grounds for necessity as

<sup>5</sup> RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 9, 16–18 (1999).

<sup>6</sup> 1 ALBERICO GENTILI, *DE IURE BELLI LIBRI TRES* sec. 12 (Thomas Erskine Holland ed., Macmillan 1877) (1612).

modifying the effect of legal strictures, Gentili instead cited canon law sources, including Pope Gregory IX's *Liber Extra* and Gratian's *Decretum*. This use would hardly have been a typical move for a humanist. Nevertheless, Panizza makes the case in his essay that *De armis Romanis* is a strong "vindication" of Gentili's opposition to scholastic views on the laws of war (*Roman Foundations*, p. 56).

It is important to recall that all scholastics (especially those affiliated with the Spanish Salamanca school) were not unreconstructed apologists for imperial designs and all humanists were not totally committed as opponents of empire. According to Peter Schröder, senior lecturer in history at University College London, Gentili certainly had more in common with such humanist writers as Machiavelli and Bodin than with Vitoria and Suárez (of the Salamanca School) and later Grotius. Nevertheless, Gentili's jurisprudence exhibited a strong trend towards combining scholastic and humanist approaches, confirming Malcolm's suggestion that Tuck's bright-line divide between the two schools is artificial. This is largely the position taken by Pärtel Piirimäe, a history professor at the University of Tartu, and Lesaffer in their respective contributions on Gentili's writing about defensive conflicts and the *ius post bellum*. In his essay, Martti Koskenniemi, of the Helsinki and NYU law faculties, goes further to argue that there was "no continuous tradition of international legal thought . . . from early modernity—Gentili, Vitoria, Suárez, Grotius, Pufendorf, Vattel, however one wants to date the moment of inception—to the twentieth century" (*Roman Foundations*, p. 298). Koskenniemi suggests that Gentili was merely the product of the political and diplomatic context of his times. This appraisal was especially so in the sense that Gentili offered legal justifications and historic precedents supporting the Protestant powers (particularly his adoptive country, England) in their conflict with Catholic Spain and the Holy Roman Empire.

Nowhere is this practical disposition on Gentili's part more evident than in his endorsement of necessity and preemption as necessary features of his just war doctrine. Gentili's invocation of necessity has already been considered here. His articulation of a theory of preventive war (*utilis defensio*

(anticipatory self-defense)) borrowed from the writings of the Salamanca theologian Melchor Cano and reflected a sort of synthesis between scholastic and humanist approaches. In *De armis Romanis*, Gentili observed that a polity need not wait until an armed attack had already commenced against it. So long as a nation had a just cause of fear—a mere suspicion of a future attack was insufficient—it could launch a preemptive strike. "It is even fitting," Gentili wrote, "to look ahead into the distant future and not to wait until danger beats on one's doors, one's bedchamber, and one's very bedposts" (*Wars of the Romans*, p. 253). Gentili openly advocated the position—sponsored by his patron, the Earl of Essex—of a preemptive war by England against Spain, before Spain grew too powerful and could not be stopped by traditional balance-of-power alliances and arms. Roman history was replete with such examples, including Rome's attacks on Carthage, Macedon, and Corinth, which were all narrated in *De armis Romanis*.

It would be a profound mistake, however, to assume that Gentili birthed the idea of preemptive defense without limits. As he acknowledged in *De iure belli*, defense on the grounds of expediency (anticipatory self-defense) was morally deficient. Otherwise, he wrote, it would be "just to resort to war of this kind as soon as any one becomes too powerful, which I do not maintain."<sup>7</sup> And perhaps it is no surprise, according to Piirimäe, that Gentili's doctrine of preemption had virtually no influence outside of humanist circles in seventeenth-century Europe, despite ample opportunity for its robust application during the bloody Thirty Years War (1618–1648). Indeed, as a matter of state practice, there may only have been one recorded instance of Gentili's doctrine being used as a justification for preemption: Denmark's 1657 attack on Sweden. In this respect, Grotius's skepticism of preventive war would later eclipse Gentili's theories. And yet preemption has always remained in the background of the *ius ad bellum*, just waiting for an opportune moment to be resurrected.

<sup>7</sup> 1 ALBERICO GENTILI, DE IURE BELLI LIBRI TRES sec. 14 (John C. Wolfe ed., *Classics of Int'l L.* 1933) (1612).

Taken altogether, Gentili's intellectual project was, according to Kingsbury and Straumann, nothing less than "to guide and justify some imperial conduct, but also to constrain early modern empires and emerging sovereign states" (*Wars of the Romans*, p. xxv). Seen in this way, it hardly matters whether Gentili was more firmly ensconced in the humanist or scholastic camps or whether he was more disposed as a scholar to reading and citing scripture, medieval canon law, Roman law, or classical historical sources. Nevertheless, the intellectual history charted in this collection of essays will undoubtedly influence the future trajectory of writing in this realm and not just of the early epochs and personages of international law. Extraordinary for a collection of this sort, the contributions are of a uniformly high quality, and the entire project design is sound. Particularly praiseworthy is the integration of interdisciplinary voices into the discussion of early modern international affairs. The views of political theorists, comparative literature scholars, classicists, and historians have equal weight here and are not crowded out by the "usual suspects" of doctrinal legal writers. The editors should be congratulated for bringing this effort to fruition, marking what may be a new turn in the scholarship of international legal history, one that properly emphasizes the intellectual, social, and cultural contexts of the subject.

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*Of the Board of Editors*

*The Dynamics of International Law.* By Paul F. Diehl and Charlotte Ku. Cambridge, New York: Cambridge University Press, 2010. Pp. vii, 206. Index. \$95, cloth; \$34.99, paper.

It is no surprise that in times of change we reflect on the nature of change. It is also no surprise that our reflections on change typically track our own experience. Not only is change contextual, so too are theories of change. To take our own era, there has been over the past twenty years a tremendous evolution in the normative content of international law. At the same time, there has been a steady expansion of the techniques available to create and implement that content. Many who have pushed the former, though, have been frustrated

with the pace of the latter. Even so, the experience of change, especially for those who lived through the Cold War, has been quite dramatic. Our time is decidedly different from the one that existed not so long ago. From this perspective, then, change—how it actually happens—occurs suddenly. That, after all, is the world we know.

In this sense, Paul F. Diehl, the Henning Larsen Professor of Political Science at the University of Illinois at Urbana-Champaign, and Charlotte Ku, professor of law and assistant dean for graduate and international legal studies at the University of Illinois College of Law (and former executive director of the American Society of International Law), have written a book consistent with contemporary experience. Their volume aims to "provide[] a new framework to analyze international legal processes that is specifically designed to help us understand the tremendous changes that have occurred in international law over the last sixty-plus years as well as ones that are likely (or not) in the future" (p. 2). In doing so, they suggest what their title advertises as the dynamics of international law.

The authors begin by dividing international law into two component parts: an operating system and a normative system.<sup>1</sup> The operating system "manages international relations by setting out the consensus of its constituent actors . . . on the distribution of authority and responsibilities for governance within the system" (pp. 28–29). This system includes four familiar topics. First is what the authors call "sources of law" (p. 30) by which they mean rules of recognition (however weak compared with their domestic counterparts), such as those in the Vienna Convention on the Law of Treaties, that tell us how international law is made and the hierarchy of those laws. "Actors/subjects" constitute a second element of the operating system (p. 31). These are the rules that specify which "actors . . . are assigned roles in how the law is made, what rights are accorded to those actors,

<sup>1</sup> This division and some of its implications were noted by the authors (and one additional coauthor) in a prior work. Paul F. Diehl, Charlotte Ku & Daniel Zamora, *The Dynamics of International Law: The Interaction of Normative and Operating Systems*, 57 INT'L ORG. 43 (2003).