
Lessons of Imperialism and of the Law of Nations: Alberico Gentili's Early Modern Appeal to Roman Law

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Alberico Gentili. ***The Wars of the Romans. A Critical Edition and Translation of De Armis Romanis***. Edited by Benedict Kingsbury and Benjamin Straumann. Translated by David Luper. Oxford: Oxford University Press, 2011. Pp. xxx + 388. £80. ISBN: 9780199600519.

Benedict Kingsbury and Benjamin Straumann (eds), ***The Roman Foundations of the Law of Nations. Alberico Gentili and the Justice of Empire***. Oxford: Oxford University Press, 2010. Pp. xiv + 382. £70. ISBN: 9780199599875.

Abstract

This review discusses two recent publications – a critical edition of a primary source and a collection of essays – around the Theory of International Law of Alberico Gentili (1552–1608). On the one hand it examines Gentili's interest in ancient Rome and how he used it as a paradigmatic case of imperial order. But on the other, it questions our own interest in Gentili's work. In line with Gentili's own focus on questions of justice, it not only shows that Gentili presents us with his own complex blend of political responsibility and natural law, but highlights structural features and possible blind spots of his 'natural/private law' paradigm that might apply also to current suggestions of how to organize international law.

1 Introduction

In histories of modern international law, Alberico Gentili (1552–1608) is routinely mentioned as a key author at the very origins of this history. Shortly before Hugo

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Grotius, he is said to have taken decisive steps in the application of a modern concept of sovereignty to international relations and in the development of an autonomous, secular jurisprudence.¹ In the context of a series of events commemorating the 400th anniversary of Gentili's death, the Program in the History and Theory of International Law at the Institute for International Law and Justice (NYU) has mobilized considerable energies to document and complement its long-standing work on Gentili. The two publications under review are the outcome of these efforts. The first is a critical, Latin–English edition of *De armis Romanis libri duo*, a work published in 1599 shortly after Gentili's seminal *De iure belli libri tres* (1598). While the three books of the latter work have established Gentili's reputation as one of the fathers of modern international law, discussing the *ius ad bellum*, *in bello* and *post bellum* respectively, the lesser known two books on the wars of the Romans are concerned with the justice of the ancient Roman Empire. The first book puts forward a critical, the second one an apologetic interpretation of ancient (and early modern) witnesses of and commentaries on Roman history. Yet, the work is more than just an exercise in humanistic historiography and more than an application of the norms laid out in *De iure belli* to the behaviour of ancient Rome. Rather, Gentili understands Rome as a paradigmatic case of imperial order in general and, relying on his earlier work, probes the specific conditions and normative criteria associated with the presence of an expanding empire in the international arena.

The second volume contains essays by leading scholars of legal history, international law, classical literature, and political science investigating Gentili's role in the context of the formation of early modern legal theory (and, at least in one of the contributions, practice) and his ideas of empire and war as legal concepts.

This review addresses some of these publications' key aspects and their relation to today's theory of international law. Thus, it becomes clear not only how studies of Gentili's arguments are of persistent relevance, but also what is at stake in drawing one's present inspiration from Gentili's arguments: namely an idea of global law modelled on private law, with a specific blind spot relating to asymmetries of informal power.²

¹ His most-quoted exhortation probably is 'Let the theologians keep silence about a matter which is outside of their province/*theologi silet in munere alieno*': A. Gentili, *De iure belli libri tres* (1933), ii, I.12, at 92. In quoting *De iure belli*, I am using the English translation by John Rolfe which was published as vol. ii of No. 16 of J. Brown Scott (ed.), *The Classics of International Law*. As is customary, I use the page numbers that refer to the Latin original and are printed in the translation in the margins. The earliest champion of Gentili as a key figure of early modern international law was Thomas E. Holland; see T.E. Holland, *An inaugural lecture on Alberico Gentili* (1874); Haggenmacher, 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture', in H. Bull, B. Kingsbury, and A. Roberts (eds), *Hugo Grotius and International Relations* (1990), at 133. Also see G. van der Molen, *Alberico Gentili and the Development of International Law: His Life, Work and Times* (1937) and D. Panizza, *Alberico Gentili, giurista ideologo nell'Inghilterra elisabettiana* (1981).

² Of course, this does not mean to suggest that other inspirations – typically Francisco de Vitoria's model of public law is invoked in contrast to Gentili – do not also have other, possibly more severe, problems. It is just important to be as clear as possible about the particular implications of whatever model one favours.

2 Gentili's *De armis Romanis*

The present edition of Gentili's *De armis Romanis libri duo* is based on the first printing of the work (by Wilhelm Anton in Hanau, 1599) and on its edition in the multi-volume *Opera juridica selecta* (by Giovanni Gravier in Naples, 1770). It is the first translation of the text and its first publication in Latin since the 1770 edition. In synoptical layout, it features both the Latin text and a judicious English translation by classical scholar David Lupher. Besides the main text, a generous apparatus helps the reader to work through the complexities of the text on manifold paths and levels.³ And such help is welcome indeed, for already the peculiar organization of the text provides puzzles to solve.

The whole treatise is (indirectly) inspired by the Carneadean dialogue in book three of Cicero's *Republic*⁴ and consists of two books: 'Indictment of the Injustice of the Romans in Warfare' and 'Defense of the Justice of the Romans in Warfare'. In the first one, an anonymous orator attacks Roman behaviour as consistently and utterly unjust. In the second one, a Roman refutes the arguments of the first and promotes Rome as the paradigmatic yardstick for political and legal virtue. While the Accusator of the first book can be recognized as Gentili's alter ego,⁵ the Defensor of the second book gets more than twice as many pages to make his case, has the 'last word', and gets to use many arguments that Gentili had advanced in his more systematic *De iure belli*. One explanation for this, offered by the editors of *The Wars of the Romans* and by several authors of *The Roman Foundations*, sees this peculiar constellation as a result of the development of the text: Originally the two parts were presented separately as public speeches delivered on ceremonial occasions at the faculty of law at the University of Oxford where Gentili was Regius professor of Civil Law from 1580. A first version of the first speech had even been published separately before. Presenting the Accusator of the first book as himself could have been an ironic acknowledgement of the prior publication,⁶ whereas Gentili's actual sympathies were certainly more with the Defensor of the second book.

Both books are identically divided into 11 chapters which are arranged chronologically and discuss Roman (in)justice from the founding of the city (Chs 2–3), the conquest of Italy (Chs 4–7), the Punic Wars (Ch. 8), the expansion into the 'Orient' (Chs 9–10), to the age of the Caesars (Ch. 11),⁷ plus one chapter on a comparison with

³ There is an introduction by the editors, a table of principal events in Gentili's life, the usual notes on consulted editions, translation, marginal notes etc., a bibliography of post-classical works referred to by Gentili, a small glossary of terms, an index of authors and works cited, and a general index. Also, Gentili's dedicatory epistle to the Earl of Essex from an earlier publication of the first of the two books is included as an appendix.

⁴ Cf. Kingsbury and Straumann, 'Introduction', in *The Wars of the Romans*, at xii–xvii and Lupher, 'The *De armis Romanis* and Roman Imperialism', in *The Roman Foundations*, at 97f.

⁵ For one, the Defensor is addressed as 'a Roman', whereas the Accusator is identified as 'a Picene', born in San Ginesio, Gentili's own birthplace. David Lupher's contribution to the second volume discusses this in more detail.

⁶ As a matter of his elaborate style, Gentili used irony and sarcasm, rhetorical questions, and all sorts of other devices amply.

⁷ Cf. Panizza, 'Alberico Gentili's *De armis Romanis*: The Roman Model of the Just Empire', in *The Roman Foundations*, at 61–64.

Alexander the Great and one concluding summary chapter. At times the two orators disagree on the historical facts, but more often they disagree on their evaluation. At all times, however, both adduce numerous classical and early modern sources as witness for their position⁸ and they show considerable wit in criticizing the sources that speak for the other party. With its somewhat inconclusive display of rhetorical technique and the ostensible lack of systematic arguments, Gentili's intention with *De armis Romanis* certainly was to no small extent a demonstration of his humanist erudition and of his skill in making this wealth of material weigh in for whatever purpose. But is this all? Cannot more be gleaned from it than how a humanist discourse of a certain historical context used classical source materials?

First of all, one can learn something about the complexity of early modern political and legal thought: Many interpretations of early modern political theory suggest that it was structured by an opposition between 'humanist' and 'scholastic' tendencies.⁹ They tend to understand Gentili as an exponent of 'humanist' thought, disqualifying considerations of justice and promoting imperial grandeur as supreme guiding principle for foreign policy. He is portrayed as pitted against the scholastic 'theologians' such as Francisco de Vitoria and Domingo de Soto who are said to insist on judging political strategies according to moral merits and according to what they conceive as natural law. But, as the editors point out in their introduction to *The Roman Foundations*, this dichotomy masks the diversity of (at least) the 'humanist' camp. Taking one's cue from the importance of classical thought that is central to all accounts of humanism, one should discern at least five different venues of its influence. Labelling Gentili a 'humanist', one should then all the more urgently specify which of the dimensions is present in what way.¹⁰ First, there are republican authors and historians like Livy, Dionysius of Halicarnassus, Plutarch, and Polybius who are taken up in what Quentin Skinner has termed the 'neo-Roman' tradition.¹¹ Then, there is an early modern affirmation of Roman imperialism, often used in justifications of the Spanish and Portuguese conquests.¹² Third, there is an important 'Ciceronian-oratorical' strand of discussions relying on writers such as Tacitus and the Greek sophists. A fourth group goes back to the Peripatetic and Stoic tradition, mediated by Lactantius and Augustine and resulting in what Richard Tuck has dubbed the 'scholastic' tradition.¹³ Finally, there is a tradition of Roman civil law discourse, mediated by glossators and

⁸ Apart from the immense number of classical works cited, the bibliography of postclassical works used by Gentili also comprises no fewer than five pages, from the historian Paulus Aemilius Veronensis (c. 1455–1529) to John Xiphilinus, an epitomator of Dio Cassius of the 12th century.

⁹ Cf. most notably R. Tuck, *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant* (1999).

¹⁰ David Lupher's earlier work, *Romans in a New World. Classical Models in Sixteenth-Century Spanish America* (2003) already pointed to the important role which the Roman paradigm had even in scholastic theorizing about international law. The present two volumes extend this to another context and show that it is indeed incontrovertible – but also that it needs qualification when relied on in interpreting early modern political thought. For the following see Kingsbury and Straumann, 'Introduction', *supra* note 4, at 2–4.

¹¹ Cf. Q. Skinner, *Liberty before Liberalism* (1998).

¹² Cf. Lupher, *supra* note 10.

¹³ For this and the oratorical tradition, cf. Tuck, *supra* note 9.

commentators, extending Roman civil law ideas to apply to political and ethical issues in general.¹⁴ Alberico Gentili and his work *The Wars of the Romans* exhibit a conjuncture of all these mentioned dimensions, and at the same time illustrate that it makes sense to keep them analytically distinct. For example, this allows one to account for the divergences between Gentili's 'legalistic' assessment of Rome's imperial expansion and his 'republican' praise of its internal organization; but more on that below.

Another thing about Gentili's humanism that is significant and worth noting from the outset is that for both parties in Gentili's work, *justice* is the crucial criterion. Thus, to imagine him as a Machiavellian philosopher who would favour *raison d'état* over justice would be highly misleading. Then again, the relationship of justice with the self-interest of the state is a complex mutual implication, and while it cannot so easily be retrieved from *The Wars of the Romans* (nor, for that matter, from the more systematic *De iure belli*¹⁵), the work as a whole gives much food for further study. For instance, it is surprising to see how lucid Gentili's critique of Roman imperialism is, anticipating many arguments that are forceful even today. One of the central and recurring aspects of the critique – and a point not entirely rebutted by the Defensor – concerns the formal character of Roman justifications. The Romans, says the Accusator, strategically profited from a general blindness of the legal forms to cumulative effects and to substantial inequalities of power and of opportunities. In short, the Accusator submits that the Romans 'created the widest possible network of alliances not in order to defend friends but to increase the chances of "legitimate" aggression against others.'¹⁶ Further, they actively claimed and exploited a monopoly on the identification of the relevant formal mechanisms and on interpreting compliance with those forms. Important discursive strategies concerned, for example, the capacity of actors to make binding agreements (while Roman generals could not conclude treaties binding on Rome herself, foreign commanders were taken to create valid commitments for their nations; and with brigands, word need not be kept at all), the public or merely private character of injuries committed by private individuals or associations (depending on which the failure to suppress them did or did not constitute a breach of the law of nations by the 'responsible' party), or even the distinction between legitimate warfare between two rival parties and the practice of piracy calling for intervention by any third party (Rome). These relied very much on mechanisms, arguments, and analogies from Roman civil law, and there is not the slightest hint of a possible check of their being in the general, i.e. global or universal, interest.¹⁷

¹⁴ Christopher Warren's contribution to *The Roman Foundations* points out that there is at least one more aspect to (Gentili's) humanism that is not adequately reflected in the list above: the interpretation, critique, and writing of poetry. Other literary genres such as drama and *belles-lettres* could certainly be added.

¹⁵ Cf. Gentili, *De iure belli*, *supra* note 1, III.12.

¹⁶ Panizza, 'Alberico Gentili's *De Armis Romanis*: The Roman Model of the Just Empire', in *The Roman Foundations*, at 70. Cf. Gentili, *The Wars of the Romans*, *supra* note 1, I.10, at 83. Compare this critique with Antony Anghie's critique of Spanish imperialism in his *Imperialism, Sovereignty and the Making of International Law* (2005), e.g., at 21. Interestingly, Panizza identifies the 'theological' mode of reasoning in this critique.

¹⁷ Again, this anticipates today's critique: cf. *ibid.*, or Anthony Pagden's contribution to *The Roman Foundations*.

Apart from these aspects and from the more or less evenly distributed methodological arguments about how critically to interpret ancient text witnesses, the more cogent rules and the more general maxims are to be found in the second, affirmative book of *The Wars of the Romans*.

3 Civility and Rule of Law

According to Diego Panizza the arguments in favour of Roman justice can be grouped into two categories: arguments of legality and arguments of humanist political morality.¹⁸ Inadvertently confirming the critique of the Accusator mentioned above, he observes that in the second book on *The Wars of the Romans*, assessments of Roman expansion seem to rely mainly on arguments about formal legality.¹⁹ Reasons of political morality on the other hand come into play rather in assessments of Rome's internal organization and structure. Gentili explains Roman virtue as being centred on the values of liberty, peace, unity, civility, and humanity and praises it for preventing a much quicker decay in the late days of the Empire.²⁰

But actually in justifying imperial expansion the 'ethical dimension' plays no small role either. Gentili's Defensor does not just rely on the mere legality of the wars, but in many places praises the imperial expansion for its civilizing effects. For instance, he maintains that, starting out as more or less barbarian, the peoples of Italy became 'cultivated', the Germans 'polished', the Spaniards 'prosperous', the Britons even 'attached to a part of the world'.²¹ The values of liberty, peace, and unity are paramount, however. It was the *pax romana* that did away with internal wars, civil strife, and general insecurity. And not only peace, but even liberty was bestowed on the conquered peoples by Rome's policy of giving them equal rights of citizenship and equal access to military and political posts.

We have wished our enemies to be friends, allies, citizens. Behold, gradually the citizenship was given to all who lived in the Roman world. Behold: Rome, the common fatherland. O the immeasurable glory of Roman citizenship!²²

More precisely, the Defensor states that the conquered peoples were 'brought over by our laws to a more cultivated way of life'.²³ And besides peerless Roman virtue, this blessed civil state has been actualized throughout the Empire ultimately by the institution of Roman Law. Unlike Roman virtue, however, Roman Law 'persists to the present day ... and penetrates into all parts of the world, even those parts to which Roman

¹⁸ For the following see Panizza, 'Alberico Gentili's *De Armis Romanis*', esp. at 63–83.

¹⁹ E.g., Gentili, *The Wars of the Romans*, *supra* note 1, II.3, at 165: '[D]id [Tullus] initiate war against the Alban fathers in order to stir the inactive Romans to war? This isn't what Vergil sang. And yet if this aim was sought through a justifiable occasion (*this* is what we are aiming at), you will no longer find fault. ... And you will agree with all those others who know that this is a method of good government.'

²⁰ *Ibid.*, II.9, at 260 or II.13, at 355.

²¹ *Ibid.*, II.1, at 129–131.

²² *Ibid.*, II.13, at 347; see also II.5, at 203.

²³ *Ibid.*, II.13, at 349, my emphasis.

arms did not reach'.²⁴ Hence its law is Rome's most important legacy and the connection to Gentili's contemporary concerns. As the Defensor (in line with Gentili's other works) professes, Roman Law is central to the pending organization and well-being of the whole world:

Picenus, you possess what the world longs for, you possess what the world delights in – the world which, though deprived of that blessed good luck of our empire, nevertheless tenaciously hangs onto and thirstily gulps down Roman laws, with which it renews for itself the sweet memory of its ancient happiness under Roman rule and alleviates the sadness of these times by this little bit of pleasure that has been mixed in.²⁵

On the one hand, Gentili's emphasis on the Roman civil law making up the law of nations and the law of nature thus becomes better understandable, the central role of this equation becomes even more obvious, and its implications and consequences more urgent to investigate. On the other hand, the sceptical objections and reservations of the Accusator as regards the law's formalism become more pertinent as well and it is regrettable that neither Gentili's Defensor of Roman justice nor a greater number of contributors to *The Roman Foundations* discuss them more extensively.²⁶

4 Roman Law and Early Modern Law of Nations

The Roman Foundations of the Law of Nations is a collection of 16 essays commenting on Gentili's conception of the law of war and the law of nations. The *De armis Romanis* is discussed extensively only in Panizza's and Lupher's contributions, an indication of how underexposed this work is.²⁷ Here is a short summary of most of the contributions:²⁸

John Richardson inquires into the development of the notions of *imperium* and *provincia* in ancient Rome and their shift from an understanding of a magistrate's (constitutionally constrained) legal authority and responsibility to political control over a territory. Clifford Ando points out that, attempting to cloak strategic action and violence with an air of legality, the later Roman Empire seems to have retrojected some

²⁴ *Ibid.*, II.13, at 351. Also cf. Kingsbury and Straumann, 'Introduction', *supra* note 4, at xviii–xxii.

²⁵ Gentili, *The Wars of the Romans*, *supra* note 1, II.13, at 351. Cf. Gentili, *De iure belli libri tres*, *supra* note 1, I.3, at 26.

²⁶ Ando, 'Empire and the Laws of War: A Roman Archaeology'; Pagden, 'Gentili, Vitoria, and the Fabrication of a "Natural Law of Nations"', and, to a certain extent, Lupher, 'The *De armis Romanis* and the Exemplum of Roman Imperialism' are notable exceptions. Ando's and Lupher's contributions are at the same time the only ones that not only mention but exploit the structural features of *The Wars of the Romans* for their interpretations.

²⁷ Apart from the two essays mentioned and cursory discussions in the other contributions, cf. Tuori, 'Alberico Gentili and the Criticism of Expansion in the Roman Empire. The Invader's Remorse', 11 *J History Int'l L* (2009) 205. Other works discussing *De armis Romanis* are Panizza, 'Il "De Armis Romanis" di Alberico Gentili: paradigmi imperiali, guerra e la "moderna cosmopoli"', 25 *Filosofia politica* (2011) 215 and C. Ando, *Law, Language, and Empire in the Roman Tradition* (2011), esp. ch. III.

²⁸ Those not covered here are omitted because they play a role in the ensuing discussion of two systematic issues inspired by the volume as a whole. See *infra*.

of its (in fact ancient) civil law concepts into analogous rules of fetial law that were then claimed to have regulated Roman warfare from the outset.²⁹ Diego Panizza insists on the continuity between *De armis Romanis* and *De iure belli*, both displaying Gentili's humanist approach susceptible to and made plausible by the Tuckean contrast to the theological authors of the so-called School of Salamanca. By contrast, David Luper underlines the contradictory structure of *De armis Romanis* and criticizes the imputation of an unequivocal idea drawn from the interpretation of other works, according to which Gentili emphatically and unwaveringly supported the Roman Empire. Christopher Warren examines the relationship between Gentili's humanism, understood as an emphasis on *studia humanitatis*, on classical learning, especially poetry and literature, on the one hand and the authority he deems necessary to expound and pass on the laws of war on the other.

Both Noel Malcolm and Peter Schröder agree that Gentili's concept of unjust enmity serves to create conceptual room altogether outside the polycentric order of sovereign states and becomes a political tool, eventually excluding Indians (and to a certain extent Ottoman Turks) from the realm of legitimate actors in the international sphere. But whereas Schröder treats this as a matter of indispensable political trust relationships, Malcolm emphasizes that Gentili's actual justification of such conceptual moves relies on theological arguments. Randall Lesaffer compares Gentili's originality in theorizing the *ius post bellum* with actual early modern state practice in peace treaty making, and thereby highlights his discrimination between intra-European and colonial contexts. Lauren Benton in her analysis of *De Hispanica advocatio*, a posthumously (1613) published text comprising records of Gentili's legal advocacy for the Spanish crown at the English Court of Admiralty in the last years of his life, shows how in his comments on the law of the sea Gentili struggled to develop a model of competing and overlapping jurisdictions designed to cope with 'a global legal regime inhabited by states of imprecisely defined and fragmented sovereignty'.³⁰ Acknowledging the appropriation of legal vocabulary by reason of state approaches and the subsequent dominance of the latter in early modernity,³¹ Martti Koskenniemi traces the origins and the development of an alternative tradition of constraints on arbitrary political action: Refining the methodical apprehension of the 'real', i.e. material conditions of self-preservation of the state, the sought-after rationalization of politics was, at least

²⁹ Ando shows that while fetial law was celebrated as a traditional constraint on Roman warfare at the age of the Caesars, the actual history of that institution was only very sparsely documented up to the second century BCE. Comparing the (later, retrospective) description of fetial law's procedure for declaring war to the ancient, better documented civil law institution of the *legis actio sacramento in rem*, he also submits that its presumed constraining character was rather a rhetorical construction and that, "in the Roman case, the application of law issued not in an avoidance of violence but an evasion of responsibility" (at 51).

³⁰ Benton, 'Legalities of the Sea in Gentili's *Hispanica Advocatio*', in *The Roman Foundations*, at 280.

³¹ In fact, reiterating his conviction that what is perceived as legal framework of international relations before the mid-19th century is nothing but a functional extension of 'Baroque statecraft' (at 305) or the external aspect of the business of government, and that it is rather a prehistory of international law that is at hand (at 298f.), Koskenniemi portrays the 'political' stakes and interests as the organizing motives in those discussions, crystallizing, e.g., in Gentili's juridical formulation of the reason of state doctrine.

in 17th and 18th century France and Germany, shifting more and more to political economy, emerging finally in theories akin to Adam Smith's *The Wealth of Nations*.

For the present reviewer, two aspects of Gentili's thought deserve to be taken up again more extensively, as they refer to a more general understanding of different approaches to international law and of their development in early modernity. The first of these aspects is the above-mentioned picture of Gentili as a 'humanist' author who would focus on self-preservation and abandon ambitions of objective or public international law. The second one is the relativization of this picture through his analysis of the relationship between natural law and the law of nations. In the end, it turns out that Gentili advances not so much a proto-positivist concept of law and a realist concept of sovereign power as his own blend of political responsibility and natural law.

5 Humanist Law of War

A number of contributions stress that in Gentili's new approach to international law and to the law of war the most characteristic and momentous innovation was precisely what opposed him to the older, 'theological' tradition that had discussed war and international relations in terms of a just, unitary global order and of sinful or virtuous actions.³² Francisco de Vitoria had already conceded that, while a war could not be just on both sides *objectively*, for reasons of invincible ignorance and good faith, both parties might effectively be justified in fighting,³³ but only Gentili more consequentially treated both parties as legally just enemies. Justice then was no longer to be understood on an ideal level, but rather as drawing on formally defined just causes.³⁴ Punishment moved out of focus and self-defence became the dominant motive in formulating such causes.³⁵ And Gentili famously extended the concept of legitimate self-defence to cover even pre-emptive aggression.³⁶ For the *ius post bellum*, which Gentili was the first to discuss extensively,³⁷ this meant that the terms of peace no longer depended on some objectively just state that had to be restored, but rather on the authority of the victor, whose title was constituted by his very victory, or on an agreement between the belligerents.³⁸

In this picture, a plurality of self-interested, sovereign states is ordered by a balance of power, and one might even discern a peculiar 'cunning of reason' built into the constitution of nature, by virtue of which men are led by self-interest, or 'utility' broadly understood, to pursue and bring about an order of 'justice'.³⁹

³² Cf. Schröder, 'Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations', at 165–167.

³³ Vitoria, 'On the Law of War', in Francisco de Vitoria, *Political Writings* (ed. A. Pagden and J. Lawrance, 1991), at 293, e.g., at 313.

³⁴ Cf. Panizza, *supra* note 18, at 65.

³⁵ Cf. Piirimäe, 'Alberico Gentili's Doctrine of Defensive War and its Impact on Seventeenth-Century Normative Views', in *The Roman Foundations*, esp. at 191–197.

³⁶ Cf., e.g., *ibid.*, at 195–199.

³⁷ Lesaffer, 'Alberico Gentili's *ius post bellum* and Early Modern Peace Treaties', in *The Roman Foundations*, at 214–217.

³⁸ Cf. *ibid.*, at 222–226, 230.

³⁹ Panizza, *supra* note 18, at 82.

6 Natural Law, the Law of Nations and the *Corpus iuris*

On the other hand, the contrast between ‘humanists’ and ‘theologians’ often rests on stylized versions of the theories,⁴⁰ and for certain questions the contributions to *The Roman Foundations* prove that it can be more productive to turn one’s back on this dichotomy and inquire directly into systematic issues. Thus, the contributions of Straumann, Blane and Kingsbury, Waldron, and Pagden in different ways inspect the entanglement of Roman civil law, the law of nations, and natural law in Gentili’s thought. Assuming a roughly Bodinian conception of sovereignty which implies the impossibility of a secular legislation above and binding on the sovereigns and suggests a state of nature between them, the task for Gentili is obviously to conceptualize international relations as a *legal* framework. As Straumann shows by reference to Gentili’s idea that with the *lex regia* the Roman people has authorized the absolute *Rex anglorum*, there is an idea of popular consent at work in the legitimation of factual state practice. However, that idea itself is not to be understood as the normative core of a proto-positivistic doctrine that would then be carried over to the sovereign. Rather the idea is that *even behind* the consent of the Roman people lie norms of *natural law*. And given the absence of political institutions above the sovereigns, the crucial moment is not the public law act of authorization by the people, but the formulation of civil law rules, the universality of which is indicated by the consent of the people. Due to the wisdom, prudence, and virtue of Rome’s jurists, and due to the unparalleled extension and approbation of Rome in social space and historical time, the *Corpus iuris* possesses a universality that transcends its being particular to a given state and makes it the prime declaration of natural law. It contains rules and specifies rights which are rooted in natural human reason itself, and hence apply to all human beings, even in a state of nature – ‘to citizens, states (*civitates*), and sovereigns (*principes*) equally.’⁴¹ Both Jeremy Waldron and Anthony Pagden take their cue from this equation between Roman and natural law, but while the former emphasizes the flexibility and tunability of natural law reasoning introduced by the empirical mediation between ideal natural law and the practical formulations of Roman Law,⁴² the latter points out that the *Corpus iuris* is a particular, historically finalized mediation that stands at the centre of a particular profession and expertise. Presenting it as a knowable historical datum

⁴⁰ This reviewer would for instance take issue with the reconstructions of Vitoria’s theory that some of the contributions put forward, but the point is precisely that for the present context the contrast between Gentili and Vitoria is not so instructive after all. For a comparison of the two positions that focuses on the particular issue of the society of mankind see Wagner, ‘Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth’, 31 *OJLS* (2011) 565.

⁴¹ Cf. Straumann, ‘The *Corpus iuris* as a Source of Law Between Sovereigns in Alberico Gentili’s Thought’, in *The Roman Foundations*, at 115, 120. Also Blane and Kingsbury briefly evoke the contrast between Vitoria’s conception of the international legal framework, modelled after an intra-state (public) law paradigm, and Gentili’s treatment of states as individuals to which the logic of comparative (natural) individual rights is applied: see Blane and Kingsbury, ‘Punishment and the *ius post bellum*’, in *The Roman Foundations*, at 250.

⁴² Waldron, ‘*Ius gentium*: A Defence of Gentili’s Equation of the Law of Nations and the Law of Nature’, in *The Roman Foundations*, esp. at 290–293.

implies a reification of natural/international law, the global access to which, i.e. the interpretation of which, was to be monopolized by European (Roman) jurists.⁴³

This quandary becomes more topical when one considers Gentili's conception of enforcement of *ius gentium/ius naturale*: Since otherwise one could not assume that natural law was efficacious, one first has to suppose that holders of natural rights – states as well as individuals and corporate actors – possess the authority to vindicate these rights even in a state of nature, that is to say, by force and independently of any political association and judicial authorization. From this follows a natural right to defend oneself which extends to punishment for the sake of deterrence, beyond the limits of mere restitution.⁴⁴ Also, formerly an agent would have a just cause for war *only if* he had suffered an injury at the hands of his opponent: the indispensable actual injury (*iniuria accepta*) would authorize the belligerent, and it would authorize *only him* who had received it. For Gentili, though, the injury need no longer be actual. Instead it can also be the anticipation of an injury that justifies pre-emptive warfare. With his concept of preventive warfare the injury moves altogether out of focus, and it is the mere power and the suspected propensity of the opponent to effect an injury that can justify an offensive war.⁴⁵

Finally the treatment of pirates and its generalization to a concept of the unlawful enemy makes it possible to exclude actors from legality altogether⁴⁶ – unlawful enemies apparently cannot claim even natural rights! Gentili's own strategic application of this argumentative strategy in concrete cases to actual pirates⁴⁷ and in more abstract reflections to Indians and Turks illustrates its hazardous character.⁴⁸

7 Conclusion

While *Gentili's* aim of discussing the Roman Empire and basing his doctrine of the law of nations on Roman Law is well reflected and argued about at various places

⁴³ Pagden, *supra* note 26, esp. at 352–354 and 360f.

⁴⁴ Cf. Blane and Kingsbury, *supra* note 41. This and the following clearly exceed my own previous interpretation (based largely on *De iure belli*) of the binding force of Gentili's law of nations consisting primarily in a moral obligation of the sovereigns. Cf. Wagner, 'Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth'. And yet, while arguments for a definite set of substantial legal norms, for authoritative interpretation, and for the enforcement of the law of nations are more readily available with *De armis Romanis* now, they seem to be anything but unproblematic.

⁴⁵ Cf. Piirimäe, *supra* note 35, at 196–198.

⁴⁶ Gentili justifies this exclusion by opposing pirates to humanity as a whole (e.g., *De iure belli*, *supra* note 1, I.4, at 34f. or I.25, at 201f.). This is probably rather to accommodate the traditional definition of pirates as *hostis humani generis* than due to some conceptual cogency – neither is the concept of humanity as a whole necessary to strip pirates of all legal standing, nor does it lend any plausibility to the designation of certain persons as being outside all law.

⁴⁷ Cf. Benton, *supra* note 30, at 279f.

⁴⁸ Cf. Pagden, *supra* note 26, at 355–357. Gentili's insistence on the discrimination between what would later be called 'civilized' and 'uncivilized' societies is also reflected in his distinction between two modes of *ius post bellum* in the context of actual historical developments; cf. Lesaffer, *supra* note 37, at 226. It remains unclear what this status of 'civility' depends on – on the one hand, there are reasons to think that the nature of the respective society's own legal institutions matters, but on the other hand, it often seems very malleable by political interests.

in the second volume reviewed here, *our own* possible motivations for discussing Gentili remain to be read between the lines. Besides Waldron's plea for a combined moral-empirical perspective on legal theorizing,⁴⁹ and besides (perfectly valid) historical interest, what appeal and what drawbacks does Gentili's approach have for present concerns with international law?

Taking the organization of international law around the paradigm of private law and the simultaneous endowment of private law with the normative force of natural law to be the gist of Gentili's systematic approach, the analysis of private ordering might be seen as the starting point for the discovery of more general rules of international law and Gentili as an inspiring author for attempts to theorize such general rules, their applicability, and their binding force. A popular, if not uncontroversial example of such a project would be the discourse on the *lex mercatoria*. If one is not bewildered by such a combination of historical and jurisprudential, contemporary interests in the first place, one will not find it surprising, then, to learn that one of the organizers of the project behind the two volumes is strongly involved in attempts to formulate and normatively develop the theory of global administrative law (GAL).⁵⁰ Of course, it cannot be the intention to enter into substantive discussion of such contemporary approaches at this point. But it may be worthwhile to point out how a reading and a discussion of Gentili's text can shed new light on them: What Gentili's extensive discussion of Roman imperialism in its entirety forcefully urges one to do in such a context is to reflect critically on the injustices and exclusions one risks legitimating. It is precisely the richness of the substantial examples Gentili discusses in the first book of *The Wars of the Romans*, their being passed over (at least to a certain extent) in the otherwise coherent legitimation presented in the second book, their entanglement with the architecture of his theory of the law of nations, and their connection to the well-known malpractices of European colonialism that suggest a systematic weight of the reservations which should not be dismissed easily. The burden requiring the historian of the Roman Empire, the Gentili scholar, and even the theoretician of today's global legal space critically to track down aspects of domination such as those sketched by the Accusator, this burden is not dispelled by just assuming, for example, the untrustworthiness of one or another of his witnesses. Structurally, what Gentili's private/natural law paradigm may be missing most desperately is a forum to prevent the law from only ever working to the benefit of the powerful, a forum for all parties concerned to participate effectively on equal standing and to agree on common interpretations of the law and its purposes, and hence also on common interests and values. One principal point of contention between the global administrative law theory and other approaches is precisely this: against private

⁴⁹ Jeremy Waldron is a notable exception to the critique just voiced. However, comparing Gentili's equation of *ius gentium* and natural law to a Rawlsian reflective equilibrium, his contribution focuses more on methodological than on substantial aspects of the question of what benefits a study of Gentili's thought might bring.

⁵⁰ Cf. Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law', 68 *L & Contemporary Problems* (2004) 15.

ordering and *lex mercatoria*, Kingsbury's GAL approach is set to maintain a legitimacy aspect of law, and thus insists on requirements of publicness in law.⁵¹ Spelling this out as inter-public law, he suggests a concept of public *entities* and of publicness as interrelation between such entities.⁵² Whether or not this in turn fails to meet the legitimacy challenge is contested, based on stronger ideas of legitimacy as connected to public *spaces* of legal practice and the inclusive, participatory character of their procedures.⁵³ Seeing how themes such as the qualification of the regular or unlawful nature of different entities (preceding the mutual weighing of their respective norms) and the danger of illegitimate normative ordering disguised by legal structures recur in the debate, the two reviewed volumes with their extensive treatment of, for example, compliance with universal norms of international, civil, or natural law, or of the justice and injustice of attempts to export the rule of law might establish a new, complementary facet to the debate and help one better to understand its stakes, options, and background relations.

However, marking and illuminating a hitherto underexposed, yet highly significant step in the history of the theory of international law, their importance certainly goes way beyond either purely historical interest or some relevance for just this one particular discussion. They promise to be truly ground-breaking: opening new debates and enabling unforeseen revisions of the established ones. The editors are to be congratulated without reservation for their cardinal – and beautiful – accomplishment.

Individual Contributions

Benedict Kingsbury and Benjamin Straumann, Introduction: The Roman Foundations of the Law of Nations (2010);

John Richardson, The meaning of *imperium* in the Last Century BC and the First AD;

Clifford Ando, Empire and the Laws of War: A Roman Archaeology;

Diego Panizza, Alberico Gentili's *De Armis Romanis*: The Roman Model of the Just Empire;

David Lupher, The *De armis Romanis* and the Exemplum of Roman Imperialism;

Benjamin Straumann, The *Corpus iuris* as a Source of Law Between Sovereigns in Alberico Gentili's Thought;

Noel Malcolm, Alberico Gentili and the Ottomans;

Christopher N. Warren, Gentili, the Poets, and the Laws of War;

Peter Schröder, Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations;

Pärtel Piirimäe, Alberico Gentili's Doctrine of Defensive War and its Impact on Seventeenth-Century Normative Views;

Randall Lesaffer, Alberico Gentili's *ius post bellum* and Early Modern Peace Treaties;

Alexis Blane and Benedict Kingsbury, Punishment and the *ius post bellum*;

Lauren Benton, Legalities of the Sea in Gentili's *Hispanica Advocatio*;

⁵¹ Cf. Kingsbury, 'The Concept of "Law" in Global Administrative Law', 20 *EJIL* (2009) 23, at 52–55.

⁵² *Ibid.*, at 55–57.

⁵³ Cf. Kuo, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury', 20 *EJIL* (2009) 997. Responding to an analogous critical suggestion, see Kingsbury and Donaldson, 'From Bilateralism to Publicness in International Law', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011), at 79.

Jeremy Waldron, Ius gentium: A Defence of Gentili's Equation of the Law of Nations and the Law of Nature;

Martti Koskeniemi, International Law and raison d'état: Rethinking the Prehistory of International Law;

Anthony Pagden, Gentili, Vitoria, and the Fabrication of a 'Natural Law of Nations'