

Benedict Kingsbury and Benjamin Straumann, *The Roman Foundation of the Law of Nations: Alberico Gentili and the Justice of Empire*, Oxford, Oxford University Press, 2010, xiv + 382 pp, ISBN 9780199599875 (hb), £70.00.
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It is very difficult to define what are the issues for debate concerning any book on the history of international law. As a part of 'Western civilization' the history is influenced by all the normative sources of that civilization, Greco-Roman philosophy and law, Christian natural law and canon law, Renaissance humanism in various forms, the Enlightenment and Western modernity. All of these traditions may appear from a distance (to an outsider perhaps) to harmonize into a systematic view of 'Western civilization', but in fact their relationships to one another are bitterly contested. In particular there is no authoritative or convincing account of how these various normative sources can ground a coherent picture of the history of international law. This book enters a debate about one particular element or building block of Western legal civilization: the differences within early modern Western humanism. In a now famous work,¹ the Harvard political scientist Richard Tuck makes a distinction between the scholastics and the humanists, which the editors of this volume think does not hold. For Tuck, the former accepted the restraints of the just-war theory, while the latter, following Machiavelli, accepted doctrines of self-preservation and the justice of pre-emptive self-defence, a humanist tradition wedded to the Roman imperial example. This humanism was supposedly, according to Tuck, occupied with scepticism and subjectivism in morals. Whatever natural rights existed were rooted in a universal drive for self-preservation, Tacitisms and a reason of state tradition.

This supposed dichotomy is challenged by Straumann, who argues that the humanist traditions which these writers drew upon did not determine the content of their views on key issues such as self-interest and imperial expansion. So, according to Straumann (pp. 122–3) Vasquez de Menchaca in his *Controversae Illustres* rejected any arguments designed to bestow title to overseas territories based on religious or civilizational superiority. This type of argument, used for whole groups of thinkers, is quite tricky because it supposes some judgement about an exact correlation between idea and actual state practice. Alternatively it might be said to invite counting of the numbers of humanists as opposed to supposed 'scholastics' who favour conquest as a primary form of state growth. Yet what concerns a historian is the 'key' thinkers, those most influential on scholars and within their political order. Surely, this is the motive behind the decision to produce a collective volume on Gentili. It may or may not be his 'humanism' which puts him on one or the other side of the dichotomy, but if so, then do the editors and/or their companions provide other explanations? The answer is they do not. However, they do indicate a way forward in the research.

Gentili belongs, for all practical purposes, where Tuck puts him. The predominance of the authors which Kingsbury and Straumann have collected together

1 R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (1999).

(Straumann himself, Panizza, Ando, and especially Pagden) take this view. Gentili favoured recourse to very vague concepts of self-defence and threat of danger and, most importantly, admired Roman expansion and the possibility it afforded to allow subject peoples to enjoy the benefits of the rule of Roman law. These views are presented rhetorically without detailed analysis of the Gentili text or detailed explanation of how a system almost entirely of private law could have been of more benefit to the conquered peoples than their liberty. It is Straumann who speaks in this book with great authority, as a protagonist of Gentili's humanism. He says there is nothing in Gentili's view of Roman law as the equivalent of natural law, a rule of reason, that compels his passion for the expansion of the Roman Empire. It is simply a matter of fact, notes Straumann, that this was the case. Pagden carries the argument a little further by stating convincingly that the equation of natural law or rule of reason with an actual state of Roman positive law, an obscure and complex system of rules, known only to a peculiar caste of lawyers in a particular civilization, made it easy for such persons to suppose that anyone who did not share their expertise was uncivilized and should have it imposed upon them.

For the reviewer there is one great strength of this volume, its attachment to the companion volume of Gentili himself, *The Wars of the Romans*, edited by Kingsbury and Straumann and translated by David Lupter, also with OUP in 2011. In his contribution to the present edited volume Lupter is the one author who dissents from the idea of a unity in Gentili's thought. Volume 1 of his *Wars of the Romans* opposes Roman imperial expansion and Volume 2 favours it. Lupter, as the translator of the work, says that Gentili sometimes shows sympathy with the view that wars had to be defensive and justifiable. The presence of this translated resource allows readers a first-time exploration in English for themselves of the questions raised by the passion for all things classical Roman which is a crucial feature of the highly contested Renaissance humanism.

There are several critical comments the reviewer would make on this enterprise. Straumann argues that there was nothing intellectually compelling about a necessary connection between the Roman law ideas espoused by Gentili and the resulting imperialism which Gentili, in Straumann's authoritative view, certainly favoured – the expansion of the empire was also a function of the superior excellence of its laws; an excellence, in Gentili's words, 'not inhuman, not proud, not the sort which would be unwilling to spread most liberally every sort of goodwill and benevolence' (p. 121). This is consistent with Kingsbury's and his own argument that one cannot read into the tenets of humanism as an intellectual adventure, a penchant for predatory, imperial expansion, as Tuck does. However, such an exercise in political philosophy or history of ideas does not exclude the necessity for a wider historical exploration of the consequences of a rediscovery of the glory of the Roman Empire for the self-understanding of the European cultural identity at this time. If among the huge array of intellectual talent that Kingsbury brought to the symposium in New York which was the basis for this book he had brought leading historians of the British Empire such as Nicholas Canny or David Armitage, these could have shown precisely how the imaginations of Elizabethan contemporaries of Gentili were fired by their recollections of Roman conquests when it came to the colonization of

Ireland. The chair of civil law in Oxford was in the gift of the Elizabethan government and an exploration of this political context should also belong in a comprehensive study of the meaning of the Roman foundations of the law of nations.

For instance in the canonical *Oxford History of the British Empire*, the editor for Volume 1, *The Origins of Empire*, Canny, explains in his introductory chapter that ‘colonization was a method that had been employed in ancient times by the Romans to advance their authority and civility throughout much of Europe, and in medieval times by the Anglo-Normans to extend their influence, including their involvement with England, Scotland, Wales and Ireland’.² This is a radically alternative trajectory for Roman influence. Gentili’s stature in Elizabethan England may well have heralded a renewed intensification of interest in ancient Rome, but the interest was still much longer-standing, if not an unbreakable element of European identity. Ireland was a laboratory for a revival of this interest in Gentili’s time. Says Canny, the English, the Scots, and the Old English in Ireland ‘were all keenly conscious that their own societies owed their origins to conquests. For these people, therefore resort to colonial methods was almost an automatic response once it became clear that reform by persuasion had proved futile’.³ Canny claims that we have the clearest information about what guided Elizabeth’s secretary Sir Thomas Smith, the author of *De Republica Anglorum*. Says Canny, ‘The only means of extending the “Commonwealth” of England beyond its historic frontiers was through military conquest followed by the erection of colonies along the lines favoured by the Romans.’⁴ For Smith, a classicist and former professor of civil law, ‘both the vocabulary and methods of colonization derived from Roman practice’.⁵ The new colony ‘would be instrumental in civilizing the Gaelic population of Ulster in the same way the Roman colonial institutions had civilized the Ancient Britons’.⁶

Armitage, in his monograph *Ideological Origins of the British Empire*, contests the orthodox argument of Canny in favour of a notion of composite kingdom in Britain, such as was widespread in Europe, for example the Austrian domination of Bohemia. He points to the histories of Spain and the Netherlands and even Sweden, besides Britain and Ireland. So composite statehood was a feature of early modernity.⁷ This ambitious and important thesis would require much more close analysis of the exact nature of the relations of the ethnic or national groups Armitage bundles together. Nevertheless, Armitage also provides ample evidence of the medieval influence of Roman ideas of *imperium* and *coloniae* throughout what he calls the Three Kingdoms. He traces the Roman origins of British imperial ideology and stresses that empire was always the language of power.⁸ This argument is supported by a close analysis of the detail of Roman legal institutions, especially the *imperium* of the magistrate.⁹

2 N. Canny, *The Oxford History of the British Empire*, Vol. 1, *The Origins of Empire: British Overseas Enterprise to the Close of the Seventeenth Century* (1998), 7.

3 Ibid.

4 Ibid., 8.

5 Ibid.

6 Ibid.

7 D. Armitage, *Ideological Origins of the British Empire* (2000), 15.

8 Ibid., 29.

9 Ibid., 29 et seq.

‘The revival of the concept of *imperium* as a conception of sovereignty has been traced to the twelfth-century recovery of Roman law.’¹⁰ This surely robs the Renaissance, but not Roman law, of its significance. It places Roman law at the heart of European identity. This makes Lupher’s translation of Gentili’s history and the critical introductory commentary of Kingsbury and Straumann all the more important. They have stimulated the reviewer’s reading at this moment. Armitage’s complex argument is that the ideological relations of the Three Kingdoms (England, Scotland, and Ireland) shows the inseparability of state formation and empire building in the early modern period.¹¹ However, this way of writing history may only be a fudging of agency. It was England which expanded. At least one other kingdom was dominated and subjugated. The other continues to contest the composite character of the state, with a nationalist majority government in Edinburgh. Sir Thomas Smith reappears in Armitage’s narrative,¹² now described as one of two prominent Cambridge humanists. In fact Smith was almost (an earlier Henrician figure who continued into the Elizabethan reign) Gentili’s opposite number in Cambridge, the Regius Professor of Civil Law and Vice-Chancellor of Cambridge University.¹³ Armitage provides, in the Irish case, dazzling evidence of the role of the Roman model for the colonization of Ireland. Says Armitage, ‘This equation between civility and superiority informed Smith’s own colonizing ventures . . . The precedents for this were once again Roman: (quoting Smith) “Mark Rome, Carthage, Venice and all other where notable beginnings hath been”, Smith advised his son’ with respect to the first attempts at the colonization of Ulster in 1572 and 1575.¹⁴ It seems clear to the reviewer that Kingsbury’s and Straumann’s attempted refutation of Tuck may have some possible, if only purely logical, weight as political philosophy, but fails as history.

Another difficulty that the volume faces may be illustrated by a few comments on the chapter by Martti Koskenniemi, entitled ‘International Law and *raison d’état*: Rethinking the Prehistory of International Law’, a 40-page piece which is, in principle, relevant to any claim of the Roman foundations of international law. He begins by noting that ‘The mythical origin of modern international law is often found in Alberico Gentili’s famous diatribe against the theologians’ (p. 297). What Koskenniemi may mean is to question whether ‘in some relevant respect today’s international lawyers are involved in the same pursuit as lawyers such as Gentili four centuries ago’ (ibid). This criticism exposes the fact that the book does not have the ambition to offer an authoritative conception of either the nature or the historical structural development of international law. Despite the title *The Roman Foundation of the Law of Nations*, the book merely ‘adds’ Roman law as a building block without explaining whether other usually supposed building blocks, such as the Catholic Church’s tradition of canon law, had been or continued to be of some importance to the international-law tradition.

10 Ibid., 30.

11 Ibid., 24.

12 Ibid., 47.

13 Ibid.

14 Ibid., 49.

Nor do the editors attempt to exercise a close editorial watch over Koskenniemi despite his destructive potential for the significance of their own work. To take only one part of his chapter, 'International Law in Enlightenment France' (pp. 305–20), Koskenniemi says there was no law in the seventeenth century which he loosely describes as enlightened. He argues that in France (p. 310) there was an express turn against law and lawyers as possessors of the knowledge of statehood. *Raison d'état* was understood as derogation from the common law. It is probable that what he is describing is the declining function of lawyers in French constitutional law. Yet Koskenniemi makes the remarkable statement that 'concentration on the extraordinary moments of great policy, linked with utmost secrecy in diplomacy and political decision making, notoriously prevented the emergence of any coherent French foreign policy for most of the 17th century'. He explains that this is because only in 1688 did the French Foreign Ministry set up an archive. Yet foreign affairs in an absolute monarchy will hardly be the exclusive prerogative of a foreign minister. Koskenniemi argues further that there was no significant French international-law tradition at all in pre-Revolutionary France. French-language work was produced by Protestant diaspora such as Jean Barbeyrac, who translated Grotius in Berlin (pp. 313–14). Koskenniemi appears here to equate French observance of the law of nations (however understood) with the presence or absence of a distinctive creativity and hence influence of French legal doctrinal writing.

This very unsure grasp of seventeenth-century French diplomatic history leads to a bizarre dismissal of Richelieu, Mazarin, and Louis XIV as not 'coherent' because there were no Foreign Ministry archives in an absolutist state. Whatever the value of Koskenniemi's judgement about the importance of the French Foreign Ministry for any of the above figures, the more fundamental point is that the editors, Kingsbury and Straumann, have no interest in contesting Koskenniemi's implicit assumption that if the leading figures of France were guided by or listening to theologians and not lawyers, then they cannot have been 'doing international law'. Koskenniemi does not bother to argue the place of theology (p. 297), talking disdainfully of the difficulty of exorcizing theology, shown by the continuing messianic teleology evidencing what he calls an 'inherently theological disposition'. This style of writing should have raised alarm bells in the editors if they had set themselves the task of assessing the relative importance of Christian morality alongside Roman law in the foundations of international law.

In fact there appears to be a widespread consensus that the medieval scholastic tradition of the just-war tradition, going back ultimately to Augustine, continued to dominate in the ultra-Catholic France of Cardinal Richelieu and Louis XIII. Cornette, a French historian, demonstrates that Richelieu followed precisely this in the 19 May 1635 Declaration of War against Spain.¹⁵ Cornette finds, in any case, plenty of use of lawyers among the councillors and advisers who defended and propagated Richelieu's policy against the Spanish Hapsburgs. Lesaffer, a Flemish legal historian, confirms the same view in his massive 60 pages of text on the same Declaration of

¹⁵ J. Cornette, *Le roide guerre: Essai sur le souveraineté dans la France du grand siècle* (1993), 123–8.

War.¹⁶ Equally, Lesaffer finds plenty of roles for lawyers. He explains the care with which Richelieu built legal arguments around a common interest that France had in preserving the sovereign equality of other smaller states and its own desire to restrain Spain. Arguments about the justice of war were essential for Richelieu to retain support at home in public opinion, as well as to sway allies and cause sedition among enemies. Finally, the American historian Church, while completely in line with the above analysis, places the primary emphasis on the role of theologians. Basing his argument on the *Testament politique*, he shows how Richelieu says no war should be undertaken until judged as to its equity by theologians ‘of the requisite capacity and honesty’.¹⁷

In conclusion it has to be said that Kingsbury and Straumann have made a dramatic bid to place Roman law at the foundation of international law. They have assembled a powerful array of academic figures, of whom Koskenniemi is only one. It is not possible to mention them all or to assess their merits, so wide is the interdisciplinary range, across literature (Chris Warren), political theory (Jeremy Waldron), and colonial history (Loreen Benton), to mention only a few further contributors not already discussed. The translation work of Lupher has already been singled out as especially significant. The reviewer has been hugely stimulated and challenged by this work, to begin to think out for himself just how important Roman law inspiration was for the practice of states in international law and to revisit really whether it was true that there was, in whatever sense, no international law in seventeenth-century France. I am sure that other readers willing to engage with the exacting and sometimes confusing scholarship of this book will be stretched to their own limits in trying to make sense of the history of international law.

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Ronnie R. F. Yearwood, *The Interaction between World Trade Organisation (WTO) Law and External International Law: The Constrained Openness of WTO Law (A Prologue to a Theory)*, London: Routledge, 2012, 240 pp., ISBN 9780415565165, (hb), £90.00.
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International law is not one homogeneous legal system with a clear hierarchy of norms, but rather consists of general rules as well as a number of specialized legal systems,¹ such as trade law, environmental law, or human rights law. None of these systems can claim ‘hierarchical superiority’ over another, as they exist on a horizontal

¹⁶ R. Lesaffer, ‘Defensive Warfare, Prevention and Hegemony: The Justifications for the Franco-Spanish War of 1635 (Part I)’, (2006) 8 *Journal of the History of International Law* 91; and R. Lesaffer, ‘Defensive Warfare, Prevention and Hegemony: The Justifications for the Franco-Spanish War of 1635 (Part II)’, (2006) 8 *Journal of the History of International Law* 141.

¹⁷ W. Church, *Richelieu and Reason of State* (1972), 501–2.

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¹ ‘Specialized legal systems’ is the term used by the author throughout his book. For that reason I will use the same terminology in this review, even though the term ‘system’ is generally accepted to refer to international