Fetishizing the State: Gentili and the Myth of the Modern Laws of War

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According to international humanitarian law, the answer to the question of who is considered a legitimate actor of force is primarily the following: sovereign states. This state-centred answer is often traced back to the teachings of Alberico Gentili, an important jurist of the 16th century. However, this narrative is actually the 'foundational myth of the laws of war', argues Claire Vergerio in her book **War, States, and International Order** *(CUP 2022). A conversation on Gentili, the historiography of the laws of war, and (painting) frames.*

Dear Claire, the cover of your book showcases *'A Dawn, 1914'* by Christopher Richard Wynne Nevinson. The artwork depicts an apparently boundless congregation of French soldiers en route to the Flanders trenches at the outset of the First World War. What I found particularly intriguing here is the fact that the image on your book cover is not merely presented but rather carefully staged through the collaborative efforts of four hands (whose owners we do not see). Why did you choose this cover? What does it tell us about your book?

Thanks for this question, Hendrik! I'm glad to hear the four hands are not going unnoticed.

The graphic design team I worked with at Cambridge UP was struck, as you were, by the photograph, to the point that they triple checked with me that this was indeed the picture I wanted, rather than a plain, unframed image of the painting itself. They were concerned about a possible miscommunication on this point. This makes sense, of course; it is an unusual photograph. But for me, the hands are precisely what conveys the impetus behind the book.

I was trying to find something that would convey the fact that when we think about "war," we usually picture war between sovereign states, each with its distinctively uniformed state army, just like what we see on "A Dawn, 1914." This is a highly restrictive understanding of "war"—it is only one possible "framing" of war, as it were, among many others, even though this one image has come to dominate our collective imagination. I found this photograph particularly striking because it emphasized the framing of the painting as much as the content of the painting itself.

This leads us directly to the focal point of your book. Within historical accounts of the modern international order, the state often assumes the role

of the primary actor of violence. Consequently, in contemporary international humanitarian law, the legitimate use of force is predominantly confined to sovereign states—a notion frequently attributed to the teachings of Alberico Gentili. A central contention put forth in your book is that this narrative is fundamentally a myth. Has international law scholarship misread Gentili? So, was he less original and less important in his own time than is commonly believed?

In short, yes, though the story is a little more complicated. There has been a great deal of scholarship on Gentili since the early 1980s, and this scholarship is carefully researched and nuanced, including in its claims about Gentili's originality and importance. My book draws on this scholarship, amongst others, to show the extent to which earlier claims about Gentili and his importance as the "founder of the modern laws of war" were misguided. And while we know better now, these earlier mistakes matter because this narrative about Gentili's greatness shaped the way twentieth-century scholars came to think about war and its laws more broadly, and we have in turn inherited many of their ideas.

As for Gentili himself, he was a controversial figure in his own time, and after he died in 1608, he was remembered primarily for his staunch defense of absolutist rule. When he was revived in the late nineteenth century, the spotlight fell on his treatise on the laws of war, *De iure belli libri tres.* Gentili was painted as an avant-garde humanitarian who understood that war could only be made bearable if the right to wage it was limited to sovereign states, and who thus pushed for the limitations of this right accordingly. What I argue in the book is that Gentili's *De iure belli* is more convincingly read in the context of Gentili's growing absolutist tendencies. Unlike many of his contemporaries – though strongly echoing Balthazar Ayala, the prominent Spanish jurist notorious for condemning the Dutch Revolt – one of Gentili's core aims was to criminalize any and all forms of rebellion against an established sovereign.

On this basis, it is not hard to see how later jurists were tempted to claim that Gentili made the right to wage war the prerogative of sovereign states. But this is a significant conceptual leap, especially since Gentili had no concept of "the sovereign state" himself. He intervened in a specific debate about who could claim to act as a "public authority," at a time where debates about the legality and legitimacy of different forms of revolt was raging. Gentili's positions, stemming from an almost caricatural understanding of Bodin, were both controversial and, to the extent that Ayala had made them much more forcefully, not exactly original. As such, claims that Gentili ushered in either a "modern" or a "humanitarian" approach to the laws of war are retrospective constructions that have obscured the actual contribution and motivations of the Italian jurist and given us a warped sense of chronology around the regulation of "modern" war.

The fact that this myth could become effective at all is, according to your argument, due to the one-sided reception by jurists at the end of the 19th century and later by realists like Carl Schmitt and Wilhelm Grewe. What were

the motives of these scholars for this form of politics of the historiography of international law?

What I tried to show in the book is the extent to which the later revivers and afficionados of Gentili were attached to the idea of the modern territorial sovereign state as a force for good in the world. They wanted to argue that restricting the right to wage war only to sovereign states and their armies was ultimately a humanitarian measure, that it would make war less destructive overall. These ideas were critical during the codification of the laws of war from the 1860s onward, when the question of how to deal with popular resistance and mass uprisings emerged as a central concern.

Gentili was revived in that context, from 1874 onwards, and my position is that the form his revival took, the nature of the narrative that emerged about him at this point, is better understood once we are aware of what his revivers were trying to argue regarding how best to regulate war. To them, it seemed ethically desirable for the right to wage war to be the exclusive prerogative of territorial sovereign states and their established armies, and they used Gentili to give historical credence to their ideas.

Schmitt made this argument even more forcefully in *Der Nomos der Erde*, with his famous claim that the restriction of the right to wage war exclusively to sovereign states enabled the "hedging," "containment," or "bracketing" of war, and allowed Europe to transition from the Middle Ages into modernity. Having read that book during my studies, before I had done any work on Gentili and his revival, I found it remarkable, when I read it again, to see that Schmitt was hanging this claim on the specific writings of Gentili, citing late nineteenth- and early-twentieth-century scholars to support his somewhat fanciful historical narrative.

Whether put forward by late nineteenth-century lawyers or by the likes of Schmitt and Grewe, the ultimate thrust of this line of argument is that the right to wage war should depend on whether you are a recognized sovereign state, not on whether you have a legitimate reason to take up arms. This is a very particular – and debatable – vision of how best to regulate the use of force in the international sphere. Yet it is hugely influential, not only in academia but also in practice: To this day, it remains the cornerstone for contemporary international humanitarian law.

Among 19th century lawyers, you mention for example Gustave Rolin-Jaequemyns, one of the co-founders of the Institut de Droit International of 1873, there was also criticism of the discovery of Gentili. Why couldn't critics like Rolin-Jaequemyns prevail? Was the narrative of the belligerent state too tempting?

I suspect critics like Rolin-Jaequemyns did not prevail because their more nuanced approach was less desirable for reasons that were at once political, personal, and institutional. In telling the story of Gentili's revival, I tried hard not fall into an "everything was just driven by politics" type of narrative. Reading some of the letters

exchanged between the “revivers” of the time, it became clear that a lot of this was also about personal and institutional reputation. If everyone wanted a piece of Gentili at one point – T. E. Holland, Pietro Sbarbaro, the University of Oxford, the Italian government – it is precisely because Gentili was being hailed as one of the “Greats,” as someone who had transformed the world through the sheer power of his mind. Those who were investing time and energy in his revival had very little incentive to say, “Well actually, he was kind of controversial and not that original after all.” So between, on the one hand, these more personal and institutional dynamics, and on the other, the value Gentili could confer by providing a shiny historical pedigree to one particular understanding of how best to regulate war, I think it is not surprising that the narrative about him materialized the way it did.

Let’s talk about method: You apply a dual historical approach – once synchronic (looking at Gentili’s context), once diachronic to explain the genesis of the myth. How do you combine these two levels of analysis?

Well, I think they’re not hard to combine because they’re intuitively complementary. There are many ways to interpret a text, some which arguably come closer than others to what the author originally intended to express. I was hoping to get a sense of how much liberty Gentili’s nineteenth-century revivers had taken with their interpretation of *De iure belli*, so I needed to have a sense of what Gentili had actually intended for *De iure belli* to achieve in his own time.

This is why the book is split into two parts: the first examines Gentili’s text in its original context, placing it within late sixteenth-century legal and political debates and paying close attention to the way concepts such as “just war” and “public authority” were being used and contested at the time. The second part of the book focuses on how *De iure belli* was interpreted from the late nineteenth century onwards. It highlights the most significant liberties Gentili’s revivers took with the interpretation of his text, and it suggests reasons for why these interpretations became so popular.

With this dual approach, I wanted to give more substance to two important but somewhat indeterminate claims: the conventional idea that all texts are reinterpreted over time, and the more specific argument about how the late nineteenth century was the moment when international lawyers consciously constructed a narrative history of their craft. Both claims are important, but on their own, they cannot tell us much about how and why a particular interpretation, a particular historical narrative, emerges as the dominant one.

As you observe, in recent debates on the History of International Law, there is actually comparatively much literature on theorists, and too little literature on practices. Now you’ve obviously written a book about a scholar: is that a contradiction to your observation? How do you think ideas relate to political and legal practices?

Thank you for that one! Yes, of course, I can see the tension between the two, though I don't think they are contradictory. Political and legal ideas and practices are entwined in all sorts of way; between (a) ideas of the broad, philosophical kind, (b) legal doctrine, and (c) more hands-on politico-legal practices and interpretations. The shaping never operates in a single direction, or at least never for very long. This is an observation that the field is increasingly committed to in terms of its research agenda, and it has allowed us to move away from the endless exegesis of a few canonical works.

What I think is sometimes missing from the discussion, though, is a critique of what we could call the "cumulative" or "yes, and…" approach. I don't think it's enough to say, "Alright, we knew a lot about the ideas side, now let's just add to our narrative with some information from the practice side." Sometimes we need to thoroughly deconstruct what we took away from the ideas side in order to widen our gaze and ask entirely new questions. For, as the book shows, some of the narratives we've inherited based on nineteenth- and twentieth-century interpretations of legal works considered "canonical" are incredibly restrictive. I hope that by shedding light on these restrictions and on what drove them in the first place, the book will help strengthen the call to move – when necessary – from "yes, and…" to "no, instead…," and to let practice-based approaches generate more inductive research freed from some of the field's more traditional assumptions.

As an outlook: You write that your goal is to make way for new histories of the laws of wars. What might such an alternative history look like – and what might it possibly tell us about modern law in tension with the political?

I would like to see histories of the laws of war that begin with questions rather than answers. What do global practices around the waging of war tell us about how the abstract "right to wage war" has evolved over time since the early modern period, in conflicts within and beyond Europe? Who, in practice, was treated as a legitimate belligerent? When were various rules and customs restricting the use of force considered to be relevant by those waging war? When were they tossed aside entirely, and why?

One way in which I've recently tried to come at these questions is through peace treaties. Who was considered a legitimate entity with whom to sign a peace treaty at the end of a conflict? To what extent did the answer to this question change over time and across space, and what can explain this variation? This is just one small attempt to use a more open-ended, practice-based approach to get at some of these classic questions about legality and legitimacy in war, but I hope it will eventually illustrate how different our answers might be from those provided by the exegesis of canonical texts.

Ultimately, it is no secret that law, and international law in particular, is at least partly a tool for enshrining certain political visions over others. Within international law, the laws of war are perhaps one of the areas where this is both most salient and least acknowledged. The past few years have witnessed a consistent scholarly effort to

start addressing this problem, and there is now a budding literature supplying critical histories of the laws of war. I hope my book will be a timely contribution to these overdue efforts.
