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REVIEW ESSAY

Past as Present: State-ifying the Laws of War

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Abstract

The history of the laws of war is an increasingly popular research field of international law. Claire Vergerio's book *War, States, and International Order: Alberico Gentili and the Foundational Myth of the Laws of War* is a good-read in this regard. It provides a critical analysis of how 19th-century international lawyers misread and reinterpreted the writings of the 16th-century Italian jurist Alberico Gentili to establish the modern sovereign state as the sole legitimate subject of the laws of war. In this review essay, I offer a critical reading of *War, States and International Order*, positioning its intervention in the context of broader scholarly debates.

Review Essay

The history of the laws of war is an increasingly popular research field of international law.[1] Claire Vergerio's book *War, States, and International Order—Alberico Gentili and the Foundational Myth of the Laws of War* is a good-read in this regard. It provides a critical analysis of how 19th-century international lawyers misread and reinterpreted the writings of the 16th-century Italian jurist Alberico Gentili to establish the modern sovereign state as the sole legitimate subject of the laws of war. Here Vergerio joins a lively field of new literature. For instance, Boyd van Dijk's award-winning book, *Preparing for War – The Making of the Geneva Conventions*, has explored what happened at and behind the negotiation tables of the Geneva Conventions.[2] Van Dijk's work demonstrates

[1] For instance, Giovanni Mantilla, *Lawmaking Under Pressure: International Humanitarian Law and Internal Armed Conflict* (Cornell University Press, 2020); Jochen Von Bernstorff, *L'essor et La Chute du Droit International Humanitaire: Une Brève Histoire de la Codification de la Protection des Civils en Temps de Guerre (1899-1977)* (Pedone, 2024); Eyal Benvenisti and Doreen Lustig, "Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874", *European Journal of International Law*, 31:1 (2020): 127-169.

[2] Boyd Van Dijk, *Preparing for War: The Making of the 1949 Geneva Conventions* (Oxford University Press, 2022).

how the Conventions were drafted because of multilayered interests, including both the political interests of states and the personal struggles of individual drafters. Tanisha M. Fazal's *Wars of Law: Unintended Consequences in the Regulation of Armed Conflict* analyzes quantitative and qualitative evidence from interstate wars over the past 200 years. Using this data to conceptualize the law-abiding pattern of belligerent groups, she argues that lawmakers have been consistently inattentive to how belligerents might receive the laws of war.[3]

All three scholars are interested in the history of the laws of war to explore a specific question: why did the laws of war develop to regulate only states, excluding non-state actors? Van Dijk's work argues that the drafters of the Geneva Conventions excluded certain categories of people from the protection of the Conventions, particularly insurgents in civil and colonial wars, to preserve the sovereignty of powerful states. This helped delegitimize domestic secessionist movements and anticolonial efforts organized from within colonial territories.[4] The unintended consequences of such exclusion, as Fazal shows in her study on the Falklands War and other conflicts, were twofold. First, states stopped formally engaging in interstate wars and ceased issuing declarations of war to avoid the bounds of the laws of war. Second, secessionist rebel groups in civil wars began to engage more actively with the laws of war to garner support from the international community for state recognition.[5]

While van Dijk and Fazal examine the exclusion of non-state actors, in a novel methodological move, Vergerio draws on the history of political thought and adopts a *longue durée* perspective to explain why states became the primary subjects of the laws of war. By tracing Gentili's work in the 16th century and its revival in the 19th century, she argues his ideas were reinterpreted by later policymakers and international lawyers to exclude non-state combatants from the protection of the laws of war. Her work carefully deconstructs the presentist techniques used in this reinterpretation, revealing how these processes unfolded over time. In this review essay, I offer a critical reading of *War, States and International Order*, positioning its intervention in the context of broader scholarly debates.

Gentili has conventionally been viewed as a forerunner to the idea that the right to wage war was essentially limited to sovereign states.[6] Vergerio by contrast argues that this view of Gentili was invented in the late 19th century in

[3] Tanisha M. Fazal, *Wars of Law: Unintended Consequences in the Regulation of Armed Conflict* (Cornell University Press, 2018).

[4] Such exclusion was done not as an absolute silence on the status of insurgents, but through "studied vagueness" of Common Article 3 (non-international armed conflicts), so that many key concepts (such as "civilians", "conflict not of an international character") remained undefined. As van Dijk shows, "at all times, British officials stated, the delegation was to leave 'open' the questions of what constituted a civil war, and how to decide upon this." Van Dijk, *Preparing for War*, 116.

[5] Fazal, *Wars of Law*, 2, 19. Such consequence is due to the controversy in the Geneva Conventions and subsequent protocols that "granting the protection of law to non-state actors effectively confers recognition upon them, with other legal implications." As such, states sought to exclude non-state actors in civil wars to apply laws of war (international humanitarian law).

[6] Vergerio cites the example of Gesina van der Molen's seminal biography of *Gentili, Alberico Gentili and the Development of International Law* (published in 1937) as a conventional account.

response to growing concerns about the participation of irregular combatants as non-state actors in the American Civil War and the Franco-Prussian War (p.14). To prevent non-state actors from entering wars against states, prominent international lawyers active in the *Institut de Droit International* (IDI), such as T.E. Holland and Travers Twiss, sought to restrict the right to war to sovereign states. In their efforts to make modern states the sole subjects of international law, they revived Gentili's work which they believed offered a useful and established doctrine. In their reading of Gentili's modern war-state theory, the right to wage war was the privilege of the sovereign state (p.15). These readings of Gentili were then repeated by influential 20th-century scholars, notably Carl Schmitt.

By placing the original content of Gentili's work alongside 19th/20th-centuries readings of his writings, Vergerio argues that Gentili's doctrine was significantly misread by modern lawyers. She suggests that this was not accidental, but rather wielded to serve imperial purposes.[7] As Vergerio shows, there appears to be a causal link between the 19th-century rediscovery of Gentili—deployed to celebrate the exclusive right of states to wage war (at the expense of colonies, semi-sovereign entities, and other actors)—the expansion of European imperialism, and the ever more frequent and brutal nature of 20th century warfare (p.5). These ideas of excluding non-state actors have had long afterlives, continuing to form the basis of counterinsurgency strategies from the 1954 Algerian War through to the 2003 Iraq war(p.174).

This book encompasses an introduction, six substantive chapters, and a conclusion. Chapter 1 outlines the methodological approach. Vergerio begins by criticizing the English School for its canonical reading of great thinkers, such as Hugo Grotius and Thomas Hobbes. This canonization often leads to misinterpretations, conflating posthumous reinterpretations with the thinkers' original ideas (pp. 22–25). Drawing on the Cambridge School of contextualism and the writings of David Armitage, Vergerio instead proposes what she calls "serial contextualism": a synchronic understanding of a specific context (a conventual contextualist approach) combined with a diachronic understanding of how an author's original text is received over time (from context to contexts) (p.35). This method is then deployed in Chapters 2–6 to reveal how canons are read with new agendas by modern scholars.

In Chapter 2, Vergerio argues that Gentili's 1598 treatise *De iure belli* (*DIB,* the Laws of War) stood out because of its commitment to the investment of absolute power in established secular rulers (p.54). While influenced by Jean Bodin's theory of sovereignty, Gentili expanded on it, integrating Bodin's absolutism with the Roman concept of *jus gentium* to develop a framework for stabilizing and regulating inter-sovereign relations (p.87). Chapter 3 then explores Gentili's concepts of "public violence" (conducted by sovereign states

[7] Other works that have studied the teleological and instrumentalized misreading of historical figures can be found in Martti Koskenniemi, "Law, Teleology and International Relations: An Essay in Counterdisciplinarity," *International Relations* 26:1 (March 2012): 3–34; Andreas Osiander, "Sovereignty, International Relations, and the Westphalian Myth," *International Organization* 55:2 (2001): 251–87.

as "public authority") and the "violence carried out by enemies of mankind" (that committed by non-sovereigns) (p.130). By characterizing "public violence" as conducted only by states, Gentili was believed by modern scholars to "redraw the boundaries of 'public war' and defend an absolutist position" (p.33). Gentili's characterization of illegitimate belligerents as "enemies of mankind" was also interpreted by some authors as "defending some form of human community" against "those who dare to take up arms when they are not already established sovereigns" (p.130). Vergerio argues that these concepts were not widely accepted due to the economic and political contexts of Gentili's time. Private authority in corporations such as the East India Company, and the continued influence of theological control over political authority, hindered the full realization of sovereign control. The concept of the sovereign state was thus not firmly established as compared to the 19th century.

Chapters 4 to 6 discuss the reception of Gentili's work, showing how the modern laws of war were constructed upon a misreading of his writings. Chapter 4 contextualizes Gentili in the late 19th century to argue that his resurrection as one of the founders of international law was central to the emergence of the discipline of international law (p.171). This revival was driven by prominent international lawyers from the *IDI* who sought to establish the scientific credentials of their discipline and construct a narrative about its past rooted in the *jus gentium* of early modern Europe (p.138). As part of this effort, the *IDI* members canonized "great men" like Hugo Grotius, Francisco de Vitoria, and Gentili, tying their ideas to specific defining breakthroughs of "modernity" (pp.140-141). A high-profile member of the *IDI*, T.E. Holland, a Chichele Professor of International Law at Oxford, for instance, made his inaugural lecture on Alberico Gentili, himself a Regius Professor of Civil Law at Oxford two centuries earlier.

In Chapter 5, Vergerio further traces the emergence of the dominant reading of Gentili's approach to the laws of war, one which credited him with inventing the idea of restricting war to public actors, paving the way for the modern understanding of warfare (p.197). Vergerio argues that these 19th-century lawyers did not read Gentili in any detail (p.172). Instead, they capitalized on Gentili's concept of "public war" and translated it into "war between sovereigns," astutely turning "public" into "sovereigns." This move promoted a new and narrower understanding of the modern nation-state which aligned with the political thinking of nineteenth century Europe—one defined by fixed territory, unitary political authority, and a monopoly over military force (p. 186, p.210). Vergerio criticizes this reinterpretation as anachronistic, noting that Gentili had no notion of the "sovereign state," "international law," or "subjects of international law" as understood by 19th-century lawyers (p.210). In the 16th century, understandings of statehood were far more fluid.

The 19th century was also marked by the emergence of a bifurcated system of international violence where "regular wars" between "civilized" states were governed by the laws of war, while conflicts with non-state actors, often during periods of colonial expansion, were treated as "small wars" subject to different

rules.[8] Gentili originally distinguished between public war and private war, defining the latter as "an act of brigandage" (p.98). International lawyers like T.E. Holland reframed Gentili's distinction to entrench a binary between "regular war" by public actors and "small war" by private actors. The "small war" then evolved to mean guerrilla warfare and counterinsurgency (p.206). Notably, the 19th-century reading supported counterinsurgency doctrines during the age of high imperialism, which enabled states to eschew the usual restraints placed on warfare when suppressing anticolonial resistance (p.208).

This reading of Gentili gained more traction in the 20th century, largely due to the work of Carl Schmitt (Chapter 6). Schmitt saw Gentili as an avant-garde thinker who created a new concept of war which focused on the sovereignty of the state rather than the subjective justice of discrete acts of war.[9] This allowed Europeans to "tame" war and make it less inhumane, since states as equal rational entities would turn war into a kind of duel, a rule-based procedure for resolving inter-European rivalries (pp. 220, 226). Vergerio argues that Schmitt also used Gentili selectively. In particular, Schmitt insisted that Gentili's concept of war was exclusively attributed to "princes," which "must be fought by sovereign territorial states" (p. 225). Schmitt's reading ignored both Gentili's concept of the "enemy of mankind" and the fact that the modern concept of the sovereign state emerged later. According to Vergerio, Schmitt's approach indirectly promoted a strong, centralized state, a view consistent with his own political ideology and the authoritarianism of the Nazi regime, while naturalizing wars of annihilation against inconvenient political enemies (p. 229).

This book is remarkable in many ways and offers much to our understanding of the history of international law and the laws of war. In the spirit of critical engagement, I would like to probe two important claims made by the book in the context of broader and ongoing academic debates. First the transtemporal perspectives it takes, and second its anti-imperial sensibilities. I contend that while this book excels in elaborating on these two points within the history of international law, its approach still remains susceptible to some of the criticisms it intends to undo.

Vergerio reads Gentili meticulously, tracking his influence on his contemporaries and more modern scholars. This method, which she calls "from context to contexts," involves following how ideas evolve and are received by different authors across time, shaped by their socio-political and institutional backgrounds. Through this method, Vergerio positions herself in

[8] A related but different understanding of "small wars" is illustrated by Lauren Benton's recent account, in which she argues that "small wars" as "small" violence (from sudden massacres to long campaigns of dispossession and extermination) have been necessary for imperial powers to keep and produce order. She cites Gentili's analysis of situations of "small wars" from truce-making, plunder and pre-emptive strikes to suggest Gentili's interest in the lawfulness of imperial violence. From Gentili and others, Benton suggests a non-military-analyst understanding of "small wars" as merely manifestations of insurgency and counterinsurgency. Lauren Bendon, *They Called It Peace, Worlds of Imperial Violence* (Princeton University Press, 2024), Prologue and Chapter 2.

[9] Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press, 2003), 158–159.

academic debates that critique teleological narratives and demythologize doctrines in legal and political thoughts.[10] As she has argued in another article, canons are not just "paragons of intellectual achievement" but should also be acknowledged as "tools of cultural imperialism."[11] Established canons are often presented as monolithic myths: singular, linear, authoritative, and originating from the West.[12] By unveiling the myth-making process of canonization, Vergerio helps us better understand the political function of canons in international law and international relations, showing how they travel through historical time as "timeless principles,"[13] thereby surreptitiously impacting on how we conceptualize our relationship to the past.

However, I would suggest *War, State and International Law* risks canonizing Carl Schmitt in a way that Schmitt or Holland are being charged for canonizing Gentili's ideas. This book makes the argument that Schmitt misreads Gentili for the purpose of absolutizing sovereign states and humanizing Nazi's wars. Vergerio then shows us that Schmitt associates a secular concept of war to the concept of the state—a concept that did not exist in Gentili's times—in order to delegitimize non-state acts of war (pp.224–226). In other words, Schmitt's efforts to "glorify the state" allowed it to "tower over all other forms of organization and monopolize the right to use force," facilitating Europeans efforts to limit wars to conflict between states (p.226).

Another group of scholars might argue that Schmitt did not see the state as being so predominant. Armin Von Bogdandy and Adeel Hussain, for instance, argue that "in Schmitt's reading, the state, understood in its conventional form as a political unity of a people, provides one convenient shell in which the political can house itself but, if need be, the institutional shell can always be swapped with another organisational form that fares better at institutionalising enmity."[14] If we follow this interpretation of Schmitt's work, Schmitt in fact thought that it was politics that determined the adoption of the state form, rather than the state shaping politics. For Schmitt, "the political" is probably the most intense human relationship. "The intensity of that relationship results from the fact that a potential combative encounter allows for legitimate killing."[15] For a man deeply committed to Realpolitik and antagonism, the state

[10] For instance, Jennifer Pitts, "International Relations and the Critical History of International Law," *International Relations* 31:3 (2017): 282–98; Christopher N. Warren, "Hobbes's Thucydides and the Colonial Law of Nations," *The Seventeenth Century* 24:2 (2009): 260–86; Martine Julia Van Ittersum, "Hugo Grotius: The Making of a Founding Father of International Law," in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffmann, 1st ed. (Oxford University Press, 2016), 82–100.

[11] Paolo Amorosa and Claire Vergerio, "Canon-Making in the History of International Legal and Political Thought," *Leiden Journal of International Law* 35:3 (September 2022): 469.

[12] Amorosa and Vergerio, 470.

[13] Amorosa and Vergerio, 475.

[14] Armin Von Bogdandy and Adeel Hussain, "Carl Schmitt's International Thought and the State," in *History, Politics, Law*, ed. Annabel Brett, Megan Donaldson, and Martti Koskenniemi, 1st ed. (Cambridge University Press, 2021), 147.

[15] Von Bogdandy and Hussain, 147.

is merely a vector of power, and its ability to wage war is simply an attribute of a strong state.

Readings of Schmitt continue to diverge. Some see him as offering an anti-liberal and anti-American critique of universal internationalism. Others foreground Schmitt as an antisemitic Nazi defender supporting an absolutist-statist position.[16] Differences in part boil down to the incoherence of Schmitt's works. As Benno Teschke highlights, one key inconsistency lies in Schmitt's concept of war, with his critique of liberal total war articulated alongside his silence on Nazi total war.[17] Schmitt's proposition of a non-discriminatory concept of war—one that argues that war should be waged between equal states to limit its scope—was a reaction against the discriminatory war (a retrieval of just war doctrine) codified in the Treaty of Versailles and the League of Nations,[18] which he viewed as instruments of American hegemony, undermining *Jus Publicum Europaeum*.[19] He opposed the legal framework that criminalized wars of aggression and branded enemies as criminals against humanity, drawing on and critiquing Immanuel Kant's concept of *unjust enemy* in *The Nomos of the Earth*.[20]

Schmitt's engagement with various theorists suggests that his ideas cannot be reduced to a simplistic reliance on Gentili to state-ify laws of war. Vergerio's critique, which characterizes Schmitt's work as "seductively simply story" tying the modern concepts of war, the sovereign territorial state, and secular European international law to Gentili (p. 226, p. 244) thus arguably oversimplifies his argument. Schmitt's later acknowledgment of guerrilla war as an exception to the modern state army further complicates the narrative. While he noted that guerrilla warfare had long existed in practice, this shift demonstrated his evolving understanding of war beyond the framework of sovereign state armies.[21] As such, Vergerio appears to present a teleological reading of her own, one that does not fully acknowledge Schmitt's developing writings.[22]

[16] Benno Teschke, "Carl Schmitt's Concepts of War," in *The Oxford Handbook of Carl Schmitt*, ed. Jens Meierhenrich and Oliver Simons, vol. 1 (Oxford University Press, 2014), 368. Robert Howse, "Schmitt, Schmitteanism and Contemporary International Legal Theory," in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffmann, 1st ed. (Oxford University Press, 2016), 213.

[17] Teschke, "Carl Schmitt's Concepts of War," 368.

[18] Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 259–60.

[19] Seyla Benhabib, "Carl Schmitt's Critique of Kant: Sovereignty and International Law," *Political Theory* 40:6 (2012): 696.

[20] Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 168.

[21] Carl Schmitt, *Theory of the Partisan: Intermediate Commentary on the Concept of the Political*, trans. G. L. Ulmen, 2. [Druck] (Telos Press Publishing, 20), 3. Schmitt says, the guerrilla war in 1808 and 1813 between the Spanish people and foreign conqueror represents a new doctrine of war.

[22] Her argument is part of a wider debate between critical international lawyers and empiricist historians. There is inadequate space to fully engage in this discussion here. For more information see: Jean d'Aspremont, "International Law and the Rage against Scienticism," *European Journal of International Law* 33:2 (2022): 679–94. Ian Hunter, "About the Dialectical Historiography of International Law," *Global Intellectual History* 1:1 (2016): 1-32; Anne Orford, *International Law and the Politics of History* (Cambridge University Press, 2021).

In another important argument forwarded, Vergerio demonstrates how canons served as tools of imperialism and were used to legitimize colonial wars. For instance, the concept of "small wars" was invented and widely applied based on two key experiences of 19th-century lawyers: the pacification of Algeria (1808–1883) and the repression of the 1848 uprising in Paris (p.207). In her exploration of how colonial thinking animated the architects of international law in the 19th century,[23] Vergerio reveals how figures like Travers Twiss and John Westlake were concerned with "applying customary (European) international law 'in the Orient'" (p.201). These lawyers selectively revived certain classics, such as Gentili's works, overlooking those with less favourable attitudes towards states, to construct a theoretical foundation for sovereign states to repress insurgency movements during colonial wars.[24]

This argument cogently demonstrates how international law developed to bolster imperial projects. However, I believe that this attempt to unveil the colonial thinking in the codification of laws of law would have benefited from a more pluralist approach to the relationship between European universalism and the history of international law. By focusing squarely on Gentili, at times it appears that the charge of Eurocentrism aimed at 19th/20th-century international lawyers might also be levelled at *War, States, and International Order.* To elucidate this point, the writings of B.S. Chimni are useful.

In his earlier scholarship, Chimni took issue with the work of *Gentle Civilizers* by Martti Koskenniemi and others. While acknowledging that this scholarship is critical of the Eurocentrism of international law, Chimni notes "the Other does not participate in the writing of this history."[25] Though this literature writes about European-statist thinkers and lawyers it fails to engage with non-European actors. While we revolve around the same "founding fathers" of international law in the West, we thus confine international lawyers' engagement "with history to the terms, vocabularies and categories of the very historical narratives they seek to evaluate, disrupt, or displace."[26] The same critique might be applied to *War, State and International Order.* I would suggest that by providing a historical account of state-ifying laws of war, the history of how "the Other" (say insurgent groups and post-colonial actors) figured in and reacted to these doctrines is too marginal. This is in contrast to, for instance, the more radical post-colonial approaches of Frédéric Mégret and

[23] Other scholars also wrote substantially in this regard. For instance, John Westlake was known for his attitude on colonialism and sovereignty at the Berlin Conference, insisting on limiting sovereignty to European states. Matthew Craven, "The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law" in Luigi Nuzzo and Miloš Vec (eds), *Constructing International Law: The Birth of a Discipline* (Klosterman, 2012): 363-403.

[24] French refusal to recognize the Algerian War of Independence as a "war" is a famous case in point. Claire Vergerio, *War, States, and International Order: Alberico Gentili and the Foundational Myth of the Laws of War* (Cambridge University Press, 2022), 239.

[25] B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches*, 2nd ed. (Cambridge University Press, 2017), 328.

[26] Jean d'Aspremont, "Turntablism in the History of International Law," in *Politics and the Histories of International Law: The Quest for Knowledge and Justice*, ed. Raphael Schäfer and Anne Peters (Brill | Nijhoff, 2021), 405, 413.

Vasuki Nesiah in their studies of the colonial origins of the laws of war and the forms of colonial violence in the field.[27]

Despite these questions, I am left with admiration for this book that offers a thorough exploration of the life and ideas of Gentili, whose impact on the development of modern laws of war have not received the attention they deserve. What is particularly valuable about this book is its ability to dispel certain myths about Gentili's ideas and to trace the ways in which his work was instrumentalized by later followers in the service of colonial violence and warfare. Additionally, it highlights the historical origins of the current tensions between international humanitarian law and non-state actors engaged in armed conflict in the conscious decisions made by 19th century international lawyers to exclude non-state actors from the ambit of the laws of war. The book's insights into the normative plight facing IHL in the contemporary world are particularly salient and offer much food for thought.

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[27] Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Anne Orford (ed), *International Law and its Others* (Cambridge University Press, 2009), 265-317; Vasuki Nesiah, "Human Shields/Human Crosshairs: Colonial Legacies and Contemporary War" *American Journal of International Law Unbound*, 110 (2016): 323, 324-5.

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