RIGHTS AND CIVILIZATIONS

Rights and Civilizations, translated from the Italian original, traces a history of international law to illustrate the origins of the Western colonial project and its attempts to civilize the non-European world. The book, ranging from the sixteenth century to the twenty-first, explains how the West sought to justify its own colonial conquests through an ideology that revolved around the idea of its own assumed superiority, variously attributed to Christian peoples (in the early modern age), Western "civil" peoples (in the nineteenth century), and "developed" peoples (at the beginning of the twentieth century), and now to democratic Western peoples. In outlining this history and discourse, the book shows that, while the Western conception may style itself as universal, it is in fact relative. This comes out by bringing the Western civilization into comparison with others, mainly the Islamic one, suggesting the need for an "intercivilizational" approach to international law.

GUSTAVO GOZZI is full professor of the History of Political Doctrines and the History of International Law. He is currently Alma Mater Professor in Multiculturalism and Cultural Relativism at the University of Bologna. He is a member of the Advisory Board of the King Abdulaziz Chair for Islamic Studies at the University of Bologna. He has conducted research at the Max Planck Institut für europäische Rechtsgeschichte in Frankfurt am Main and has been visiting professor in Tunis, Istanbul, Tarragona, and Corinth. He is director of the series Democracies, Rights, Constitutions, and has founded a master's programme in International Cooperation on Human Rights and Intercultural Heritage.

RIGHTS AND CIVILIZATIONS

A History and Philosophy of International Law

GUSTAVO GOZZI
University of Bologna

Translated by Filippo Valente

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Thanks be to Nature, then, for the incompatibility, for heartless competitive vanity, for the insatiable desire to possess and to rule! Without them, all the excellent natural capacities of humanity would forever sleep, undeveloped. Man wishes concord; but Nature knows better what is good for the race; she wills discord.

– *Immanuel Kant*, Idea for a Universal History from a Cosmopolitan Point of View *(1784)*

It was unearthly, and the men were – No, they were not inhuman. Well, you know, that was the worst of it – this suspicion of their not being inhuman.

– *Joseph Conrad,* Heart of Darkness *(1899)*

CONTENTS

PREFACE TO THIS ENGLISH TRANSLATION

This book originally appeared in Italian at the end of 2010. With this English translation comes an opportunity to reflect on the theses it sets out, to rethink the research behind its writing, and to underscore the perspectives it proposes to open.

This is a work on the history and philosophy of international law, and its underlying idea has been to mine the past so as to uncover the roots of processes that propel themselves into the future. In so doing, the book highlights a significant continuity between early modernity and the tormented season of the present age.

In pursuing this research programme, the book crucially describes the unfolding of two parallel histories.[1] On the one hand is the history of legal and institutional relations among states, leading to the creation of international organisms. On the other hand is the history of these powers' representations, depicting an alterity or "otherness" understood to be incompatible with their own interests as players on the international stage: this is the otherness of the Indios of the New World, of peoples who have been colonized, of peoples regarded as "underdeveloped" or "nondemocratic," of the resistance movements that have sprung up in the Third World.

For an appreciation of what is involved in this otherness we need to draw on disciplines such as ethnology and anthropology, making it possible to clarify the complex paradigm that in the history of international law has been constructed by a working together of legal and humanistic studies.[2] In highlighting the need to investigate this complex

[1] This dual-track approach owes a debt to Martti Koskenniemi, whose *Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2002) has provided a constant stimulus, offering insights that inform the entire discussion.

[2] This effort to bring the humanities to bear in complementary fashion on the study of international law has happily been pursued in the literature. A fine example is Mohammad Shahabuddin's *Ethnicity and International Law: Histories, Politics and Practices*, with a foreword by Antony Anghie (Cambridge: Cambridge University Press, 2016).

intersection, this book recognizes that we are advancing into a largely unexplored research area.

The discussion in this book has also profited from a comparative approach that looks at the history and philosophy of Western international law next to other historical traditions (especially the Islamic one) in an effort to develop an "intercivilizational" perspective.[3] This inclusive effort inevitably leads to a relativist conception that asks us to trace every history and every foundational attempt in philosophy to its own traditions, highlighting the need for an exchange of views that may translate into an enriched understanding on all sides. This research avenue has been making strides, to be sure,[4] but there is still much work to be done.

Ever-refreshing as a wellspring of inspiring insights in this area of investigation has been the TWAIL perspective (Third World Approaches to International Law), to which I owe an important intellectual debt. Now well underway as a line of investigation, TWAIL points out the significant role that colonialism has played in shaping the paradigm of international law in the nineteenth century, while also highlighting how the legacy of colonialism is still very much with us, continuing to shape contemporary international law. Critical in this respect, and yet still largely unaddressed, is the problem of the relation between international law and colonial law, for by analyzing this relation we can shine a light on the normative practices and discourses the colonial powers devised when they embarked on their colonial ventures establishing a system of laws under which to govern and dominate the foreign peoples they subjugated. By digging deeper into these relations, we can uncover the "underbelly" of the West – of its normative system and its accompanying conception of rights. And, importantly, we can highlight the basic contradiction at play, for just as this system of laws and rights was being propounded as an expression of universal principles, these very principles were being denied to the peoples subject to the West's colonial domination.

By analyzing different doctrines of international law and comparing different cultural traditions, the research carried out in this book brings

[3] Significant in this regard is the innovative work that Yasuaki Onuma has done starting from her article "When was the law of international society born? An inquiry of the history of international law from an inter-civilizational perspective," *Journal of the History of International Law*, 2 (2000), 1–66.

[4] Worthy of mention among the contributions by young scholars who have devoted themselves to this effort is Nahed Samour, "Is there a role for Islamic international law in the history of international law?" *The European Journal of International Law*, 25, no. 1 (2014), 313–19.

into focus the conceit of a "Western humanity" always set in opposition to other forms of non-Western subjectivity and held up as superior to them. We would therefore all stand to gain if this conception – running continuously from early modernity to the contemporary reality – could come under closer scrutiny in a critical effort, at once deep-probing and wide-ranging, to retrace the Western history of international law and rights so as to definitively put the centrality of the West behind us and lay the foundation for an epistemology capable of making complementary the diversities by which we are otherwise divided.

Spring of 2017

INTRODUCTION: THE WEST AND THE LAW OF PEOPLES

It is through a long and laborious process that this book came to completion, especially because the initial project was at one point set aside and re-envisioned from the perspective that now informs the entire work. The idea was initially to investigate the relation between the sovereignty of states and the rights of man in *ius gentium* and the international law that developed out of it. But this initial intent began to grow richer and richer when, through a reading of Martti Koskenniemi, I came to appreciate the Foucauldian "order of discourse" packaged into international law: the West's hegemonic vision relative to other civilizations and cultures.

And so it was that with greater and greater clarity there came into view the main thesis of this book: the thesis that from the early modern age the discourse of Western hegemony maintained a continuity with the contemporary reality.

This perspective has guided my reading of the classics of *ius gentium*, from Francisco de Vitoria to Fernando Vázquez, Hugo Grotius, Samuel Pufendorf, Emer de Vattel, and Immanuel Kant. The same conception informs my reading of contemporary thinkers, from Carl Schmitt to Hedley Bull and John Rawls.

The book thus identifies two *parallel stories*. On the one hand is the story of the formation of the system of states, the birth of the international society, and the development of a new world order. But this is just one aspect of reality, for on the other hand the book traces out the transformations that have taken place in the discourse of the West, moving from the trope of the superiority of the Christian peoples to the mandate of developed countries over underdeveloped peoples, to the current discourse of good governance and the instrumental use of human rights.

1. Without considering the question of whether there existed an international law in antiquity and the Middle Ages, this investigation

starts out from the age that gave rise to the modern system of states between the fifteenth and sixteenth centuries.[5] From a doctrinal point of view it starts out from the School of Salamanca (or Second Scholastic) of the first half of the sixteenth century, and in particular from the work of Francisco de Vitoria and Fernando Vázquez de Menchaca. To Vitoria we owe a reinterpreted definition of *ius gentium*, a definition that traces back to the *Corpus Juris Civilis*:[6] it is Vitoria who replaces its use of *homines* with the term *gentes*.[7] This turning point made it possible to consider the legal link that *ius gentium* establishes among peoples, as well as to represent the international society the same *ius gentium* is a part of.[8] At the foundation of *ius gentium* was natural law, making it so that the legal relations among states found their justification in a universalistic natural law theory from which derived the rights of men and of peoples.

In Chapter 1, the work of Francisco de Vitoria is taken up in all its ambivalence: on the one hand de Vitoria recognized the rights of New World peoples, including their right of ownership over the lands they inhabited, and even though he rejected the proposition that it would be justified to wage a "just war" on account of the diversity of customs, he wound up ultimately justifying the Spanish conquest by papal mandate in the name of Christian religious propaganda. The complexity of his work can also be appreciated from the analysis through which he compared the

[5] See Ludwig Dehio, *Gleichgewicht oder Hegemonie: Betrachtungen über ein Grundproblem der neueren Staatengeschichte* (Krefeld: Scherpe, 1948), pp. 24 ff.

[6] *Institutiones*, lib. I, tit. II, 1, *Corpus Iuris Civilis*, ed. Paul Krueger, I, p. 1: "Quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur." In translation: "But the law which natural reason appoints for all mankind obtains equally among all nations, and is called the law of nations, because all nations make use of it." Justinian, *The Institutes of Justinian*, trans. Thomas Collett Sandars (Chicago: Callaghan & Company, 1876), p. 70. See, in this connection, Ada Lamacchia, "Francisco de Vitoria e l'innovazione moderna del diritto delle genti," introduction to Francisco de Vitoria, *Relectio de Indis: La questione degli Indios* (Bari: Levante Editori, 1996), p. LXXIX.

[7] Writes Vitoria: "Quod naturalis ratio inter omnes gentes constituit, vocatur ius gentium." Francisco de Vitoria, "De Indis insulanis relectio prior" (1539), in *Relectiones Theologicae XII*, Tomus primus (Lugduni: apud Iacobum Boyerium, 1557), pp. 352–53 (the original passage is from Justinian's *Institutes*, here quoted at the previous note 2). In translation: "What natural reason has established among all nations is called the *jus gentium*." Franciscus de Victoria, "The first relectio of the Reverend Father, Brother Franciscus de Victoria: On the Indians lately discovered," in Ernest Nys (ed.), *De Indis et de Iure Belli Relectiones, Being Parts of Relectiones Theologicae XII by Franciscus de Victoria*, trans. John Pawley Bate (New York and London: Oceana Publications, 1917), sec. 3, § 386.

[8] See J. Barthélemy, "François de Vitoria," in A. Pillet (ed.), *Les fondateurs du droit international: Leurs oeuvres, leurs doctrines* (Paris: V. Giard & Brière, 1904), pp. 1–36, at 7.

Christian world with the Muslim world in the geopolitical space of the Mediterranean. Vitoria conceded the legitimacy of exterminating Muslims, regarded as perpetual *hostes* of the Christian faith, for the purpose of ensuring "peace" and security. The origins of the clash of civilizations can thus be traced to a much earlier time than that of the reconstruction which Samuel P. Huntington put forward in the 1990s.

Even the subsequent doctrine developed by the Dutch jurist Hugo Grotius was profoundly influenced by the conception of the law of peoples expounded by the School of Salamanca. This theme is developed in Chapter 2, devoted to Grotius, by addressing the deep contrast that in his thought frames the entire relation between the rights of man and the sovereignty of states, a contrast that found its resolution with the full affirmation of the modern system of states that was formed in the wake of the Peace of Westphalia.

But the development of this system of states is also examined here from the perspective of the rise of Western colonialism. This perspective emerges in particular from an analysis of Grotius's seminal work *De Jure Praedae*. Following the path beaten by Vitoria, though within a frame of thought that by now had become fully secularized, Grotius observed how the push to take the property of indigenous populations would typically masquerade under the justification of civilizing the barbaric regions of the world. And even if we concede that this critical assessment was conceived solely for the purpose of mounting a defense for the Dutch in the face of Portuguese colonial expansion, we can still turn to the classics of *ius gentium* to find the very arguments that to this day so-called Western civilization is deploying to extend its own hegemony over other regions and civilizations around the world.

These themes figure centrally in this book and are fully developed in Chapter 5, devoted to the relation between international law and Western civilization. By looking at authors like Johann Caspar Bluntschli, James Lorimer, and John Westlake, we will be analyzing the conceptions that lay at the foundation of international law in the nineteenth century and will then trace out the way these conceptions develop in the twentieth century. Nineteenth-century international law came into being as a European project: it expressed a shared European consciousness and was regarded as a product of the community of Christian and "civilized" peoples (Martti Koskenniemi).

In reality, and this will be the central thesis defended in Chapter 5, until the second half of the nineteenth century, Western international

law was only one among a plurality of international legal systems: these include the Sino-centric system and the *siyar* system of international Islamic law, and just like the European legal system, they expressed a pretence to universality. A core part of this book is therefore informed by the argument that the universality claimed for the international legal system of the West was in fact relative. In this sense the book invites the reader to look at the West through the eyes of "the other."

Only in the second half of the nineteenth century did international law take shape as the expression of a "global society," when the Ottoman Empire, China, and Japan were forced to adhere to the regional legal system that revolved around Europe. This system of relations of Western superiority and dominance lasted until the postcolonial age that came in the wake of World War II, when a world society developed out of a combination of political systems set apart by deep differences, in that they were based on conceptions rooted in profoundly different cultures. But if a legal system is to qualify as universal, it needs to rest on concepts and principles that are not just Western but also non-Western. Chapter 5 therefore discusses some proposals that introduce an intercivilizational perspective, especially in the area of international human rights law (Yasuaki Onuma, Yadh Ben Achour, and Abdullahi Ahmed An-Na'im).

2. In analyzing the relativism of the Western legal system, this book also investigates and compares some of the most significant doctrinal traditions in the study of international law: taken into account in addition to the Grotian tradition (from Hugo Grotius to Hedley Bull) are the cosmopolitan current – inclusive of Kant (Chap. 4), Hans Kelsen (Chap. 6), John Rawls (Chap. 9), and Jürgen Habermas (Chap. 8) – and the realist current, with Ludwig Dehio, Carl Schmitt, and Hans J. Morgenthau (Chap. 7).

Thus, once the analysis of Grotius's work is fully developed, we will consider the way *ius gentium* has changed over time, looking in particular at some crucial turning points up to the contemporary debate.

In the first place we will be addressing the "cosmopolitan law" of Kantian thought (Chap. 4), which was conceived as a way to progressively move beyond the power politics of the sovereign states of the eighteenth century and as a criticism of Western colonialism, taking a historical perspective that, in the matter of international relations, laid the groundwork for asserting human rights against the states –

a conception that did not come to full fruition until the 1948 Universal Declaration of Human Rights.[9]

Kantian thinking on international law has been interpreted not as utopian but rather as stoutly realistic, this because, as much as Kant may have envisioned an unachievable ideal of peace, he also laid out a necessary path on the way to that ideal.

Then, in Chapter 6, still from the vantage point of the cosmopolitan perspective, we will be addressing the problem of the crisis of the sovereignty of nation-states in the transition from the nineteenth to the twentieth century, to this end drawing on Hans Kelsen, who proceeded precisely from an awareness of that crisis to develop a monistic conception of international law relative to the states' domestic law. In his analysis he called into question the very principles of nineteenth-century doctrine, where international law – conceived as the highest expression of the state – was accordingly reduced to what Hegel called external public law, or the state's external law (*äußere Staatsrecht*). He instead drew on a tradition of thought that traced back to Christian Wolff and his doctrine of the *civitas maxima*, taking it up as the institutional form of a new society of peoples. Kelsen thus developed a conception that, moving beyond the contract-theory approach, made international law into a higher-order system independent of the will of the states. Corresponding to this doctrine was an ideology of "pacifism" set against the "imperialist" ideology of nation-states.

On this foundation he built the paradigm in light of which to guide the development of present-day international law, understood to rest on two main principles as follows: (a) war needs to come under the rule of law, meaning that any wartime violations of the international legal order need to be subject to sanctions set forth in law; and (b) a relation between law and morals needs to be specified under a criterion of individual criminal responsibility for any actions committed in violation of human rights and of the principles governing a system of international criminal law. But, as we will see, this Kelsenian paradigm proves impracticable in the face of a system of international relations based on the unilateral action of the great powers.

In continuity with the Kantian perspective, we will also discuss John Rawls (in Chapter 9), who frames a conception of international law as

[9] See Norberto Bobbio, "Kant and the French Revolution," chap. 8 in *The Age of Rights*, trans. Allan Cameron (Cambridge, UK, and Malden, MA: Polity Press, 1996), p. 122. The Italian original at Norberto Bobbio, *L'età dei diritti* (Turin: Einaudi, 1990), p. 154.

part of a law of peoples inclusive of the principles of positive international law. Rawls's attempt is to identify a common foundation of international law given the plurality of states and the plural ideologies they subscribe to, ranging from those of liberal democracy to those of Islamic law.

He seeks to identify the conditions of a possible coexistence within "a just political society of well-ordered peoples."[10] More to the point, Rawls's law of peoples sees in human rights a common standard which holds good independently of one's ideological persuasion – be it natural law or Islamic law – and which can accordingly serve as a basis for membership in a just society of peoples. With this basic idea Rawls goes back to the crucial question of war, finding that any legitimation of war must be grounded in the guarantee of security, that is, in self-defense, or else in the exception of "supreme emergency."[11]

The discussion so far will have been an attempt to outline the transformations that international law has undergone from the *ius gentium* of the modern age to contemporary international law, developing some specific aspects of the complex relations that have historically developed between the rights of man, the rights of peoples, and the sovereignty of states.

This discussion will also key in on two broad themes in international relations: on the one hand, the Western conceptions of human rights will be looked at in comparison with Islamic declarations of human rights (Chap. 10); on the other, we will be looking at the way international law has been understood from a Third World perspective (Chap. 11).

In addressing the first theme, international law will clearly reveal itself to actually consist of a *plurality* of international systems deeply informed by the cultural differences by which peoples are divided. This appreciation will make it possible to compare the Western and Islamic visions of human rights so as to identify any common ground: I will be suggesting that this is to be found in the scholarly attempts to interpret Islamic religious sources from a historical perspective, even though it must be conceded that such scholarly efforts have yet to come into full bloom in the Islamic world.

Chapter 10 will illustrate the conflict that has existed between the West and the Islamic world from the time of the negotiating and drafting history of the 1948 Universal Declaration of Human Rights. Starting

[10] John Rawls, "The Law of Peoples," *Critical Inquiry*, 20, no. 1 (1993), 36–68, at 50.
[11] John Rawls, *The Law of Peoples, with the "Idea of Public Reason Revisited"* (Cambridge, MA, and London: Harvard University Press, 1999), p. 97.

from the Barcelona Declaration of 1995, however, the Mediterranean has been identified as the geopolitical area that – by reason of a long historical tradition of cross-fertilization among civilizations (Greek, Roman, Hebraic, Christian, and Islamic) – can give rise to a "meeting of civilizations," as contrasted with the "clash of civilizations" at the core of the Atlantic North American account.

Chapter 11 then develops in depth that specific stream in the analysis of modern international law which goes by the label TWAIL, short for Third World Approaches to International Law, on which, as the name suggests, Western international law is viewed from a Third World perspective. Here we will be looking at the work of scholars like R. P. Anand, Antony Anghie, James Thuo Gathii, Balakrishnan Rajagopal, Siba N'Zatioula Grovogui, and Bhupinder Chimni, focusing on two specific theses they have advanced about international law: first, that this is the source from which there developed the ideology on which basis colonialism has been justified; and, relatedly, that international law places itself at the service of the Western powers' new colonial approaches.

Chapter 12, in the fourth and final part of the book, analyzes the conditions for a possible meeting of civilizations in domestic law. On this approach, the problem of the foundation of rights will be addressed by relating rights to dignity, and in particular by comparing the Western understanding of this relation with its understanding in the Islamic tradition. This analysis will suggest the need to recognize cultural rights, so as to protect the identities embedded in different cultures and make for more-embracing democracies, moving toward a legal pluralism bound to work deep changes in them. Only if Western democracies succeed in effecting forms of integration through which "the other" is recognized and respected will they be able to present themselves as participants in an "intercivilizational dialogue" in which they are in their own turn recognized by countries belonging to other civilizations and cultures.

Finally, Chapter 13 challenges what in the Western debate has been advanced as the idea of a possible "constitutionalization" of international law, an idea that we will be scrutinizing by looking at the work of contemporary authors like Jürgen Habermas, Christian Tomuschat, and Armin von Bogdandy against the backdrop of the power of empire in international relations. But we will also be considering the objection the so-called Third World has raised against the project for global governance and the claims made in favour of the "rights of peoples." The future does seem unpredictable.

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Many are the intellectual debts I owe to those who have been helpful in enabling me to complete this book.

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A NOTE ON THE CONTENTS

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