

A Cosmopolitan World Order? Perspectives on Francisco de Vitoria and the United Nations

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I. Fragmentation and Tradition

Little is left of the certainties that animated the first generation of liberal international lawyers in the latter part of the 19th century. Their aspirations for an international rule of law were shattered amidst the two great cataclysms of the 20th century which finally proved the utopian nature of the idea of regarding Europe as “the legal conscience of the civilized world”¹ that would lead humanity towards global peace and prosperity. The “ivory-tower” sociology with which they charted the

* This article reiterates themes explored in my Master's Thesis, “Beyond Sovereignty: The Universal of Francisco de Vitoria”, approved by the Law Faculty of the University of Helsinki in September 2007. Many thanks to my thesis supervisor Martti Koskenniemi.

¹ M. Koskenniemi, *Gentle Civilizer of Nations, The Rise and Fall of International Law 1870-1960*, 2002, 11-97.

world had produced only untested generalizations about human nature and cause and effect, whose “simplicity and perfection” gave them an “easy and universal appeal”,² but which failed to reflect reality in any meaningful way. More pragmatic legal analysis came to dominate the field as all serious theoretical and historical inquiry was assumed merely to reproduce the unending collision between naturalist and positivist theories and to create feelings of discomfort regarding the complacent hypotheses of the “civilizing mission”. The realistic mindset focused on building an elaborate international legal structure, designed to thwart the disastrous consequences of modern inter-state warfare under the supervision of the United Nations.

The advent of globalization has further strengthened this tendency towards practicality. While the creation of a global marketplace has homogenized aspects of public and private life, it has been accompanied by “an accelerated differentiation of society into autonomous social systems, each of which springs territorial confines and constitutes itself globally”.³ For international law, this fragmentation has signified “the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice”.⁴ As is well-known, the arrival of self-governing sub-disciplines – such as “trade law”, “human rights law” and “environmental law” – has raised various questions about how to solve normative conflicts arising from their distinct visions and preferences and whether they pose a threat to the perceived coherence of general international law. In the middle of such phenomenon, questions relating to the fundamental “nature” of international law or to its historical origins seem unimportant, the answering of which cannot substantially help a “functional” lawyer who is expected to give streamlined answers to pressing legal questions as a qualified expert of a particular subject-area.

In the wake of this, the composition of the international field has been thoroughly restructured. Non-state actors – transnational corporations, NGOs, inter-governmental organizations, labor groups, reli-

² E.H. Carr, *The Twenty Years' Crisis, 1919-1939*, Reissue 2001, 6.

³ A. Fischer-Lescano/ G. Teubner, “Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law”, *Mich. J. Int'l L.* 25 (2004), 1006 et seq.

⁴ *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by M. Koskeniemi, Doc. A/CN.4/L.682 of 2006, 11.

gious factions, and other formal and informal networks and pressure groups – have emerged alongside states to shape the contours of the complex global governance regime.⁵ Instead of a single overarching legal system, we have an order “in which national and international, public and private legal regimes overlap, struggle for priority, and have quite diverse impacts on the ground”.⁶ The classical text-book credo that defines international law as a body of rules applicable between states appears to have lost its appeal as it fails to take into account various rule regimes as well as forces that mould and effect political decision-making outside formal channels of interstate diplomacy. If the appeal of the Westphalian-projection of the world has eroded, so has the unity of international legal academia. In particular, the emergence of studies labelled as “New Stream” has generated an unprecedentedly rich and eclectic body of writing that uses a wide repertoire of methods to challenge mainstream views and assumptions.⁷

Statements such as “[a] world structured around international law cannot but be one of imperialist violence”,⁸ “the promotion of international law is a worthy cause, one that ... will promote ... a common, cooperative approach to the resolution of global issues”,⁹ and “international law is not law”,¹⁰ may be hopelessly general and present the extremes (and *may* do little justice to the ideas of the writers in question), but they prove that outside one’s constituency disagreement reigns. Which of the plurality of views is the mainstream insight and which the minority depends on the (historically determined) leverage of the con-

⁵ For a useful general discussion on the subject-matter with regard to human rights, see P. Alston (ed.), *Non-State Actors and Human Rights*, 2005.

⁶ H. Charlesworth/ D. Kennedy, “Afterword and Forward – There Remains So Much We Do Not Know”, in: A. Orford (ed.), *International Law and its Others*, 2006, 401 et seq.

⁷ For useful representations of the “New Stream” movement in the context of international law, see N. Purvis, “Critical Legal Studies in Public International Law”, *Harv. Int’l L. J.* 32 (1991), 81 et seq.; D. Cass, “Navigating the Newstream: Recent Critical Scholarship in International Law”, *Nord. J. Int’l L.* 65 (1996), 341 et seq.

⁸ C. Mievile, *Between Equal Rights. A Marxist Theory of International Law*, 2005, 319.

⁹ T.M. Franck, “The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium”, *AJIL* 100 (2006), 89 et seq.

¹⁰ J.R. Bolton, “Is There Really ‘Law’ in International Affairs”, *Transnat’l L. & Contemp. Probs* 10 (2000), 7 et seq.

stituency. Here, as many Third World Scholars have noted, the scale is tipped in favor of Western/Northern institutions that have a prerogative to decide which issues are highlighted.

By and large, all of the above holds true for the United Nations as well. There is no shared understanding about its actual or potential role in 21st century world politics. Proposals for institutional restructuring are constantly on the agenda but little has been achieved in this respect; the profound controversy that circles the reform debates, especially the paralysis of “the politics of Security Council expansion”,¹¹ exhibit the difficulties and tensions involved in any substantial United Nations discussion. “To remain relevant and useful to its member states, the United Nations must reduce its ambitions and play a more modest role in reducing international conflict”.¹² This is e.g. the current American view, arguing that the United Nations is not delivering what the United States expects and that its future relevance is conditional on its ability to conform to and promote the interests of one of its most powerful members. Christian Tomuschat’s claim that it is “obvious” that “the Charter is nothing else than the constitution of the international community”¹³ embodies the opposite view which, broadly speaking, sees the Charter and its objectives as transcending and delineating the particular interests of UN Member States as well as the promotion of those interests.

To talk about the United Nations at such a high-level of abstraction is, of course, rather unproductive. Whatever the pros and cons of the world body, neither of the two views portrays the quotidian ambiguity that hangs over its place in today’s world. It should be obvious that any argument claiming to capture the “truth” about the purpose or nature of the United Nations is more or less ideologically charged and politically motivated, an everyday exercise in the struggle for power waged at the main stages of international politics. That positions on the United Nations remain irreconcilable reflects the rich diversity of personal and

¹¹ A.M. Slaughter, “Security, Solidarity, and Sovereignty: the Grand Themes of UN Reform”, *AJIL* 99 (2005), 630 et seq.; B. Fassbender, “All Illusions Shattered? Looking Back on a Decade of Failed Attempts to Reform the UN Security Council”, *Max Planck UNYB* 7 (2003), 183 et seq.

¹² J. Yoo/ W. Trachman, “Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations”, *Chi. J. Int’l L.* 5 (2005), 393 et seq.

¹³ C. Tomuschat, “Foreword”, in: C. Tomuschat (ed.), *The United Nations at Age Fifty. A Legal Perspective*, 1995, ix.

cultural backgrounds of the authors as well as traditions and concerns of the institutions in which they were fostered into professional maturity.¹⁴

II. Tradition versus Fragmentation

Against all this, it might be plausible to think that no universal denominators connect those that practice, write, and talk about international law in myriad contexts and that outside one's professional niche looms ubiquitous heterogeneity and discord. But then again, however, reasonable such an estimate may be, it lacks intuitive credibility. Although the managerial style of much current scholarship – its sophistication, dispassion, and technical nature – often hides its aspirations, it is difficult to think of a scholar or practitioner who would not want to promote some justice. This underlying ethos has been infused in the subconscious of international lawyers ever since the profession established itself and began to look at its craft as “not just a set of more or less arbitrary inter-state compromises”,¹⁵ but as a universalizing mission proclaiming to have humanity's welfare at heart. While some perspectives appear unfounded when viewed from another, each stance contains an abstract ideal against which it measures the world.¹⁶ Because each employs a distinct sociology, their prescriptions for the good-life differ.

The topic of human rights might be an ideal emblem of today's cosmopolitanism. They are employed across cultural, religious, and intellectual boundaries to render service to an infinite number of political and social causes. Albeit public opinion continues to associate politics with the usual traits (persuasion, canvassing), human rights are at the heart of much political rhetoric. They promise to set absolute limits to political discretion and further justice on a global scale by endowing a set of universal and inalienable rights to all. While the appealing vision

¹⁴ Cf. I. Scobbie, “Wicked Heresies or Legitimate Perspectives?”, in: M.D. Evans (ed.), *International Law*, 2006, 84-87.

¹⁵ M. Koskenniemi, “On the Idea and Practice for Universal History with a Cosmopolitan Purpose”, in: B. Puri/ H. Sievers (eds), *Terror, Peace and Universalism. Essays on the Philosophy of Immanuel Kant*, 2007, 123.

¹⁶ As Stefano Guzzini has argued, “realism is unthinkable without the background of a prior idealistic position deeply committed to the universalism of the Enlightenment and democratic political theory”. See S. Guzzini, *Realism in International Relations and International Political Economy*, 1998, 16.

of global human dignity appears infeasible amidst the monumental socio-economic disparities that define today's global architecture, instruments and institutions designed to promote and protect human rights continue to proliferate. The United Nations itself is the epitome of this dynamic pursuit. In the roughly sixty years of operation, its human rights structures have evolved radically, from the vague aspirations of the Universal Declaration of Human Rights, to the versatile machinery that today monitors the implementation of UN Charter and treaty-based human rights obligations on a global scale. One small feature in this development has been a strong increase in the number of NGOs involved in UN human rights processes. Bearing in mind the functions and powers of ECOSOC under Article 62 para. 2 of the Charter, it is noteworthy that today more than 3,000 NGOs have a consultative status under the ECOSOC mechanism,¹⁷ allowing them to sit as observers, to submit written statements and to give oral presentations at public meetings of the ECOSOC and its subsidiary bodies with certain qualifications.¹⁸ While these NGOs represent and advocate a wide range of causes, the bulk of them focus on observing and reporting "classical" human rights violations.

One of the groups holding a consultative status is called "Dominicans for Justice and Peace". It is affiliated to the Order of Preachers (commonly known as Dominican Order) and was instituted in 1998. It focuses on "the challenge of justice and peace in the world" and wishes to "contribute to the ongoing discourse on social justice and human rights violations worldwide".¹⁹ To give additional weight to its operation, it is stated:

"In the 16th Century, Fray *Francisco de Vitoria* and the Salamanca School in Spain established the theoretical foundations of the modern problematic of human rights. In the same century, Fray *Bartolome de las Casas* and Fray *Montesinos* championed the rights of indigenous people in Latin America. Our presence at the UN is consistent with the history of the Order."²⁰

In a fragmented world, where violence and conflict are engendered by intertwined and complex causalities, this statement creates a sense of

¹⁷ The granting of the consultative status is based on Article 71 of the UN Charter.

¹⁸ See paras 29-40 of the ECOSOC resolution E/RES/1996/31 of 25 July 1996.

¹⁹ See under <<http://un.op.org/background>>.

²⁰ Ibid.

continuity, of historical purpose and direction and wholeness. It implicitly claims that human rights and moral values are unequivocal, after all, and that the Order of Preachers has embodied and defended such ideals from the very beginning. From the distance of a half millennia, three Dominican monks are evoked and depicted as founders and advocates of a world order, the execution of which would finally erase the dividing lines of humanity. However massive the obstacles facing Dominican ideology – secularization, the influx of “competing” denominations, lack of resources, to name just few – the above introduction appears untroubled by their existence.

But is it plausible to claim that Vitoria’s work instigated a tradition of human rights which the United Nations carries forward today? And are human rights or have they been an unambiguous phenomenon as the Dominican group suggests, despite the colossal academic critique cast upon their ostensibly universal, indivisible and apolitical nature? It is easy to make such historical associations, but would a closer scrutiny reveal differences, even fundamental, in how the notion of human rights was employed by Vitoria and how we employ them today. And, behind the rhetoric, what role did Vitoria’s jurisprudence play in 16th century politics and what is the impact of the actions of the United Nations in the 21st century struggle for global justice?

III. Fragmentation in a Historical Context

1. Introduction

As is well known, many regard Vitoria as having instituted the “problematic” of international law. Vitoria faced a world ruled by sovereigns whose conflicting interests needed to be reconciled in a way that left them independent and equal, yet bound to a normativity that rises from their will or comes down from above or, rather, the two combined. In other words, something generations of international lawyers have faced ever since. Vitoria’s legacy has been utilized in various ways. Those interested in doctrinal work have used Vitoria’s texts on the law of war to construct continuums in which humanitarian law develops through nascent and early stages to the highly-sophisticated forms of the present. Others with a more theoretical inclination have tended to see Vitoria’s works as the first attempt to answer the fundamental question of public international law, namely, “how is order between sovereign entities possible?”

Quite often Vitoria's writing has been isolated from the "more general intellectual and social matrix"²¹ out of which it arose and within which it was to be applied and treated as an early sign of a particular ideological stance or movement that has shaped the course of human history right up to the present, in the development of which international legal rules have become entangled. Perhaps most international lawyers have a gut-feeling that whatever our predecessors did or wrote, their world and worldview was somehow simpler and more manageable, divisions were less fundamental and disciplinary disintegration, as we have and understand it today, was not something they recognized or had to consider.

While the question about the fundamental nature of international law feels too ambitious and less relevant today, Vitoria's work resembles, in many ways, the vision and ethos of today's international lawyers. Universal justice, cosmopolitanism, sovereignty and equality are all notions that *can* be detected in his work as well. This is why it has been so easy to create connections between later works and Vitoria. But there are problems in creating such uncomplicated historical links. Pure textual analysis may create the impression that doctrinal development equals social development; the more sophisticated the doctrine the better the conditions of social life. Such an outlook considers the relation of law and social life unambiguous and mutually supportive, and places a progressive logic into the heart of both. The second problem is the very idea that normative visions of the world would share a common methodological base; that sovereign discord was central to Vitoria's thought is often simply presumed.

The third associated problem is harder to point out. It has to do with the thought that assumptions of established intellectual traditions are uncontroversial, their effects beneficial, and that historical events and figures support both ideas; settled approaches and forms of action as well as idiosyncratic beliefs pave the way to a better tomorrow. For instance, a constitutionalist, who posits the United Nations at the apex of his/hers world order and regards the Charter as its constitution, may refer to Vitoria and make the following presumptions; that Vitoria's vision and the Charter acknowledge the equal standing of all nations, at least formally; that Vitoria's international law and the "Charter-led" international law impose normative demands on state behavior, efficiently delimiting state behavior horizontally and vertically, and as a corollary,

²¹ Q. Skinner, *The Foundations of Modern Political Thought. Volume One: The Renaissance*, 1978, x.

that law and politics are distinct phenomenon; and, finally, that there is an agency that embodies these benevolent ideas and in which crucial decisions affecting their realization are made. For Vitoria the agency is the European-universal culture in general, whereas the constitutionalist's agency is the United Nations whose operation embodies the pursuit of European-universal ideals.

In what follows, the world is viewed from Vitoria's perspective, on his terms and the analysis has two major objectives. The first is to examine Vitoria's texts and look at the context in which he wrote more closely. This should answer some fundamental questions: what assumptions guided his worldview? Was his international law concerned with a world order to which sovereign states were central? What political challenges influenced his writing? How should one approach the relation of Vitoria's work and Spanish colonialism? Did fragmentation, intellectual or practical, bother him? Answering such questions should tell whether modern interpretations of Vitoria are based on misguided assumptions. Two conflicting readings of Vitoria are presented and used to elucidate how modern scholars often judge past writing with today's concerns and standards in mind.

A further objective relates to the place of legal traditions in today's international world. Some of the problematic assumptions and implications of the UN-centered vision of the world will be highlighted and discussed. An example of the activities of the United Nations will be given in order to display how the emphasis ought to be shifted from institutional questions and formal legal analysis to other forms of action which could be more fruitful in the promotion of some of the core human rights. This aims at opening new directions to both scholarship and practice and promotes the need to engage in constant self-reflection about the assumptions, stakes, limits, possibilities and effects involved in any given professional context and setting.

2. One, Two, Three Vitorias?

Most modern scholars have interpreted Vitoria to base his answer on international law's binding force on an *a priori* moral order which should constrain sovereign behavior. They have then either rejected Vitoria's moral vision as irrelevant in the face of sovereign power or as an important reminder of the fact that universal principles (should) always animate and control state behavior. Vitoria's position as a pioneer of in-

ternational law is based on James Brown Scott's work.²² He reads Vitoria as having founded a new international order in which "the law applicable to members of the Christian community was found to be applicable to non-Christians; and the law of nations, once confined to Christendom, ... [had] become international".²³ A global order based on religious and cultural tolerance is, according to Scott, at the heart of Vitoria's work. He sees Vitoria as a champion of non-Christian rights with no bias in favor of Christian polities. "[E]quality of States, applicable not merely to the States of Christendom and of Europe but also to the barbarian principalities in the Western World of Columbus"²⁴ is what Vitoria had in mind, much in the vein of the UN Charter Preamble which reads of "the equal rights of men and women and of nations large and small". What had been European, becomes universal in Vitoria's work. Scott's belief in the Christian vision makes him label the Spanish led colonial project as an early civilizing mission devoid of self-interest and exploitation, created for the benefit of the Indians who lived "in an imperfect state of civilization".²⁵ Although Scott closes his eyes to the realities of Spanish colonialism and treats Vitoria and Christianity as representatives of a universal morality, the formal equality of the Indians, as that morality's co-occupants, remains, for Scott, the main principle of Vitoria's international law.

This unreservedly admiring reading has been challenged by recent critical scholarship. The work of Antony Anghie has been central in re-examining the role international law played in the colonial encounter.²⁶ Anghie too reads Vitoria as moving toward a new world order to which even the native peoples of the Americas belong, but approaches Vitoria's texts from a very different perspective. According to Anghie, Vitoria's work has an ambivalent undertone and is ultimately aimed at providing justification for the imperial ambitions of the West. In the

²² Scott was a dedicated Catholic as well as an early advocate of international arbitration who utilized his position as the General Editor of the Classics of International Law series to promote the efforts of his co-religionist.

²³ J. Brown Scott, *The Spanish Conception of International Law and of Sanctions*, 1934, 1-2.

²⁴ Id., *The Spanish Origin of International Law. Francisco de Vitoria and His Law of Nations*, 1934, 281. Quite interestingly, Scott does not discuss the status of Islamic or African or Oriental polities in Vitoria's thought, as if they were non-existent.

²⁵ Id., see note 24, 287.

²⁶ I base my reading of Anghie on his *Imperialism, Sovereignty and the Making of International Law*, 2005.

veil of equality and neutrality, Vitoria justifies the usurpation of non-western territory. Vitoria absorbs the Indians into the ambit of a universal law which reflects the values and beliefs of Christian societies. This law sanctions western presence in the Americas and, eventually, the appropriation of Indian land and resources. While Vitoria's international law endows the Indians with similar rights as Christians, it has a profound structural bias in favor of Christianity which renders the notion of "equality" meaningless.

Anghie argues that no legal framework regulated Spanish-Indian relations.²⁷ Thus, "international law was created out of the unique issues generated by the encounter between the Spanish and the Indians."²⁸ In contrast to Scott, then, Anghie denies the idea that a finalized body of rules was simply expanded to govern the relations of western and non-western polities as well. For him, the principle of sovereign equality was a useful analytical tool in conceptualizing and systematizing the more or less homogenous state centred system of Europe and could not be used to analyze the structures of the 16th century global community. Anghie argues that the Spanish title over the Americas was traditionally settled "by applying the jurisprudence developed by the Church to deal with the Saracens to the Indies."²⁹ In his eyes, divine law administered by the Pope stood above positive and natural law and granted the Pope the right to exercise universal jurisdiction. Thus, European sovereigns could rely on papal sanction whenever they needed legitimation for their conquests of pagan territory.³⁰ Anghie reads Vitoria to have rejected this traditional framework. In his words "Vitoria ... creates a new system of international law which essentially displaces divine law and its administrator, the Pope, and replaces it with natural law administered by a secular sovereign."³¹ Just like Scott, Anghie interprets Vitoria to mean that Amerindians belong to the realm of this natural law and enjoy the same rights as Europeans. The dictates of Vitoria's new natural law reflect the exercise of human reason. Vitoria equates its exercise with the maintenance of European customs and beliefs. Because the Indians lead lives that resemble European-universal lifestyle, they are fellow humans, have an equal standing in the realm of natural law, and the Spanish have no right to appropriate their land or

²⁷ Anghie, see note 26, 15.

²⁸ Ibid.

²⁹ Ibid., 17.

³⁰ Ibid., 17.

³¹ Ibid., 17-18.

property.³² One expression of Vitoria's universal rationality is the *ius gentium*. It consists of rules to which all nations adhere. According to Vitoria the Spaniards have, for instance, the right to travel and trade in Indian land. These rights belong reciprocally to the Indians.

According to Anghie the realities of Spanish colonialism mean that "Vitoria's scheme finally endorses and legitimizes endless Spanish incursions into Indian society".³³ The sole enforcement mechanism of Vitoria's *ius gentium* is war. Anghie interprets this to mean that the Indians will inevitably and continuously, with the colonial realities in mind, resist Spanish penetration and breach the rules of Vitoria's new international law. This resistance sanctions Spanish retaliation and transfers title over native land and property into Spanish hands in accordance with Vitoria's law of war.³⁴ Vitoria's doctrine of war is based on the presumption that in any conflict only one of the parties, the injured party, is waging a just war and that only a just prince may wage war legitimately. Anghie reads some of Vitoria's comments on the status of the Saracens to mean that all non-Christians, the Amerindians included, "are inherently incapable of waging a just war".³⁵ This leads to his pessimistic conclusion: "the Indians are excluded from the realm of sovereignty and exist only as the objects against which Christian sovereignty may exercise its power to wage war".³⁶ In his eyes, Vitoria is not dealing with the (defining international law) question "of order among sovereign states but [with] the problem of order among societies belonging to two different cultural systems".³⁷ This problem is solved by creating a system in which all peoples stand as equals. Vitoria's equality is based on an unequal assimilation of the two as Christian customs and values are at the basis of his universal system. A central part of that system is his *ius gentium* that governs the relations of western and non-western polities. These rules accord the West the right to engage in its particular activities within the non-Christian world. Resistance against their exercise grants Christians a right to wage war. For Anghie, Vitoria categorically denies the right of the non-Christians to wage war. As warfare is a central attribute and tool of 16th century politics, Vitoria's denial means that the Amerindians, and non-

³² Ibid., 18-20.

³³ Ibid., 21.

³⁴ Ibid., 21 and 24. See below under III. 4.

³⁵ Ibid., 26.

³⁶ Ibid.

³⁷ Ibid., 28.

Christians more generally, have no sovereignty, no means, whether legal or practical, to oppose Spanish-European occupation. For Anghie, then, Vitoria is a tragic handmaiden of Spanish imperialism.

Although at the outset Anghie and Scott interpret Vitoria's work in a similar way, they end up in opposite positions. Both perceive Vitoria as a trendsetter who coined a disciplinary structure for later scholars. Sovereign (mis)behavior is central to that structure. Scott attempts to establish that Vitoria is a first naturalist whose natural law overrides sovereign consent or is in harmony with it, whereas Anghie treats Vitoria's natural law as an apology for the Spanish empire which shatters the meaning of Indian sovereignty. If other positivists start from the premiss that all states enjoy at least formal sovereignty, Anghie restricts its occurrence to the western scene due to his cultural scheme. Both writers detach Vitoria's religious dogma and doctrine from the new and secular international law and view Christianity as only his implicit driving force. Both engage in a narrow textual analysis only and do not consider Vitoria's intellectual and spiritual background nor the political circumstances of contemporary Europe. But are their interpretations plausible even if methodological differences between us and Vitoria exist?

3. The Foundations of Vitoria's Thought

When one begins to explore Vitoria's thought it soon becomes clear that his theology cannot be isolated from the rest of his work. Rather, everything he wrote was based on his profound religious vocation and his background leaves no doubt about this. Vitoria was a friar of the Dominican Order, he led a monastery life and had bound himself to personal poverty and celibacy. The Order had above all one sacred purpose; its members had dedicated themselves to seek the salvation of souls by proclaiming the gospel the world over.³⁸ Studying, preaching, and teaching were focal in this ambitious task and formed the means with which the Christian vision was explicated and possibly attained. Through rigorous study the aspiring friar strove to achieve a holistic understanding of God's universe, facilitating the guidance of Christians and conversion of those still outside the Catholic Church. For Vitoria, the bible was *veritas ipsissima*, the black-box of humanity whose secrets

³⁸ W.A. Hinnebusch, *The History of the Dominican Order. Vol. II, Intellectual and Cultural Life to 1500*, 1973, 3-6.

the clergy alone could unravel, although the biblical fundamentals were unequivocal. While Vitoria discusses secular issues and uses an eclectic group of pagan philosophers as authoritative sources, Christian dogma invariably underlies and animates the discussion. For him, the philosopher judges “the nature of things as they are in themselves” and the theologian “considers them in their relation to God *conceived as being both their origin and their end*” (emphasis added).³⁹ Conclusions pertaining directly to God presume a belief in Christian revelation, whereas conclusions derived through cognitive faculties do not. Because rational conclusions do not presuppose faith, “they can be extracted from their theological context and judged, from the point of view of natural reason, as purely philosophical conclusions”.⁴⁰ But in a fundamental way they are no less theological; philosophy simply completes his theology, making the Christian universe and the human one more intelligible and creating a more integral and defensible theology. Salvation in the future life remains the ultimate horizon. Vitoria’s discussion on law and politics is founded on these divine premises. Since God’s imprint is ubiquitous, political power and the laws that regulate its use are derived from God. A passage from Romans, which Vitoria reiterates repeatedly, reveals the source of all authority: “Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God.”⁴¹ And God is the sole source of normativity within the Vitorian worldview as His laws delineate the contours and content of political life. It will be discussed in the following what implications this “base” has on Vitoria’s jurisprudence and politics before considering the two lectures that gave him the reputation of being a founding father of international law.

a. Vitoria and the Order of the Universe

In methodology and doctrine, Vitoria mimicked St. Thomas Aquinas, his intellectual godfather and fellow Dominican. A central structural aspect to which Vitoria subscribed was “Aquinas’s vision of a universe

³⁹ E. Gilson, *The Christian Philosophy of St. Thomas Aquinas*, 1957, 9. While the quotes from Gilson only relate to Aquinas’s work, the analogy between Aquinas and Vitoria rests on a firm base; both were Dominicans and Vitoria owns his doctrine, methodology and his scholastic style to Aquinas.

⁴⁰ Gilson, see note 39, 9.

⁴¹ This is from Romans 13:1.

ruled by a hierarchy of laws".⁴² The four categories of law, which St. Thomas had outlined in his *Summa Theologica*, provided an ethical framework within which all powers were to be exercised. Since all laws stemmed from and were a reflection of God's benign will, Vitoria made no difference between law and morality or between law and reason; these qualities were inbuilt elements of whichever type of law. Because God's creation was purposeful, it had endowed humanity and nature with capabilities with which they could realize their particular purposes. Thus an eternal, unchangeable law was built into the fabric of the universe. The *lex aeterna* reflected the idea, in the words of St. Thomas, that "the whole community of the universe is governed by Divine Reason" which "has the nature of a law".⁴³

The second type of law was divine law whose precepts were "supernaturally revealed certifications of natural law and determinations of it with a view to man's ultimate end of eternal blessedness".⁴⁴ Divine law shares the ontology of both natural and positive law as all three direct human behavior. Both external and "internal" behavior affects the odds of salvation. But whereas positive law deals with external conduct, divine and natural law are internally orientated. Expressly, divine law is ordained "to an end of eternal happiness which is disproportionate to man's natural faculty", whereas natural law includes those rational precepts that are open to all humans and deal with man's "natural faculty".⁴⁵ Divine law completes human knowledge and refines the conscience to meet the strict requirements that condition the attainment of eternal life.

⁴² Q. Skinner, *The Foundations of Modern Political Thought, Volume II, The Age of Reformation*, 1978, 148.

⁴³ St. Thomas Aquinas, *Summa Theologica*, 1981 (five volumes, translated by fathers of the English Dominican Province). Aquinas divided the *Summa* in three parts and the second part into further two parts. My references to the *Summa* first refer to the pages in the English edition, then to the part in which it is originally found (I., first part; I.-II. first part of the second part; II.-II. second part of the second part; III., third part), and then to the question and article in which the quote is within the original part. Here the quote is from 996, I.-II., question 91, article 1.

⁴⁴ A.S. McGrade, "Rights, Natural Rights, and the Philosophy of Law" in: N. Kretzmann/ A. Kenny/ J. Pinborg (eds), *The Cambridge History of Later Medieval Philosophy. From the Rediscovery of Aristotle to the Disintegration of Scholasticism 1100-1600*, 1982, 751.

⁴⁵ Aquinas, see note 43, 998-999, I.-II., question 91, article 4.

In his treatment of natural law, Vitoria mimicked St. Thomas. The latter had famously defined natural law as “nothing else than the rational creature’s participation of the eternal law”.⁴⁶ It is a specific exercise of eternal law which is characteristic to humans only. Natural law was an innate element of *all humanity*, “channelled into us” unavoidably, by which humans “judge what is right by natural inclination”.⁴⁷ This was at the basis of the claim that “unbelief does not cancel ... natural law”,⁴⁸ that is, no knowledge of Christian revelation or divine positive law was required in order to seize and follow the principles of this ethical system.⁴⁹ Non-Christians too were guided by *ius naturale*, although they remained unaware that it was the invisible hand of the Christian God that directed them. Self-preservation and reproduction are natural inclinations or “laws” which humanity shares with other animals, but only humans by virtue of their rational nature have a natural inclination to do good deeds and to live in society. These inclinations are wholly independent of any legislative measure.⁵⁰ The precepts of natural law have their own internal hierarchy as the *ius naturale* contains varying degrees of precepts with varying degrees of “validity”. At the zenith stands a broadly formulated ethical guideline, good is to be done and evil avoided, from which all other natural law precepts flow.⁵¹ It is this foundational principle and other kindred principles that, Vitoria presumes, form the basis for the lives of all peoples regardless of time and place. Vitoria makes a distinction between primary and secondary precepts when these very first principles are trans-

⁴⁶ Id., see note 43, 997, I.-II., question 91, article 2.

⁴⁷ F. de Vitoria, *Political Writings, Cambridge Texts in the History of Political Thought*, A. Pagden/ J. Lawrance (eds), 1991. The quote is taken from Vitoria’s lecture “On Law”, 163 and 169. The book consists of the treatises: “On Civil Power”; “I. On the Power of the Church”; “II. On the Power of the Church”; “On Law”; “On Dietary Laws or Self-Restraint”; “On the American Indians”; and “On the Law of War”. Below, I refer directly to the individual treatises.

⁴⁸ Vitoria, see note 47, “On the American Indians”, 244.

⁴⁹ Skinner, see note 42, 151. See also B. Hamilton, *Political Thought in Sixteenth Century Spain. A Study of the Political Ideas of Vitoria, De Soto, Suarez, and Molina*, 1963, 19. On these, see Vitoria, ‘On Law’, see note 47, 163-164.

⁵⁰ “It [natural law] is ... always binding” and thus “there is no need to wait for its promulgation before it becomes binding”. Vitoria, see note 47, “On Law”, 160.

⁵¹ Vitoria, see note 47, “On Law”, 170-172.

formed into more detailed rules of natural law. To the first category belong principles that are similarly universal in their occurrence. These are a set of self-evident moral and societal principles stemming directly from the idea embedded in the first premise. The Decalogue includes such obvious moral imperatives as; “thou shall not kill”, “thou shall not steal”.⁵² However, these “necessary inferences” from the first principles are no longer absolute but can be modified under restricted circumstances (e.g. killing is sanctioned in self-defence).⁵³ Further down were additional deductions from the first principles that varied according to time and place. Loyal to Aquinas’s systematics, Vitoria treated these secondary and tertiary principles as providing “the rational underpinnings for all codified laws”.⁵⁴

In his treatment of positive law, Vitoria, again, leaned on St. Thomas who had defined it as “an ordinance of reason for the common good, made by him who has care of the community, and promulgated”.⁵⁵ Thus, even the patently obvious natural law precepts, such as “do not murder” or “do not steal”, need some kind of an enactment to make them part of positive law, although their authority in no way depends on legislation. While the whole of humanity is guided by natural law, humans live in remarkably diverse conditions to which standardized solutions do not fit. Thus, the content of positive laws may vary to suit local circumstances.⁵⁶ But unlike the higher precepts of natural law, these “local laws” require an enactment, established custom or some other determination in order to come into force.⁵⁷ But this variation of positive law does not detach it from its base. All positive law is ultimately in harmony with natural law as it merely verifies what nature

⁵² The Ten Commandments were part of both natural and divine law as both have to do with the instructions with which God directed the course of humankind.

⁵³ Vitoria, see note 47, “On Law”, 170-172. The term “necessary inferences” is from Hamilton, see note 49, 14.

⁵⁴ Pagden/ Lawrance, “Introduction” in: Vitoria, see note 47, xv.

⁵⁵ Aquinas, see note 43, 995, I.-II., question 90, article 4. Vitoria concurs with Aquinas’s definition. For this and for Vitoria’s discussion on positive law more generally see note 47, “On Law”, 155-163.

⁵⁶ Vitoria, see note 47, “On Law”, 183-185. Positive laws may also be abrogated and changed when it contributes to the “common good”.

⁵⁷ Hence, promulgation does not refer solely to written law. Vitoria answers the question “Can custom obtain the force of law?” affirmatively, though only if certain prerequisites are met. Vitoria, see note 47, “On Law”, 185.

dictates. When positive law “deflects from the law of nature, it is no longer a law but a perversion of law”,⁵⁸ i.e. a non-law to begin with.

Vitoria’s treatment of the *ius gentium* was scarce and somewhat inconsistent. In the Thomist legal taxonomy he placed it under positive rather than natural law.⁵⁹ According to Vitoria *ius gentium* can be distinguished from *ius naturale* and it is “contained more under positive than under natural law”.⁶⁰ Unlike natural law, which is “equal and absolutely just”, the rules of *ius gentium* are not directly ethical; their justness arises in relation to a third concept. Vitoria uses the example of private property (a concept based on the law of nations) to elucidate the idea. Ownership is not equitable or just in itself, “but such a division of property is ordered for the peace and concord of men which cannot be preserved unless every one should have his property clearly defined”.⁶¹ Because division of property is highly conducive to the common good (a condition of all positive laws), it is equal and just in a “secondary way”. This gives proprietary rights the ethicality which is a precondition of all laws. Vitoria himself states that “the *ius gentium* so closely approaches to the natural law that the natural law cannot be preserved without this *ius gentium*”.⁶² The inviolability of ambassadors is a good example of this; their immunity is mandatory for otherwise “they could not put an end to wars”.⁶³

Vitoria’s language is inconsistent and passages such as “the law of nations ... either is or derives from natural law”⁶⁴ tend to suggest that his *ius gentium* would not always be positive law. Likewise, he seems to make a distinction between absolute rules of *ius gentium* derived from natural law (which all humanity presumably agrees with), and rules “not derived from natural law” in which case the “consent of the

⁵⁸ Aquinas, see note 43, 1014, I.-II., question 95, article 2.

⁵⁹ Vitoria’s most comprehensive discussion on the law of nations is found in his *De Jure Gentium et Naturali* (a commentary on Aquinas’s *Summa Theologiae, Secunda Secundae*, question 57, art. 3), which is reprinted in Scott, see note 23, Appendix E, cxi-cxiv. Skinner, see note 42, 151-153 and Hamilton, see note 49, 98-100, concur with this basic argument.

⁶⁰ Vitoria, see note 59, cxi.

⁶¹ Ibid.

⁶² Vitoria, see note 59, cxiii.

⁶³ Ibid.

⁶⁴ Vitoria, see note 47, “On the American Indians”, 278.

greater part of the world is enough to make it binding”,⁶⁵ without making any substantive commitment as to which types of rules belong to which category. Vitoria also argues that since the *ius gentium* is not “natural law ... it can be abrogated”, but since it is impossible to obtain the “consensus of the whole world” such an abrogation is unlikely.⁶⁶ Despite the confusion, few generalizations of Vitoria’s international law can be made. It is positive law, based either on “pacts or agreements” or on widespread, often universal custom. Vitoria’s allusions to natural law refer to the moral foundation which the rules of *ius gentium* have (i.e. they are based more or less directly on natural law) and to his belief in the universality of the practices it includes. Property rights and the right to trade, for instance, are not culturally determined contingencies but universally applicable rules which form the backbone of the good life of every human society, across religious and cultural boundaries. Vitoria interpreted these practices to be in harmony with the dictates of natural law and with the use of reason in general. Thus, his claim that the rules of *ius gentium* are part of positive law is simply posited, and their universal validity is based on this presumed worldwide custom. European practices were universal attributes of human life, not particular phenomena with a particular pedigree. Vitoria accommodated his abstractions to a set of circumstances to which he had been socialized and, similarly, he interpreted those circumstances to fit into the intellectual framework which had been modified and solidified repeatedly by his Christian predecessors. Repetition equals reality. That the idea of, say, proprietary rights remained thoroughly unintelligible for the Amerindian mindset did not bother Vitoria as he had an unconditional belief in the Christian vision towards which humanity was marching. This cultural “arrogance” is a main element in Anghie’s critique against Vitoria. But his belief in the universality of the Christian way of life is not yet an argument for non-Christian exploitation or an argument against non-Christian sovereignty. On the contrary, as Vitoria constantly reiterated, all non-Christians were under the influence of God’s natural law and entitled to live the good-life without Christian interference.

⁶⁵ Ibid., 281. It will be dealt with the content of the rules of Vitoria’s *ius gentium* in more detail when discussing the Indian lectures.

⁶⁶ Vitoria, see note 59, cxiii.

b. Vitoria's Politics; Spiritual and Temporal

God's laws shaped the contours and content of political life. There were two types of politics, spiritual and secular. Both govern human societies, but in distinct ways. Vitoria reiterates the medieval premiss "For there is no power but of God" throughout his texts to establish the origins of power in both spheres. The commands of God, which both types of politics mediate to the masses, not only lay down the general fabric within which human leadership operates but constantly govern and encumber the exercise of power within it. Vitoria's discussion on politics is targeted at answering and repudiating the work of Martin Luther, whose work undermined the authority and teaching of the Catholic Church. As Quentin Skinner has noted, a central unifying theme of the body of work produced by Vitoria and his fellow neo-Thomists was the refutation of the "impious" claims advanced by Luther and Christian humanists.⁶⁷ Vitoria not only thought that God's will was intelligible but that his commands were just and rational and could be followed in a way which would lead to earthly happiness (the objective of secular politics) and eternal salvation (the objective of humanity and spiritual power). It was this fundamental juristic structure that Luther questioned. For Luther, humans had no capacity "to intuit and follow the laws of God", because His will remained beyond human reach.⁶⁸ And because humanity is "absolutely a servant of sin" and "unable to desire anything good",⁶⁹ salvation could not be achieved by human effort; it depended exclusively on the impenetrable will of God. This means that there is no place for a single authoritative intermediary (the Catholic Church) between God and individual Christians. Each Christian was equally obliged to and capable of ministering one's co-religionists' spiritual welfare, regardless of the standing one had in society.⁷⁰ Ecclesiastical hierarchies and jurisdictional powers were "not a matter of authority and power" in the real sense of the words.⁷¹ The practices and interpretations of the

⁶⁷ Skinner, see note 42, 138. Positions on Luther's views are derived solely from Skinner's account and Luther's texts have been consulted only to the extent that the validity of Skinner's reading is confirmed.

⁶⁸ Skinner, see note 42, 4.

⁶⁹ *The Bondage of the Will (in Finnish Sidottu Ratkaisuvälta)*, 1952, originally published in 1525, 164 and 176 (translations from Finnish are mine).

⁷⁰ Skinner, see note 42, 11.

⁷¹ *Temporal Authority; to What Extent it Should be Obeyed (1523)*, quoted in Skinner, see note 42, 14.

Church cannot claim to possess any divine authority because God's will is not open to humans. God's word can only be revealed, offered, and preached through the written word of the bible.⁷² Moreover, Luther places the Church under the supervision of the secular ruler who is given the right to assign and discharge clergy members and to have control over Church property.⁷³

Vitoria rejected these Lutheran contentions on a number of grounds. He refers to a number of biblical passages and to other Christian and pagan sources to prove that there is a supernatural end towards which the life of the faithful is directed and that the Church was instituted personally by Christ for its attainment.⁷⁴ The Church has law-making powers so that it can carry out its divine mission and the Pope stands at the apex of the ecclesiastical organization.⁷⁵ Vitoria defends catholic traditions; the consecration of the sacraments and established biblical interpretations are fundamentally important "to gain life eternal".⁷⁶ At the base of this argument is Vitoria's belief in the human ability to detect and interpret God's will which the catholic doctrine reflects. Because salvation is the final end of humankind, Vitoria prioritizes the Church's mission over the mission of secular politics. Since "temporal rulers have no expertise in divine law", Vitoria creates an absolute line of demarcation between spiritual and temporal power.⁷⁷ Under no circumstances may the latter meddle in the affairs of the Church. But this absoluteness is not bi-directional. Following Aquinas's lead, Vitoria subdues the secular authority to the spiritual when necessary "for spiritual ends".⁷⁸ Vitoria reiterates repeatedly his basic view over the relation of the two human ends; "spiritual power is far more excellent and more exalted in its supreme dignity" than the secular power, and the rationale of "spiritual power far excels that of temporal power".⁷⁹ Vitoria

⁷² See note 69, 137.

⁷³ Skinner, see note 42, 15.

⁷⁴ The crucial passage in this respect was from Matthew, 16:19. See, Vitoria, see note 47, "I On the Power of the Church", 70-82 and "II On the Power of the Church", 139-148.

⁷⁵ Skinner, see note 42, 144.

⁷⁶ *Ibid.*, 56.

⁷⁷ *Ibid.*, 52.

⁷⁸ *Ibid.*, 92. Vitoria's views on the geographical scope of the Church's jurisdiction will be discussed below as well as the effect this has on the Indian question.

⁷⁹ Vitoria, see note 47, "I. On the Power of the Church", 82.

states that the church forms a single body in which both the civil and spiritual communities reside though in a subordinate relation.⁸⁰ This means that “temporal things exist for spiritual ones, and depend on them”.⁸¹ But there is no habitual right of intervention; only in a case of necessity, when severe spiritual harm threatens, may the Pope intervene in Christian politics in order to avert the looming damage.⁸² He may both revoke an unjust law or depose a heathen prince (within Christendom) that might prove to be detrimental to Christianity.⁸³ It is left to the discretion of the Pope to determine when such occasions are at hand. This casual papal plenary power is tangible proof of Vitoria’s priorities and of the subsidiary place of secular sovereigns within the divine order. Vitoria’s discussion on the distribution of powers contributed to the centuries-long dispute waged over the supreme command of Christendom. There were three variants in the debate. Each exaggerated the factual influence of their chosen leader as well as the unity of Christendom. Ever since the Western Roman Empire had fallen at the end of the fifth century, the unity “retained by Europe as a whole ... [had become] primarily, if not solely, religious and ritual in character”.⁸⁴ The existing two extreme versions argued for the overlordship of Pope or Holy Roman Emperor over all Christians and infidels alike in both spiritual and temporal affairs, whereas the more placatory version emphasized the separateness of papal-imperial functions and spoke in terms of coordination and complementarity.⁸⁵

Luther’s outlook on human nature had led him to categorically denounce the right of the Church to intervene in political life. Spiritual guidance on the basis of the bible was all the Church was entitled to do. Secular authorities had a monopoly to use coercive power, “including

⁸⁰ Vitoria, see note 47, “I. On the Power of the Church”, 91.

⁸¹ Ibid.

⁸² Ibid., 93-94.

⁸³ Ibid., 94.

⁸⁴ F.H. Hinsley, *Sovereignty*, 1986 (2nd edition), 54.

⁸⁵ This last version, which Vitoria modified slightly in favor of the Pope, was based on the fifth century Gelasian doctrine, according to which “Christ ... separated the offices of both powers according to their proper activities and their special dignities ... so that Christian emperors would have need of bishops in order to attain eternal life and bishops would have recourse to imperial direction in the conduct of temporal affairs”, quoted in I.S. Robinson, “Church and Papacy”, in: J.H. Burns (ed.), *The Cambridge History of Medieval Political Thought c. 350-1450*, 1988, 289.

powers over the Church”,⁸⁶ in order to “punish the wicked and to protect the good”, and to maintain peaceful living conditions.⁸⁷ This led the Lutherans to conclude that political power is directly ordained by God and conferred to men precisely in order to root out the moral shortcomings of the masses.⁸⁸ This was in direct opposition to the Thomist outlook which believed that the (natural) law of God is open to each human regardless of their religious conviction. Vitoria and his fellow Thomists approached Luther’s work by sketching a genealogy of political society. They all begin by contrasting political life with an imagined (or historical) pre-political (and post-Fall) state of humanity from which the discussion advances. Vitoria speaks of a period in which humans lived “under the natural law”, meaning the time when neither divine law had been revealed nor any human laws enacted. This condition is one of freedom and equality in which no political dominion exists. Still, it is equally controlled by law (natural law) since all humans, in every condition and time, are disposed to know and follow its instructions. Moreover, it is not a solitary state; since nature had made humans unable on their own to provide for themselves “a sufficiency of the physical necessities of existence”, they were incapable of living in isolation of each other in this “state of nature” as well. And since humans were equipped with reason and virtue, they longed for companionship and the good life over and above life’s necessities (this is, again, a central aspect of the natural law which humans are able to grasp whatever the surrounding circumstances). This optimistic view on human rationality helps to explain why people are willing to exchange their “natural liberty to the constraints of political society”. Vitoria asserts that if there was no higher authority, each individual would strive for his own self-interest in totally separate directions, ripping society apart.⁸⁹ For Vitoria, this transition in no way restricts individual freedom but extends it.

Although civil power “may indeed have had its origin in nature and may thus be said to belong to natural law” it is, however, “undoubtedly not instituted by nature, but by an enactment (*lex*)”.⁹⁰ An act of

⁸⁶ Skinner, see note 42, 15.

⁸⁷ *Address to the Nobility of the German Nation*, 1520. Unfortunately, the references have to be made to the text in general since page numbers are not available.

⁸⁸ Skinner, see note 42, 139.

⁸⁹ Vitoria, see note 47, “On Civil Power”, 9.

⁹⁰ Vitoria, see note 47, “On the American Indians”, 254.

positive human law creates political society. Civil power is close to natural law in Vitoria's legal catalogue, a "necessary inference" from *ius naturale*.⁹¹ Vitoria notes that it is particularly the civil partnership "which most aptly fulfils men's needs" and that "the city is ... the most natural community, the one which is most conformable to nature".⁹² The political and social institutions and practices of Christendom set the standard and act as a benchmark against which other ways of living are measured and potentially improved. Against the Lutherans, Vitoria is clear on the fact that non-Christians too have legitimate sovereigns which neither Christian sovereigns nor the Church may depose of.⁹³ He explicitly states that grace (faith) is not the foundation of power.⁹⁴ On a more detailed level, Vitoria uses the concept of *dominium* to expound his ideas on the universality of natural law.⁹⁵ The essence of *dominium* is that all men have a natural right, *dominium*, "over not only their private property, their goods, but also over their actions, their liberty and even – with certain important qualifications – their own bodies".⁹⁶ Whether these rights are practiced in a civil society or in a more primitive society, is indifferent to their existence. Since unbelievers were considered to be in a state of sin, it was claimed that they thereby were deprived of their right to *dominium* and that the Spanish could automatically seize their land and property. But this was,

⁹¹ Similarly, J.A. Fernández-Santamaria, *The State, War and Peace. Spanish Political Thought in the Renaissance 1516-1559*, 1977, 67 ("civil power is of, but not founded on, natural law").

⁹² *Ibid.*, 8-9.

⁹³ Vitoria, see note 47, "On Civil Power", 17-18.

⁹⁴ God "gives his temporal goods to the good [Christians] and the bad [infidel]", *ibid.*, 18 and "On the American Indians", see note 47, 243 (the quote).

⁹⁵ The meaning of this concept is summarized in A. Pagden, "Dispossessing the Barbarian: the Language of Spanish Thomism and the Debate over the Property Rights of the American Indians", in: A. Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe*, 1987, 79-88. A more elaborate exposition of the concept is found in Richard Tuck's *Natural Rights Theories. Their Origin and Development*, 1-81. Pagden acknowledges that his discussion owes much to Tuck's account. A.S. Brett's, *Liberty, Right and Nature. Individual Rights in Later Scholastic Thought*, 1997, (especially) 1-164, deals with similar themes. It is difficult to get into the nuances and variations of the diverse usages of the concept of *dominium*. The basic ideas will be laid out as will its effect on Vitoria's approach to non-Christians.

⁹⁶ Pagden, see note 95, 80-81.

as Vitoria time and again argued, based on the mistaken belief that *dominium*, public or private, depended on God's grace and not on His natural law of universal occurrence.⁹⁷

This excursion to Vitoria's law and politics should reveal the mistakes of modern readers and give more credit to Vitoria's overall work. To talk about a new and secular international law maintained by sovereigns rather than God, would be an utter heresy for Vitoria. His jurisprudence is based on only one authoritative source that precedes and dictates all. Secular and spiritual authorities are only middlemen between God and humanity with no authentic autonomy. Vitoria's international law has its origins in the wisdom of God, not in some universal moral order (Scott) or in the will of Christian sovereigns (Anghie). There is no distinction between law and morality, between international law and municipal law, or between public and private acts of sovereigns. For Vitoria lawgiving is always explanatory, never constitutive. Though different rules bind different actors, such differences stem from varying capacities or varying spheres of activities within the one order.⁹⁸ Labels attached to categories of law are ultimately artificial and distort their original homogeneity. Vitoria's prince is never the source of law, but a creation of the eternal and divine order that allocates and dictates the extent of his authority both in relation to his citizens and other sovereigns. Politics embodies and reflects the dictates of the *a priori* universal order which also reveals what the right course of action in any given case is. Any dispute over the content or binding force of the holistic system is excluded by assuming its impossibility. Recourse to Christian wise men will show that no conflict exists on either point. The place of the individual is to conform to the common good which the prevailing power structure is assumed to reflect. Resistance is denied, although Vitoria's statements are confusing, even against defective political leadership on the ground that it causes more harm than good.⁹⁹

⁹⁷ Vitoria's discussion in the "On the American Indians" lecture goes through the other claims made in favor of Spanish occupation. He examines which type of Indian action might have resulted in losing their presumed *dominium*.

⁹⁸ D. Kennedy, "Primitive Legal Scholarship", *Harv. Int'l L. J.* 27 (1986), 8.

⁹⁹ The blame for sovereign misconduct lies with the community, because "the commonwealth is ... responsible for entrusting its power only to a man who will justly exercise" the power he is given (Vitoria, see note 47, "On Civil Power", 21).

Human rights, as we understand and employ them today, were not what Vitoria had in mind. For Vitoria, human dignity did not mean that individuals were dignified as themselves, as autonomous subjects separated from the pervasive morality of the divine order. Rather, only those individual acts which were in conformity with God's commands made humans noble and even then it was to God's credit since He directed all righteous human behavior. Any notion of subjectivity would have signaled a misunderstanding of the laws that structured the universe.

The shadow of the Church looms behind politics as the Pope may intervene when Christian sovereigns behave in ungodly ways. Salvation is the ultimate goal of humanity which justifies and explains this papal privilege. Vitoria's priorities are clear. While he values politics and earthly life to a certain extent, they fall far behind the consummation that awaits in the hands of God. Although unbelief was always a sin, it did not abolish the ability of the infidels to live the political life in accordance with these central dictates. Non-Christian communities fell beyond the jurisdiction of Christian sovereigns and the Pope could not usurp their land or property. This is the starting point for Vitoria's discussion on the Indian question. For Scott, it is also the end-point while for Anghie it is merely a façade hiding Vitoria's ultimate endorsement of Spanish imperialism. For the latter, the only purpose of Vitoria's natural (and international) law is to create a system that first sanctions Spanish presence in the Americas and consequently legitimizes the appropriation of native land.

4. Vitoria and *De Indis*

Vitoria held his two lectures on the Indian question almost half a century after Columbus's "discovery". By then the *conquistadores* had already subjugated the indigenous populations at a baffling pace and created a ruthless colonial regime aimed primarily at exploiting the easily accessible human and natural resources. The fundamental question which Vitoria examined was not whether the colonial project should be abandoned, but, rather, on what grounds it could be justified. Columbus had believed that he had discovered the outmost eastern coast of Asia and this created a dispute as to which of the two rivals, Spain or Portugal, was entitled to rule over the discovered land. The Portuguese claim rested on a series of papal bulls which had granted exclusive rights to the Portuguese kings over all newly discovered lands

“*usque ad indos*” (for them, all non-Christian land beyond the Islamic world).¹⁰⁰ The Spanish replied by appealing to Pope Alexander VI to grant them sovereign rights over the newly discovered territories. Alexander VI issued a series of Bulls, known as the Bulls of Donation, which conveyed upon the Spanish monarchs sovereignty over all the lands discovered and to be discovered beyond a line “drawn from pole to pole 100 miles westwards of the Azores and Cape Verde islands”, and upon Portugal a corresponding right over the eastward territories.¹⁰¹ The two parties specified the location of the line in the Treaty of Tordesillas. In return for the papal grant, the Spanish crown took upon itself the obligation to evangelize the peoples of the occupied lands.¹⁰² The Bulls rested on the highly contested assumption that the Pope “*est totius orbis dominus*”, lord of all the world, who had a divine mandate to rule over Christians and infidels in both spiritual and temporal matters. As noted, this was more a theoretical than concrete claim. Nonetheless, the Bulls were a part of the colonial rhetoric with which Spain argued for its sovereignty in the New World even if they soon realized that other arguments were required to satisfy their dissenting European rivals.¹⁰³ Twice a royal commission was called to investigate the Indian question and to provide some moral and legal guidelines with which the colonial administration was to be executed.¹⁰⁴ The latter committee was set up after a Dominican missionary on the island of Hispaniola had made an enraged public outcry over the inhumane treatment of the natives.¹⁰⁵ The findings of this committee confirmed that the Spanish had the right to rule over the Indians, and more importantly, the colonial enterprise was entitled to use native labor force and exploit their natural resources.¹⁰⁶ The committee’s work relied on

¹⁰⁰ W.G. Grewe, *The Epochs of International Law*, 2000, 230-232.

¹⁰¹ Grewe, see note 100, 233-234.

¹⁰² A. Pagden, *Spanish Imperialism and the Political Imagination. Studies in European and Spanish-American Social and Political Theory 1513-1830*, 1990, 14.

¹⁰³ For the views of the political and scholarly opponents of Spanish imperialism, see Grewe, see note 100, 236-250. Another ground evoked by the Spanish was discovery (*ibid.*, 250-255), which will shortly be dealt with in the next section.

¹⁰⁴ Pagden, see note 102, 14-16.

¹⁰⁵ Although this did not target Spanish overlordship as such, it was interpreted to have “brought into question ... the crown’s *rights* in America and above all its rights to dominium”, *ibid.*, 14-15.

¹⁰⁶ *Ibid.*, 15.

Aristotle's theory of natural slavery to rationalize Spanish sovereignty.¹⁰⁷

The essence of his theory was the idea that the physical and social laws of nature divided humans into objectively instituted socio-biological classes such as free men, women and natural slaves.¹⁰⁸ In the context of Spanish colonialism this idea was transformed uncomplicatedly to justify Spanish overlordship. Aristotle's observation, that because all material particles in the universe are in motion each one must be moved by another that is more powerful than itself,¹⁰⁹ Subnormal humans (the Indians) must be moved by the strong-minded (the Spaniards) if the harmony of the natural order is to be preserved. The natural end of the Indians is attained only if they succumb to the Spanish. A corollary of this was the "fact" that Indian mentality prevented them from having any kind of *dominium* over their property, their actions and, even, their bodies. What made this proposition easier to digest was the fact that the first peoples the Spaniards had encountered had led lives that at all points differed starkly from the European system.¹¹⁰ But the discovery and occupation of the two Amerindian "kingdoms", Mexico and Peru introduced remarkably sophisticated cultures with characteristics that resembled their European counterparts. As a result the whole discussion over the status of the Indians was reinvigorated and the basis of the entire colonial project re-examined although without implications to practice.

Vitoria begins his first lecture by asking whether the Indians, "before the arrival of the Spaniards, had true dominion, public and private?"¹¹¹ Since God's natural law had a global reach, the Indians were under its influence and capable of organizing their lives politically. Vitoria evaluates the Indian mindset and observes that the Indians "are not in point

¹⁰⁷ A. Pagden, *The Fall of Natural Man. The American Indian and the Origins of Comparative Ethnology*, 1982, 47-56.

¹⁰⁸ Accordingly, Aristotle believed that natural slavery ran in the family, "from the hour of their birth, some are marked out for subjection, others for rule", Aristotle, *Politics, Cambridge Texts in the History of Political Thought*, S. Everson (ed.), 1988, 6.

¹⁰⁹ Pagden, see note 107, 48.

¹¹⁰ As Pagden notes, they lived in "loose-knit communities with no real leaders, no technology, no personal property and frequently no clothes", *ibid.*, 58.

¹¹¹ Vitoria, see note 47, "On the American Indians", 239.

of fact madmen, but have judgment like other men".¹¹² His analysis of native competence is based on the standards of civil life which Aristotle had sketched in the *Politics*.¹¹³ According to Vitoria, the natives have "cities, proper [monogamous] marriages, magistrates and overlords, laws, industries, and commerce", and a "form of religion".¹¹⁴ He groups the natives into one homogeneous group and describes their communities as reflections of the European civil community. Vitoria convinces both himself and his audience of the ultimate similitude of the Indian and the Christian, thereby maintaining the coherence of his Christian vision. He answers the above question unequivocally: the natives "undoubtedly possessed as true dominion, both public and private, as any Christians".¹¹⁵ Thus, only post-discovery Indian action could deprive them of their undisputed rights. The second part of Vitoria's lecture lays out titles with which Spanish overlordship had or could have been justified and their detailed refutation. The first two claims related to the ideological struggle for "ritual supremacy", waged between the Spanish monarchy and the papalists.¹¹⁶ Vitoria bluntly denied the universal ambitions of both. Even if the Emperor was a universal ruler, he would have no right to "occupy the lands of the barbarians, or depose their masters ... or impose taxes on them", because his power would only be jurisdictional.¹¹⁷ Likewise, "the pope has no dominion in the lands of the infidel, since he has power only within the Church".¹¹⁸ The Pope may use temporal power "as far as is necessary

¹¹² Vitoria, *ibid.*, 250.

¹¹³ Aristotle, see note 108, 167.

¹¹⁴ Vitoria, see note 47, "On the American Indians", 250.

¹¹⁵ Vitoria, see note 47, "On the American Indians", 250.

¹¹⁶ Hinsley, see note 84, 54. When Vitoria addressed the Indian question, Charles V (1500-1558) held the crown of Spain as well as the Holy Roman Empire. Large parts of central and eastern Europe, the Iberian peninsula, parts of Italy, and the discovered territories were included in his vast empire.

¹¹⁷ Vitoria, see note 47, "On the American Indians", 258. "Jurisdictional" refers to the status of the Holy Roman Emperor, Charles V, in relation to some of his estates in Europe over which he had only a nominal overlordship.

¹¹⁸ Vitoria, see note 47, "I On the Power of the Church", 84 and "On the American Indians", 258-264. According to Vitoria "the pope ... [can] have dominion ... [only] by natural, divine, or human law" and none of the categories of law grant him such powers, see note 47, "On the American Indians", 260.

for the administration of spiritual things”,¹¹⁹ but this right does not apply in the case of the Indians because their actions, including their rejection of Christianity, in no way harms the Church. Vitoria reads the Bulls of Donation to create only a mandate and duty “to expand the Christian faith in America” through missionary work.¹²⁰ The next claimed entitlement relates to this duty of evangelization. The realization of this obligation was made possible by the *ius gentium* rule which bestowed on the Spaniards (along with the rest of humanity) the right to travel and reside in the Americas “so long as they do no harm to the barbarians”.¹²¹ Vitoria reasoned that the natives have a duty to “listen to peaceful persuasion about religion” or, even, if the preaching is done “diligently and observantly” a duty to “accept the faith of Christ under pain of mortal sin”.¹²² However, if the natives either refuse to listen to the faith or continue to reject it after peaceable persuasion, “this is still no reason to declare war on them and despoil them of their goods”.¹²³ Vitoria observes that Spanish behavior toward the natives has been filled with “provocations, savage crimes, and multitudes of unholy acts”¹²⁴ which have impeded the Church’s mission. While native refutation of Christian faith grants the Spanish no right to use force, this denial is central to Vitoria’s reasoning when he considers the circumstances which could have created Spanish title over native land.

There were four more titles – discovery, gravity of the Indians’ sins, Indian consent to Spanish mastership, and God’s judgment – which had been used to rationalize Spanish sovereignty,¹²⁵ and again Vitoria disallowed them all. Thus, he rejected all of the official grounds the Spanish had employed to justify their sovereignty in the Americas. While he did sanction Spanish presence and the Christian mission with a *ius gentium* rule, this did not yet deprive the Indians of their dominion. A precondition for the use of the travel right is that no damage is done to the natives. Anghie interprets this right to mean that the Indians will inescapably oppose Spanish presence, given the historical realities, thereby

¹¹⁹ Ibid., 258-264 (the quote is at 261).

¹²⁰ Grewe, see note 100, 326.

¹²¹ Vitoria, see note 47, “On the American Indians”, 278.

¹²² Ibid., 270-271.

¹²³ Vitoria, see note 47, “On the American Indians”, 271.

¹²⁴ Ibid.

¹²⁵ For these, see Vitoria, see note 47, “On the American Indians”, 264-265; 272-277.

sanctioning Spanish vengeance and, then transferring Indian land and property into Spanish hands.¹²⁶ Scott, on the other hand, treats Vitoria's equation of Indian and European mentality as an intellectually plausible move without engaging in any analysis on the actualities of Spanish occupation or Indian lifestyle.

In the last section of the first Indian lecture Vitoria goes over the grounds that could have established Spanish title.¹²⁷ He re-introduces the universal right "to travel and dwell" which naturally extends to the Americas under the precondition that no harm is done to the local populations. This travel right is anchored conceptually to the law of nations. The second *ius gentium* right allows the Spaniards to "trade among the barbarians, so long as they do no harm to their homeland".¹²⁸ Thirdly, the Spaniards have a right to share and enjoy "any things among the barbarians which are held in common both by their own people and by strangers" – the natives have no right to prohibit the Spanish from doing so.¹²⁹ What confirms the existence of these rights is a universal custom which in its turn is a reflection of the biblical idea of neighborly love, Vitoria's all-pervasive *opinio juris*.¹³⁰ Vitoria moves on to consider how the Spaniards may react if the barbarians bar from them the use of these rights and attack the former without cause. The extensive rights of war which a prince is usually entitled to employ must be kept in check. But if the natives, nonetheless, continue to "persist in their wickedness" the Spaniards may unleash their full military power and deprive the natives of their dominion, both public and private, in consonant with Vitoria's war doctrine. This is the first way in which the "Spaniards could have seized the lands and rule of the barbarians".¹³¹

¹²⁶ Anghie, see note 26, 21 and 24.

¹²⁷ It is hard to tell whether Vitoria's discussion is purely academic or whether he believes that some of the grounds presented have historical value and actually justify Spanish overlordship. Occasionally, his language implies that the title in question does not correspond with what went on and that it has only theoretical value. Vitoria presents eight titles, but they will be discussed only to the extent that his basic ideas come to the fore.

¹²⁸ Vitoria, see note 47, "On the American Indians", 279.

¹²⁹ *Ibid.*, 280. This is dictated by demands of equality and fairness.

¹³⁰ Vitoria, see note 47, "On the American Indians", e.g. 278-279.

¹³¹ *Ibid.*, 283.

Another just title relates to Christianity's diffusion.¹³² The missionary work is in the interest of the natives themselves for they have no chance of salvation unless they hear and accept God's truth. Again, this is in the interests of the natives themselves. As under the previous title, everything runs smoothly as long as the Spanish may freely preach the Gospel, but if the Indians obstruct the exercise of this fundamental right, the Spaniards may, if persuasion fails, continue their propagation against native will or even declare war on them if that is the only way to ensure continuous evangelization.¹³³ Vitoria takes the final step and concludes that "if the business of religion cannot otherwise be forwarded ... the Spaniards may lawfully conquer the territories of these people", and use the gory measures of the laws of war.¹³⁴ Only moderation is the demand that reasonable limits are observed in the use of force.¹³⁵ Vitoria ends his discussion on this title by expressing his fear that in practice Spain may have gone "beyond the permissible bounds of justice and religion".¹³⁶ When Vitoria's just titles are considered, it is difficult to consider them apart from the abuse that took place. Nevertheless, he allows the Spanish to use the *ius gentium* rights only under the condition that their use in no way harms the Indians. Likewise, the evangelization is to be guided by Christian charity and under no circumstances may the Indians be forced to convert. Vitoria ended the lecture "On the American Indians" on a pragmatic note by reflecting on the detrimental effects that a Spanish withdrawal would entail. He notes that if all the just titles he had presented "were inapplicable ... the whole Indian expedition and trade would cease, to the great loss of the Spaniards".¹³⁷ This leads him to claim that whatever the injustices of the ongoing occupation, "trade would not have to cease".¹³⁸ However, Spanish sovereignty would come to an end and the Indians would regain their land and property. How should one value these restraints and notions?¹³⁹

Vitoria delivered the second lecture on the Indian question, titled "On the Law of War", a few months after the first one in the summer of

¹³² Ibid., 284.

¹³³ Ibid., 285.

¹³⁴ Ibid., 285-286.

¹³⁵ Vitoria, see note 47, "On the American Indians", 286.

¹³⁶ Ibid., 286. Two other Spanish titles relate to evangelization.

¹³⁷ Vitoria, see note 47, "On the American Indians", 291.

¹³⁸ Vitoria, *ibid.*, 292.

¹³⁹ These questions are addressed below.

1539. He raised questions that equally preoccupy the minds of 21st century international lawyers. Who has authority to wage war? What conditions constitute the right to wage war? What means can be used in a just war? Like in everything else, Vitoria's discussion on war owed much to Greco-Roman ideas. The concept of "just war", which stands at the heart of Vitoria's lecture, was coined by Aristotle.¹⁴⁰ Roman scholars took the "just war tradition"¹⁴¹ further by developing a list of causes which warranted the commencement of hostilities. St. Augustine laid the basis for the Christian concept of just war. His teaching was fundamental in the way it defeated the "early Christian condemnation of war and the associated requirement that military service be refused" and, on the other hand, in the way it "transformed Antiquity's conceptions of just war ... and integrated them into a Christian view of the world".¹⁴² He also forged the conditions for just war that were to remain at the heart of the discussion right up to Vitoria: legitimate authority, just cause, proportionality, last resort and objective of peace.¹⁴³ Vitoria answers the question, "whether it is lawful for Christians to wage war?", affirmatively by leaning on Church tradition, Scripture and common sense. No doubt remains, "Christian[s] may lawfully fight and wage war".¹⁴⁴ The integrity of Vitoria's overall theory requires that no war can be just on both sides. Were it not so, the unity and oneness of the divine/natural order would be under threat. The whole idea of a humanity united in its ability to recognize and follow the laws of God would shatter if those laws could be interpreted in various ways. God's universe would fracture into discordant factions. It is the *a priori* divine order that dictates how sovereigns behave both in relation to their subjects and other sovereigns as it assigns each prince a sphere of influence and a set of prerogatives. Vitoria presumes that each prince understands the demands of the natural order and stays within the predetermined limits of his domain. He also presumes that in any conflict only one of the princes has overstepped his jurisdiction. Thus, only when a sovereign transgresses the limits of that divinely instituted domain and infringes the rights of another sovereign, does warfare become an op-

¹⁴⁰ F.H. Russell, *The Just War in the Middle Ages*, 1975, 3-4.

¹⁴¹ This is from the title of James Turner Johnson's book *Just War Tradition and the Restraint of War. A Moral and Historical Inquiry*, 1981

¹⁴² Grewe, see note 100, 107.

¹⁴³ C. Tyerman, *God's War. A New History of the Crusades*, 2006, 34.

¹⁴⁴ Vitoria, see note 47, "On the Law of War", 297.

tion;¹⁴⁵ the injured party may commence a *justum bellum* in order to punish the offender for the impious action. Vitoria's system means that, for instance, difference of religion, "enlargement of empire", or "the personal glory or convenience of the prince",¹⁴⁶ can never be causes for a just war since God proscribes and punishes such motives. A prior injury is always an absolute precondition for the use of force.

Anghie claimed that the Amerindians (and non-Christians in general) "are inherently incapable of waging a just war" and that "the sovereign, the entity empowered to wage a just war, cannot, by definition, be an Indian".¹⁴⁷ He bases his argument on a few sentences in which Vitoria discusses wars waged between Christians and Muslims, and on Vitoria's claim that no war can be just on both sides. Particularly the passage: "the wars of Turks and Saracens against Christians would be justified, since these peoples believe that they are serving God by waging them",¹⁴⁸ is in Anghie's mind crucial. But this argument is based on a textual interpretation that is, ultimately, incompatible with Vitoria's overall theory. Anghie also refers to Vitoria's means of war to further prove his conclusion. The right to use some of the war measures depends on the religious beliefs of the enemy.¹⁴⁹ The first point in which Vitoria treats the enemies unevenly is the enslavement of "innocent non-combatants", which may be carried out against pagan women and children only.¹⁵⁰ Vitoria's brutal statement that it is sometimes "lawful and expedient to kill all the enemy combatants" is an applicable rule in wars against the infidel "from whom peace can never be hoped for on any terms", which means that "the only remedy is to eliminate all of them".¹⁵¹ However, in wars fought between Christians this is not permissible because "great harm would result for mankind".¹⁵²

While Vitoria speaks of infidels as one group, it is clear that these two Christian rights are targeted against the arch-enemy of his Christianity, the Ottoman Empire, which had already ingested the remains of

¹⁴⁵ In Vitoria's words, the sole just cause for waging war "is when harm has been inflicted", *ibid.*, 303.

¹⁴⁶ *Ibid.*, 302-303.

¹⁴⁷ Anghie, see note 26, 26.

¹⁴⁸ Vitoria, see note 47, "On the Law of War", 307.

¹⁴⁹ It should be noted that most of the means of warfare belong equally to all sovereigns whatever their religious beliefs.

¹⁵⁰ Vitoria, see note 47, "On the Law of War", 318.

¹⁵¹ *Ibid.*, 321.

¹⁵² *Ibid.*

the Byzantine Empire and was closing in on the very heart of Europe. Vitoria's tone is much more moderate whenever he discusses the position of the Indians. He urges the Spanish to soften their approach towards the natives and only if the latter continue to threaten and intimidate the Spanish, do the extensive rights of war become an option. The overwhelming technological lead of the Europeans made sure that the Amerindians posed no real threat to the former. This divergent treatment is conceptually based on the dichotomy invincible/vincible ignorance with which Vitoria elucidates the basic reasons behind sovereign misbehavior.¹⁵³ Invincible ignorance refers to those who have never heard of Christ or the Gospel, such as the Amerindians. They can follow the law of nature, but their unbelief diminishes its force, which makes them susceptible to misunderstanding Spanish intentions and the demands of the natural order more generally. Vincible ignorance refers to those who have heard God's word but still refuse to accept it or twist its meaning, such as the Saracens. When Vitoria states that the Turks and Saracens "believe that they are serving God by waging"¹⁵⁴ war against the Christians, he is referring to their vincible ignorance. In other words, Vitoria's religious conviction made him argue that the wars between Christendom and the Islamic world were invariably commenced by the latter, although Christians had not harmed them in any way. But Vitoria does not mean that Christians could not harm non-Christians in a way which would not justify the latter to wage war against the former. He simply presumes that this has not, historically, been the situation in any of the wars between them. It is the only conclusion that is in line with his overall theory which emphasizes natural law's true universality.

IV. Lessons of Vitoria

A sense of discomfort arises when reading Vitoria's discussion on the above titles. To grant reciprocal rights to the natives feels absurd and condescending given their radically divergent outlook on human life and the realities of the situation. Vitoria's tone has a mixture of empathy and arrogance and his support for the interests of the Spanish colonists, against their European rivals, is more or less explicit. Scott's uncondi-

¹⁵³ This division originates from Aquinas's *Summa*, see note 43, 930-933, I.-II., question 76, articles 1-4, and 1207-1218, II.-II., question 10.

¹⁵⁴ Vitoria, see note 47, "On the Law of War", 307.

tional admiration for Vitoria engenders similar sentiments. Anghie's claim that Vitoria's system is structurally tilted in favor of the particular Christian customs and beliefs, is hard to refute. But it is equally hard to label Vitoria as an unqualified supporter of the real-life colonial project. He was well aware of the Spanish excesses as the Dominicans were among the first to send missionaries across the Atlantic. Vitoria refers to this misbehavior occasionally and his frustration is evident. It may seem infuriatingly naïve of Vitoria to write that the colonists should act compassionately towards the natives. Their "willingness to parrot Christian doctrine and profess a Christian morality while continuing to behave like savages"¹⁵⁵ should have forced Vitoria to reconsider the value and relevance of his normative utopia. In Vitoria's ideal world the Spaniards would have behaved in a Christian way and the Indians would have greeted them with brotherly love. They would have established some kind of barter economy that would have benefited both, and the missionaries would have taught the natives the truth about God and the heavenly kingdom. That is what the divine order demanded of the Spaniards. We are unable to concur with his vision as the certainties that undergird his belief system are no longer available and God's judgment seems either too distant to affect human behavior or a baseless idea to begin with. Faith alone does not bring about a just world order. We need sanctions and threats, control and enforcement mechanisms in order to curb the excesses of both states and individuals. And we despair over their absence in the international world.

Despite the fact that Vitoria's system remained unchallenged by "self-governing" sub-disciplines or by competing meta-narratives, the formal perfection of his system did not improve the social conditions of the Amerindians, just as today's declarations of, say, the General Assembly seem to have little relevance for those that remain at the sharp end of world politics. But Vitoria did not settle for mere academic work. In addition to repudiating the official colonial ideology, he made several protests to the Spanish Crown against native exploitation, after hearing the horrible accounts of the Dominican missionaries.¹⁵⁶ Still, this does not take away the ambivalence that circles his work. Vitoria had an unflinching belief in the supremacy of the Christian way. His

¹⁵⁵ J.M. Coetzee, *Diary of a Bad Year*, 2007, 219.

¹⁵⁶ In response, Charles V, The Holy Roman Emperor wrote a letter to Vitoria's home priory in Salamanca and demanded that ecclesiastic measures should be taken to prevent Vitoria from propagating his unloyal views in lecture halls, Grewe, see note 100, 241.

work has an ambiance of bravado to it that is not uncommon today; political rhetoric is saturated with nationalist sentiment and ethos that views the world through black-and-white spectacles. The Christian message of forgiveness and charity is lost in sections where he uncomplicatedly reduces the non-Christian world into a terrain of ignorance, malice and superstition. He rides on a wave of unbridled confidence as his institution and creed represent the unchallenged dogma of the day. This is why he has no need to argue that the Indians should be compelled to accept Christian-European customs; he presumes that once their charitable essence is revealed, the Indians will embrace them voluntarily.

Vitoria's teleology, the idea that God's plan is being carried out and humanity is heading towards better times, is an undertone that much international legal writing shares. Today this undertone is expressed in narratives which tell a story of a progressive discipline (of international law) that has moved from its earlier state-centrism to a phase that now recognizes the individual in the shadow of the state and is committed to promote "a. higher standards of living ... b. solutions of international economic, social, health, and related problems; and ... c. universal respect for, and observance of, human rights ... for all".¹⁵⁷ For many, the coordinated efforts of the United Nations and its Member States are decisive in the quest for global justice, just like the Catholic Church led by its clergy was decisive for Vitoria. What unites Vitoria and a European constitutionalist is the way both claim to have located the benign forces of the world. The United Nations seem to represent and pursue a set of ostensibly universal values and have a toolbox designed precisely to mend the world's injustices and generate global welfare. There is no need to look for alternatives or engage in self-reflection since there already is a framework within which the particular ideals are efficiently protected and promoted. From a pragmatic perspective, such an understanding creates cause for concern. It denotes *excessive* contentment with the *status quo*, with the structures and procedures already in place. It seems there is no need to engage in any analysis over the assumptions, consequences, limits and possibilities of the action employed, since the meta-effect of the United Nations is presumed to be positive and effective. An advocate of the United Nations might think that if only states would pay heed to the wise counsel of the Charter and other seminal international treaties, global problems could be solved or at least mitigated. While such a wish is easy to understand, it leaves unan-

¹⁵⁷ Article 55 of the UN Charter.

swered what the genuine role and relevance of the UN institutions and procedures are in the solution of global issues?

An example illustrates the problematic. The AIDS/HIV epidemic has highlighted the tension between patent rights and access to proper medication. The economic incentive needed to facilitate continuous research at pharmaceuticals leads to high-pricing of patented drugs. More than seventy per cent of patients that could benefit from antiretroviral therapy remain outside it according to a recent WHO assessment.¹⁵⁸ While it is easy to argue that access to medication is a human right, the International Covenant on Economic, Social and Cultural Rights acknowledges the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health”¹⁵⁹, it seems far more difficult to understand and affect the opaque processes of global drug distribution as well as to understand the role international law plays. While the global effort has decreased infection rates and increased the number of those properly treated, more resources are needed to gain an edge on the epidemic. What role should international lawyers play in the process? Has the legal profession done its part once the multilateral treaty is signed and the argument for access to medication is available? One small aspect of the global effort is the reporting mechanism established under the Covenant which requires states to submit reports “on the measures which they have adopted and the progress made in achieving the observance of the rights recognized”.¹⁶⁰ Based on the reports, the Committee on Economic, Social and Cultural Rights (CESCR) has composed a set of non-binding General Comments designed to clarify what the treaty requires of its Member States. General Comment No. 14 titled “The right to the highest attainable standard of health”¹⁶¹, lays out highly abstract guidelines and normative demands – such as “[h]ealth facilities, goods and services have to be accessible to everyone without discrimination”¹⁶²; “health facilities, goods and services must

¹⁵⁸ *Towards Universal Access. Scaling Up Priority HIV/AIDS Interventions in the Health Sector, Progress Report, April 2007*, WHO, 2007, 5, available at <http://www.who.int/hiv/mediacentre/universal_access_progress_report_en.pdf>.

¹⁵⁹ Article 12 (1) ICESCR.

¹⁶⁰ Article 16 ICESCR.

¹⁶¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, 2000.

¹⁶² *Ibid.*, para. 12.

also be scientifically and medically appropriate and of good quality”¹⁶³; and “health facilities, goods and services must be affordable for all”.¹⁶⁴

But what is the relevance of the CESCR mechanism or the role of the formal legal argument about the existence of a human right in this respect? Do they affect those decisions by which more resources are given to the fight against HIV/AIDS or dictate the extent to which medical companies are willing to loosen their patents? When one ploughs through the websites of pharmaceuticals and, for instance, their “Corporate Responsibility Reports”, it becomes clear that economic considerations along with public image concerns dictate the extent to which pharmaceuticals are willing to relax their intellectual property rights.

No rational person would claim that access to essential drugs is not a fundamental human right. But the tension between patent rights and health rights cannot be solved in any categorical way. While it is intellectually appealing to construct formal legal solutions to right conflicts – along the lines of *lex superior* or *lex specialis* – such constructions fail to reflect the conditions of political life in which the suggested solution has to operate. As has been compellingly argued, “the social meaning of rights is exhausted by the content of legal rights, by the institutional politics that gives them meaning and applicability. From a condition or limit of politics, they turn into an effect of politics”.¹⁶⁵ Property and drug accessibility, and rights in general, have to be balanced against each other, case by case as the practice of various human rights bodies, the European Court of Human Rights (ECHR) in particular, has amply demonstrated. But the structural constraints of global resource distribution – here, the robust protection endowed to intellectual property rights – means that the overall picture will remain bleak. That millions of people continue to die of preventable causes every year may evoke moral outrage, but such circumstances are not due to any impersonal evil but are “the product of decisions by people, decisions that are framed, implemented and defended in legal terms”.¹⁶⁶ The rights of

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ M. Koskenniemi, “Human Rights, Politics, and Love”, *Mennesker & Rettigheter* 33 (2001), 35.

¹⁶⁶ D. Kennedy, “One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream”, a keynote address at the International Law Association (British Branch) Spring Conference, SOAS, Brunei Gallery, Lon-

Sub-Saharan HIV/AIDS patients have to yield to the proprietary rights of pharmaceuticals however much it breaches the precepts of the Charter or the Universal Declaration of Human Rights. Pharmaceuticals can always defend their property by equally impeccable legal argument as an advocate of universal drug accessibility. While an argument that prefers property to human life seems detestable, such calculation is at the heart of much international legal talk and will not go away. Vitoria, too, failed to recognize the interests that dictated Spanish colonial policy and denied what Machiavelli knew all along; the Devil had irremediably pervaded the sovereign's soul.

Thus, if we add up the Covenant and the reporting mechanism, a few national cases in which courts have verified that access to essential drugs is a human right¹⁶⁷ as well as the argument that access to “life-saving medication in national health emergencies, particularly in pandemics, subject to progressive realization is part of customary international law”¹⁶⁸ what do we have? A functioning legal regime efficiently safeguarding drug accessibility? A profound insight of the global mechanisms that relate to, regulate and affect access to medication? We have neither. When the focus is solely on the end-products of transnational diplomacy, on multilateral treaties and on UN declarations and procedures, their salient nature is presumed and too much is left out. As David Kennedy has argued, “[m]yriad networks of citizens, commercial interests, civil organizations and government officials are more significant than interstate diplomacy”.¹⁶⁹ In other words, if human rights receive “meaning and applicability” through political processes in which public and private actors bargain over interests, resources and benefits, international lawyers should attempt to understand those processes better in order to find new ways to influence the outcome of distributory decisions that affect the enforcement of core human rights.¹⁷⁰ Just like

don, United Kingdom, March 4, 2006. Available at <<http://www.law.harvard.edu/faculty/dkennedy/speeches/>>.

¹⁶⁷ For these, see H.P. Hestermeyer, “Access to Medication as a Human Right”, *Max Planck UNYB* 8 (2004), 101 et seq.

¹⁶⁸ *Ibid.*, 176.

¹⁶⁹ D. Kennedy, “Challenging Expert Rule. The Politics of Global Governance”, *Sydney Law Review* 27 (2005), 7 et seq. Kennedy’s phenomenal article put into words the intuitions I had about the problems of international legal traditions.

¹⁷⁰ As Kennedy notes, there are three related assumptions and aspects to this “recalibration”: “First, the proposition that background norms and institutions are more important in global governance than we have thought. Sec-

Vitoria combined his normative blueprint with practical political action, we should combine the abstract legal argument with a more grass-root understanding and action in order to make the formal law count for something more.

The challenge would be to understand better how drug-related resources are allocated, which norms and institutions are involved, what assumptions drive their work, who influences those that call the shots, and how the impact of the decisions that affect drug allocation could be brought to light, scrutinized and contested, in intellectual and pragmatic terms. Understanding the mechanisms would enable targeted action in particular contexts in which the legal argument might be useful alongside economic and moral considerations. If prevention is considered focal, the forces and factors that contribute to the spreading of the illness should be disclosed and challenged.

For instance, we often hear the claim that excessive pricing of patented drugs is mandatory in order to maintain a resourceful research and development division. But to what extent this is a false “necessity” whose sole purpose is to end the discussion right there? Who could tell? How big a portion of the net sales of a particular pharmaceutical would a “standard” relaxation of a particular patent constitute? Knowledge in statistics and economics would be needed to formulate an argument that could persuade pharmaceutical executives and institutional investors to seriously consider the relaxation. The formal legal argument for access to medication disregards the expectations of various interest groups that tie the hands of pharmaceutical executives or politicians deliberating the content of suggested intellectual property legislation. Are the flexibilities outlined in the TRIPS agreement and the Doha Declaration viable? Their one-sided utilization will probably generate more or less veiled threats on the part of pharmaceuticals and political circles, as recent experiences have shown.¹⁷¹

ond, the idea that the vocabularies, expertise and sensibility of the professionals who manage these background norms and institutions are central elements in global governance. Third, the proposition that expert work might be reinterpreted and contested in political terms, despite the ubiquity of the conviction among international legal experts that their expert work is not political, *ibid.*, 7.

¹⁷¹ In late 2006 Thailand announced that it aimed to issue several “compulsory licenses” for patents related to AIDS and heart medications. This maneuver was based on the relaxation mechanisms under the TRIPS agreement. In response, Abbott Laboratories, a US based pharmaceutical, “announced that it has withdrawn applications to sell seven new drugs in Thailand in re-

If the mechanisms established under multilateral treaties have no effect on problems they attempt to solve, surely international lawyers should think up something new. What about the fundamentals of public and private drug development? Which rules and regimes govern those questions? Could national parliaments subsidizing medical innovation demand easy accessibility for the end products and which national and international bodies could be used today to take legal action on “drug-related” issues?

To focus on the structures, processes and instruments we already have, leaves too many questions unaddressed and sanctions the opaque mechanisms and background forces whose actions determine the broad outlines of global resource (and drug) distribution. The “conventional”, UN-centered mindset creates “a misconception that to the extent someone can do anything about anything, it will be the normal players...[and the existing institutions and instruments of] the political system”.¹⁷² Vitoria’s vision attempted to bypass the problems of enforcement by presuming their ultimate non-existence, whereas the UN-centered vision attempts to bypass them by viewing social reality from a bird’s eye view which fails to detect the ambivalences and causalities of political life that perpetually hamper and deflate the coming of the ambitiously normative UN-led world order. Both visions seem remarkably out of touch with the complexity of forces and rationale that engender violence and conflict between states and groups of humans as

sponse to the country’s decision to issue a compulsory license for the company’s antiretroviral drug Kaletra”, excerpt from article “Abbott to stop launching new drugs in Thailand in response to country’s compulsory license for antiretroviral Kaletra”, available at <<http://www.medicalnewstoday.com/articles/65274.php>>. Peter Mandelson, the EU Trade Commissioner, wrote a letter to the Thai Minister of Commerce expressing his concern for the detrimental effects the Thai policy would have on “the patent system”. While acknowledging the right of WTO members to grant compulsory licenses, the Commissioner was of the view that neither “the TRIPS agreement nor the Doha Declaration appear to justify a systematic policy of applying compulsory licenses wherever medicines exceed certain prices”. This was followed by a call for the Thai Government “to engage in direct discussions with the right holders” and to create a “constructive dialogue” which would serve the long-term needs of populations, that is, the Thai Government should pay more compensation for issuing the compulsory licenses. The letter is available at: <<http://www.wcl.american.edu/pijip/documents/mandelson07102007.pdf?rd=1>>.

¹⁷² Kennedy, see note 169, 9.

well as with the structural inequities of social life and ordinary human experience.

V. Concluding Remarks

Deep cleavages continue to divide peoples horizontally and vertically and the opaque processes of globalization seem to favor the most dominant players. The questions and points raised above are only the tip of the iceberg, a sneak peak at one corner of the operation and problems of the “global governance regime” which operates in the shadow of public politics but fundamentally affects how wealth and power are distributed between groups of humans. No engineer could have matched its complexity but it is nonetheless run by humans and constantly reshaped by the decisions we take. Perhaps some of the questions could be answered instantly or ignored as completely irrelevant. But the point was to highlight the perplexities we have to face today when considering any international issue. Fragmentation is a fait accompli which cannot be wished away by defending the integrity of public international law; such a vision will function properly only in a normative laboratory.

Anghie’s idea of a “truly universal international law” that could “further justice ... [and] increase the well being of humanity”,¹⁷³ is something we recognize and desire, just as Vitoria and Scott would have. But it is an overambitious vision. We should move our emphasis, in whichever context we work, from overtly normative blueprints or highly abstract critique to more pragmatic action that could help real people in real need without thinking that today’s global establishment already represents general will and is driven by a cosmopolitan undertone. We should understand better the assumptions, effects and limits of our own work and recognize the contingent nature of our forms of action; none of them were or are carved in stone but are the result of a historical process shaped by contingent events. Anghie’s idea of universal justice resembles the belief Vitoria had in the blessedness of the life to come. Like salvation, universal justice connotes an idea of complete freedom from the restraints of a divided and unjust world. But justice cannot be institutionalized or captured in a legal code or in some other legal process or technique. The very paradox of the idea that law is the medium towards global justice is the fact that any system of law, at a

¹⁷³ Anghie, see note 26, 317 and 320.

fundamental level, will continue to promote some interests and outlooks over others as well as safeguard the prevailing social inequities.