

Defending Empire

The School of Salamanca and the “Affair of the Indies”

The conquest, occupation, and settlement of the Americas were the first large-scale European colonizing ventures since the fall of the Roman Empire. From Columbus' first landfall on a still unidentified island in the Caribbean, which its inhabitants called Guarahani, on October 12, 1492, the Spanish – followed by the Portuguese, the French, the British, the Dutch, the Germans, and even briefly the Russians, the Swedes, and the Danes – established settlements in territories where they had no clear and obvious authority. Before long, and in varying degrees of intensity depending on the circumstances of the initial settlement, this gave rise to considerable anxiety as to what kind of rights, if any, these states might have in the lands they had occupied. In some cases the overseas territories had been acquired by treaty or purchase. In the case of the most significant in terms of sheer size and wealth, however – the Spanish, French and British in the Americas – they had been acquired by forceful occupation. Their acquisition had, that is, involved warfare, and within the European legal tradition, violence by one group of people against another could only be legitimate when it was defensive. “The best state”, as Cicero had observed in a much-quoted phrase, “never undertakes war except to keep faith or in defense of its safety”.¹ Of course, as Cicero well knew, the Roman state had frequently acquired clients, “allies” (*socii*), the need to “keep faith” with whom could be employed as a justification for what was in effect a war of conquest. But what the arguments from defence clearly could not easily do was legitimate attacks on remote populations whose very existence, in the most contentious case, had previously been entirely unknown. The debates over the legitimacy of the much publicized European “conquests” in the Americas therefore turned, inevitably, on the question of how what seemed uncontestedly to be wars of occupation and dispossession could be presented as wars of defence.² This involved an extensive reexamination, and sometimes reworking, of whole areas of the legal systems of early-modern Europe, just

as it threw into question earlier assumptions about the nature of sovereignty, utterly transformed international relations, and was ultimately responsible for the evolution of what would eventually come to be called international law.

The earliest, and most influential, contributors to this enterprise were a group of theologians who have become known as the School of Salamanca, or since some of them had only a slight connection to the University of Salamanca itself, the “Second Scholastic”. Theologians from Domingo de Soto (1494–1560) and Melchor Cano (1509–60) to the great Jesuit metaphysicians, Luís de Molina (1535–1600) and Francisco Suárez (1548–1600) – whom Leibniz claimed (improbably) to be able to be read with as much pleasure as most people read novels – were, for the most part, the pupils, and the pupils of the pupils, of Francisco de Vitoria who held the Prime Chair of Theology at Salamanca between 1526 and his death in 1546.³ “Insofar as we are learned, prudent and elegant”, wrote Cano, “we are so because we follow this outstanding man, whose work is an admirable model for every one of those things, and emulate his precepts and his example.”⁴ Although they are sometimes described vaguely as “theologians and jurists”, they were all, in fact, theologians.⁵ The discussion of the Roman law played a large role in their work, and their influence can be seen in particular in canon lawyers such as Diego Covarrubias y Leyva (1512–67) and in the civil lawyer Fernando Vázquez de Menchaca (1512–69), whom Hugo Grotius called the “pride of Spain”.⁶ But jurists were members of a distinct and, in the opinion of most theologians, inferior faculty. In the early-modern world, theology, the “mother of sciences” because it dealt directly with first causes, was considered to be above all other modes of inquiry and superior to everything that belonged to what today is called jurisprudence, as well as to most moral and political philosophy.⁷

Many of the more prominent members of the School of Salamanca acted not only as university professors but also as advisors primarily, but not exclusively, on matters of conscience to a wide range of public and private bodies. Vitoria was asked about the justice of the Portuguese slave trade, the validity of clandestine marriages, and the legitimacy of increasing the price of corn during a poor harvest. Cano advised Philip II in his struggle with Pope Paul IV and was even consulted on how best to defend the Canary Islands against attacks by French pirates. Suárez was questioned innumerable times on the Immaculate Conception, the election of the Pope, benefices, marriage contracts, and the preaching rights of the Dominicans.⁸ Vitoria once told a correspondent that his views were rarely heeded, for kings were necessarily pragmatic beings driven to think “from hand to foot and their counselors even more so”.⁹ Theology and philosophy, he claimed, should ideally be confined to professional deliberations. “I sometimes think”, he wrote, “how very foolish it is for one of my kind to think, let alone to speak, about government and public affairs. It seems to me even more absurd than a grandee pronouncing on our philosophies.”¹⁰ There was, however,

something disingenuous in these claims. Most of the topics on which the Salamanca theologians and jurists were asked their opinion had clear policy implications, and many of the major figures of the “School” – Vitoria himself, Cano, and Domingo de Soto – were taken away from their lecture halls for long periods to become diplomats (Soto was a member of the Spanish delegation at the Council of Trent) and councillors or members of that select body of spiritual-cum-political advisors, the royal confessors.

It was, however, their views on the legitimacy of their sovereign’s conquest of the Americas, and more broadly on the nature of the polity that has come to be called the Spanish Empire, for which they were best known by later generations. The involvement of the School of Salamanca in the “Affair of the Indies” had a wide and long-lasting resonance, sufficient even for that staunch anti-imperialist Samuel Johnson to remark as late as 1763: “I love the university of Salamanca, for when the Spaniards were in doubt as to the lawfulness of their conquering America, the University of Salamanca gave it as their opinion that it was not lawful.”¹¹ Johnson was being overenthusiastic. The University of Salamanca never went that far. On occasions, however, some of its members came perilously close. And their reputation as upholders of the rule of law against an otherwise unprincipled monarch, and an overambitious Pope, endured. “It is difficult for us in the present age”, wrote Sir Travers Twiss, former British Advocate General and salaried champion of Leopold II’s occupation of the Congo in 1856,

to measure the degree of courage and noble principle which impelled these excellent monks [Francisco de Vitoria and Domingo de Soto] to vindicate the right of the oppressed against the authority of the Church, the ambitions of the Crown, the avarice and pride of their countrymen, and the prejudices of their own Order. These were the early streaks of dawn, the earnest of the coming day.¹²

Twiss was referring initially to a now celebrated public lecture, *relectio* “On the Indies” (*De Indis*) or “On the American Indians”, delivered by Vitoria in January 1539.¹³ It is a text that has, ever since, been held to be the earliest attempt to transform the Roman law of nations into something that later generations would recognize as an international law.

Vitoria’s objective, he claimed, had been merely to find an answer to the question: “By what right (*ius*) were the barbarians subjected to Spanish rule?” He began, however, with a caution. “It may first of all be objected”, he admitted,

that *this whole dispute is unprofitable and fatuous* not only for those like us who have no warrant to question or censure the conduct of government in the Indies irrespective of whether or not it is rightly administered, but even for those whose business it is to frame and administer their government.

Could it be possible that Ferdinand and Isabella, “most Catholic Monarchs”, and Charles V, officially entitled “most righteous and Christian prince”,

might have failed “to make the most careful and meticulous inquiries” into a matter of such concern to both their security and their conscience? “Of course not”, Vitoria retorted, “further cavils are unnecessary, and even insolent.”¹⁴

However, he went on, in cases where some reasonable doubt might exist as to the lawfulness of a particular case, “it is pertinent to question and deliberate” the issue. No one, that is, was casting doubt on the righteousness of Ferdinand and Isabel’s or Charles V’s acts. For if the “verdict of the wise” is that an act is lawful, “anyone who accepts their opinion may be secure in his conscience *even if the action is in fact unlawful*” (emphasis added). This, in Vitoria’s cautious assessment, was the position in which Ferdinand and Isabel and Charles V had all found themselves. What was at issue, then, was not the conscience of a king, but the legal facts of the case. And although the previous “wise men” who had decided in favour of the legality of the issue might have been in good faith, it is nevertheless the case that any decision will be binding only “until such time as an equally competent authority pronounces a conflicting opinion which reopens the case or leads to a contrary verdict”. As facts change over time, so, too, will the laws and the kind of government they sustain. “For the law in such things”, wrote Vázquez de Menchaca, “is for one day only, and on another day it dies.”¹⁵ This was precisely what had occurred in the case of “this business of the barbarians”. For now, it would seem, in the light of all the evidence which currently existed, that “the matter is neither so evidently unjust of itself that one may not question where it is just, nor so evidently just that one may not wonder whether it might be unjust”. Under these circumstances, it was perfectly legitimate to reopen the case, for although

we may readily suppose that, since the affair is in the hands of men both learned and good, everything had been conducted with rectitude and justice. . . . When we hear subsequently of bloody massacres and innocent individuals pillaged of their possession and dominions, there are grounds for doubting the justice of what has been done.¹⁶

Most of the previous cavils had been proposed by the jurists. The Indians, however, were not, as Vitoria put it, “subjects [of the Spanish crown] by human – [i.e., positive] law”, and the jurists – he went on, pulling academic rank – were, therefore, “not sufficiently versed” in the matter to “form an opinion on their own”. This was clearly “a case of conscience”, and as such it was a question for the theologians (although in fact, the substance of Vitoria’s arguments are legal rather than theological). It was also the case that “theological disputations”, as distinct from legal ones, “are of the deliberative kind – undertaken that is not to argue about the truth, but to explain it”.¹⁷

By posing his question in terms of a *right*, however, Vitoria was clearly aware – as his overextended piece of self-justification makes plain – that he was raising a far wider, and for his royal master potentially far more damaging, doubt about the nature and the possible legitimacy not only of

the Spanish monarchy in the Americas but also of all empires everywhere. He was also raising questions about what right, if any, a state had to make war against another which had not caused it any direct harm. More generally he pointed to issues, which have still not been resolved, about the right of any people to impose on others what it believes to be the natural rights of all humankind or to intervene in affairs of another state in the defence of those whom it believes to be oppressed.

It was this which led the German jurist Carl Schmitt to declare in 1951 that “for four hundred years from the sixteenth to the twentieth centuries the structure of European international law (*Völkerrecht*)” had been “determined by a fundamental course of events; conquest of a new world”. It was this “legendary and unforeseen . . . and unrepeatable historical event”, he claimed, that had given rise to what he called “the traditional Eurocentric order of international law”. For the discovery of America by presenting the jurists and theologians of Christian Europe with a truly novel problem had dramatically altered the nature of the legal and moral arguments concerning what Schmitt described as the “justification of European land-appropriation as a whole”.¹⁸ And it was this which, in 1780, Jeremy Bentham had christened “international law”.

For America, and its inhabitants – despite ingenious attempts to prove that it had once been occupied by stranded Carthaginian sailors – was indisputably, in Vitoria’s words, “previously unknown to our world”.¹⁹ Whatever else the Amerindians might be, they, therefore, could clearly not be “subjects by human law”.²⁰ This meant that the only categories of law under which they might be subject were the divine, the natural, and the law of nations, all of which were believed to be binding, in different ways on all humankind. Any argument that might grant the Spanish any kind of *rights* in the Americas would, *therefore*, have to be expressed in terms of some kind of universal claim.

The earliest, and politically most contentious, of these had been papal donation. Ever since the ninth century, the canon lawyers in the service of the Curia had held that the pope as “Vicar of Christ” enjoyed both spiritual and secular authority over all the peoples of the world whatever their religious beliefs. If this were the case then the pope was in a position to grant sovereignty over a non-Christian people to a Christian prince. Acting on this belief, in 1454, Pope Nicholas V had granted to Afonso V of Portugal rights of settlement over all “provinces, islands, ports, places and seas, already acquired and which you might acquire in the future, no matter what their number size or quality” in Africa from Cape Bojador and Cape Nun, “and thence all southern coasts until their end”.²¹ After Columbus returned from his second voyage in 1493 and it became clear to all – except Columbus himself – that what he had discovered was not the outer fringes of “Cathay” but some new world whose size and potential wealth was as yet unknown, the Castilian crown hastily secured from Alexander VI five bulls which

granted it territorial rights over all those lands “as you have discovered or are about to discover” and which were not already occupied by another Christian prince.²²

One year later Spain and Portugal signed a treaty at the Spanish border town of Tordesillas, which divided the entire globe into two discrete spheres of jurisdiction, along a line set at 370 leagues west of the Cape Verde Islands. This corresponded approximately to 46°30'W, although at the time, before the invention of the marine chronometer, this could not be established with any accuracy. By means of what William Paterson, first governor of the Bank of England, contemptuously dismissed in 1701 as “certain imaginary mathematical lines between heaven and earth”, the western half of the globe went to Castile, which believed that it now controlled an unhindered route to Asia.²³ The eastern half went to Portugal, intent mainly on keeping its Castilian rivals out of the South Atlantic, which thereby came into possession of Brazil.

The treaty, however, as the English astronomer John Dee gleefully pointed out, said nothing about what happened to the line once it emerged on the far – eastern – side of the globe. Furthermore, by continuing around the globe it had, in effect, violated the terms of the bulls, which had spoken only of lands to the west.²⁴ Because both the bulls and the treaty were cast in the future tense, they also assumed that the actual inhabitants of all those territories had no legitimate claim to them. These had now become merely caretakers biding their time until the arrival of their true owners. Any attempt to resist could, therefore, be met with legitimate force.

Needless to say, most of the other rulers of Europe were generally dismissive of any such claims. The Treaty of Tordesillas was recognized to be binding between its two signatories but worthless elsewhere. As for the bulls, they, as Dee colorfully put it, “importeth not a Portingale fig”. Queen Elizabeth, said William Camden, “could not perswade her selfe the Spaniard had any rightfull title to the Bishops of Romes donation, in whom she acknowledged no prerogative, much less authority in such causes”.²⁵ In the bulls the English also believed that they could see clear evidence of a characteristically papist collusion between church and state. Alexander VI was, as the English geographer Richard Hakluyt pointed out, himself a Spaniard and “therefore no marvell thoughte he were ledd by parcialitie to favour the spanish nation though yt were to the prejudice and dommage of all others”.²⁶

Despite the absurdities and duplicities involved, on which the Spanish scholastics themselves dwelt at length, the Bulls of Donation remained for the Spanish monarchy itself the principle and, in its mind, only undisputable claim to sovereignty in the Americas until the final demise of the Kingdoms of the Indies in the nineteenth century. The *Recopilación de leyes de los reynos de Indias* of 1680, which constituted a distinct law code for the Americas, states, “By donation of the Holy Apostolic See and other just and legitimate titles We [the King of Spain] are Lord of the Western Indies and the Mainland of the Ocean Sea, which has been discovered or is

still to be discovered, and has been are incorporated into our Royal Crown of Castile.”²⁷

The Salamanca theologians, however, had no doubt that whatever other status the Americas might have, they were certainly not a gift from the pope as God’s legate on earth. Twiss was overdramatizing the case when he claimed that it had been the “scandal given by [the] extreme reach of the authority on the part of the See of Rome coupled with the cruel and rapacious abuse of the Donation made by the Spaniards” that had “provoked” a “champion from amongst the ranks of the theological casuists to step forth in [sic] behalf of the native inhabitants of the newly discovered countries”.²⁸ He was right, however, in seeing the need to deprive the papacy of its plenitude of power in secular matters, as among the first of their concerns. For whereas it might be acceptable to grant the Church some measure of precedence over the secular authority on spiritual and even moral grounds, the idea that the papacy could make grants of sovereignty ran directly counter to the hallowed, if often abused, injunction of Jesus himself to “Render . . . unto Caesar the things which are Caesar’s; and unto God the things that are God’s” (Mathew 22:21), and it raised questions about the spheres of jurisdiction shared by pope and emperor, both of whom, at one time or another, made mutually incompatible claims to universal sovereignty.

The canon lawyers, for their part, rested their claims on an argument which had been made most forcefully by the decretalist Hostiensis in the thirteenth century. If, as they assumed, the Roman Emperors had, by the terms of Justinian’s decree *Bene a Zenon*, been granted exclusive rights of property in “the world”, then the popes, as their sole true heirs, could likewise lay claim not only to sovereignty over the entire world, Christian and non-Christian, but also the right of ownership (*dominium ac proprietatem bonorum omnium*) to everything in it.²⁹ This, in turn, allowed the papacy the right to distribute that property among its subjects as it so wished. It was on this presumption that the Holy See had given jurisdiction and property rights over one half of the world to Afonso V and to Ferdinand and Isabella over the other half. Clearly, however, only the most committed champion of papal supremacy could find any unassailable reason for endorsing such a claim. It was, said Soto bluntly, nothing other than a prescription for tyranny. In practice, only the Turks had ever exercised such rights. A Christian prince, by contrast, whose rule was absolute but not arbitrary, could not make use of the goods (*bona*) of his subjects “except where it is necessary for the defence and government of the community”.³⁰

To exercise universal *dominium* the pope would, as Vitoria pointed out, have had to have acquired it through one of the three forms of law: divine, natural, or civil. Clearly, on the canon lawyers’ own evidence, papal *dominium* could not derive from either civil or natural law. And, “as for divine law, no authority is forthcoming”, wrote Soto, hence, “it is vain and willful to assert it”.³¹ All the references to secular authority in the Bible

would indeed seem to suggest a clear distinction between the domain of Christ and that of Caesar. The pope's authority, as Innocent III had decreed, was confined to spiritual rather than secular matters, except where strictly moral issues were involved.³² "It is clear from all that I have said", concluded Vitoria bluntly and categorically, "that the Spaniards when they first sailed to the lands of the barbarians carried with them no right at all to occupy their territories."³³

Papal claims to plenitude of power over the whole world, furthermore, like all universalist claims supposed the existence of a stable and recognizable cosmos. If, as Soto argued, the Latin term *terra* (or *orbis terrarum*) was taken to describe nothing more than the territorial limits of the jurisdiction of the Roman people, and if "Christendom" was deemed to be coextensive with the Empire, there were grounds for supposing that the pope might be in a position to act as an adjudicator between Christian rulers, and such rulers "are bound to accept his judgment to avoid causing all the manifold spiritual evils which must necessarily arise from any war between Christian princes".³⁴ (It was precisely this claim, widely accepted by all Christians before the Reformation, which was effectively abandoned by the Treaty of Westphalia in 1648.³⁵)

The analogous claim of the rulers of the oxymoronic "Holy Roman Empire of the German Nation", of which Charles V was of course one, to exercise *dominium* over all the world as the heirs of Augustus suffered from similar defects.³⁶ It was Soto who first addressed this question in a *relectio* entitled *De dominio* of 1534.³⁷ On the first argument he pointed out that the Romans had certainly never, in fact, exercised jurisdiction over the entire world, for "many nations were not then subjugated as is attested by Roman historical writing itself; and this point is most obvious with regard to the other hemisphere and the lands across the sea recently discovered by our countrymen". And if that were so, then clearly they could have no a priori jurisdiction over places which were previously unknown to them, nor could they claim to have exercised sovereignty over the entire world.³⁸ And even if it had been the case that the Romans had had an exact geographical knowledge of what they freely called the *orbis terrarum*, they could not, even then, claim to exercise sovereignty over any part of it, other than that which they actually administered.

The frequently cited (Christian) supposition that "God handed the world over to the Romans on account of their virtues" necessarily implied, Soto argued, that all the nations of the world had "willingly handed themselves over to the Romans on account of their zeal for justice". In historical fact, however, "[f]rom their own historians we learn that their right was in force of arms (*ius erat in armis*) and they subjugated many unwilling nations through no other title than that they were more powerful, and one cannot find where God gave them such a right".³⁹ Furthermore, the collective *virtus* of the Romans (assuming it to have existed at all) had been constituted by purely

secular and civil qualities, such as justice and fortitude, which retain their intrinsic merit, even when they are pursued for the wrong reasons. The Romans might have had the capacity for instructing the less able in the path of secular virtue, but that did not make their empire a divinely sanctified state. The supposition which had underpinned so much Christian thinking about the pagan empire was clearly false. It had been a purely human creation limited, like all such creations, in both time and space. As such, of course, its historical existence offered no possible legitimization for future imperial projects, especially those supposedly pursued in the interest of evangelization.⁴⁰

For Soto, however, there was a further, and in the long run far more compelling, reason why there could exist in the world no ruler of any kind with universal sovereignty. All the neo-Thomists were insistent that civil power could only be transferred by society acting as a single body. What was known as the “efficient power” of the commonwealth because it is “founded upon natural law” ultimately derived from God. But the “material cause” of civil power – that is, the actual task of administration and of the choice of who is to rule – must rest with the commonwealth, for, in Vitoria’s words, “in the absence of any divine law, or human elective franchise (*suffragium*) there is no convincing reason why one man should have power more than another”.⁴¹ To create a truly *universal* empire, therefore, it would be necessary, said Soto, for “a general assembly to be called on which at least the major part consented to such an election”. No one, however, could possibly imagine a general assembly of literally all the world. Even if, as the prehistory of civil society seemed to require, some such meeting had once been called, the new discoveries would have subsequently nullified its decisions, if only because, as Soto reiterated, “neither the name nor the fame of the Roman Caesars reached the Antipodes and the islands discovered by us”.⁴² The whole idea of any kind of universal rule was, as Hugo Grotius said later, nothing more than a “silly notion”.⁴³

The Roman Empire itself, however exceptional it might have been, was merely, in fact, a very large state – although this is not, of course, how any of the neo-Thomists phrased it. Soto was prepared to accept that “the imperial authority . . . surpasses all others, [and] it is the most excellent of all”, but only because it involved the rule of more than one people (*natio*). It did not, however, he continued, “follow from this that it is the only one to dominate the world”.⁴⁴

II

Vitoria and his successors had established beyond any doubt that, in Vitoria’s words, “it is clear . . . that the Spaniards when they first sailed to the land of the barbarians, carried with them no right at all to occupy their countries”.⁴⁵ The question now then was, did there exist any other claim that the Spanish might have which could be said to have been acquired after their arrival in the Americas? Any such “titles” could only be valid under one of

the four kinds of law: divine, civil, natural, and the law of nations. As we have seen, no European ruler was in a position to claim rights in America under civil law because no civil, or positive law, could apply beyond the territorial limits of the state in which it had been promulgated. Divine – that is, revealed – law made no mention of the Americas.⁴⁶ This left the natural law and the law of nations, the *ius gentium*, and it is because of their rewriting of the latter that the School of Salamanca is most often accredited with having laid the basis for a law which would be something more far-reaching than a simple domestic law applied to the wider world.

Initially the *ius gentium* had been the law used by the Romans in their dealing with the *gentes* – that is, non-Roman citizens. It was based on the *mos maiorum* or the customs of the majority, for, as Cicero had observed, “there is a fellowship that is extremely widespread shared by all with all”.⁴⁷ By the second-century CE, however, its reach had been considerably expanded and it had become enmeshed in the natural law. The jurist Gaius is widely accredited with having made it into a general law which “natural reason establishes among all men and is observed by all peoples alike [this] is called the *ius gentium*, as being the *ius* which all nations employ”.⁴⁸ In the fourteenth century, Bartolus of Sassoferrato and the commentators then divided the *ius gentium* into two: a “primary law of nations” (*ius gentium primaevum*) and a secondary one (*ius gentium secundarium*). The first of these would seem to be indistinguishable from the natural law. The second, however, since it was clearly arrived at by human agency and was generally deemed to be made up of the assembled customs of all the peoples of the world, was a species of positive, or human, law.⁴⁹

The distinction between Bartolus’ two kinds of *ius gentium* is primarily an historical one. The *ius gentium primaevum* belongs to the natural law in that it corresponds to untutored human reason and, thus, could be known to all human beings – all *homines* – everywhere, even to those living in some hypothetical pre-social condition, and is, consequently, in Vitoria’s terms, “equitable of itself”. The *ius gentium secundarium*, however, is a species of positive law which, as Vitoria said of it, “is not equitable of itself but has been established by human statute grounded in reason”.⁵⁰ Parts of the law of nations clearly derive unproblematically from the natural law, and these are “manifestly sufficient to enable it [the law of nations] to enforce binding rights”. However, he went on, “even on the occasions when it is not derived from natural law, the consent of the greater part of the world, is enough to make it binding, especially when it is for the common good of all men”.⁵¹

We might say, then, that the law of nations was that law which *could* have been agreed on by all the peoples of the world had anyone been in a position to discover what the collective reasoning of its members might be. “Reason”, as Domingo de Soto put it, “dictates what are its particularities.”⁵² This distinguishes it from the purely civil law of individual states which requires either “a

council of the commonwealth or the will of the prince” for it to be binding.⁵³ Or, in Francisco Suárez’s words, it “had been introduced not by evidence [as was the case with the civil law] but by the probable and common estimation of men”, and then enacted, if only *ex hypothesi*, by what Vitoria famously called “the whole world which is in a sense a commonwealth [*respublica*]”, a version of Cicero’s “human society” and “common human law”.⁵⁴ In the slightly different formulation offered by Soto, whereas a civil law had to be supported, as Soto put it, by “the council of the state or the authority of the prince”, acting on behalf of the collective will of the peoples of that state, the law of nations clearly did not: “To constitute the law of nations”, he concluded, “no assembly of men in one place is required.” In Martti Koskenniemi’s words: “The prelapsarian *ius naturae* . . . was adjusted in the world of real human beings by a consensual and historical *ius gentium*.”⁵⁵ This allowed the *ius gentium* the universality of the natural law, but not its immutability. “That which may be inferred from the absolute necessity of things, belongs to the natural law”, wrote Soto, “but those matters which do so not through absolute consideration of things but because they are determined by a particular end, belong to the law of nations.”⁵⁶ This meant that “although some things which pertain to the law of nations, contribute to human relations, so that there can be no dispensation from them, and indeed any such dispensation would be considered null”, others clearly do not. A positive *ius gentium*, however, grounded in reason, was still subject to change and abrogation. It was – provisionally at least – subject to the *dominium* of individual princes, and it had to respond to circumstances. What the “whole world which is in a sense a commonwealth” might decide to do at one moment in time might not be the same as what it would decide to do, even in like circumstances, at another. As Jeremy Waldron has phrased it, “like the *ius civile*, the *ius gentium* is a matter of history and contingency—what happens to have been established among men.” In much the same way, Aquinas had accepted that even the natural law might be changed if only by addition or “in its secondary principles”.⁵⁷

Vitoria’s world *respublica* takes the form of a single legal person, with *de iure* at least, full powers of enactment – the *vis legis* – so that, in Vitoria’s words, “the law of nations does not have the force merely of pacts or agreements between men, but has the force of a positive enactment (*lex*)”.⁵⁸ This, of course, makes of the “whole world which is in a sense a commonwealth” a quasi-legal body at least *de iure* even if the right of actual enactment belongs to the sovereign princes of the world. For “if the commonwealth has these powers [of punishment] against its own members, there can be no doubt that the whole world has the same powers against any harmful and evil men. And these powers can only exist if exercised though the princes of the commonwealth.”⁵⁹

Despite this insistence that the *ius gentium* belongs with the positive law, the fact that it was still ultimately grounded on an expression of human reason rather than consent or enactment meant that there was a good deal of

slippage between it and the natural law in the ways in which this was understood. As a consequence in the manner it is handled by the School of Salamanca – and later by Grotius – the *ius gentium* often comes out looking less like an inter-national law than and inter-personal law applied on a universal scale.⁶⁰

It is this which allows Vitoria, for all that he was insistent that the prince enjoyed unfettered authority within his own territory, to claim that the community of all humanity took precedence over the nation. This then conferred on the *ius gentium* precedence over the local legislative practices of individual states so that no “kingdom may chose to ignore this law of nations”.⁶¹ Furthermore, because one of the eight reasons Vitoria offers for the legitimacy of warfare itself is “the good of the whole world”, it followed that any “war which is useful to one commonwealth or kingdom, but of proven harm to the world or to Christendom [is] by that very token unjust”.⁶² And since any state which wages an unjust war may legitimately be resisted, this would seem to confer, if only by implication, a clear right on any state under threat from what today would be called a “rogue state” to intervene in the affairs of another to prevent “further harm”.⁶³ In all cases where there arose a conflict between the law of nations and the civil law, the former would appear to trump the latter.

It might be argued, however, that if the law of nations really was a positive one, it could only ever have been arrived at by peoples who were already in some kind of juridical condition. Vitoria’s *respublica* – if only by virtue of being a *respublica* – clearly cannot be the state of nature. And any people living in a *respublica* would have to be bound by some kind of civil law, however primitive. Such peoples were also unlikely to come up with laws which were simultaneously licit as civil law and illicit (although they might be inapplicable) as part of the *ius gentium*. And if they did, it did not necessarily follow that the *ius gentium* took precedence.

III

It was in the terms of this rather shaky and unstable understanding of the law of nations that Vitoria, and his successors, set out to try to explain how it was that the Spanish Crown had come to exercise “private and public *dominium*” in the Americas. As Schmitt (and Hegel before him) had seen, the Spanish occupation of what was before 1492 a wholly unknown landmass had been the outcome of what, in particularly after Hernán Cortés’ seizure of the “empire” of Montezuma in 1519–21, had been a highly publicized conquest. The word “conquest” caused the Spanish Crown, as it was later to cause the English, considerable legal anxiety, and in 1680 the *Recopilación de leyes de los reynos de las Indias* required that “this word conquest be omitted, so that it should not be the case of, or provide an excuse for, force or harm being given to the Indians”.⁶⁴ For all the triumphalism involved in the studious

comparison with ancient Rome, a “conquest” could only be justified if it could be shown to be the outcome of a just war. Such a war conferred on the aggressor a right to wage war – the *ius ad bellum* – and was governed by a set of agreements about how the war should be conducted and the benefits which the victor was entitled to derive from it – the *ius in bello*.⁶⁵ As the Roman jurists had maintained that war could only be just if it was waged defensively, it could only be conceived as a means of punishing an aggressor and seizing compensation for damages suffered by the victor who was, by definition, the injured party. Wars, said St. Augustine, in one of the most frequently cited passages on the subject, “are just which revenge the injuries caused when the nation or *civitas* with which war is envisaged has either neglected to make recompense for illegitimate acts committed by its members, or to return what has been injuriously taken”.⁶⁶

Clearly no war could be just if it were pursued for personal gain or for the sake of glory. “When we are fighting for empire and seeking glory through warfare”, Cicero had insisted, war may be “waged less bitterly” than with a true enemy, but that did not alter the fact that, in these cases also, the condition of a just war “should be wholly present”.⁶⁷ For a war to be just, it had therefore to begin as an act of self-defence. “Reason has taught to the wise,” wrote Cicero, “necessity to the barbarians, custom to the *gentes* and nature to brute beasts that they should repulse on every occasion by every means all violence to their bodies their heads and their lives.”⁶⁸ War, Cicero had also said, might similarly be waged on behalf of allies or clients, which is what he meant by “fighting for empire”; it could also – a point to which I shall return – be waged against those who are believed to have offended not merely an individual or a state but also humanity itself by violating the law of nature.

The question for Vitoria was, how could such conditions possibly apply to wars against a distant people who had manifestly caused no harm to any European prior to their arrival and then had only apparently acted in self-defence? One possible answer was that, for some reason, the Indians had not been in legitimate “public and private *dominium*” – that is, property rights and sovereignty – over the territories they occupied before the Europeans arrived, in which case their lands might be considered “empty”. The Indians’ refusal to make way for the Spanish would then constitute grounds for a just war under the law of nature.

If this argument were to apply, it would have to be shown that *either* the Indians were in some sense less than fully human (or fully adult), in which case they could not be said to be true masters either of themselves or of their goods, or that, although both fully human and fully adult, they had somehow failed to fulfill the necessary conditions by which human beings were believed to acquire ownership over land.⁶⁹ In the first case, they would have to be either mad, or in some other way irrational. It is under this heading that perhaps the most contentious attempt to deny the Indians their natural rights, Aristotle’s theory of natural slavery, was introduced – a point to which I shall return in

Chapter 3. But, although it clearly was, in Vitoria's estimation, the case that if such a thing as a natural slave were to exist, no single group fitted Aristotle's definition better than the Indians; it was also "self-evident" from the "order in their affairs" that they "have judgment just like other men".⁷⁰ Vitoria was prepared to adduce from the related argument that *if* the Indians were all truly mad, they could make no more claim to be able to govern their own affairs than a group of children, in which case the Spanish king would possess a highly constrained right to take "them into his control". Since, however, this would be due under the terms of the obligation we all have to our neighbors, it could only be done "for the benefit and the good of the barbarians and not merely for the profit of the Spanish".⁷¹

This suggestion was to have a long afterlife. Despite its tentative and imprecise formulation, despite the fact that Vitoria himself introduces it "merely for the sake of argument", it was translated by later jurists into an embryonic theory of "trusteeship". After the creation of the Mandate System by the League of Nations in 1919, international lawyers struggling to find some historical pedigree for what in the twentieth century came to be called a "suspension of sovereignty" turned to Vitoria's argument as a way of challenging the arguments of nineteenth-century positivists that "uncivilized" peoples might legitimately be appropriated by "civilized" ones, because only the latter could claim to constitute states and thus to exercise sovereignty.⁷²

In the specific case of the Spanish occupation of America, however, where "care" had, in fact, taken the form of colonization and settlement, it could not provide any grounds for the suspension, much less the acquisition, of sovereignty. As the theologian Melchor Cano argued in 1546, even if were true that the Indians were some kind of children in need of civic education, the Christians would not be entitled to "take them into their care" if they had to conquer them first to do so. For any act whose purpose is to secure the good of another is a precept of charity, and no act of charity can ever involve coercion. The position of the Castilian Crown, Cano concluded, somewhat unflatteringly for his monarch, was like that of a beggar to whom alms may be due, but who is not empowered to extract them.⁷³ Vitoria's argument would also seem to imply that the gold and silver which the Spaniards had extracted in massive quantities from the mines in Mexico and Peru could not legitimately be shipped back to Europe to pay for costly wars fought against other Christian princes.

If, as Vitoria concluded briskly at the beginning of "On the American Indians", "it is clear that from all that I have said that the Spaniards when they first sailed to the land of the barbarians, carried with them no right at all to occupy their countries", then the only legitimate grounds would have to derive from the claim that the wars waged against them constituted just ones.⁷⁴ In Question 3 of the *relectio* he, therefore, considers on what grounds such an argument might be made. He offers eight possibilities. The only ones to which he seems to have been prepared to give any credence, however, are

Articles 1 and 5. Both were to have a long afterlife, and it is on them that Vitoria's somewhat airy claim to have been the "father of international law" largely rests. I shall begin with Article 5. This is a version of what today comes under the general heading of the "Responsibility to Protect", or what Vitoria calls "the defence of the innocent". The Spanish might, he wrote – and only might – have a right to intervene in the Americas "either on account of the personal tyranny of the barbarians' masters towards their subjects or because of their tyrannical and oppressive laws against the innocent". As in Vitoria's words, "the Spaniards are the barbarians' neighbors, as is shown by the parable of the Samaritan (Luke 10: 29–37); . . . the barbarians are obliged to love their neighbors as themselves" and vice versa. Under the terms of what Edmund Burke in the eighteenth century – in the hope of persuading his listeners that the French Revolution constituted a European civil war – called the "law of civil vicinity", neighbors have an obligation to assist each other in times of crisis.⁷⁵ Now the rulers of an individual state have, for Vitoria at least, an unassailable right to "punish those of its own members who are intent on harming it with execution or other penalties". From this it followed that, as the law of nations always overruled mere civil law: "If the commonwealth has these powers against its own members, there can be no doubt that the whole world has the same powers against any harmful and evil men." But although, as we have seen, the world *respublica* does possess *de iure* the "power to enact laws" (*potestas ferendi leges*), there clearly exists no institutions that could transform this into a *de facto* authority.⁷⁶ The question then arises: who, in the absence of some analogue of the United Nations, has the right to do the job for "the whole world"? Vitoria's answer is "the prince", by which he apparently means any legally established ruler capable of assuming the legislative authority of the entire world for "these powers can only exist if exercised though the princes of the commonwealth".⁷⁷

"It should be noted", he wrote,

that the prince has the authority not only over his own people, but also over foreigners to force them to abstain from harming others; this is his right by the law of nations and the authority of the whole world. Indeed, *it seems he has this right by natural law*: the world could not exist unless some men had the power and authority to deter the wicked by force from doing harm to the good and the innocent. (Emphasis added.)

Under the appropriate conditions then, it would appear that any sovereign was in a position to draw on the authority of both the law of nations *and* the natural law in defence of the world *respublica*.⁷⁸ In the case of the Americas the Spanish are merely acting on behalf, and by the authority, of a supposed international community. They are in America by historical contingency, and the task of defending the innocent has thus fallen to them. But this responsibility could just as easily have been assumed by any other ruler, Christian or – since unbelievers have just as much right to exercise *dominium*

as unbelievers – non-Christian.⁷⁹ (The argument is, however, decidedly odd, since it implies that the authority to act on behalf of one legal entity – the international community – can only derive from another which historically is a subsequent creation.)

The principal evidence to support Vitoria's claim that the American Indians were being forced to live under "tyrannical and oppressive laws" were the much-discussed practices of human sacrifice and cannibalism. Vitoria accepts that there is no prohibition against cannibalism "in divine or civil law". It is not, therefore, a mortal sin "provided that it is not against charity to God, or ones' neighbour" (although it is not clear who one is going to eat if not one's "neighbour"). Because, however, it "is held in abomination by all nations who have a civil and humane life", it is clearly contrary to the *ius gentium* since.⁸⁰ Human sacrifice was more tricky if only because the biblical stories of Abraham and Jephthah seemed to suggest that under certain circumstances human sacrifice might not only be natural but even pleasing to God. Vitoria's response was that it was contrary to natural law and, of course, *eo ipso* against the law of nations on the grounds that no man may "deliver himself up to execution" (unless justly convicted of a crime), for the same reason that he may not commit suicide, because possession in his own body (*dominium corporis suuis*) belongs not to him, but to God.⁸¹

It is important, however, that although human sacrifice, at least, constitutes a violation of the law of nature, it is not that which, in Vitoria's view, might justify intervention, any more than a Christian prince might legitimately make war on another Christian prince because his subjects are "adulterers or fornicators, perjurers or thieves because these things are against natural law".⁸² As Suárez observed, it was not man's task to vindicate the Almighty. If God wishes to take revenge on the pagans for their sins, he remarked acidly, "he is capable of doing so for himself".⁸³

The truly significant difference between "unnatural" activities practiced among individuals in Christian states and the cannibalism and human sacrifice practiced in the Americas is that whereas the former are forbidden by law, the latter were sanctioned by the state. They are, that is, a part of law, and it is this which makes them tyrannical. The *harm* which the rulers of the barbarian are prepared to inflict on their own subjects in this way clearly constitutes a breach not of the natural law but of the *ius gentium*. And it is because of this, not because of the gruesome nature of the practices themselves, that the human community may intervene to prevent them.

It is also the case, Vitoria insisted, that: "It makes no difference that all the barbarians consent to these kinds of laws and sacrifices, or that they refuse to accept the Spaniards as their liberators in this matter". For as Soto phrased it, "that which nature teaches is not within the reach of everyone, but only those who have serene reason and are free from all obscurity (*nebula*)".⁸⁴ Prolonged habit is capable of distorting every human being's understanding of the natural law and, by implication, the law of nations. "For sometimes,

due to bad customs, and in those who have fallen profoundly into evil, the knowledge of the natural law may be changed.”⁸⁵ Clearly, then, if the rulers of the “barbarians” refuse to abandon their crimes against their own peoples, “their masters may be changed and new princes set up”.⁸⁶

Vitoria’s “defence of the innocent” suffered from some very obvious defects. In common with all attempts to justify armed intervention in the interests of others, it fails, of course, to specify very clearly what would count as “tyranny” and “oppressive laws” outside the two specific – and extreme – cases he cites. It was, too, an innovative move because, in general, theories of the “just war” avoided claims made on behalf of third parties, unless these were specifically involved as “allies”. The Indians might, for instance, quite reasonably have sought the assistance of the Europeans in their (legitimate) struggles against other Indians. This had indeed, as Vitoria points out, happened in the case of the Tlaxcalans who had – at least in Hernán Cortés’ account of events – sought Spanish aid in their struggle against the Aztecs.⁸⁷ But no subsequent writer on the law of war from Grotius to Kant accepted that one ruler had the authority to decide what constitutes an “offence against the innocent” in another state, nor to intervene on their behalf, and even against their will. Intervention was only licit if the actions of that state also in some way constituted a clear and direct threat to the belligerent, and even here there was much disagreement over what might count in such instances as what was called “just fear”.

What the international community – however defined – clearly could not do, therefore, was precisely what Vitoria was arguing that the Spaniards could – that is, to make war on a foreign power to set up new princes more to their liking, and what they believed the liking of their subjects to be. Intervention “in defence of the innocent” required, much as the claim to trusteeship did, a suspension of sovereignty, and very few were prepared to sanction that as a prior condition of war – as part, that is, of the *ius ad bellum* – rather than a legitimate (but not inevitable) *outcome* of a just war, and thus a part of the *ius post bellum*. Vitoria himself in an earlier *relectio*, *On Civil Power*, delivered in 1528, had asserted vehemently that even if an entire commonwealth collectively decided to rid itself of an established power “their agreement would be null and void as contrary to natural law which the commonwealth cannot abolish”.⁸⁸ And this of course is precisely what any hypothetical delegation of the “innocent” seeking assistance against their legitimate if tyrannical rulers would in fact be doing. In other words, no individual or group of individuals can decide to break what Kant later called “legal continuity” without violating the law of nature.⁸⁹

There was a further problem with this line of argument as a justification for *conquest*. For although it might provide grounds for initial intervention, it offered no charter for effective colonization. Since anything resembling “humanitarian” intervention could only be for the good of those supposedly afflicted, once the “integrity of the state” had been established, the invading

power should logically withdraw. The victor was only entitled to seize such moveable goods as he deemed necessary to compensate for the losses he had incurred. He might also seize goods, and even persons, as punishment for wrongdoing. However, what were termed “immovable goods” – that is, territory, cities, and, crucially in the Spanish case, what lay beneath the land – were another matter. Vitoria accepted that

it is sometimes lawful to occupy a fort or town, but the governing factor in this case must be moderation, not armed might. If necessity and the requirements of war demand that the greater part of enemy territory or a large number of cities be occupied in this way, they ought to be returned once the war is over and peace has been made, only keeping so much as may be considered fair in equity and humanity for the reparation of losses and expenses and the punishment of injustice.⁹⁰

All of which was ultimately to present all those who hoped to use some version of the “defence of the innocent” to justify intervention in the affairs of sovereign states with considerable difficulties. But the inter-personal rather than international aspect of Vitoria’s understanding of the law of nations, its vacillating proximity to the law of nature, and the power which this conferred on the world republic and its self-appointed agents allowed his successors to extend substantially the possible applications of the same argument. It allowed Suárez, for instance, to argue that the law of nations might sanction war against Henry VIII of England. For although by breaking with Rome, Henry had harmed no state other than his own, the offences he had caused his own people were already, or so Suárez claimed, so severe that he might legitimately be attacked to prevent further collapse.⁹¹ “War”, as Suárez phrased it, “is permitted so that the state may preserve the integrity of its rights”, even if that war had been initiated by a foreign power, against its own sovereign.⁹² Furthermore, St. Augustine had endorsed wars that were fought to “acquire peace” – peace in this context being defined as a “work of justice” (*opus justitiae*) for the restoration of the “tranquility of the order of all things”.⁹³ In such circumstances, argued Suárez, “the natural power and jurisdiction of the human republic” could be mobilized as a “reason for universal conquest”.⁹⁴ Under these circumstances, the scope of the jurisdiction exercised by the “human republic” had thus, potentially at least, become very wide indeed.⁹⁵

IV

The second – although in fact it is the first – of Vitoria’s “just titles” is similarly grounded on the assumption that the law of nations is a form of interpersonal law and that it trumps the civil law. It is based on the claim that the “division of things” (*divisio rerum*) – that is, the carving up of the world into autonomous (and sovereignty-bearing) nations which had taken place after mankind’s

departure from the state of nature – had not obscured certain natural rights, which remain the common property of all human beings.⁹⁶ On Vitoria's account these rights, precisely because they survived from man's primitive condition, cannot be abrogated by merely human legislation, since they pre-date state sovereignty.⁹⁷ Among these were what he called “the right of natural partnership and communication” (*ius naturalis societas et communicatio-nis*).⁹⁸ This describes a complex set of claims divided into five propositions. At the core, however, lies an allusion to the ancient obligation to offer hospitality to strangers. For “Nature” claimed Vitoria, quoting the *Digest*, “has decreed a certain kinship between men (*Digest* I.i. 3). . . . Man is not a ‘wolf to his fellow men’ – *homo homini lupus* – as the comedian [Plautus] says, but a fellow.”⁹⁹ All of this brings with it an obligation to friendship, for “amity between men is part of the natural law”. “In the beginning of the world”, he continued, “when all things were held in common, everyone was allowed to visit and travel through any land he wished. This right was clearly not taken away by the division of property; it was never the intention of nations to prevent men's free mutual intercourse with one another by its division.” This allowed Vitoria to transform the ancient concept of hospitality – the authority he cites is Virgil – into a right under the law of nations and the natural law.¹⁰⁰ “Amongst all nations”, he wrote, “it is considered inhuman to treat travellers badly without some special cause, humane and dutiful to behave hospitably to strangers.” This, of course, meant that the Indians could not “lawfully bar them [the Spaniards] from their homeland without due cause”.¹⁰¹ If they attempted to do so, then a just war might be waged against them.

Expressed as a right under the terms both of the natural law and of the *ius gentium*, this was an original – if also highly debatable – claim. In making it, Vitoria was drawing on a long ancient and humanist tradition, which is, like the natural law itself, Stoic in origin. Clearly individuals, no matter how rude and barbarous they might be, had an inalienable right to communicate with their fellow beings. This is the historical underpinning for the modern concern with freedom of speech. The fact that such communication was also perceived as a means of civilizing the barbarian in no way altered its standing as a right.

Vitoria, however, extended the same argument to commerce. The natural right of communication delivers a right under the law of nations for all travelers (*peregrini*) to engage in trade with whoever they please “so long as they do not harm the citizens” of the lands through which they are traveling. Therefore, he added, “they [the Spaniards] may import the commodities which they [the Indians] lack and export the gold and silver and other things which they have in abundance”. And at the very end of his lecture Vitoria pointed out that the Portuguese had done just as well out of a licit trade “with similar sorts of people”, without conquering them, as the Spaniards had done by possibly illicit occupation. Something which, he tentatively suggested, the Spanish Crown might think of emulating.¹⁰²

The transition from passage to trade was, however, at best, a shaky one because the right of passage, as a natural right, could only be understood as both a “perfect” (one that is binding in all possible circumstances) and negative one, in that every individual has a natural right not to be hindered. On Vitoria’s account, the right to free trade, by contrast, comes out looking very much like an “imperfect” obligation. As the eighteenth-century Swiss diplomat Emer de Vattel said of it later: “The obligation of trading with other nations is in itself an imperfect obligation, and gives them only an imperfect right. . . . When the Spaniards attacked the Americans under a presence that those people refused to traffic with them, they only endeavored to throw a colourable veil over their own insatiable avarice.”¹⁰³

Furthermore, Vitoria’s last inference, as Soto, generally more radical on most such issues than his predecessor, pointed out, confused a mere right of passage – or even of settlement – with rights of property. The Spanish Crown, even if it could make an unassailable claim to sovereignty in the Americas, could still not take possession of the gold and silver or any other goods which they might find there, for

the law of nations established a division between the regions [of the earth], and therefore, even if the inhabitants of those regions held such things to be common [property], foreigners cannot take possession of them without the consent of those who live there. For neither can the French enter for this reason into Spain, nor we into France, without the consent of the French.¹⁰⁴

The Spaniards, in other words, had, in effect, been mining illegally, and logically they should now restore what they had taken to their rightful owners.

In Vitoria’s account, however, merchants were not the only class of person to possess a right to travel, so too, and far more problematically, were missionaries. They, like all humans, enjoyed a natural right to “teach the truth if they [in this case the Indians] are willing to listen”. By implication, however, while the Indians are under an obligation to allow the Christians to be heard, they are themselves under no obligation to listen, much less, of course, to believe what they hear. For “whether or not they accept the faith it will not be lawful to attempt to impose anything on them by war or otherwise conquer their lands”.¹⁰⁵ And despite Vitoria’s evocation of Mark, “Go ye into the world and preach the gospel to every creature” (which would seem to make the “right to preach” one in divine law), it is still the case that the only right, in fact, invoked here is a further appeal to both the “law of civil vicinity” and the “defence of the innocent”. For “brotherly correction is as much a part of natural law as brotherly love” and the non-Christian is always, by definition, in need of correction. Furthermore, if the Indian princes were actively to oppose the conversion of their subjects “by deterring them with threats or any other means”, they may be resisted by force because this would constitute a harm inflicted by the rulers on the ruled so that “the Spaniards could wage war on behalf of other subjects for

the oppression and wrong which they were suffering, especially in such important matters".¹⁰⁶ In other words, Indian converts, or would-be converts, could be considered as a class of "innocents" requiring protection. Furthermore it would seem that were there a sufficient number of converts, then "it would be neither expedient nor lawful for our prince to abandon altogether the administration of those territories".¹⁰⁷

As with all claims made under the law of nations, it was crucial for their coherence that they should be applicable to the entire world. This would mean that Indian missionaries – should such persons have existed – or far more contentiously Muslim ones, should have been allowed a similar access to Spain. In reality, however, as the jurist and historian Arthur Nussbaum has claimed: "Admission of non-Christian missionaries to Spain would of course have been unthinkable." He is, of course, quite right. It would. But Vitoria does not, and in the logic of his argument could not, say so.¹⁰⁸

There are, it need hardly be said, a great many problems with this argument. Samuel Pufendorf pointed out in 1672, as Soto had done, that both Vitoria's and Grotius' understanding (which I discuss in Chapter 5) of the right of hospitality confused transit with property.¹⁰⁹ This "natural communication", he wrote scathingly, "cannot prevent a property holder from having the final decision on the question, whether he wishes to share with others the use of his property." It was also, in Pufendorf's view, "crude indeed" to claim that everyone, irrespective of "the numbers in which they had come" or "their purpose in coming", possessed such a right. In 1546, Melchor Cano had made a similar point. The Spaniards might have natural rights as travelers, or even as ambassadors. But they had gone to America as neither. They had gone as conquerors. "We would not", he concluded dryly, "be prepared to describe Alexander the Great as a *peregrinus*."¹¹⁰

For Pufendorf, however, the key issue was precisely the degree to which the law of nations, if it was a positive law with an international reach, could really override the civil laws of individual states. If it had been created by a consensus among nations, and not among single individuals in the state of nature relying solely upon their natural reason – that is, if it was indeed a "secondary" natural law and not a primary one – then it was clear to Pufendorf that it could not, as Vitoria insisted it should, take precedence over other forms of positive law. It would, as Cano had argued, clearly be absurd to suggest that there might exist a law which would forbid a prince from controlling the passage of foreigners over his own territories. Vitoria himself, after all, had recognized that if the "barbarians" could not interfere with the right of the Europeans to travel among and trade with them, then it must follow that no European state could prevent another from doing the same thing. The French, he admitted, could not lawfully "prevent the Spaniards from traveling to or even living in France and vice versa".¹¹¹ This would, of course, have given the French as perfect a right to wage war against Charles V as he had to make war on the Indians.

Any such right would in fact, however, be contrary to actual practice and a violation of the civil laws of Castile. Did it mean, then, that the civil laws of Castile were in some sense in violation of the common wisdom of the commonwealth of the world? Clearly the answer could only be no. In Vitoria's account it would appear that rights that derived from the *ius gentium* must trump any laws derived from a purely civil code, because, as we have seen for Vitoria, the "whole world which is in a sense a commonwealth" is prior to, and must take precedent over, any individual state. For Pufendorf, however, it was clear that there simply could be no right which had somehow survived the *divisio rerum*, since this had been precisely the moment in history in which the *ius gentium* had come into being. And this meant that the *ius gentium* was what its name claimed it to be: a law which governed the relationships between states (and peoples), not a universal law governing the behaviour of individuals in a hypothetical stateless condition. As Pufendorf understood it, Vitoria's claim that any prince might possess the right to force the rulers of states "to abstain from harming others" came down to the claim that what were, in fact, private rights – such as the *ius peregrinandi* – could be used not merely to trump the rights of states but also to legitimate wars in their defence which could, of necessity and by right, only be waged by states. "Most writers", concluded Pufendorf, "feel that the safest reply to make is this: Every state may reach a decision, according to its own usage, on the admission of foreigners who come to it for other reasons than are necessary and deserving of sympathy." Refugees clearly possessed some kind of claim to permanent settlement, if only on the grounds of charity. But refugees had no right to behave as conquerors, and they certainly did not have any prior claim over any portion of their land of adoption. "Such persons", he concluded, "must recognize the established government of that country, and so adapt themselves to it so that they may be the source of no conspiracies and revolts."¹¹² The Spanish could make no claim to be "refugees" and certainly had not recognized the established government of the Indians. Therefore, they clearly had no right to be in the Americas at all.

All of this seemed to dictate the need for some distinction between those who were, so to speak, fully covered by the law of nations and those who were not. None from the School of Salamanca make any such distinction explicit. Some recent historians, however, have tried to locate the distinction between "civilized" and "barbarian" peoples, which became the staple of the new international law in nineteenth century to a supposed distinction by Vitoria and others between Christian and pagan peoples. But had Vitoria held any such position, he would, on his own account, have fallen prey to the heresy of deriving *dominium* from grace not law.¹¹³ As the French jurist Gaston Jèze had rightly seen in 1896, all of the Salamanca theologians had, in fact, consistently maintained that "civilized powers have no more right to seize the territories of savages than savages have to occupy the European continent. The law of nations does not admit any distinction between the barbarians and the so-called civilized."¹¹⁴

Jèze was clearly right as far as Vitoria and his successors were concerned; nevertheless it was not at all clear that it had not been they who had at least prepared the way for the notorious barbarian and civilized distinction he was arguing against. As Vázquez de Menchaca pointed out, Bartolus' *ius gentium secundarium* must originally have been the laws adopted by the different *gentes* of the world. And then "with the passage of the ages", these had become "the practice of most of those peoples that are governed by customs and laws". At first then, it was "a purely civil law" but subsequently became "accepted by all or most of the peoples of the world".¹¹⁵

It is not a very large step from this to the claim that this aboriginal "civil law" was in fact the law of one particular people, the most obvious candidate being the Romans. As we shall see in Chapter 2, this was an argument deployed slightly later by the Italian jurist Alberico Gentili who makes of the Roman civil law a kind of *summa* of all the laws of all the peoples of the world.¹¹⁶ But even if we ignore the claim that this aboriginal civil law is identical with Roman law, it was very hard to avoid the supposition that it must, at least, have been the law of a very gifted – or to use another language – civilized people. Both Grotius and Pufendorf had been driven to much the same conclusion, and it was repeated with various nuances until Wolff and Vattel in the eighteenth century.

The division of the *gentes* into civilized and uncivilized posed a further, if rather obvious, problem. As the eclectic German jurist and philosopher Christian Thomasius asked in 1705:

Who will determine if a nation is civilized or barbarian? For all peoples are equal amongst themselves, and this latter term [civilized] has its origins in the arrogance of the Greeks and the Romans, and among those nations who imitate them and who stupidly despise all other nations. The customs of the so-called civilized nations can be very much crueller than those of the Barbarians, as one can see from the treatment of Protestants by a Catholic prince.¹¹⁷

In the end the only possible reply had been to reduce the law of nations still further into a body of purely positive contract or treaty law between consenting states. As Robert Ward, whose *Enquiry into the Foundation and History of the Law of Nations in Europe* was the first systematic attempt to write a history of the subject, warned in 1795:

We expected too much when we contended for the *universality* of the duties laid down by the Codes of the Laws of Nations. . . . However desirable such universality might be . . . what is commonly called the Law of Nations . . . is not the Law of *all* Nations, but only of particular classes of them; and thus there may be a *different* Law of Nations for *different* parts of the globe.¹¹⁸

But that was precisely what Twiss and many of the other members of *Institut de droit international* were seeking to avoid. What they wanted was precisely what the Salamanca theologians had seemed to offer, namely the possibility of a truly

universal human consensus, which would be capable of delivering a universal law of nations with a powerful prescriptive component inferred not from any presumptions about the natural law but from the actual civil laws of a large number of diverse peoples “who have a civil and humane life”. For many this would have included both the Muslims (or at least the Ottomans) and Chinese. This, in turn, would be capable of providing the basis for a law which could then be applied to all peoples everywhere. It was for this reason that Vitoria was described in 1927, by James Brown Scott, founder of the American Society of International Law and secretary of the Carnegie Endowment for International Peace, as having provided “a summary of the modern law of nations”.¹¹⁹

Endnotes

- 1 *De Republica* 3.34.
- 2 I have discussed these at length in *Lords of All the World: Ideologies of Empire in Britain, France and Spain, 1400–1800* and “The Struggle for Legitimacy and the Image of Empire in the Atlantic to c. 1700” in Nicholas Canny ed., *The Oxford History of the British Empire*, I, *The Origins of Empire* (Oxford: Oxford University Press, 1998), 34–54. See also Richard Tuck, *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 51–78.
- 3 Leibniz’s remark is in “Vita Leibnitii a seipso” in Foucher de Careil, *Nouvelles lettres et opuscules inédits de Leibniz* (Paris, 1857), 382.
- 4 *De locis theologis* (Salamanca, 1536), XII, *Proemium*.
- 5 Antony Anghie, for instance, mistakenly describes Vitoria as a “theologian and jurist”, as did James Brown Scott, the international lawyer who was responsible for the revival of interest in the School of Salamanca in the Anglophone world in the early twentieth century and for the re-edition of many of its works. Anghie, *Imperialism, Sovereignty and the Making of International Law*, 13.
- 6 “Vázquez decus illud Hispaniae”, *The Free Sea [De Mare Libero]*, Richard Hakluyt trans., David Armitage ed. (Indianapolis: Liberty Fund, 2004), 43. Also see Annabel Brett, *Liberty, Right and Nature* (Cambridge: Cambridge University Press, 1997), 245. “Vázquez should be read neither in isolation from, nor as a continuation of, the School of Salamanca, but rather as a positive response to its achievements, and particularly to that of Soto.”
- 7 See the discussion in Francisco Suárez, *Tractatus de legibus ac Deo Legislatore* [1612], Luciano Pereña ed. (Madrid: CSIC, 1971), I, 2–8.
- 8 For these, see my “The ‘School of Salamanca’ and the ‘Affair of the Indies’”, *History of Universities* 1 (1981), 71–112.
- 9 “Los reyes piensan a las veces del pie a la mano, y mas los de consejo” in reply to Miguel de Arcos’ question as to why political authorities pay so little attention to their advisors. In Vicente Beltrán de Heredia, “Colección de dictámenes inéditos”, *Ciencia tomista* 43 (1931), 1743.
- 10 Letter to Pedro Fernández de Velasco, *Vitoria: Political Writings*, 337.
- 11 James Boswell, *Boswell’s Life of Johnson*, G. B. Hill ed. (Oxford: Oxford University Press, 1934), I, 45.

- 12 *Two Introductory Lectures on the Science of International Law* (London: Longmans, 1856), 8, and quoted in Marti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001), 78.
- 13 A *relectio*, literally a “re-reading”, was a lecture given not on a particular text, as were most lectures, but instead on a specific problem.
- 14 “On the American Indians”, I, Introduction, *Vitoria: Political Writings*, 233–4.
- 15 *Controversiarum illustrium aliarumque usu frequentium, libri tres*, I, 18.
- 16 *Ibid.*, 234–8.
- 17 *Ibid.*, 238.
- 18 *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 39, 69.
- 19 “On the American Indians”, I, Introduction, *Vitoria: Political Writings*, 233.
- 20 *Ibid.*, 238.
- 21 “Romanus pontifex” in *Monumenta hericina* (Coimbra: Comissao Executiva das Comemorações do V Centenario da Morte do Infante D. Henrique, 1960–74), XII, 71–9. On the importance of these for the Portuguese claims to sovereignty in Africa, see Giuseppe Marcoci, *L’invenzione di un imperio: Politica e cultura nel mondo portoghese (1450–1600)* (Rome: Carocci editore, 2011), 69–88.
- 22 There were five bulls in all. They are printed in “Bulas Alejandrinas de 1493 texto y traducción” in Juan Gil and José Maria Maestre eds., *Humanismo latino y descubrimiento* (Seville: Universidad de Sevilla and Universidad de Cadiz, 1992), 16. Also see Hans-Jürgen Prien, “Las Bulas Alejandrinas de 1493” in Bernd Schröter and Karin Schüller eds., *Tordesillas y sus consecuencias: La política de las grandes potencias europeas respecto a América Latina (1494–1898)* (Frankfurt: Vervuet Iberoamericana, 1995), 12–28.
- 23 *The Writings of William Paterson, Founder of the Bank of England*, S. Bannister ed., 2 vols. (London, 1858), I, 121.
- 24 *The Limits of the British Empire*, Ken MacMillan (with Jennifer Abeles) eds. (Westport, CT; London: Praeger, 2004), 92–3.
- 25 Quoted in Tuck, *The Rights of War and Peace*, 111.
- 26 “A Discourse on Western Planting” in *The Original Writings and Correspondence of the two Richard Hakluyts*, E. G. R. Taylor ed. (London: Hakluyt Society, 1935), II, 302. For a wider discussion of the English rejection of the bulls, see Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576–1640* (Cambridge: Cambridge University Press, 2006), 67–9.
- 27 3. I. i. and quoted in Francisco A. Ortega Martínez, «Entre ‘constitución’ y ‘colonia’, el estatuto ambiguo de las Indias en la monarquía hispánica» in *Conceptos fundamentales de la cultura política de la Independencia* (Bogotá: Universidad Nacional de Colombia, 2012), 61–91 at 64. The Papal Bulls are also the only justification for the Spanish presence in America offered by the Historiographer Royal, Antonio de Herrera, in his massive official history of the conquest of the Americas, *Historia general de los hechos de los Castellanos en las islas y tierra firme del Mar Océano* of 1601–1615. See David Brading, *The First America: The Spanish Monarchy, Creole Patriots and the Liberal State, 1492–1867* (Cambridge: Cambridge University Press, 1991), 205–10.
- 28 *Two Introductory Lectures on the Science of International Law*, 9.

- 29 *Codex*, VII, 37, 3.
- 30 *De iustitia et iure, libri decem*, IV. IV. i. (Salamanca, 1556), 301.
- 31 “On the American Indians”, 2.2., *Vitoria: Political Writings*, 260. Vitoria uses the same arguments in “On the Power of the Church”, I. 5.1., *Vitoria: Political Writings*, 83–4.
- 32 See Brian Tierney, *The Crisis of Church and State 1050–1300* (Toronto: Toronto University Press, 1988), 127–38.
- 33 “On the American Indians”, 2.2., *Vitoria: Political Writings*, 264.
- 34 *De iustitia et iure, libri decem*, III. IV. iii. (262).
- 35 See Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011), 148–9.
- 36 Vitoria, who similarly rejected the claim, pointed out that Charles V styled himself “Divine Maximilian or Eternally August Charles Lord of the World (*orbis dominus*)”, “On the American Indians”, 2.1., *Vitoria: Political Writings*, 252. Also see Juan Carlos D’Amico, *Charles Quint maître du monde: entre mythe et réalité* (Caen: Presses universitaires de Caen, 2004).
- 37 See David A. Lupher, *Romans in a New World: Classical Models in Sixteenth-Century Spanish America* (Ann Arbor: University of Michigan Press, 2003), 344–7, *passim*.
- 38 Quoted in Lupher, *Romans in a New World*, 63. The argument is made again in Soto, *De Iustitia et iure*, IV. IV. II. (304).
- 39 Quoted in Lupher, *Romans in a New World*, 65. As Lupher points out, what he calls the “starkly paradoxical phrase” (*ius erat in armis*) could not be read as meaning that the Roman Empire had been based, independently of divine decree, on the pursuit of the *ius belli*. But merely that the Romans owed their success, as did the Spanish, to “brute military superiority”.
- 40 *De Iustitia et iure*, IV. IV. II. (305). A more detailed analysis of Soto’s argument on this point is in Lupher, *Romans in a New World*, 64–5.
- 41 This is Vitoria’s formulation, but the others of the School of Salamanca were in broad agreement. Indeed it is a conventional Thomist explanation of the sources of political power and the basis of the scholastic distinction between power and authority, which Hobbes ridiculed. “On Civil Power”, I. 3, 4, *Vitoria: Political Writings*, 10–12.
- 42 *De Iustitia et iure*, IV. IV. ii. (304).
- 43 *The Rights of War and Peace*, II, xii, 13. Also see “Elephant of India’: Universal Sovereignty through Time and across Cultures” in Peter Fibiger Bang and Dariusz Kolodziejczyk eds., *Universal Empire. A Comparative Approach to Imperial Culture and Representation in Eurasian History* (Cambridge: Cambridge University Press, 2012), 7.
- 44 *De Iustitia et iure*, IV. IV. II. (305).
- 45 “On the American Indians”, 2. 2. *Vitoria: Political Writings*, 264.
- 46 *Ibid.*, I, Introduction, 238.
- 47 *De Officiis*, III, 69.
- 48 “Quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.” *Institutes* II. I.1. In Justinian’s *Institutes* (made up largely of quotes from Gaius), the *ius gentium* is similarly described as “those rules prescribed by natural reason for all men are observed by all peoples alike”.

- 49 See Annabel Brett, *Changes of State. Nature and the Limits of the City in Early-Modern Natural Law* (Princeton: Princeton University Press, 2011), 76.
- 50 *Comentarios a la Secunda Secundae de Santo Tomás*, Vicente Beltrán de Heredia ed. (Salamanca: Biblioteca de teólogos españoles, 1934), III, 89–90.
- 51 “On the American Indians”, 3.1, *Vitoria: Political Writings*, 281.
- 52 “On Civil Power” 3.4, *Vitoria: Political Writings*, 40. Soto, *De iustitia et iure* III, II, iii (205)
- 53 *De iustitia et iure*, III. 1. iii. (197)
- 54 *De Republica* 2, 26 and *De Finibus* II 24.
- 55 “International Law and *raison d'état*: Rethinking the Prehistory of International Law”, in Benedict Kingsbury and Benjamin Straumann eds., *The Roman Foundations of the Law of Nations*, 303.
- 56 *De iustitia et iure*, III. 1. iii. (198).
- 57 “*Ius gentium*: A Defence of Gentili’s Equation of the Law of Nations and the Law of Nature”, in Benedict Kingsbury and Benjamin Straumann eds., *The Roman Foundations of the Law of Nations*, 283–96, and Aquinas, *Ia IIae*. q. 94 a. 5.
- 58 Suárez, *Tractatus de legibus ac Deo Legislatore* II. xix. 4, and “On Civil Power”, 3.4, *Vitoria: Political Writings*, 40. See also *Comentarios a la Secunda Secundae de Santo Tomás*, III, 89–90. For a more detailed account, see Daniel Deckers, *Gerechtigkeit und Recht. Eine historisch-kritische Untersuchung der Gerechtigkeitslehre des Francisco de Vitoria (1483–1546)* (Freiburg: Universitätsverlag Freiburg, 1991), 345–94.
- 59 “On the Law of War”, 1.4, *Vitoria: Political Writings*, 305.
- 60 Marti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), 98 n. 95, and the authorities cited therein.
- 61 “On Civil Power”, 3.4, *Vitoria: Political Writings*, 40.
- 62 *Ibid.*, 1.10, p. 21.
- 63 “On the Law of War”, 1.1, *Vitoria: Political Writings*, 298.
- 64 *Recopilación de leyes de los reynos de las Indias*, Bk. 4 Tit. 1 Ley 6 (Madrid, 1791), II, 4. For the English case, see 105–12.
- 65 See, in general, S. Albert, *Bellum Iustum* (Frankfurter Althistorische Studien 10) (Kallmunz, 1980); Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975) 1 and Jonathan Barnes, “The Just War” in *Cambridge History of Later Medieval Philosophy*, Norman Kretzmann, Anthony Kenny, and Jan Pinborg eds. (Cambridge: Cambridge University Press, 1982), 775–8.
- 66 *Quaestionum in Heptateuchem*, VI. X. and cf. “War should be waged only as a necessity, and waged only that God may by it deliver men from necessity and preserve them in peace. For peace is not sought in order to kindle war, but war is waged in order that peace may be secured. . . . So it should be necessity not desire, that destroys the enemy in battle.” *Epist.* 189.6 [to Bonifatius], *Patrologia latina*, XXXIII. Col. 856.
- 67 *De Officiis*, 1, 35, 38. See also *De Republica*, III, 34a–b, and Tuck, *The Rights of War and Peace*, 201
- 68 *Pro Milone*, XI. 30.
- 69 The term *dominium* employed by all the Spanish scholastics described, in Soto’s definition, “a faculty and right [*facultas et ius*] that [a person] has over anything,

- to use it for his own benefit by any means that are permitted by law". *De iustitia et iure*, III. II. II (280). The term "sovereignty", which I have used here rather loosely and which did not enter the language until later, translates *dominium iurisdictionis*, that is, the "faculty and right" which a sovereign has over jurisdiction or government.
- 70 "On the American Indians", 1.1 and 1.6, *Vitoria: Political Writings*, 239 and 250.
- 71 *Ibid.*, 3.8, pp. 290–1.
- 72 Antony Anghie claims that "virtually every book written on the mandates make some reference to Vitoria's work" but does not offer any examples. *Imperialism, Sovereignty and the Making of International Law*, 144–5.
- 73 *De Dominio indorum*, printed in Luciano Pereña, *Misión de España en América* (Madrid: Consejo Superior de Investigaciones Científicas, 1956), 107. For a more extensive reading of Cano's *relectio*, see Luper, *Romans in a New World*, 85–93.
- 74 "On the American Indians", 2. 2, *Vitoria: Political Writings*, 264.
- 75 "First Letter on a Regicide Peace" in *Selected Works of Edmund Burke*, E. J. Payne ed. (Indianapolis: Liberty Fund, 1990), III, 117.
- 76 "On Civil Power", 3.4, *Vitoria: Political Writings*, 40, and see Adolfo Miaja de la Muela, "El derecho *totius orbis* en el pensamiento de Francisco de Vitoria", *Revista española de derecho internacional* 18 (1965), 341, 348–52. Vitoria, like most scholastics, accepted the traditional distinction between *potestas* and *auctoritas* (on which Hobbes heaped such scorn). On this issue, see Andreas Wagner, "Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth", *Oxford Journal of Legal Studies* 31:3 (2011), 565–82, who describes *potestas* as a "factual power reflexively embedded in a legal order".
- 77 "On the Law of War", 1.4.19, *Vitoria: Political Writings*, 305.
- 78 In doing so, however, he was not exercising the purely private right which Grotius later found most useful – that "any person even a private citizen may declare and wage a defensive war" – since he had not himself been harmed by the behavior of the barbarians. "On the Law of War", 1.2, *Vitoria: Political Writings*, 299. On Grotius' use of this claim, see Tuck, *The Rights of War and Peace*, 81–3
- 79 D. J. B. Trim's claim that "The Spanish commentators restricted the application of this right [to defend the innocent] to 'barbarians', i.e. the indigenous inhabitants of the New World", although factually accurate, at least in this particular instance since all that Vitoria – and Vitoria is the only source Trim cites – was concerned with were precisely the "barbarians" is nevertheless misleading, as is the subsequent claim that "in the second half of the sixteenth century, however, the right to act against tyranny and oppression was extended to Christian princes, and was characterised as a duty". For Vitoria and his successors, Christian princes enjoyed the same natural rights and were bound by the same duties as non-Christian ones, and "defending the innocent" had always been as much a right as a duty. "If a Prince Use Tyrannie Towards His People": Interventions on Behalf of Foreign Populations in Early-Modern Europe" in Brendan Simms and D. J. B. Trim eds., *Humanitarian Intervention: A History* (Cambridge: Cambridge University Press, 2011), 25–66.
- 80 "On Dietary Laws", 1.3, *Vitoria: Political Writings*, 209.
- 81 *Ibid.*, 1.4, p. 215.

- 82 Ibid., 1.5 p. 218.
- 83 *Disputatio xii. De Bello*, from *Opus de triplice virtute theologica, fide spe et charitate* [Paris, 1621], printed in Luciano Pereña Vicente, *Teoría de la guerra en Francisco Suárez*, II, 149–52.
- 84 *De iustitia et iure*, III I ii, (195).
- 85 *De legibus. Comentarios al tratado de la ley*, Francisco Puy and Luís Núñez ed. and trans. (Granada: Universidad de Granada, 1965), 94.
- 86 “On the American Indians”, 3.5.15, *Vitoria: Political Writings*, 287–8. This is the fifth “just title”.
- 87 “On the American Indians”, 3.7, *Vitoria: Political Writings*, 289.
- 88 “On Civil Power”, 1–7, *Vitoria: Political Writings*, 19. This, however, contrasts sharply with his argument in “On the American Indians”, 3.6, that “true and voluntary election . . . might be a legitimate title in natural law”. He refrains, however, from saying whether he truly believes that the American Indians had, in fact, “decided to accept the king of Spain as their prince”. *Vitoria: Political Writings*, 288–9. On the legitimacy of Cortés’ alliance with the Tlaxcalans, see Richard Tuck, “Alliances with Infidels in the European Imperial Expansion” in Sankar Muthu ed., *Empire and Modern Political Thought* (Cambridge: Cambridge University Press, 2012), 61–83.
- 89 See pp. 171–89, *passim*.
- 90 “On the Law of War”, 3. 7, *Vitoria: Political Writings*, 324.
- 91 See my *Spanish Imperialism and the Political Imagination*, 31.
- 92 *Disputatio xii. De Bello*, 126–7.
- 93 *De Civitate Dei*, XIX. 13.
- 94 *Disputatio xii. De Bello*, 238.
- 95 Ibid., 158–61.
- 96 See my “Stoicism, Cosmopolitanism and the Legacy of European Imperialism”, *Constellations* 7 (2000), 3–22.
- 97 See Brett, *Liberty, Right and Nature*, 205–6. On natural rights of this kind and modern “human rights”.
- 98 “On the American Indians”, 3. 1, *Vitoria: Political Writings*, 278. As he defines it, this seems to have been Vitoria’s own creation. St. Augustine had suggested that denial of a right of passage might be sufficient *injuria* for a just war. However, this has none of the structure of Vitoria’s argument. (*Quaestiones in Heptateuchum*, IV. 44; *Decretum* C.23. 2.3).
- 99 “On the American Indians”, 3. 1, *Vitoria: Political Writings*, 280.
- 100 Ibid., 278, citing Justinian, *Institutes* I.2.1, “What natural reason has established among all nations is called the law of nations.” See note 48.
- 101 “On the American Indians”, 3. 1, *Vitoria: Political Writings*, 279.
- 102 Ibid., 291–2.
- 103 *The Law of Nations or, Principles of the Law of Nature* [1797], Béla Kaposy and Richard Whatmore ed. (Indianapolis: Liberty Fund, 2008), 275. The original, *Le droit des gens. Ou principes de la loi naturelle*, was first published in 1758.
- 104 *De iustitia et iure*, V. III. iii. (423).
- 105 “On the American Indians”, 3.1, *Vitoria: Political Writings*, 285.
- 106 Ibid., 285.
- 107 Ibid., 292.

- 108 *A Concise History of the Law of Nations* (New York: Macmillan, 1954), 81.
- 109 See p. 135.
- 110 *De Dominio indorum*, 142, “nisi vocetur Alexander peregrinus”.
- 111 *Ibid.*, 280.
- 112 *De iure naturae et gentium libri octo*, C. H. Oldfather and W. A. Oldfather trans. (Oxford: Clarendon Press, 1934), II, 364–6. I would like to thank Theodore Christov for drawing my attention to this important passage.
- 113 Antony Anghie, for instance, claims that “Vitoria bases his conclusion that the Indians are not sovereign on the simple assertion that they are pagan”. *Imperialism, Sovereignty and the Making of International Law*, 29. Cf. Sharon Korman who infers from Vitoria’s claim that non-Christian rulers were bound to admit Christian missionaries under the *ius peregrinandi* implied that non-Christian states did not possess the same legal standing as Christian ones. *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996), 53. There is, in fact, nothing in Vitoria’s discussion of the *ius peregrinandi* to deny the obvious inference that Christian rulers had a corresponding obligation to admit Muslim missionaries – although clearly he could not say as much. Quincy Wright’s claim that “Francis of Vitoria and other writers of the Naturalist School of international law . . . held that Montezuma of Mexico and other non-Christian states had equal rights [with Christian states] under natural law”, which Korman denies, is, in fact, perfectly correct. “The Goa Incident”, *American Journal of International Law* 56 (1962), 629 n. 37.
- 114 *Étude théorique et pratique sur l’occupation* (Paris, 1896), 103.
- 115 Quoted in Brett, *Liberty, Right and Nature*, 78.
- 116 See pp. 70–1.
- 117 *Fundamenta iuris naturae et gentium ex sensu communi deducta* (Halle, 1718), 161 (LXXII).
- 118 *An Enquiry into the Foundations of the Laws of Nations in Europe from the Time of the Greeks and Romans to the Age of Grotius* (London, 1795), I xiii–xiv and 169, and see Jennifer Pitts, “Empire and Legal Universalism in the Eighteenth Century”, *American Historical Review* 117 (2012), 92–121.
- 119 *The Spanish Origin of International Law: Lectures on Francisco de Vitoria (1480–1546) and Francisco Suárez (1548–1617)* (Washington, DC: School of Foreign Service, Georgetown University [1928]), 21.